DEFENDANT

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

THE DEFENSE ASSOCIATION OF NEW YORK — September, 1994

DAUBERT AND THE ADMISSABILITY OF EXPERT OPINION IN NEW YORK

By: John J. McDonough*

As most trial lawyers are now aware, in June 1993 the United States Supreme Court decided **Daubert v. Merrill Dow Pharmaceutical,** ____ U.S. ____, 113 S.Ct. 2786 and, in doing so, rejected the requirement of **Frye v. United States,** 293 Fed. 1013 (D.C. Cir. 1923) that expert testimony be generally accepted in the scientific community in favor of the more liberal standards of Federal Rules of Evidence Rule 702.

New York, of course, does not follow the federal rules of evidence but in 1983 the New York State Court of Appeals decided **People v. Hughes,** 59 N.Y.2d 523, 466 N.Y.S.2d 255. In **Hughes,** the defendant was alleged to have raped the complainant. The victim was precluded from testifying to her post-hypnotic memories for identification purposes. **Hughes** went on to apply the standard established by New York courts for determining the admissability of evidence produced through scientific procedures. This standard, as will be seen, was and is identical to the one set forth in **Frye v. United States,** supra and considers "whether the reliability of the results of a procedure is generally acknowledged in the scientific community." **Hughes,** at 91.

This article will examine the continued viability of the **Hughes/Frye** test in New York courts since the **Daubert** decision.

(continued on page 16)

*Mr. McDonough is a member of the Manhattan firm of Alio, McDonough & Mescall and Editor of the Defendant.

WORTHY OF NOTE

Compiled by-John J. Moore*

INSURANCE-Uninsurance-Livery Exclusion. The Court of Appeals recently rendered a decision which indicated that livery exclusion, which purportedly excluded from coverage vehicles being used to carry persons or property for a fee contained in the uninsured motorist coverage endorsement of personal automobile liability policy was invalid and unenforceable. There was no express statutory or regulatory provision permitting such an exclusion (**Matter of Liberty Mut. Ins. Co. [Hogan]**, 82 N.Y.2d 57, 603 N.Y.S.2d 409).

MALPRACTICE-Uncertainty of Expert. In **Evans v. Holleran** (A.D.2d , 604 N.Y.S.2d 958) the Second Department submitted that a patient asserting a malpractice claim based upon the perforation of a colon could not recover pursuant to a theory that the physician negligently performed a colonoscopy or that the physician's advice to treat the abdominal pain with a warm enema was negligent, where the patient's expert witness acknowledged on cross-examination that he could not say with a reasonable degree of medical certainty that the physician's departure from a good and accepted medical practice proximately caused the patient's injuries.

Whether the physician's delay in detecting the perforation of the patient's colon was negligent

(continued on page 18)

*Mr. Moore is a member of the Manhattan firm of Barry McTierman & Moore.

VIDEO USE IN PRODUCTS LIABILITY CASES: EVIDENTIARY AND SUBSTANTIVE ISSUES

Saul Wilensky, Esq.*
Richard Adam Senzer, Esq.*

INTRODUCTION

Video is routinely used as demonstrative evidence in products liability cases. Such evidence may depict the allegedly offending product, the accident scene, exemplar products, and experimentation. Clearly, video is one of the more important aids that can be utilized to educate the jury with respect to how a particular product operates. Combined with the expert's testimony, it should simplify the complexities of a product. Like all demonstrative evidence, video will be admitted or excluded based upon the traditional rules of evidence.

In addition to its use as evidence to depict a given product, video is also used to demonstrate the effects that an injury has had on the activities of daily life of an individual. These so-called "day-in-the-life videos" pose an obvious threat to the defense, and can dramatically increase the sympathy factor in favor of the plaintiff. Of course, a plaintiff's claims regarding the physical injuries sustained can often be undermined with the use of surveillance videos.

Lastly, video serves as an important litigation tool when utilized to record deposition testimony. Not only does a videotaped deposition preserve testimony, but it can also serve to improve judicial procedures in multiple litigation.

VIDEO AS DEMONSTRATIVE EVIDENCE

A videotaped demonstration can be an invaluable tool on behalf of either the plaintiff or defendant in a number of cases. Videotapes can be used to recreate an accident, demonstrate the proper or improper use of a particular product, or to establish the possibility or impossibility of an alleged series of events. Videotape often presents an attractive alternative to the uncertainties and hazards of courtroom demonstrations. If the taped demonstration does not confirm the hypothesis, the party is at least in a position to revise its

(continued on page 8)

*Mr. Wilensky is a Senior Partner and Mr. Senzer is a Senior Associate of the Manhattan law firm of Lester, Schwab, Katz & Dwyer.

CREED v. UNITED HOSPITAL ET AL. THE SECOND DEPARTMENT ADDRESSES EMOTIONAL DISTRESS AND I.V.F.

Marian Polovy*

The case of CORA BALAFAS CREED and MICHAEL CREED V. UNITED HOPSITAL, I.V.F. AUSTRALIA (USA) LTD., and IVF AUSTRALIA PROGRAM AT UNITED HOSPITAL, ALBERT PARKER, M.D., involves the erroneous implantation of an embryo into the wrong woman via the in vitro fertilization program at United Hospital in Westchester.

(continued on page 13)

*Marian Polovy is the founder of her own law firm on Madison Avenue in Manhattan devoted to defense medical malpractice litigation. Ms. Polovy is a graduate of Marymount College, Tarrytown, New York and holds a B.A. in English and a J.D. from Southwestern University School of Law, Los Angeles, California.

The Defendant, September 1994

Published quarterly by The Defense Association of New York, Inc., a not-for-profit corporation.

Editor in Chief.....John J. McDonough

Staff..... Dennis Breen
Michael Caulfield
Saul Wilensky Anthony McNulty
Richard Adam Senzer Michael L. Stanberg
John J. Moore Tony Celantano
Marian Polovy Alexandra M. McDonough

THE QUALIFIED IMMUNITY DOCTRINE FOR MUNICIPALITIES

By: Frederick S. DiStephan*

The leading authority in this State, as it is so often quoted, on the qualified immunity of a municipality with respect to the maintenance of the street and highways is that of **Weiss v. Fote**, 7 N.Y.2d, 579, 200 N.Y.S.2d 409 (1960).

In **Weiss v. Fote, supra**, the Court of Appeals reversed the Appellate Division upholding a judgment of the Supreme Court, Erie County, against the City of Buffalo. That case concerned a two car collision at an intersection controlled by a traffic light. Plaintiff contended the light was improperly timed as it did not give vehicles time to clear the intersection before it turned green for the cross traffic.

The Court of Appeals reviewed the history as to immunity of the State and its subdivisions with respect to maintenance of the streets and highways and noted that it had been withdrawn even before the Legislature enacted Section 8 of the Court of Claims Act. Although a number of Court cases recognized the liability of a municipality, the court pointed out:

"...But in measuring that duty, we have long and consistently held that the courts would not go behind the ordinary performances of planning functions by the Officials to whom those functions were entrusted." (Page 441.)

The Court recognized that lawfully authorized planning bodies have a unique character and deserve special treatment before being subject to tort liability. The reasonableness of the planning body's decisions are not to be placed before a jury. The Court stated at page 413:

"...To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts."

(continued on next page)

*Mr. DiStephan is associated with the Melville firm of Alio and Ronan.

JOHN E. BOEGGEMAN

A Tribute by
Mark G. Barrett*

I would like to thank the committee for this opportunity to honor my former partner and Past President of the Defense Association of New York, John E. Boeggeman.

We all knew John Boeggeman and his many fine qualities but the word that comes to mind when we remember John Boeggeman is DEDICATED.

John was dedicated to the Law. He was a graduate of Duquesne University and New York Law School. He was the founding partner of his firm. He was a member of the Federation of Insurance Counsel, the American Bar Association, New York State Bar Association, Rockland County Bar Association, Westchester County Bar Association and the White Plains Bar Association. He served as a member of the Board of Governors of D.A.N.Y. and was President from 1986 to 1987. As President, he established D.A.N.Y. in the field of Continuing Legal Education. He established the seminars which are held each spring and fall at the County Courthouse in White Plains. He always had time to give advice to young lawyers, in his firm, in his organizations and in the courthouses. When things did not go well at trial for a young lawyer, his encouraging motto was "next case."

John was dedicated to his Community. He served as a volunteer fireman, President and then Counsel to the West Nyack Fire Engine Company.

John was dedicated to his Country. He served as an infantry officer in both World War II and the Korean War. He was awarded the Bronze Star for service in Korea. Later, he joined the Judge Advocate General's Corps of the U.S. Army Reserve.

John was dedicated to his Faith. He was a daily communicant at St. Ann's Church in Nyack. On weekends, he served as a eucharistic minister and lector at St. Anthony's Church, Nanuet. His

(continued on next page)

*These remarks were delivered by Mr. Barrett at the D.A.N.Y. Past President's Dinner on November 16, 1993, and again at a memorial session of the Supreme Court, Rockland County, on December 17, 1993.

JOHN E. BOEGGEMAN [Con't.]

dedicated faith led him to many acts of charity towards the poor and elderly that were of the "hands on" as well as the "check-writing" variety.

At our last meeting, the Board of D.A.N.Y. Inc. voted to honor John by designating the fall seminar in White Plains beginning in 1994 as the John E. Boeggeman Memorial Lecture.

Before then, however, each and every one of us can build a living memorial to John by re-examining and re-dedicating ourselves to the ideals by which he lived.

■

THE QUALIFIED IMMUNITY DOCTRINE FOR MUNICIPALITIES [Con't.]

In reversing the Appellate Division, the Court took note of the fact that the City of Buffalo had made extensive studies of traffic conditions at the intersection in question and based on those studies felt that four seconds was sufficient time for traffic to clear. There was no proof to show that the decision of the City was either arbitrary or unreasonable. Although a jury could consider the time interval inadequate and the Court noted there was "ample basis for doubting that body's capacity to arrive at a conclusion as to the 'clearance interval's' reasonableness" (page 414) it upheld the planning body's decision.

In its published conclusion, the Court reiterated at page 415:

"...In the area of highway safety, at least, it has long been settled view, and an eminently justifiable one, that courts should not be permitted to review determinations of governmental planning bodies under the guise of allowing them to be challenged in negligence suits; something more than a mere choice between conflicting opinions of experts is required before the State or one of its subdivisions may be charged with a failure to discharge its duty to plan highways for the safety of the travelling public."

In 1986 in the case of **Cataldo v. New York State Thruway Authority**, 67 N.Y.2d 271, 502 N.Y.S.2d 669, the Court of Appeals had the opportunity to review and clarify its decision in **Weiss v. Fote, supra,** and the doctrine of qualified immunity. The case considered by the Court concerned a major roadway or bridge known as the Tappan Zee Bridge. The issue was whether or not the Authority was liable for failing to install a median barrier to prevent head-on cross over accidents. The bridge had been constructed in 1955 without any median barriers but in 1962 median barriers were placed only on the west end of the bridge. Plaintiff Cataldo was injured in 1973 when an eastbound vehicle crossed over a low median in the tangent portion of the bridge and struck Cataldo head on. The Thruway Authority had studied the crossover problem in "**1962 following the occurrence of nine crossover accidents and several fatalities*** in the time the bridge was put into service." (Page 672.) [*Emphasis added.] There were staff reports suggesting the installation of a safety barrier but cautioned it could cause rear-end collisions and pile-on type of accidents in heavy traffic. A traffic safety engineer submitted a report concluding that barriers should be installed on the west curve where there was a high concentration of crossover accidents and it was done. No further studies were made until 1972, some ten years later. A traffic safety engineer's report mentioned how successful the barriers on the west curve had proven to be but reiterated the fears of ten years earlier.

