NEW YORK STATE BAR ASSOCIATION

FORM FOR VERIFICATION OF PRESENCE AT THIS PROGRAM

Pursuant to the Rules pertaining to the Mandatory Continuing Legal Education Program for Attorneys in the State of New York, as an Accredited Provider of CLE programs, we are required to carefully monitor attendance at our programs to ensure that certificates of attendance are issued for the correct number of credit hours in relation to each attendee's actual presence during the program. Each person may only turn in his or her form—you may not turn in a form for someone else. Also, if you leave the program at some point prior to its conclusion, you should check out at the registration desk. Unless you do so, we may have to assume that you were absent for a longer period than you may have been, and you will not receive the proper number of credits.

Speakers, moderators, panelists and attendees are required to complete attendance verification forms in order to receive MCLE credit for programs. Faculty members and attendees, please complete, sign and return this form to the registration staff **before you leave** the program.

PLEASE TURN IN THIS FORM AT THE END OF THE PROGRAM.

Torts, Insurance & Compensation Law Section
Summer Meeting – THURSDAY 8th SESSIONS
August 7-10, 2019| Williamsburg, Virginia

Name:_____
(please print)

I certify that I was present for the entire presentation of this program

Signature:_____Date:_____

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NYSBA

NEW YORK STATE BAR ASSOCIATION

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PLEASE TURN IN THIS FORM AT THE END OF THE PROGRAM.

Torts, Insurance & Compensation Law Section
Summer Meeting – FRIDAY 9th Sessions
August 7-10, 2019| Williamsburg, Virginia

Name:_____
(please print)

I certify that I was present for the entire presentation of this program

Signature:_____Date:_____

Speaking Credit: In order to obtain MCLE credit for speaking at today's program, please complete and return this form to the registration staff before you leave. **Speakers** and **Panelists** receive three (3) MCLE credits for each 50 minutes of presenting or participating on a panel. **Moderators** earn one (1) MCLE credit for each 50 minutes moderating a panel segment. Faculty members receive regular MCLE credit for attending other portions of the program.

NYSBA

TICL Summer Meeting

Torts, Insurance and Compensation Law Section

Section Chair:
James O'Connor, Esq.

Program Co-Chairs:
J.P. Delaney, Esq.
Douglas Hayden, Esq.
Joanna Roberto, Esq.

Co-sponsored by the Young Lawyers Section

August 7-10, 2019

Kingsmill Resort
1010 Kingsmill Road, Williamsburg, VA

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

ACCESSING THE ONLINE ELECTRONIC COURSE MATERIALS

Program materials will be distributed exclusively online in PDF format. It is strongly recommended that you save the course materials in advance, in the event that you will be bringing a computer or tablet with you to the program.

Printing the complete materials is not required for attending the program.

> The course materials may be accessed online at:
> http://www.nysba.org/TICLSum19book/

A hard copy NotePad will be provided to attendees at the live program site, which contains lined pages for taking notes on each topic, speaker biographies, and presentation slides or outlines if available.

Please note:

- You must have Adobe Acrobat on your computer in order to view, save, and/or print the files. If you do not already have this software, you can download a free copy of Adobe Acrobat Reader at https://get.adobe.com/reader/
- If you are bringing a laptop, tablet or other mobile device with you to the program, please be sure that your batteries are fully charged in advance, as electrical outlets may not be available.
- NYSBA cannot guarantee that free or paid Wi-Fi access will be available for your use at the program location.

MCLE INFORMATION

Program Title: **TICL Summer Meeting**
Date/s: August 7-10, 2019 Location: Williamsburg, VA

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_d75xITqkHJWijyt
This evaluation survey link will be emailed to registrants following the program.

Total Credits: **7.0 New York CLE credit hours**

Credit Category:
5.0 Areas of Professional Practice
1.0 Ethics and Professionalism
1.0 Skills

This course is approved for credit for **newly admitted attorneys** (admitted to the New York Bar for less than two years).

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff
2) Complete and return a **Form for Verification of Presence** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Form for Verification of Presence certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also provided above.

ADDITIONAL INFORMATION AND POLICIES

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

Newly admitted attorneys (admitted to the New York Bar for less than two years) may not be eligible to receive credit for certain program credit categories or formats. For official New York State CLE Board rules, see www.nycourts.gov/attorneys/cle.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or the NYSBA Member Resource Center at (800) 582-2452 (or (518) 463-3724 in the Albany area).