The Court of Claims had held the Authority liable on the grounds that the matter had not been properly studied; that the decision not to install the barriers was not predicated on reasonable professional engineering judgment and that continuous occurrence of crossover accidents had taken place between 1962 and 1972. The Appellate Division reversed and dismissed the complaint "holding that '[b]ecause {THE AUTHORITY'S} decision not to install median barriers was premised upon a reasonable public safety plan, it may not be held liable for claimant's injuries.' " (Page 673.)

The Court of Appeals affirmed the Appellate Division stating:

> "Strong policy considerations underpin the qualified immunity doctrine set forth in Weiss (supra) and, in cases such as these where a governmental body has invoked the expertise of qualified employees, the Weiss directive should not be lightly discounted. Appellants would have us examine the criteria that were considered by the State's professional staff, emphasize factors allegedly overlooked, and, with the benefit of hindsight, rule that the studies were inadequate as a matter of law. We decline this invitation, for to do so, as the Appellate Division correctly concluded,

(continued on next page)

THE QUALIFIED IMMUNITY DOCTRINE FOR MUNICIPALITIES [Con't.]

> 'would constitute the type of judgment substitution that **Weiss v. Fote (supra)** prohibits' (**Muller v. State of New York,** 108 A.D.2d 181, 189, 488 N.Y.S.2d 751)" (Page 676.)

Plaintiffs will attempt to get around the qualified immunity doctrine by presenting expert witnesses who will try and point out that the municipality could easily have made the road safer by the use of the latest technology and methods. However, the following cases demonstrate that the Appellate Courts do consider the particular nature of the road in question as well as the fiscal restraints that municipalities are under.

In **Tomassi v. Town of Union,** 46 N.Y.2d 91, 412 N.Y.S.2d 842, (1978) the Court of Appeals reversed the Appellate Division's affirmation of a lower court's finding of 25% negligence against the Town of Union.

The theory of negligence against the Town was that the Town's construction of a ditch in close proximity to the paved portion of the roadway was a hazard for motorists and the cause of plaintiff's injuries.

The Court of Appeals stated at page 844, after considering the character of rural locals and the unavoidable risks:

> "...This paved roadway, 22 feet in width, is more than adequate for safe public passage, and travel beyond those limits is neither contemplated nor foreseeable....To be sure, any public roadway, no matter how careful its design and construction, can be made safer. Indeed, plaintiffs' expert witness testified that the town should have posted signs warning motorists of the drainage ditch, painted center lines on the roadway and eliminated the ditch by installing shoulders. We decline, however, to impose a duty upon the town which transcends that imposed by reasonable care and foresight..."

In **Pulatti v. State,** 91 A.D.2d 1152, 459 N.Y.S.2d 176 (1983) the Appellate Division, Fourth Department, affirmed the lower Court's dismissal of the plaintiff's case.

Plaintiff was driving to work on Route 81, with which he was familiar, left the left lane of travel, crossed over two lanes of traffic to his right and struck a bridge railing, went through the railing and to the ground below. Plaintiff remained in a comatose condition since the date of the accident. The claim against the State was that the railing should have been replaced with a more modern design providing greater safety.

The Appellate Division noted:

> "...Even claimants' expert testified that the design of the guardrail was standard when it was installed in 1957."
>
> * * *
>
> "...Although there is a continuing obligation to review such plans and designs in the light of actual operation (Weiss v. Fote, supra), it is proper to take into account such factors as traffic conditions, the nature of the highway, fiscal practicality, and a variety of other criteria...." (Page 177.)

In **Van De Bogart v. State,** 133 A.D.2d 974, 521 N.Y.S. 125 (1987) the Appellate Division, Third Department affirmed the lower Court's dismissal of plaintiff's case.

Plaintiff was in a one car accident wherein the vehicle was travelling on route 357 in the Town of Franklin, New York. The car went off the road at a left hand curve, over a recessed headwall and struck a tree twelve feet from the edge of the road. Route 357 was described as a rural, lightly travelled road, constructed in 1928. It consisted of two **10-foot paved lanes** with shoulders partially paved for three feet. The road was resurfaced in 1981. Plaintiff's expert contended that the State should have reconstructed the roadway rather than merely repaving it in order to eliminate or ameliorate the curve or put a guide rail at the curve to shield the culvert and remove the tree. He also contended the speed limit should have been posted at 35 MPH instead of 45 MPH and chevron signing of the curve instead of a single arrow.

The Appellate Division stated:

> "...In maintaining older highways, the State is not obliged to undertake expensive reconstruction simply because highway safety design standards have changed since the original construction....* Thus, even though the shape of the road and extent of the 'safe recovery area' adjoining it did not comply with current criteria, no major restructuring was required unless the curve could not safely have been negotiated at moderate speed."
>
> (Page 126-127.) [*Citations omitted.]

(continued on next page)

THE QUALIFIED IMMUNITY DOCTRINE FOR MUNICIPALITIES [Con't.]

The Court further stated:

> "...While claimant's expert disagreed with the conclusion of the State's highway engineers, such judgmental decisions are precisely the kind which are clothed with qualified governmental immunity under **Weiss v. Fote**, supra." (Page 127.)

Based on all the foregoing, the Courts of this State have not imposed liability upon a municipality merely because the roadway could be made safer by using more modern devices or by altering the road to remove the risks. Where the road was sufficiently wide enough for a motorist to negotiate safely at the posted speed limit and exercising proper caution under the circumstances, liability did not attach for maintaining curbing, ditches, culverts or trees alongside a rural roadway. The opinion of claimant's expert that differs from the judgment of the municipality's traffic expert's is insufficient to impose liability. The municipality is not required to reconstruct or alter the contour of the roadway to change it from a rural County road to a high speed highway.

Plaintiffs will of course attack the defense of the qualified immunity doctrine by trying to show that the municipality's studies were inadequate and that there were numerous prior similar accidents that warranted that changes be made. Plaintiff's proof however should be closely scrutinized to see that it is not merely based on opinion of residents or motorists without records and which do not take into consideration the physical condition of those drivers and their automobiles. Even observations of experts of the area some time after the accident may not be admissible.

Rittenhouse v. State, 521 N.Y.S.2d 824, (A.D.3 Dept. 1987) involved a one car accident in which plaintiff's vehicle left the roadway of Route 9P in the Town of Malta, New York and struck a tree twenty feet from the edge of the pavement. Plaintiff's expert contended that the proper safety plan for hazards of curves and roadside obstacles was to have reduced the speed to 30 MPH and install a guide rail system.

In affirming the lower Court's dismissal of the plaintiff's claim, the Appellate Division stated:

> "...a **'ballbank test,' the best accepted indicator** of safe curve speed, confirmed the propriety of the advisory reduced 35 mile-per-hour speed. There was no evidence submitted by claimant that the plan adopted by the State was the result of inadequate study or lacked a reasonable basis."
>
> * * *
>
> "Claimant failed to prove that the prior accidents involved vehicles leaving the highway and colliding with trees or indeed, that there were any other pertinent circumstances in the prior accident similar to the instant one. Accordingly, prior accidents were not proof of the State's notice of any possible unreasonably dangerous conditions involved in the instant case...mere scarring of the trees without any record of reports of accident related thereto, was insufficient to establish notice." [Emphasis added.] (Page 826.)

The practitioner should not have overlooked the defense of prior written notice. Plaintiff of course will try to get around that defense if they can prove that the municipality created the condition.

In **Reinert v. Town of Johnsburg**, 99 A.D.2d 572, 471 N.Y.S.2d 398, (June, 1984), the Appellate Division Third Department, affirmed the lower Court's granting of summary judgment to the defendant Town on the plaintiff's failure to plead compliance with Section 65(a)(1) of the Town Law. In that case the plaintiff alleged that his injuries were attributable to the "negligent and careless design of the road and/or defendant's failure after due notice, to correct the design of the road at the location where the accident occurred and to take other steps to warn drivers of the curvature of the roadway." (Page 398-399.) The Court stated:

> "Plaintiff failed to plead compliance with the respective town and county notice of defect statutes. Such notice constitutes a necessary condition precedent to entitlement to sue these governmental entities (....See **Holt v. County of Tioga**, 56 N.Y.2d 414, 452 N.Y.S.2d 383, 437, N.E.2d 1140; **Rich v. Town of Queensbury**, 88 A.D.2d 1027, 451 N.Y.S.2d 903)."
>
> * * *
>
> "Plaintiff has failed to allege facts sufficient to constitute constructive notice to the town of any defect in compliance with requirements of Section 65-a of the Town Law...." (Page 399.)

(continued on next page)

THE QUALIFIED IMMUNITY DOCTRINE FOR MUNICIPALITIES [Con't.]

The Appellate Division, Second Department in **Hughes v. Jahoda,** 140 A.D.2d 490, 528 N.Y.S.2d 600, (May 16, 1988) dismissed a complaint against the Town of Huntington on similar grounds.

In that case the plaintiff was injured when the vehicle she was riding in struck a utility pole at 61 Cove Road, Huntington. Plaintiff alleged in her complaint that the Town failed "to post proper warnings, reflective devices or signs with respect to the location of the subject pole and failed to maintain adequate lighting, fencing, curbing and/or impact absorbing materials at the site and its permitting the pole to remain in a position which causes an unreasonable risk of harm to users of Cove Road." (Page 601.)

The Court stated:

> "It has been held that where a plaintiff's accident and injuries were allegedly attributed to the negligent and careless design at the location where the accident occurred and to take other appropriate steps to warn drivers of the curvature of the roadway, the required written notice was a condition precedent to entitlement to sue the municipality (Reinert v. Town of Johnsburg, 99 A.D.2d 572, 471 N.Y.S.2d 398)." (Page 602.)

As regards a "Traffic Safety Plan" most towns and villages do not have a written plan or lists of goals they want to achieve. Rather, the traffic safety plan is what the municipality does as regards the monitoring of their roads. The Traffic Safety Plan comprises the study of accident reports filed by its own patrolling police force or received from the police department of another municipality that patrols its roads; the taking of periodic traffic counts; ball-bank surveys; complaints filed by residents; reports received from its maintenance department; the signing of its roads and painting of lines for various safety purposes. It is an on-going study of all that takes place on its roads and their effect on traffic safety.

Few towns or villages have actual safety meetings where stenographic records are kept as to what was discussed and decided as in the case of the New York State Thruway Authority. Nevertheless, the maintenance of all pertinent records coupled with the actions taken and responses to complaints will suffice to show that there is a definite Traffic Safety Plan and that the decisions made are not arbitrary or without any rational basis.

Other than the Court of Claims, you will find that most reported cases wherein the qualified immunity doctrine was upheld as a valid defense were cases where the appeal was taken from a lower court's denial of the motion. This may be reflective of the reluctance of the lower courts to dismiss a seriously injured plaintiff's claim arising out of a one car accident where not even no-fault benefits are sufficient to maintain that person.

The motion therefore has to be supported by convincing documentary evidence clearly demonstrating that the municipality in question did closely monitor its roads and had a viable ongoing traffic safety plan that it administered. ■

APPLICATION FOR MEMBERSHIP*

THE DEFENSE ASSOCIATION OF NEW YORK
EXECUTIVE OFFICES 25 BROADWAY - 7TH FLOOR
NEW YORK, NEW YORK 10007 (212) 509-8999

I hereby wish to enroll as a member of DANY. I enclose my check/draft $ _____. Rates are $50.00 for individuals admitted to practice less than five years; $125.00 for individuals admitted to practice more than five years and $300.00 for firm, professional corporation or Company.

NAME .....

ADDRESS .....

TEL. NO. .....

I represent that I am engaged in handling claims or defense of legal actions or that a substantial amount of my practice or business activity involves handling of claims or defense of legal actions. (* ALL APPLICATIONS MUST BE APPROVED BY THE BOARD OF GOVERNORS).

VIDEO USE IN PRODUCTS LIABILITY CASES: EVIDENTIARY AND SUBSTANTIVE ISSUES [Con't.]

strategy and/or pursue resolution of the case before the damage is done. Videotaped demonstrations are often the only way a jury can comprehend and visualize a complex product or system. Videotape can often also serve to enable the viewer to visualize certain events which cannot be conveyed in a series of still photographs, such as a manufacturing process, a particular type of chemical reaction or other series of events.

In preparing a videotaped demonstration, particularly involving a product in its use and operation, substantial preparation is required. Counsel, the expert, and client should determine, to the fullest extent possible, what the likely outcome of a test or demonstration will be before the videotape is taken. If a negative result is a distinct possibility or probability, perhaps the videotape should be avoided. Otherwise, the videotape may be discoverable or subject to subpoena at trial. Additionally, once the expert who will be called at trial has conducted the videotaped demonstration, his or her ability to testify may be impaired.

In some circumstances, where a negative result is feared, it may be suitable to use a separate expert who is not retained to testify at trial to conduct a demonstration first. If the results are favorable, the testifying expert can then duplicate them on videotape. Otherwise, counsel risks the possibility of creating damaging evidence, and quite possibly educating his adversary and adversary's expert as to the problems in the case.

Once a determination has been made to conduct a videotaped demonstration or test, attention should be devoted to the particular circumstances surrounding the taping. The conditions should resemble those in issue as much as possible. A videotaped demonstration depicting visibility, for example, if conducted outdoors, should be conducted under the same daytime/nighttime conditions that existed at the time of the accident.

In many instances, the actual product in issue is used for a videotaped demonstration. If so, it should be used under circumstances which closely resemble the conditions that existed at the time of the accident. In other instances, an exemplar must be used, because the actual product is unavailable or has been altered or damaged in such a way that it is not suitable for use in a demonstration. Under such circumstances, the exemplar should be chosen based on its similarity to the product in issue in each of the relevant respects. There still may be differences in terms of size, model, or year, as long as the product is viewed as substantially similar in all relevant respects.

Whether or not the subject product is utilized for the taping, it is critical that a similarity of conditions be established. The key is "substantial similarity." In **Veliz v. Crown Lift Trucks**, 714 F. Supp. 49 (E.D.N.Y. 1989), for example, the court held that it was proper to admit certain videotapes depicting experiments designed to show that the accident could not have occurred as the plaintiff had described it, although there existed certain dissimilarities between the experiments and the actual conditions. In so holding, the court stated that, to be admissible, all that is required is substantial similarity between the experiments and actual conditions; the demonstrations do not have to "mirror" the actual conditions involved. Dissimilarities, if minor, are grounds for cross-examination, and go to the weight of the videotape, not its admissibility. Nevertheless, if the demonstration does not satisfy the relatively stringent "substantial similarity" requirement, the video will be excluded outright. **See, e.g., Chase v. General Motors Corp.**, 856 F.2d 17 (4th Cir. 1988) (applying Federal and West Virginia law) (videotaped braking tests performed by the National Highway Traffic Safety Administration ("NHTSA") as well as other tests performed by plaintiff's expert, were improperly admitted into evidence because they were not substantially similar to the accident involved in the lawsuit). Even if similarity of conditions is established, a proffered video may still be excluded, if it is found to be cumulative. **See, e.g., Johnson v. William C. Ellis & Sons Iron Works, Inc.**, 604 F.2d 950 (5th Cir. 1979), **modified on other grounds**, 609 F.2d 820 (1980) (applying Federal and Mississippi law) (motion picture "portraying the normal action of the cotton compress in the processing of a standard bale" was excluded as cumulative, since the operation of the cotton compress had already been fully described by testimony).

In attempting to recreate conditions that existed at the time of an accident, counsel should take great care to rely upon admissible evidence. Depositions, admissible portions of police reports, admissions, and other admissible documents should be used to recreate the events. If the document or statements which demonstrate the similarity are inadmissible, then counsel may not be able to lay a proper foundation.

The matter or protocol for which the test or demonstration is to be conducted should be resolved long before the videotape is taken. This offer requires the meeting of counsel and expert and the client. All should be comfortable with the testing protocol. In some instances, where the client is confident that the results will be favorable and no surprise is anticipated, it may be advisable to confer with opposing counsel and their client

(continued on next page)

VIDEO USE IN PRODUCTS LIABILITY CASES: EVIDENTIARY AND SUBSTANTIVE ISSUES [Con't.]

prior to conducting the test to agree upon a protocol that would be acceptable and proper. An effective questioning of an opposing expert at deposition may also solicit an acceptable protocol from that expert's perspective. The protocol should be outlined, reviewed prior to the demonstration or test, and then followed strictly.

One of the more complicated issues that counsel and client must address is videotaping the preparatory stages of a demonstration or test. Taping the preparation may avoid any accusation that the test samples or product were "doctored" in order to ensure a favorable result. Such a test may also be used to prove that conditions were not altered in any way, or to establish the whereabouts of the particular sample or substances up until the moment that they were tested. Where there is a concern that the adversary will make an accusation that evidence was "doctored," it may be advisable to have the videotape operating at all times.

As noted, video is a useful tool to educate a lay jury on the operation of a product. In **Panaro v. General Motors Corp.** 122 A.D.2d 784, 505 N.Y.S.2d 670 (2nd Dep't 1986), a case involving the alleged negligent design of an automobile steering joint, the jury was shown a series of videotapes prepared by the parties' witnesses which demonstrated how a car responds when the steering wheel is turned differently. **See also, Petty v. Ideco, Div. of Dresser Industries, Inc.**, 761 F.2d 1146 (5th Cir. 1985) (applying Federal and Texas law) (it was not an abuse of discretion to admit videotapes prepared by the defendant's expert to show normal operation of the allegedly defective product); **Zollman v. Symington Wayne Corp.**, 438 F.2d 28 (7th Cir.), **cert. denied**, 404 U.S. 827, 92 S.Ct. 59 (1971) (applying Federal and Indiana law) (videotape was used to demonstrate the way in which the machinery operated).

Videotape depicting the operation of the product is not admitted as a matter of course. Indeed, the question of whether the jury should view a video lies within the discretion of the trial court. **See, e.g., Mercatante v. Hyster Co.**, 159 A.D.2d 492, 552 N.Y.S.2d 364 (2nd Dep't 1990). In **Mercatante**, the trial court's decision to allow the jury to see a video demonstration of the operational capabilities of a "Walkie-Rider" jack truck was held to be unduly prejudicial, requiring reversal of a defense verdict. The tape was found to be of questionable probative value, since it depicted the operator "walking" the machine, while the accident occurred while the plaintiff was "riding" the machine. In so holding, the court stated:

> Thus, the videotape was of questionable probative value since the circumstances portrayed therein were vastly different from those which existed at the time of the accident. When we consider the high potential for prejudice inherent in allowing the jury to view a film which was prepared by the defendant exclusively for trial, the limited need for and utility of the videotape as an "instructional tool," and its "absence of evidentiary value" with respect to plaintiffs' principal claim of a design defect, we conclude that it was improvident exercise of discretion for the trial court to have authorized its admission into evidence.

159 A.D.2d at 493; 552 N.Y.S.2d at 366 [citing **Glusaskas v. Hutchinson**, 148 A.D.2d 203, 544 N.Y.S.2d 323 (1st Dep't 1989)].

The Use of Sound

The use of sound or narrative may enhance or detract from or perhaps even render inadmissible a videotape. Careful consideration must be taken prior to the test or demonstration as to whether sound will be used. In some instances, it is beneficial to pick up the background noises to demonstrate the ability or inability of one to hear, or to demonstrate the injury or harmlessness of the product in question. Plaintiff's counsel, when videotaping a particularly large piece of machinery which caused an injury, may want the machine to sound as loud and menacing as possible. The sound of the machine may also serve to explain why the plaintiff or a co-worker could not hear each other. These are all factors that must be taken into consideration in determining whether sound should be used in a videotape. These sounds may also create a number of distracting or potentially harmful background noises which are extraneous to the case.

The use of narrative must be carefully considered. Statements by an expert or client participating in the demonstration would generally be inadmissible as hearsay, given that they would constitute unsworn statements made out-of-court. Under the more liberal hearsay rules in federal court, however, it is possible that some statements in that regard may be admissible, provided the "narrator" is available for cross-examination.

If narration is used, the parameters of the narration must be resolved ahead of time. References to inadmissible or potentially damaging subjects must be avoided. Strenuous conversation before, during, or after the

(continued on next page)

VIDEO USE IN PRODUCTS LIABILITY CASES: EVIDENTIARY AND SUBSTANTIVE ISSUES [Con't.]

demonstration must be avoided at all costs, as long as the videotape and sound are in operation.

Editing the Videotape

In many instances, a complete videotaped test or demonstration may go on for several hours, producing a tape far longer than a jury could be expected to sit through. In other instances, the tape may include a multitude of tests, some of which are determined to be irrelevant, non-beneficial or inadmissible. Obviously, these portions of the tape should not be viewed. The tape must, therefore, be edited.

Extreme caution must be taken before decisions are made to edit a videotape. Opposing counsel, on cross-examination, will probably ask that question at the outset. As soon as there is an admission that the tape has been edited, a seed may be planted in the juror's mind that he may not have been shown the entire picture. The credibility of the videotape shown to the jury can be severely compromised. This issue can be addressed in several ways.

First, if the tape contains certain matters which are clearly inadmissible from the perspective of all concerned, the editing of the tape can be a joint effort for the various parties, until they agree on which portions will be shown. If the editing must be done unilaterally, however, it is absolutely essential that the unedited version of the tape be preserved. This way, counsel offering the videotape is always in the position to use the complete unedited version to demonstrate that the client has nothing to hide. Under no circumstances should the original unedited version be destroyed, if there is any intention of using any portion of the videotape.

In some instances, portions of the videotape may be harmful. A test, for example, may have been conducted five times, and on one occasion the results were unfavorable. Using any portion of that videotape, then, creates a grave risk. If counsel shows a portion of the videotape, such as the four tests which were favorable, on cross examination, it would be brought out that the tape was edited and that there are additional portions of the demonstration which the jury has not seen. If the unedited portions of the tape are not produced in court, the court may instruct the jury that it is permitted to draw adverse inferences from its absence. This type of missing evidence charge may be severely damaging to the credibility of the videotape and the party which has offered it. In such instances, therefore, it is usually better to avoid the use of the videotape at all.

Computer Demonstrations

In many instances, a live demonstration is impractical. The collision of a truck or a vehicle with a pedestrian or other vehicle for instance, is not something that counsel would wish to recreate in real life. In many instances, competent experts can draw upon the facts of the case, including the specifics of the vehicle(s), persons, roadway and other principles of science in order to recreate the manner in which the accident could or could not have occurred. A computer generated graphic will then be displayed depicting the accident in animated form. Such computer generated animation has become increasingly popular in the courtroom. In the recent case of **Datskow v. Teledyne Continental Motors Aircraft Products, Div. of Teledyne Industries, Inc.**, ____ F. Supp. ____, 1993 WL 263458 (W.D.N.Y. July 15, 1993), for example, the court held that it was proper to admit a videotaped computer-generated animation illustrating the plaintiff's expert's theory of how a fire began inside an engine. In so holding, the court stated:

> The mere fact that this was an animated video with moving images does not mean that the jury would have been likely to give it more weight than it would otherwise have deserved. As one commentator has observed, "If audio or visual presentation is calculated to assist the jury, the court should not discourage the use of it... Jurors, exposed as they are to television, the movies, and picture magazines, are fairly sophisticated. With proper instruction, the danger of their overvaluing such proof is slight."

(quoting 1 J. Weinstein & M. Berger, Weinstein's Evidence, P 403[5] at 403-88 (1992 ed.)).

In preparing a computer graphic, it is again essential that the facts and premises upon which the experts rely come directly from admissible proof that will be in the trial record. Testimony or observations concerning the road, vehicles, time and distance must be carefully reviewed in order to accurately recreate what took place. Significant deviations from the event may cause the videotape to be excluded, or, if it is admissible, the tape may be readily subject to ridicule on cross-examination if it is based on facts which vary significantly from those on the record. A rather substantial amount of money will have then been wasted.