TICL Summer Meeting 2019

Schedule of Events

Wednesday, August 7th

2:00 – 6:00 p.m.	**Program Registration**
3:00 – 5:00 p.m.	**Executive Committee Meeting -** Randolph
6:30 – 7:30 p.m.	**Welcome Reception** – James Landing Grill Sponsored by Comprehensive Medical Reviews
7:30 p.m.	**Dinner on Your Own** *Guests are encouraged to make reservations prior to arrival*

Thursday, August 8th

7:30 – 9:00 a.m.	**Program Registration**
7:30 - 8:30 a.m.	**Breakfast**
7:30 – 8:30 a.m.	**Executive Committee Meeting -** Randolph
8:45 – 12:30 p.m.	**General Session –** Tazewell
8:45 – 8:55 a.m.	**NYSBA Welcome** James O'Connor, Chair
8:55 – 9:45 a.m.	**The 10 Commandments of Trial Practice and Tactics: Observations from The Bench and Caution from Counsel** **1.0 MCLE Credit** | Skills An interactive discussion amongst attendees and panelists about the common pitfalls in current Trial practice. Perspectives include: Plaintiff (McCone); Defendant (Maroney) and Bench (Silver & Cannataro).
Panelists:	**Hon. Judge Anthony Cannataro** |New York Supreme Court Justice | New York County **Cody McCone, Esq.** | O'Dwyer & Bernstein **Thomas J. Maroney, Esq.** | Maroney O'Connor, LLP **Hon. Judge George J. Silver,** New York Supreme Court Justice |New York County

9:45 – 10:35 a.m.	**The State of Affairs for Artificial Intelligence, Algorithms and Machine Making Decisions** **1.0 MCLE Credit |** Areas of Professional Practice Addressing the risks associated with the use and management of AI in the 21st Century's world of business. Discussion on how the riveting world of AI has changed the landscape of legal practice and business function today.
Panelists:	**Thomas J. Hamilton |** VP Legal Strategy | ROSS Intelligence **James O'Connor** | Maroney O'Connor LLP
10:35 – 10:45 a.m.	**Coffee Break** Sponsored by Lexitas-Deitz Court Reporting
10:45 – 11:35 a.m.	**Product Liability: Warnings, Defects and More** **1.0 MCLE Credit |** Areas of Professional Practice New York and Federal law analysis and treatment of claims and defenses. Recent case law update and developing trends in Product Liability practice.
Panelists:	**Hon. Suzanne Adams |** Kings County, Family Court **Dennis J. Brady |** Gerber Ciano Kelly Brady, LLP
11:35 – 12:35 p.m.	**Sports & Recreational Liability: "Game Over? Or Let the Games Begin!"** **1.0 MCLE Credit |** Areas of Professional Practice Description of New York State statutes involving recreational use, including skiing incidents and use of waivers of liability; Discussion on claims for participant injury; bystander and spectator injuries; and concussion injury in contact sports.
Panelists	**Tom Bowler, CPSI| Consultant |** Total Playground Consulting Services **Glenn A. Monk, Esq. |** Harrington Ocko & Monk LLP
1:00 – 6:00 p.m.	**Optional Activity** **Golf – Plantation Course – Tee Time – 1pm** The Plantation Course is an Arnold Palmer and Ed Seay design that challenges players of all skill levels. The 6,432-yard, par-72 course favors accurate iron play and good putting. Fairway landing areas are generous, but water comes into play on eight holes, and there's no shortage of deep woods or yawning ravines. Greens are large and provide inviting targets for approach shots. Once on the putting surface, undulations and swales make getting down in two a satisfying accomplishment. With landmarks from Richard Kingsmill's 1736 plantation woven into the landscape, a round on the Plantation Course is truly historic.

7:30 – 10:00 p.m.	**Cocktail Reception & Dinner – Riverview Ballroom** Wine Sponsored by Wright Public Entity
Honorable Guest:	**Jim Icenhour** | Jamestown District Supervisor| James City County Board of Supervisors