(continued on next page)

VIDEO USE IN PRODUCTS LIABILITY CASES: EVIDENTIARY AND SUBSTANTIVE ISSUES [Con't.]

DAY-IN-THE-LIFE AND SURVEILLANCE VIDEOS

Day-in-the-life videos are used to demonstrate the effects that an injury has had on the activities of daily life of an individual. For example, a paralyzed plaintiff may seek to offer such a video, which may depict segments in his daily routine, including waking, eating, transportation, therapy, bowel/bladder care, and going to bed. Additionally, the video may depict the plaintiff's difficulty in operating things most persons take for granted, such as a telephone or a light switch. **See, e.g., Andrulonis v. United States**, 724 F. Supp. 1421, 1515 n.588 (N.D.N.Y. 1989). Clearly, day-in-the-life videos, if not obviously staged, can be highly beneficial to a plaintiff, and create substantial sympathy. The plaintiff must be careful, however, to avoid the appearance that the daily routine has been "staged" or manipulated. The video must also be relatively recent, so that it fairly represents the plaintiff's current level of disability. Additionally, the videotape cannot capture the entire waking day, or it would last ten to fourteen hours. The decision by the plaintiff as to which events to film and which to omit or edit from the tape will be the subject of cross-examination.

Given the potential influence that such a tape may have on a jury, defense counsel should review any day-in-the-life video well before trial, and, if appropriate, move **in limine** to exclude it or portions thereof. In federal court, and in those departments where trials are not ordinarily bifurcated, the day-in-the-life video may create additional grounds for bifurcation, to prevent the overwhelming sympathy that the tape may generate from impacting on a liability verdict. Therefore, the defendant, by motion **in limine**, should move to exclude the video as prejudicial, misleading, etc.

While day-in-the-life videos are used to demonstrate the plaintiff's incapacity, surveillance videos can demonstrate that the plaintiff's claim of injury is greatly exaggerated. Surveillance videos depicting the plaintiff's work activity have been admitted to refute the plaintiff's claim that the continuing pain from his accident prevented him from returning to work or performing those activities illustrated in the videos. **See, Shushereba v. R.B. Industries, Inc.**, 104 F.R.D. 524 (W.D.Pa. 1985).

The New York State Court of Appeals, in **DiMichel v. South Buffalo Railway Co.**, 80 N.Y.2d 184, 590 N.Y.S.2d 1 (1992), addressed the discoverability of surveillance videos. The Court held that, because they constitute material prepared for litigation, such videos are discoverable only upon a showing of substantial need and undue hardship. According to the Court, however, because surveillance tapes are so easily altered, substantial need and undue hardship is inherent in the nature of all tapes themselves:

> Personal injury defendants secure surveillance materials in order to verify the extent of a plaintiff's purported injuries and introduce them because they are powerful and immediate images that cast doubt upon the plaintiff's claims.... At the same time, however, film and videotape are extraordinarily manipulable media. Artful splicing and deceptive lighting are but two ways that an image can be skewed and perception altered.... "Thus, that which purports to be a means to reach the truth may be distorted, misleading, and false."

80 N.Y.2d at 193, 590 N.Y.S.2d at 4 [quoting **Snead v. American Export-Isbrandtsen Lines, Inc.**, 59 F.R.D. 148, 150]. Arguably, then, all surveillance films will be discoverable. The Court did, however, limit its holding to only those surveillance tapes intended to be used at trial. It was further held that, because of the danger that plaintiffs may tailor their testimony accordingly, surveillance films should be turned over only after a plaintiff has been deposed.

Although the Court of Appeals articulated a generous standard in **DiMichel**, the decision restricted discovery to only those tapes that the defendant intended to use at trial. CPLR §3101(i), which became effective September 1, 1993, amends **DiMichel** by providing that tapes (including out-takes) must be disclosed, whether or not they are intended for use at trial. CPLR §3101(i) provides:

> In addition to any other matter which may be subject to disclosure, there shall be full disclosure of any films, photographs, video tapes or audio tapes, including transcripts or memoranda thereof, involving a person referred to in paragraph one of subdivision (a) of this section [CPLR 3101]. There shall be disclosure of all portions of such material, including out-takes, rather than only those portions a party intends to use. The provisions of this subdivision shall not apply to materials compiled for law enforcement purposes which are exempt from disclosure under section eighty-seven of the public officers law.

The purpose behind the new statutory provision was to make videotape discoverability

(continued on next page)

VIDEO USE IN PRODUCTS LIABILITY CASES: EVIDENTIARY AND SUBSTANTIVE ISSUES [Con't.]

extremely generous. If the plaintiff learns of the tape and requests it, the tape must be provided, even if the defendant has no intention of introducing it at trial.

Although modified, **DeMichel** has not been overruled by CPLR §3101(i). Rather, **DiMichel** will continue to govern, in that surveillance tapes (whether or not intended to be used at trial) would nevertheless qualify for discovery under CPLR §3101(d)(2), as material prepared for litigation.

USE OF VIDEOTAPED DEPOSITIONS

CPLR 3113(b) was amended by Proposal No. 1 of the Judicial Conference, in its Report to the 1977 Legislature, effective September 1, 1977, to provide that recording of testimony at the examination may be by stenographic or other means. As explained by the 1977 Judicial Conference: "This measure would expressly permit testimony to be perpetuated on videotape." Federal Rule of Civil Procedure 30(b)(4) similarly permits the recording of depositions "by other than stenographic means," but only by stipulation of counsel or on motion to the court.

One obvious purpose served by videotaping depositions is the preservation of critical testimony for the time of trial. Indeed, this is crucial, where a party or other witness is expected to be unavailable to testify at trial for whatever reason. Even where the witness is available to testify at trial, his videotaped deposition testimony may still, under certain circumstances, be utilized. **See, e.g., Clarksville-Montgomery County School System v. United States Gypsum Co.**, 925 F.2d 993 (6th Cir. 1991) (use of videotaped deposition of expert was proper, even though expert was available to testify, where objection to the admissibility of the videotape was not timely made).

Videotaped depositions have been extensively utilized in mass tort ligation, such as consolidated asbestos trials to reduce costs per case and to speed the trials. **See, e.g., In re Eastern and Southern Districts Asbestos Litigation**, 772 F. Supp. 1380 (E.D.N.Y. and S.D.N.Y. 1991). Other advantages of video depositions include increased accuracy, trustworthiness, and convenience. **See, Rice's Toyota World, Inc. v. Southeast Toyota Distributors, Inc.**, 114 F.R.D. 647, 648 (M.D.N.C. 1987). A party may choose to videotape the deposition of an adversary if he believes that the witness will make a poor appearance. A witness on videotape does not have the luxury of taking all day to answer questions. Indeed, fidgeting or other body language exhibited during a videotaped deposition can be extremely damaging at trial.

AUTHENTICATION OF THE VIDEOTAPE

As noted, the issue of permitting the showing of a video in a products liability case is one for the discretion of the trial court. A video, when properly authenticated, will be admitted if the court deems it to be relevant to the issues in the case and if its value as evidence outweighs its potential prejudicial effect.

Video is treated as a photograph under Rule 1001(2) of the Federal Rules of Evidence. In New York, CPLR 4539 adheres to FRE 1001. Video is properly admissible as demonstrative evidence, as long as a proper foundation has been established. Authentication of a video typically requires the following:

(1) evidence as to the circumstances surrounding the taking of the film;

(2) the manner and circumstances surrounding the development of the film;

(3) evidence in regard to the projection of the film; and

(4) testimony by a person present at the time the videotape was taken, that the pictures accurately depict the events as he saw them when they occurred, and that the tape was not altered or changed thereafter.

Authentication testimony is often provided by the video photographer, but may also be supplied by any other witness who is competent to testify that the tape fairly and accurately reflects what took place and confirm the lack of subsequent alteration of the tape.

CONCLUSION

No area of law more readily lends itself to the use of video evidence than the trial of a products liability case. Indeed, one of the most significant advantages to be gained from the use of such evidence is the simplification of issues for the jury. Not only can video be utilized to educate jurors with respect to the technical complexities of a given product, but it is also an invaluable tool to graphically depict the true nature and extent of a plaintiff's purported injuries. For both the plaintiff and defendant alike, the innovative and appropriate use of videotape can only help to increase the likelihood of a successful outcome to the products liability litigation.

CREED v. UNITED HOSPITAL ET AL. THE SECOND DEPARTMENT ADDRESSES EMOTIONAL DISTRESS AND I.V.F. [Con't.]

Mr. and Mrs. Creed sued United Hospital, IVF Australia and Dr. Albert Parker for alleged medical malpractice, claiming psychological damages over the loss of their embryo. We immediately commenced a motion to dismiss on behalf of Dr. Parker, my client, based upon multiple grounds, in particular, where there is an exclusive claim of emotional distress and no independent physical injury, there can be no recovery.

The lower court denied our motion to dismiss and motion to renew and reargue (Supreme Court, Westchester County).

With respect to our motion to dismiss, we immediately appealed to the Appellate Division Second Department. The lower court decision was reversed and the action was dismissed unanimously by the Appellate Division based upon the rationale set forth herein.

We likened the Creed case to the line of still birth cases, whereby a woman who carries a child for nine months and has a stillbirth cannot recover for emotional distress without an independent physical injury. **Tebbutt v. Virostek**, 65 N.Y.2d 931 (1985): **Endresz v. Friedberg**, 24 N.Y.2d 478 (1969); **Wittrock v. Maimonides Medical Center**, 119 A.D.2d Dept. (1986); **Farago v. Shulman**, 104 A.D.2d 965 (2d Dept. 1984), Aff'd 65 N.Y.2d N.Y.2d 763 (1985).

We argued that if a woman who carries a child for nine months, cannot recover purely for emotional distress, then a fortiori, where there was no contact between the embryo and the Creeds, recovery could not be allowed.

Moreover, we stressed a long line of Appellate Division Second Department cases denying said recovery in analogous situations and further delineated public policy concerns of limiting liability and not expanding the zone of danger beyond manageable parameters, as it would give rise to spurious claims of psyche. **Cf. Dillon v. Legg**, 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912.

Where would liability end? What if the potential grandparents and/or aunts sought emotional distress claims? What if the embryo was dropped on the floor? What if the embryo was properly implanted in Creed, but it did not take? Our policy arguments were persuasive and the court adopted them.

Moreover, we stressed the absence of physical injury. Plaintiff attempted to use, for the first time on Appeal, the argument that the initial extraction of the ovum constituted the physical injury. However, as we pointed out in case law and theory, the extraction did not proximately cause the injury, nor was there any claim of negligent extraction. The Court agreed. See **Bovsun v. Sanperi**, 61 N.Y.2d 219, (1984); **Lancelotti v. Howard Palmer**, 155 A.D.2d 588 (2d Dept. 1989). (Where recovery is sought for purely psychic injuries, the claim must be premised upon a breach of duty owed directly to the plaintiff, which either endangered the plaintiffs physical safety or caused the plaintiff to fear for his or her own physical safety. Those requirements could not be met in the **CREED** case given the factual scenario. Therefore, as a mater of law no recovery is possible). **Bubendey v. Winthrop University Hospital**, 543 N.Y.S.2d 147 (1989). **Burgess v. Miller**, 124 A.D.2d 692 (1986).

We also distinguished the **Creed** case from the limited exception cases, whereby emotional distress claims are allowed without physical injury, ie. where hospitals state that a close family relative is alive, when they are dead, or dead when they are alive; and cases where an individual is in a ski lift and the protective bar opens. **Battala v. State of New York**, 10 N.Y.2d 207. In these cases it is a close enough situation, that the thrust of spurious claims is relatively non existent.

In **Johnson v. State of New York**, 37 N.Y.2d 378, 372 N.Y.S.2d 638, the defendant was held liable for erroneously informing the claimant of her mother's death. **Johnson v. State of New York supra** has been limited to its particular facts involving communications with regard to a dead body.

In **Johnson v. Jamaica Hospital**, 62 N.Y.2d 523, 478 N.Y.S.2d 838, the Court of Appeals commented on the prior **Johnson** ruling as follows:

"[**Johnson v. State of New York**, supra] presented exceptional circumstances in which Courts long ago recognize liability for resultant emotional injuries: a duty to transmit truthfully information concerning a relatives death or funeral... which the hospital assumed by sending the message... and the mishandling or the failure to deliver a dead body with the consequent denial of access to the family" (**Johnson v. Jamaica Hospital, supra** at 530; See also, **Tebbutt v. Virostek**, 65 N.Y.2d 931, wherein the court stated that **Johnson v. State of New York** (supra) had been limited to its particular facts). There exists here a special likelihood of genuine and serious mental distress, arising from special circumstances, which serves as a guarantee that the claim is not spurious. In **Johnson v. State of New York, supra**, the defendant Hospital negligently sent a telegram to plaintiff notifying

(continued on next page)

CREED v. UNITED HOSPITAL ET AL. THE SECOND DEPARTMENT ADDRESSES EMOTIONAL DISTRESS AND I.V.F. [Con't.]

her of her mother's death, when in fact here mother had not died and in the case of **Lando v. State of New York**, 39 N.Y.2d 803, the defendant hospital negligently failed to locate a deceased patient's body for 11 days, when it was found in an advanced state of decomposition. Each case presented exceptional circumstances in which courts long ago recognized liability for resultant emotional injuries; a duty to transmit truthfully information concerning a relative's death or funeral, which the hospital assumed by sending the message (**Lafferty v. Manhasset Medical Center Hospital**, 54 N.Y.2d 277, and the mishandling of or failure to deliver a dead body with the consequent denial of access to the family; **Finley v. Atlantic Transportation Company**, 220 N.Y. 249; **Darcy v. Presbyterian Hospital**, 202 N.Y. 259).

Issues concerning the status of the embryo as a person, given the proscriptions of **Roe v. Wade**, were briefed, but not addressed by the Court, given their reliance on the above principles in reaching their determination.

Presumably, the issue was not addressed, as it would of necessity re-opened the **Roe v. Wade** debate and compel a determination as to whether or not an extra corporeal embryo is a person.

The case of CORA BALAFAS CREED and MICHAEL CREED v. UNITED HOSPITAL, I.V.F. AUSTRALIA (USA) LTD., and IVF AUSTRALIA PROGRAM AT UNITED HOSPITAL, ALBERT PARKER, M.D., involves the erroneous implantation of an embryo into the wrong woman via the in vitro fertilization program at United Hospital in Westchester.

Mr. and Mrs. Creed sued United Hospital, IVF Australia and Dr. Albert Parker for alleged medical malpractice, claiming psychological damages over the loss of their embryo. We immediately commenced a motion to dismiss on behalf of Dr. Parker, my client, based upon multiple grounds, in particular, where there is an exclusive claim of emotional distress and no independent physical injury, there can be no recovery.

The lower court denied our motion to dismiss and motion to renew and reargue (Supreme Court, Westchester County). (Of further note, we were able to obtain a transfer of venue from Kings County to Westchester County after multiple motions in the lower court and ultimate reversal in the Appellate Division of the lower Court Order denying venue transfer thereby ensuring venue in Westchester County).

With respect to our motion to dismiss, we immediately appealed to the Appellate Division Second Department. The lower court decision was reversed and the action was dismissed unanimously by the Appellate Division based upon the rationale set forth herein.

We likened the Creed case to the line of stillbirth cases, whereby a woman who carries a child for nine months and has a stillbirth cannot recover for emotional distress without an independent physical injury. **Tebbutt v. Virostek**, 65 N.Y.2d 931 (1985): **Endresz v. Friedberg**, 24 N.Y.2d 478 (1969); **Wittrock v. Maimonides Medical Center**, 119 A.D.2d Dept. (1986); **Farago v. Shulman**, 104 A.D.2d 965 (2d Dept. 1984), Aff'd 65 N.Y.2d N.Y. 2d 763 (1985).

We argued that if a woman who carries a child for nine months, cannot recover purely for emotional distress, then a fortiori, where there was no contact between the embryo and the Creeds, recovery could not be allowed.

Moreover, we stressed a long line of Appellate Division Second Department cases denying said recovery in analogous situations and further delineated public policy concerns of limiting liability and not expanding the zone of danger beyond manageable parameters, as it would give rise to spurious claims of psyche. **Cf. Dillon v. Legg**, 68 Cal.2d 728, 69 Cal. Rptr. 72, 441 P.2d 912.

Where would liability end? What if the potential grandparents and/or aunts sought emotional distress claims? What if the embryo was dropped on the floor? What if the embryo was properly implanted in Creed, but it did not take? Our policy arguments were persuasive and the court adopted them.

Moreover, we stressed the absence of physical injury. Plaintiff attempted to use, for the first time on Appeal, the argument that the initial extraction of the ovum constituted the physical injury. However, as we pointed out in case law and theory, the extraction did not proximately cause the injury, nor was there any claim of negligent extraction. The Court agreed. See **Bovsun v. Sanperi**, 61 N.Y.2d 219, (1984); **Lancelotti v. Howard Palmer**, 155 A.D.2d 588 (2d Dept. 1989). (Where recovery is sought for purely psychic injuries, the claim must be premised upon a breach of duty owed directly to the plaintiff, which either endangered the plaintiffs physical safety or caused the plaintiff to fear for his or her own physical safety. Those requirements could not be met in the **CREED** case given the factual scenario. Therefore, as a matter of law no recovery is possible). **Bubendev v. Winthrop University Hospital**, 543 N.Y.S.2d 147 (1989). **Burgess v. Miller**, 124 A.D.2d 692 (1986).

(continued on next page)

CREED v. UNITED HOSPITAL ET AL. THE SECOND DEPARTMENT ADDRESSES EMOTIONAL DISTRESS AND I.V.F. [Con't.]

We also distinguished the **Creed** case from the limited exception cases, whereby emotional distress claims are allowed without physical injury, ie. where hospitals state that a close family relative is alive, when they are dead, or dead when they are alive; and cases where an individual is in a ski lift and the protective bar opens. **Battala v. State of New York**, 10 N.Y. 2d 207. In these cases it is a close enough situation, that the threat of spurious claims is relatively non existent.

In **Johnson v. State of New York,** 37 N.Y.2d 378, 372 N.Y.S.2d 638, the defendant was held liable for erroneously informing the claimant of her mother's death. **Johnson v. State of New York supra** has been limited to its particular facts involving communications with regard to a dead body.

In **Johnson v. Jamaica Hospital,** 62 N.Y.2d 523, 478 N.Y.S.2d 838, the Court of Appeals commented on the prior **Johnson** ruling as follows:

"[Johnson v. State of New York, supra] presented exceptional circumstances in which Courts long ago recognize liability for resultant emotional injuries: a duty to transmit truthfully information concerning a relatives death or funeral . . . which the hospital assumed by sending the message. . . and the mishandling or the failure to deliver a dead body with the consequent denial of access to the family" (**Johnson v. Jamaica Hospital, supra** at 530; See also, **Tebbutt v. Virostek,** 65 N.Y.2d 931, wherein the court stated that **Johnson v. State of New York** (supra) had been limited to its particular facts). There exists here a special likelihood of genuine and serious mental distress, arising from special circumstances, which serves as a guarantee that the claim is not spurious. In **Johnson v. State of New York, supra,** the defendant Hospital negligently sent a telegram to plaintiff notifying her of her mother's death, when in fact her mother had not died and in the case of **Lando v. State of New York,** 39 N.Y.2d 803, the defendant hospital negligently failed to located a deceased patient's body for 11 days, when it was found in an advanced state of decomposition. Each case presented exceptional circumstances in which courts long ago recognized liability for resultant emotional injuries; a duty to transmit truthfully information concerning a relative's death or funeral, which the hospital assumed by sending the message (**Lafferty v. Manhasset Medical Center Hospital,** 54 N.Y.2d 277, and the mishandling of or failure to deliver a dead body with the consequent denial of access to the family; **Finley v. Atlantic Transportation Company**, 220 N.Y. 249; **Darcy v. Presbyterian Hospital**, 202 N.Y. 259).

Issues concerning the status of the embryo as a person, given the proscriptions of **Roe v. Wade,** were briefed, but not addressed by the Court, given their reliance on the above principles in reaching their determination.

Presumably, the issue was not addressed, as it would of necessity re-opened the **Roe v. Wade** debate and compel a determination as to whether or not an extra corporeal embryo is a person.

Physician assisted suicide is murder. The Dr. Death's of the world take pride in snatching away the last vertiges of life and pearls of meritorious suffering from people, in the name of mercy. The mass murder of infants spawns nothing more than a great yawn from our politically correct society. To oppose any one of these evils, precipitates an avalanche of pejorative epithets, ending with the critical misnomer "religious right fanatic."

Last time I looked this was America, bursting at the seams with freedoms, including the First Amendment. How far we have strayed as a people from the precious freedoms this Country has heralded throughout the ages.

Life, liberty and the pursuit of happiness does not include mass murder of infants for political expediency; it does not include preying on the elderly or ill whose physical or emotional suffering may cloud their thoughts, into giving up on life, should the whispers and seemingly logical argument in favor of physician assisted suicide overwhelm them in an hour of need into taking the purported easy way out. Easy for whom?

The recent case filed in federal court challenging the bar to physician assisted suicide in New York must be defeated. Slowly but surely, respect for "human life" and the right to voice opinions concerning the value of human life have been severely restricted, limited and denounced in this society, whose listless moral values have been relegated to pithy maxims on the back of Pom Pom covers.

Only God gives life and only God has the right to take it away. ■

DAUBERT AND THE ADMISSABILITY OF EXPERT OPINION IN NEW YORK [Con't.]

Rule 702 of the Federal Rules of Evidence (hereinafter "FRE") sets the federal standard for when and what kind of expert testimony will be admitted. This rule states:

> Rule 702 Testimony by Experts
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Writing for the majority in **Daubert**, Justice Blackman, stated that "general acceptance" is not a necessary precondition to the admissibility of scientific evidence in federal trials. Id., 113 S.Ct. at 2799. The Court reassured that there is nothing in the Rules as a whole as in the drafting history that gives any indication that "general acceptance" is a pre-requisite to admissability. On the contrary, such a rigid standard would contradict the Rule's "liberal trust... and their general approach of releasing the traditional barriers to opinion 'testimony'." **Id** at 2794.

In rejecting the general acceptance test of **Frye** the Court established a "gatekeeper" role to the trial judge who is to screen scientific evidence from a jury. Now under rule 702 trial courts are required to place limits on the introduction of purportedly scientific evidence by working a preliminary finding that the expert's testimony both rests on a reliable foundation, and is relevant to the circumstances of the case. **Id** at 2799. The Court suggested several factors which may bear on a trial court's analysis of proffered scientific opinion testimony:

(a) whether the theory or technique in question can be (and has been) tested;

(b) whether the theory or technique has been subjected to peer review and publication;

(c) the potential role of error of the particular scientific technique;

(d) whether the theory has attracted widespread acceptance within a relevant scientific community; and

(e) the existence and maintenance of standards controlling the theory or technique's operation.

New York's standard for **when** an expert opinion can be admitted has always been somewhat more restrictive than FRE 702 as the standard in our courts is not whether such testimony will assist the jury, but whether the jury **needs** the expert testimony. **Kulak v. Nationwide Mutual Ins. Co.**, 40 N.Y.2d 140; **Dougherty v. Milliken**, 163 N.Y. 527.

Assuming a New York jury needs expert testimony to resolve a fact in issue has **Daubert** changed the standard by which the admissability of that evidence will be judged? Authority is scant.

Until **Daubert, Frye** was the controlling law in roughly two-thirds of the American jurisdictions. As recently as the mid-1970's, the general acceptance test appeared to be the governing standard in at least forty-five states.

Some commentators saw the erosion of the **Frye** test as the reason why so much so-called "junk science" was being admitted into evidence. In Galileo's Revenge: Junk Science in the Courtroom, Peter Huber, had charged that American courts had lowered the threshold for admitting expert testimony to the point that many juries were returning erroneous verdicts based on pseudo-scientific theories propounded by fringe elements within a given discipline. In Huber's words:

> Junk science is the mirror image of real science, with much of the same form but none of the same substance. There is the astronomer, on the one hand, and the astrologist, on the other. The chemist is paired with the alchemist, the pharmacologist with the homeopathist. Take the serious sciences of allergy and immunology, brush away the detail and rigor, and you have the junk science of clinical ecology. The orthopedic surgeon is shadowed by the mathematician by the numerologist and the cabalist. Cautious and respectable surgeons are matched by some who cut and paste with gay abandon. Further out on the surgical fringe are outright charlatans, well documented in the credulous pulp press, who claim to operate with rusty knives but no anesthesia, who prey on cancer patients so desperate they will believe a palmed chicken liver is really a human tumor. Junk science cuts across chemistry and pharmacology, medicine and engineering. It is a hodgepodge of biased data, spurious inference, and logical legerdemain, patched together by researchers whose enthusiasm for

(continued on next page)

DAUBERT AND THE ADMISSABILITY OF EXPERT OPINION IN NEW YORK [Con't.]

> discovery and diagnosis far outstrips their skill. It is a catalog of every conceivable kind of error: data dredging, wishful thinking, truculent dogmatism, and, now and again, outright fraud.[1]

Since the Supreme Court's decision in **Daubert** there have been no published civil decisions which address the **Daubert** versus **Hughes/Frye** analyses. However, since a plaintiff may now have a greater ability to introduce expert testimony which does not come within the realm of "general acceptance" in the relevant scientific community a review of the few New York cases on point may be instructive.

The Third Department in **People v. Krol**, ____ A.D.2d ____, 603 N.Y.S.2d 1004 noted the rejection by the United States Supreme Court of the **Frye** test in considering the propriety of the admission of a serum osmolarity test by the prosecutions expert. The People's expert arrived at his opinion about the defendant's blood alcohol level by examining a blood sample taken two hours after the defendant was involved in a motor vehicle accident and by means of backwards linear extrapolation based on various element levels present in defendant's serum osmolarity opined the defendant was legally intoxicated at the time of the accident. The jury acquitted the defendant on a charge of driving while intoxicated but convicted the defendant for driving while impaired. On appeal the defendant contended the People's expert should not have been permitted to testify because it was not demonstrated that the serum osmolarity test was sufficiently reliable to determine blood alcohol content. The court cited **Frye** with approval as the applicable standard by which to judge the admission of the contested testimony and then went on to determine that as a result of the "sharply contrasting" testimony of the expert for the People and that of the defendant the methodology employed by the People's expert had not gained general acceptance in the scientific community.

The DNA testing procedures of Allmark Diagnostics was at issue in another Third Department case, **People v. Moore**, 194 A.D.2d 32, 604 N.Y.S.2d 976. In **Moore**, a pre-trial **Frye** hearing was held at which the trial court determined the results of forensic DNA testing met the standards for admissability set forth in **Frye**. The Third Department expressly approved of this procedure but noted **Frye** had been overturned by **Daubert**.

The validity of the **Hughes** test was addressed in a trial court decision in Monroe County in **Bennett v. Saeger Hotels**, 158 Misc.2d 79, 600 N.Y.S.2d 910. When the plaintiff in this negligence action could not recall what had happened inside defendant's hotel to bring about her injuries, even though the lawsuit claimed that the defendant was responsible for same, the plaintiff underwent hypnosis to help her remember. A pre-trial evidentiary hearing was held after the defendant brought a motion in limine to restrict plaintiff's trial testimony to her pre-hypnosis recollections. The court excluded the post-hypnosis recollections. The court excluded the post-hypnosis recollection testimony after citing **Huges** as the appropriate standard.

While **Daubert** may provide foothold for fringe discipline defense attorneys should also be aware of the possible "offensive" use of **Daubert**. In **Liu v. Korean Airlines Co., Ltd., ____ F. Supp. ____, 1993 LEXIS (S.D.N.Y.) Nov. 16, 1993 Judge Pierre N. Leval conducted an evidentiary hearing based on the authority of Daubert** to determine the admissability of an economists testimony. Judge Leval applied **Daubert** to exclude proposed expert testimony that was not opposed on grounds that the testimony involved a novel scientific theory but, rather, that the testimony was likely to be inflammatory and prejudicial to the objecting party. ■

---

[1] Peter W. Huber, Galileo's Revenge: Junk Science in the Courtroom pp.2-3 (1991). Huber is, of course, not without his critics. See, Kenneth J. Chesebro, Galileo's Retort: Peter Huber's Junk Scholarship.

WORTHY OF NOTE [Con't.]

and whether that negligence proximately caused the patient's injuries was for the jury where the patient's expert testified that the physician's failure to order an abdominal x-ray was a departure from good and accepted medical practice and that the x-ray might have revealed circumstances from which it was reasonable for a physician to have detected the existence of a colon perforation.

NEGLIGENCE-Condition Open to Public. In **Giova v. Guidicipierto** (A.D.2d , 605 N.Y.S.2d 45) the First Department ruled that a property owner was not liable for personal injuries allegedly sustained when an individual ran onto property to retrieve a ball and tripped and fell over a rock embedded in the lawn.

COURT OF APPEALS-Authority. The Court of Appeals is usually constrained to review only the law and is without the power to disturb affirmed findings of fact (**Prozeralik v. Capital Cities Communications, Inc.**, 82 N.Y.2d 466, 605 N.Y.S.2d 218).

DAMAGES-Fracture of Tibia-Expert Testimony-Elements. An Award of $4,500 for pain and suffering to a five-year-old boy whose ankle was ridden over by a bicycle, fracturing the boy's leg, was reasonable compensation in a personal injury matter where the boy suffered a nondisplaced or incomplete fracture of the tibia, was in a cast for one month, resumed sport activity within days of its removal, did not limp or complain of pain and demonstrated no sign of permanent injury; so indicated the Second Department in **Weber v. William & James Drug, Inc.** (A.D.2d , 605 N.Y.S.2d 375).

The plaintiff was not entitled to the submission to the jury of the issue of whether the boy's injury of a three-eighths of an inch difference between the size of his legs was permanent; although the boy's expert initially testified that the injury was permanent, he admitted on cross examination that there were no current symptoms of the injury, that he did not know whether any future treatment would be necessary, that he did not know whether the boy would ever exhibit the symptoms of the injury, and that the permanency of the injury could only be determined after the boy reached puberty.

INSURANCE-Notice to Insurer-Delayed Notice of Disclaimer-Forty-One Day Delay-Elements. In **Nationwide Mut. Ins. Co. v. Steiner** (A.D.2d ,605 N.Y.S.2d 391) the Second Department held that an automobile insurer's unexplained forty-one day delay in disclaiming coverage was unreasonable, the insured's failure to notify the insurer of the accident was grounds for disclaiming coverage and was readily apparent when the insurer received notice of the accident. A timely notice of disclaimer of coverage must be given even when the injured claimant in the first instance failed to provide the insurer with timely notice of the accident.

INSURANCE-Underinsurance-Elements. It was recently held by the Second Department that a claimant who was struck by an automobile, the driver of which had a single limit policy of $300,000, could assert an underinsured motorist claim under his father's policy which had bodily injury coverage limits of $250,000 per person and $500,000 per accident. The tortfeasor's coverage of $300,000 was less than the claimant's overall policy limit of $500,000.

The determination of whether the vehicle is underinsured is made by comparing the bodily injury limits of the claimant's policy with the bodily injury limits of the tortfeasor's policy (**Allstate Ins. Co. v. Hager**, A.D.2d ,605 N.Y.S.2d 310).

INSURANCE-Duty to Settle-Bad Faith-Elements. In **Pavia v. State Farm Mut. Automobile Ins. Co.** (82 N.Y.2d 445, 605 N.Y.S.2d 208) the court set forth a holding that in order to establish a prima facie case against the insurer of bad faith in refusing a settlement offer within the policy limits, the plaintiff must establish that the insurer's conduct constituted "gross disregard" of the insured's interests, that is, deliberate or reckless failure to place on an equal footing the interests of its insured with its own interests when considering the settlement offer. The plaintiff must establish that the insurer engaged in a pattern of behavior evincing a conscious or knowing indifference to the probability that the insured would be held personally accountable for a large judgment if the settlement offer were not accepted.

The evidence that the settlement offer was made and not accepted is not dispositive of the insurer's bad faith. An insurer cannot be compelled to concede liability and settle a questionable claim simply because the opportunity to do so is questionable claim simply because the opportunity to do so is presented, rather, the plaintiff must show that the insured lost an actual opportunity to settle the matter at a time when all serious doubts about the insured's liability were removed.

INDEPENDENT CONTRACTOR-Employee-Elements. It was recently indicated by the First Department that laborers hired by a grocery store to unload a truck were "independent contractors" as a matter of law. The grocery store manager

(continued on next page)

WORTHY OF NOTE [Con't.]

testified that the laborers would ask each morning if there was work and, if they were needed, they would be told to return at a certain time; after work was completed, one individual would be paid a sum of money which he would then share with the others as he saw fit, and there was no evidence that anyone from the grocery store actively directed or controlled the work done by such laborers apart from telling them where to place sacks inside the grocery store (**Lazo v. Mak's Trading Co., Inc.,** A.D.2d , 605 N.Y.S.2d 272).

The determination of whether one is an independent contractor generally involves questions of fact concerning which party controlled the method and means by which the work was to be done. Where proof on the issue of control presents no conflict in evidence, the matter may be properly determined by the court as a matter of law.

DISCLOSURE-Notice to Admit-Elements. In **Washington v. Alco Auto Sales** (A.D.2d , 605 N.Y.S.2d 271) the First Department held that a notice to admit is to be used only for disposing of uncontroverted questions of fact and those that are easily provable, and is not intended as a means of compelling an opposing party to admit to the most fundamental and material contested issues of fact. The plaintiff's notice to admit, which mostly repeated allegations in the complaint, improperly demanded that the defendants concede many matters that were in dispute or clearly denied. The protective order against such notices to admit were warranted.

NEGLIGENCE-Assault-Elements. The Second Department recently indicated in the case of **Fariello v. City of New York Bd. of Educ.** (A.D.2d , 606 N.Y.S.2d 20) that even if a girlfriend negligently lied to her boyfriend about disparaging remarks a fellow student allegedly made about her, the girlfriend was not liable for the injuries which occurred to the student when the boyfriend allegedly assaulted the student. The sole proximate cause of the student's injuries was the assault upon him.

NEGLIGENCE-Construction-Scaffolding. In **Van Guilder v. Sands Hecht Const. Corp.** (A.D.2d , 606 N.Y.S.2d 1) the First Department concluded that a plaintiff's rocking of a scaffold to move it was not an unforeseeable intervening cause of the accident in which the scaffold collapsed and the plaintiff suffered an injury. Contributory negligence was not a defense to this action.

NEGLIGENCE-Slip and Fall-Hazardous Condition-Notice. The First Department recently submitted in **Drillings v. Beth Israel Medical Center** (A.D.2d , 606 N.Y.S.2d 191) that evidence which only established that the floor upon which plaintiff allegedly fell was shiny "as always" failed to establish that the hazardous condition existed on the day of the incident or that the defendants had any notice, actual or constructive, of the alleged hazardous condition.

LIBEL/SLANDER-Opinion-Elements. In **Gross v. New York Times Co.** (82 N.Y.2d 146, 603 N.Y.S.2d 813) the Court of Appeals ruled that an inquiry as to whether a reasonable person could have concluded that the facts were being conveyed about plaintiff as required for actionable defamation must be made by the court, and entails an examination of the challenged statements with a view toward: whether the specific language in issue has a precise meaning which is readily understood; whether the statements are capable of being proven true or false; whether either the full extent of the communication in which the statement appears or the broader social context and surrounding circumstances signal the readers or listeners that what is being read or heard is likely to be opinion and not fact.

In determining whether a particular communication is actionable, the Court of Appeals recognizes and utilizes the distinctions between the two actionable statements of opinion that implies basis in fact which are not disclosed to the reader or listener and non-actionable statements of opinion accompanied by a recitation of facts on which it is based or one that does not imply the existence of undisclosed underlying facts. In the former case, a reasonable listener or reader would infer that the speaker or writer knows the facts which support the opinion and are detrimental to the subject, whereas in the latter case, the hypothesis is readily understood by the audience as conjecture.

In all cases, whether the challenged remark concerns criminality, or some other defamatory category, the courts are obliged to consider the communication as a whole, as well as its immediate and broader social contexts, to determine whether a reasonable listener or reader is likely to understand the remark as an assertion of a provable fact, as is required for the remark to be actionable.

TRIAL-Evidence-Missing Document Charge-Elements. The Second Department recently concluded in the case of **Fares v. Fox** (A.D.2d ,603 N.Y.S.2d 892) that to receive a missing document charge, the party must make a prima facie showing of entitlement, that is, that the documents in question actually existed and were in the adversary's control.

(continued on next page)

WORTHY OF NOTE [Con't.]

ANIMALS-Vicious Propensities-Elements. In **Papadopoulos v. Gardners Village, Inc.** (A.D.2d , 604 N.Y.S.2d 570) the Second Department indicated that for the purpose of determining plaintiff's burden of proof, a goat is deemed a domestic animal. In the action, against a petting zoo, for injuries sustained by a woman when a goat struck her from behind with its horns, the woman was required to prove that the goat had vicious propensities and that the owner of the zoo had knowledge of said propensities or that they existed for such a period of time that a reasonably prudent person would have discovered them.

DAMAGES-Fracture of Left Humerus. Awards to a psychiatric patient of $375,000 for past conscious pain and suffering and $375,000 for future conscious pain and suffering arising out of a fractured left humerus which was improperly set, resulting in a permanent partial disability, were excessive and would be reduced to $250,000 and $100,000 respectively, so indicated the Second Department in **Mojica v. City of New York** (A.D.2d , 604 N.Y.S.2d 235).

INSURANCE-Uninsured-Covered Person. The Second Department recently concluded in **Matter of Prudential Property and Cas. Insurance Co.** (A.D.2d ,604 N.Y.S.2d 136) that an insured's brother was a covered person under the insured's automobile policy which provided protection for the insured, and any relatives living in her household, against bodily injury arising out of accidents with underinsured motorists, where the insured's brother was a member of the insured's household and no clear exclusion of coverage was present.

INDEMNIFICATION-Preindemnification-Waiver of Rights-Subrogation-Antisubrogation Rule-Elements. In **Northstar Reinsurance Corp. v. Continental Insurance Co.** (82 N.Y.2d 281, 604 N.Y.S.2d 510) the Court of Appeals indicated that an indemnitee is entitled to recover the entire amount paid. There is no mitigation of right to be indemnified. The "preindemnification doctrine" bars a common law claim for indemnification by a vicariously liable party, or the party's insurer, to the extent that the wrongdoer, pursuant to contractual obligation, has insured that party against the loss.

The owners of construction sites at which the contractor's employees were injured did not waive the right of common law indemnification against the contractors by requiring that the contractors maintain an owners' contractors' protective (OCP) policy naming the owners as insureds as the "preindemnification doctrine" was rejected. The contracts between the owners and the contractors explicitly reserved the owners' rights to indemnification, the disparity between premiums paid for and terms of the OCP policies and the general contractor's liability policies indicated that the parties contemplated indemnification. While the owners suffered no personal outlay of funds, the owners' OCP insurers paid the claims and the owners were entitled to seek indemnification on behalf of the insurers and neither the owners nor the insurers would receive a windfall by being allowed to seek indemnification.

The insurer that has paid the claim on behalf of the insured who is only vicariously liable for the loss is entitled to recover the amount paid by way of indemnity from the wrongdoer. That obligation to indemnification arises from the equitable principle that the wrongdoer ought to bear the responsibility for the loss.

In the same matter, the court also indicated that the antisubrogation rule prohibited insurers which issued both the owners' contractive protective (OCP) policies naming the owners as insureds and general contractor's liability (GCL) policies naming the contractors as insureds, from recovering from the contractors for the amounts paid under the OCP policies. The OCP and the GCL policies were purchased together as coverage against the same risk and paid for by the contractors, thusly, the OCP and GCL policies were indistinguishable from a single policy.

NEGLIGENCE-Construction-Homeowner. An owner of a one-family dwelling who used the property solely for commercial purposes was not entitled to the statutory exemption for homeowners from the Labor Law provision imposing strict liability on the owner and contractors for injuries by workers at the construction site even in the absence of supervision and control, so indicated the First Department in **Zangiacomi v. Hood** (A.D.2d , 603 N.Y.S.2d 31).

CONSTRUCTION-Liability of General Contractor-Indemnification. It was recently submitted by the First Department that a general contractor, who is vicariously liable pursuant to statute imposing liability for scaffolding supplied for use by employees, may recover indemnification from the subcontractor whose defective materials or safety devices led to the injury, provided that the general contractor exercised no control over the work.

A brief inspection of the premises by the general contractor prior to the commencement of the repair work on the fire escape, was not control or supervision over the work which precluded the general contractor from being indemnified by the

(continued on next page)

WORTHY OF NOTE [Con't.]

subcontractor which supplied the defective materials (**Seecharran v. 100 West 33rd Street Realty Corp.,** A.D.2d , 603 N.Y.S.2d 308).

NEGLIGENCE-Failure to Warn-Property Owner. It was recently indicated by the Third Department that landowners were not negligent in failing to advise a tree removal contractor of the tree's advanced state of decay. The landowners knew only that the top of the tree had fallen off and that some "sawdust-like material" had been falling from the tree, the absence of the treetop was apparent to the contractor and the landowners advised the contractor of the fact that the tree had been shedding sawdust (**Santo v. O'Kane,** A.D.2d , 603 N.Y.S.2d 242).

INSURANCE-Broker-Liability of. In **Andriaccio v. Borg & Borg, Inc.** (A.D.2d , 603 N.Y.S.2d 528) the Second Department indicated that a broker who negligently fails to procure a policy stands in the shoes of the insurer and is liable to indemnify the insured for any judgment which would have been covered by the policy.

APPEAL-Evidence-Handwritten Note-Hearsay. The First Department recently submitted that a defendant who unsuccessfully urged at time of trial that handwritten notes should be admitted pursuant to the hearsay exception of past recollection recorded could not subsequently argue on appeal that the exhibit should have been admitted as a prior consistent statement (**Isler v. Sutter**, A.D.2d , 603 N.Y.S.2d 442).

DAMAGES-Blindness. The First Department recently affirmed in the case of **Jones v. The State** (A.D.2d , 603 N.Y.S.2d 484) that an award of $7,454,687.50 in damages was not excessive for the state's malpractice with respect to treating a fifteen year old self-abusive child who was rendered permanently blind due to detached retinas, where the child needed lifetime care as a result of his blindness.

GENERAL MUNICIPAL LAW-Duty of Municipality. In **Heard v. City of New York** (82 N.Y.2d 66, 603 N.Y.S.2d 414) the court ruled that a municipal lifeguard's failure to insist that a swimmer leave a jetty created no justifiable reliance by the swimmer, and thus the lifeguard's conduct was not a breach of any assumed duty proximately causing the swimmer's diving injuries. The swimmer was in no worse position after the lifeguard acquiesced in one more dive than if the lifeguard had stood by and done nothing.

The scope of the municipality's general duty to supervise varies according to the circumstances but does not extend to protecting patrons from dangers, inherent in the sport, that are obvious and necessary.

NEGLIGENCE-Duty of Care. An assumed duty or a duty to go forward may arise after a defendant undertakes a course of conduct upon which another relies, depending upon whether the defendant's conduct placed the plaintiff in a more vulnerable position than the plaintiff would have been in had the defendant done nothing (**Heard v. City of New York**, 82 N.Y.2d 66, 603 N.Y.S.2d 414).

EVIDENCE-Use of Expert Testimony. In **Viacom Intern. Inc. v. Midtown Realty Co.** (A.D.2d , 602 N.Y.S.2d 326) the First Department ruled that if a factual issue transcends the realm of knowledge that lay persons possess, expert testimony is required.

ARBITRATION-Adjournments-Discretion. In **Peraza v. Allstate Ins. Co.** (A.D.2d ,602 N.Y.S.2d 937) the Second Department concluded that a decision whether to grant or refuse an adjournment is within the sound discretion of the arbitrator and misconduct results only when that discretion is abused.

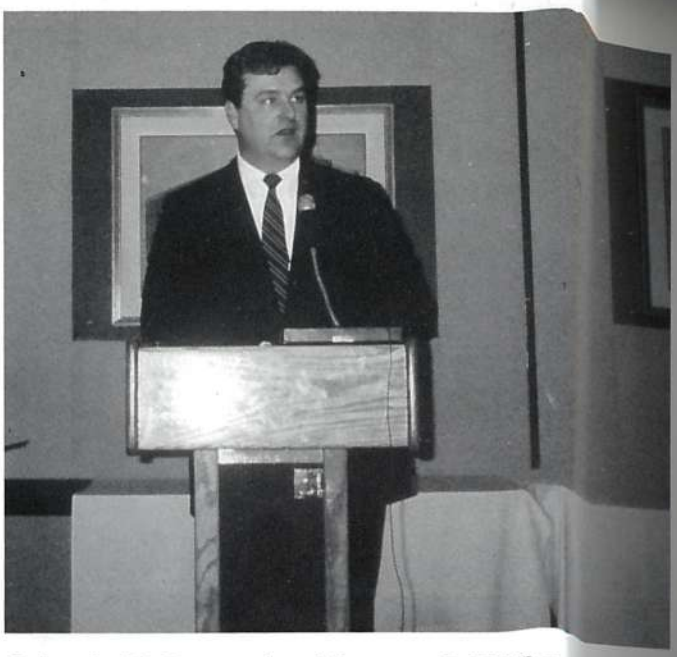
An arbitrator's refusal to grant the claimant a continuance to procure photographs of the damaged vehicle in which she was allegedly riding as a passenger was not an abuse of discretion where the claimant and her witness testified about the condition of the insured's automobile after the accident and their testimony was corroborated by an affidavit of a body shop owner.

DAMAGES-Knee. The Second Department recently held that a damage award of $600,000 to an employee injured when a steel beam which was part of a hoist which he was dismantling fell and struck him in the knee was excessive and a new trial would be granted on the issue of damages unless the employee agreed to a reduction of the award to $300,000. (**Rodriguez v. Margaret Tiez Center for Nursing Care, Inc.,** A.D.2d , 602 N.Y.S.2d 640.)

INSURANCE-Determination of Coverage. It was recently indicated by the Appellate Division, Third Department in **General Accident Ins. Co. v. U.S. Fidelity & Guaranty Ins. Co.** (A.D. , 602 N.Y.S.2d 948) that coverage is not determined merely on the basis of the policy's insuring clause, but must be determined upon the basis of a combination of insuring clauses and exclusions. Generally, the policy's exclusions must be accorded a strict and narrow construction. The policy is generally construed in favor of the insured and any ambiguity is to be resolved against the insurer and in favor of the insured.

(continued on next page)

DANY President, Eileen L. Hawkins, presents the Pickney Award to Michael J. Conroy of Home Insurance.



John J. McDonough addresses DANY sponsored seminar on Anti-Subrogation issues.

Past DANY President, James G. Barron, acknowledges receipt of the DRI Outstanding Service Award.

Past DANY President, Kevin Kelly, receives the DANY Merit Award from Eileen L. Hawkins.

DEFENDANT

WORTHY OF NOTE [Con't.]

subcontractor which supplied the defective materials (**Seecharran v. 100 West 33rd Street Realty Corp.,** A.D.2d , 603 N.Y.S.2d 308).

NEGLIGENCE-Failure to Warn-Property Owner. It was recently indicated by the Third Department that landowners were not negligent in failing to advise a tree removal contractor of the tree's advanced state of decay. The landowners knew only that the top of the tree had fallen off and that some "sawdust-like material" had been falling from the tree, the absence of the treetop was apparent to the contractor and the landowners advised the contractor of the fact that the tree had been shedding sawdust (**Santo v. O'Kane,** A.D.2d , 603 N.Y.S.2d 242).

INSURANCE-Broker-Liability of. In **Andriaccio v. Borg & Borg, Inc.** (A.D.2d , 603 N.Y.S.2d 528) the Second Department indicated that a broker who negligently fails to procure a policy stands in the shoes of the insurer and is liable to indemnify the insured for any judgment which would have been covered by the policy.

APPEAL-Evidence-Handwritten Note-Hearsay. The First Department recently submitted that a defendant who unsuccessfully urged at time of trial that handwritten notes should be admitted pursuant to the hearsay exception of past recollection recorded could not subsequently argue on appeal that the exhibit should have been admitted as a prior consistent statement (**Isler v. Sutter**, A.D.2d , 603 N.Y.S.2d 442).

DAMAGES-Blindness. The First Department recently affirmed in the case of **Jones v. The State** (A.D.2d , 603 N.Y.S.2d 484) that an award of $7,454,687.50 in damages was not excessive for the state's malpractice with respect to treating a fifteen year old self-abusive child who was rendered permanently blind due to detached retinas, where the child needed lifetime care as a result of his blindness.

GENERAL MUNICIPAL LAW-Duty of Municipality. In **Heard v. City of New York** (82 N.Y.2d 66, 603 N.Y.S.2d 414) the court ruled that a municipal lifeguard's failure to insist that a swimmer leave a jetty created no justifiable reliance by the swimmer, and thus the lifeguard's conduct was not a breach of any assumed duty proximately causing the swimmer's diving injuries. The swimmer was in no worse position after the lifeguard acquiesced in one more dive than if the lifeguard had stood by and done nothing.

The scope of the municipality's general duty to supervise varies according to the circumstances but does not extend to protecting patrons from dangers, inherent in the sport, that are obvious and necessary.

NEGLIGENCE-Duty of Care. An assumed duty or a duty to go forward may arise after a defendant undertakes a course of conduct upon which another relies, depending upon whether the defendant's conduct placed the plaintiff in a more vulnerable position than the plaintiff would have been in had the defendant done nothing (**Heard v. City of New York**, 82 N.Y.2d 66, 603 N.Y.S.2d 414).

EVIDENCE-Use of Expert Testimony. In **Viacom Intern. Inc. v. Midtown Realty Co.** (A.D.2d , 602 N.Y.S.2d 326) the First Department ruled that if a factual issue transcends the realm of knowledge that lay persons possess, expert testimony is required.

ARBITRATION-Adjournments-Discretion. In **Peraza v. Allstate Ins. Co.** (A.D.2d ,602 N.Y.S.2d 937) the Second Department concluded that a decision whether to grant or refuse an adjournment is within the sound discretion of the arbitrator and misconduct results only when that discretion is abused.

An arbitrator's refusal to grant the claimant a continuance to procure photographs of the damaged vehicle in which she was allegedly riding as a passenger was not an abuse of discretion where the claimant and her witness testified about the condition of the insured's automobile after the accident and their testimony was corroborated by an affidavit of a body shop owner.

DAMAGES-Knee. The Second Department recently held that a damage award of $600,000 to an employee injured when a steel beam which was part of a hoist which he was dismantling fell and struck him in the knee was excessive and a new trial would be granted on the issue of damages unless the employee agreed to a reduction of the award to $300,000. (**Rodriguez v. Margaret Tiez Center for Nursing Care, Inc.,** A.D.2d , 602 N.Y.S.2d 640.)

INSURANCE-Determination of Coverage. It was recently indicated by the Appellate Division, Third Department in **General Accident Ins. Co. v. U.S. Fidelity & Guaranty Ins. Co.** (A.D. , 602 N.Y.S.2d 948) that coverage is not determined merely on the basis of the policy's insuring clause, but must be determined upon the basis of a combination of insuring clauses and exclusions. Generally, the policy's exclusions must be accorded a strict and narrow construction. The policy is generally construed in favor of the insured and any ambiguity is to be resolved against the insurer and in favor of the insured.

(continued on next page)

WORTHY OF NOTE [Con't.]

TRIAL-Witness-Foreign. The First Department recently ruled that it was beyond the power of the Supreme Court justice to compel proposed witnesses residing in France to attend a trial in New York and give evidence. The trial court exceeded its powers in ordering at trial that it would not close the proceeding until it heard two witnesses not called by either party, which in effect amounted to a direction to counsel to exploit the pre-trial disclosure to preserve the testimony since the witnesses resided in France, in case in which there was no indication of any provision by which the witnesses could be called as witnesses of the court (**Carroll v. Gammerman**, A.D.2d , 602 N.Y.S.2d 841).

NEGLIGENCE-Construction-Duty of Subcontractor. In **Terranova v. City of New York** (A.D.2d , 602 N.Y.S.2d 830) the First Department concluded that a subcontractor has no liability for job site injuries unless it had authority to direct, supervise and control the work giving rise to the injury. The party asserting liability has the burden to present evidence of supervision and control of an activity which resulted in the injury. The subcontractor could be held liable for a job site injury upon proof that its actual negligence contributed to the accident.

90-DAY NOTICE-Duty of Plaintiff's Attorney. In **Wilson v. Nembhardt** (180 A.D.2d 731, 580 N.Y.S.2d 70) the First Department concluded that once a plaintiff's attorney received notice to resume prosecution of an action and to serve and file a Note of Issue within 90 days, it was incumbent upon plaintiff's counsel to comply with the notice by filing a Note of Issue or by moving, before the default date, to either vacate the notice or to extend the 90-day period. Service of a demand for a pre-trial conference did not satisfy the requirement to comply with the notice to resume prosecution of the action.

CONSOLIDATION-Elements. The First Department recently submitted in **Lamboy v. Inter Fence Co. Inc.** (A.D.2d ,601 N.Y.S.2d 619) that absent a showing of prejudice to substantial rights, the existence of common questions of law or fact justify the granting of a motion for consolidation. In the cited case, both actions arose out of the same automobile accident, both actions involved the same issues of liability, the insurer that opposed the consolidation failed to demonstrate that it would be prejudiced and there was no reason to believe that the jury would be influenced by the appearance of an insurer.

SNOW AND ICE-Liability of Owner-Elements. In **Shen v. Gerald J. Neufeld Inc.** (A.D.2d, 601 N.Y.S.2d 637), the Second Department held that an owner was not negligent in failing to remove snow and ice from a sidewalk in a driveway leading from the premises, where the storm was still in progress when the accident occurred.

COURTS-Duty of. While adherence to state case law precedent may be justified absent clear guidance from the Supreme Court, the state court is bound to follow both holding and rationale of the nation's highest court on questions of federal law if there is no ambiguity in the Supreme Court's decision, so indicated the Court of Appeals in **Fletcher v. Kidder** (81 N.Y.2d 623, 601 N.Y.S.2d 686).

NEGLIGENCE-Res Ipsa Loquitur-Elements. In **Chang v. F.W. Woolworth Co. Inc.** (A.D.2d , 601 N.Y.S.2d 904) the First Department ruled that the doctrine of **res ipsa loquitur** could be applied even if more than one defendant is in a position to exercise exclusive control over the agency or instrumentality. The permissible inference of negligence is grounded on the remoteness of any probability that the negligent act was caused by someone other than the defendant.

A child injured when her leg became wedged between the escalator's moving stairs and a side panel was entitled to instruction on **res ipsa loquitur**, even though the escalator was available to substantial public access, where the gap between the step and the side panel was small and unlikely to have been caused by vandalism, there was no testimony that the gap could have been only created by vandalism, and the escalator had been shut down for repairs a few hours before the accident, which greatly diminished the possibility of vandalism as a casual factor.

GENERAL MUNICIPAL LAW-Sidewalk Repair. In **Zipkin v. City of New York** (A.D.2d ,602 N.Y.S.2d 149) the Second Department held that the city's alleged policy of leaving repairs to an abutting homeowner when the sidewalk defects were caused by tree roots, and giving the priority to making the repairs in more heavily populated areas, did not excuse the City from its duty to maintain the sidewalk on which a pedestrian fell.

NEGLIGENCE-Construction-Duty of Engineer. It was recently held by the Appellate Division, First Department that a professional engineering firm's duty to inspect the work site, pursuant to a contract with the state, was not sufficient by itself to result in liability under the Labor Law safe workplace section for injuries sustained by a worker since the contract only obligated the firm to report any deviations from the project design or delays to the engineer in charge, an employee of the state, and there was no

(continued on next page)

WORTHY OF NOTE [Con't.]

evidence otherwise to indicate that the firm had any duty or authority to direct that any action be taken by the state in response to its inspection (**Carter v. Vollmer Associates,** A.D. , 602 N.Y.S.2d 48).

An engineering firm, as an inspecting engineer for the work site pursuant to a contract with the state, could not be held liable to an injured worker under the codification of the common law duty to provide a safe workplace, or in common law negligence, in the absence of a contractual right to control the activity which was alleged to have brought about the injury.

INSURANCE-RICO. The First Department recently held that an insurer was required to defend its insured in a federal RICO action, irrespective of the ultimate liability, even though the federal action had been dismissed on procedural grounds and the claims made by the plaintiffs might not have been substantiated, where claims that directors and officers had committed acts of self-dealing and fraud causing injury to the corporation and the plaintiffs were within the policy coverage for "negligent act, error or omission." (**Volney Residence Inc. v. Atlantic Mut. Ins. Co.**, 195 A.D.2d 434, 600 N.Y.S.2d 707).

NEGLIGENCE-Scaffolding-Liability of Owner. It was recently indicated by the Second Department that the statute imposing liability for failure to provide appropriate scaffolding and other devices for use of employees does not apply to routine maintenance in a non-construction non-renovation context. The owner of a building could not be held liable for injuries suffered in a fall by an employee who worked in a building, pursuant to a statute imposing liability to provide a safe workplace to protect the safety and health of the employees, absent any evidence to show that the owner maintained any direction or control over the manner in which the employee performed his duties (**Edwards v. Twenty-Four Twenty-Six Main Streets Associates**, 195 A.D.2d 592, 601 N.Y.S.2d 11).

PROCESS-Service on Receptionist. In Eastman Kodak Co. v. Miller & Miller consulting Actuaries Inc. (195 A.D.2d 591, 601 N.Y.S.2d 10) the Second Department held that service of process at defendant's place of business, effected upon the receptionist situated outside the office of defendant's president, was valid since the record revealed that service had been effected in that manner on at least six prior occasions so that the receptionist was clothed with the apparent authority to receive service on behalf of the defendant. Even if the receptionist situated outside the office of the defendant's president was not authorized to receive process on defendant's behalf, the service was properly effected where the process server observed defendant's president in his office a few feet away, heard his presence announced by the receptionist and unavailingly waited ten minutes for him to come out and accept service.

■

DANY

The Success of DANY Depends on You...

Please Lend Us Your Cooperation