Friday, August 9th

8:30 a.m.	Breakfast
8:30 – 12:00 p.m.	**Program Registration**
9:00 – 12:30 p.m.	General Session – Tazewell
9:00 – 9:10 a.m.	**Program Introduction** James O'Connor, Chair
9:10 – 10:00 a.m.	**Ethical Concerns Facing Modern Litigation: Integrity, Impartiality and Competence** 1.0 **MCLE Credit** | Ethics and Professionalism Recent trends and New York case law as it relates to Tort Liability practice. Bench (Hon Judges Gonzalez & Silvera) and Bar perspective (Cassidy & Coyne) on issues related to avoidance when handling tort cases.
Panelists	**Daniel Cassidy, Esq.** | Law Office of Daniel D. Cassidy, PLLC **Roderick J. Coyne** | McMahon, Martine & Gallagher LLP **Hon. Judge Doris Gonzalez,** Administrative Judge of Civil Matters | Supreme Court Bronx County **Hon. Judge Adam Silvera** | Supreme Court of New York
10:00 – 10:50 a.m.	**Insurance Coverage: How Bad is Bad Faith?** 1.0 MCLE Credit | Areas of Professional Practice A comparative analysis by both the policyholder and insurer's perspective of case law, recent decisions and fact patterns that have led to the ever-evolving discussion of bad faith.
Panelists	**John J. Rasmussen** | Insurance Recovery Law Group LLC **Joanna M. Roberto, Esq** | Gerber Ciano Kelly Brady **Lindsay Lankford Rollins** | Hancock Daniel
10:50 – 11:05 a.m.	**Coffee Break** Sponsored by PM Legal
11:05 - – 11:55 a.m.	**The Cannabis Quandary: Legal Issues vs. Moral Muddle** 1.0 **MCLE Credit** | Areas of Professional Practice

In June, Illinois became the 11th state in the US to legalize recreational marijuana use. The New York legislature came very close to legalizing recreational marijuana in 2019, and many believe that it will occur in NY in 2020. What have other states experienced in their tort law development after they have legalized recreational marijuana--- A preview of issues for the future practice of the NY tort lawyer.

Panelist **Richard W. Kokel, Esq.** | Richard Kokel Law Office
Kaitlyn O'Connor, Esq. | Nixon Law Group | Richmond, VA

1:00 – 6:00 p.m. **Optional Activity**
Golf – River Course – Tee Time 1pm
For more than three decades, The River Course has hosted the world's best players on both PGA and LPGA tours. It has also hosted thousands of lesser-known golfing superstars.

Bordered by the calm azure waters of the James River, this famed championship course has tested the mettle of the game's most famous names. On a still morning, dew still beading on the precisely manicured greens, you can almost hear the echoes of applause for crisply struck irons and delicately holed putts. The River Course inspires you to test your own mettle. To see how you stack up against the greats of today, and of years gone by.

The course has been reborn thanks to the efforts of original architect Pete Dye. The renowned course designer tinkered just enough with his layout, bringing

7:00 – 10:00 p.m. **Barbecue, Cocktails and Entertainment**
Enjoy music by the Brian Caputo Trio while trying your hand at cornhole and ladderball and enjoying a barbeque buffet
Burwell Ballroom and Patio

Lawyer Assistance Program 800.255.0569

NYSBA

Q. What is LAP?

A. The Lawyer Assistance Program is a program of the New York State Bar Association established to help attorneys, judges, and law students in New York State (NYSBA members and non-members) who are affected by alcoholism, drug abuse, gambling, depression, other mental health issues, or debilitating stress.

Q. What services does LAP provide?

A. Services are **free** and include:

- Early identification of impairment
- Intervention and motivation to seek help
- Assessment, evaluation and development of an appropriate treatment plan
- Referral to community resources, self-help groups, inpatient treatment, outpatient counseling, and rehabilitation services
- Referral to a trained peer assistant – attorneys who have faced their own difficulties and volunteer to assist a struggling colleague by providing support, understanding, guidance, and good listening
- Information and consultation for those (family, firm, and judges) concerned about an attorney
- Training programs on recognizing, preventing, and dealing with addiction, stress, depression, and other mental health issues

Q. Are LAP services confidential?

A. Absolutely, this wouldn't work any other way. In fact your confidentiality is guaranteed and protected under Section 499 of the Judiciary Law. Confidentiality is the hallmark of the program and the reason it has remained viable for almost 20 years.

Judiciary Law Section 499 Lawyer Assistance Committees Chapter 327 of the Laws of 1993

Confidential information privileged. The confidential relations and communications between a member or authorized agent of a lawyer assistance committee sponsored by a state or local bar association and any person, firm or corporation communicating with such a committee, its members or authorized agents shall be deemed to be privileged on the same basis as those provided by law between attorney and client. Such privileges may be waived only by the person, firm or corporation who has furnished information to the committee.

Q. How do I access LAP services?

A. LAP services are accessed voluntarily by calling **800.255.0569** or connecting to our website **www.nysba.org/lap**

Q. What can I expect when I contact LAP?

A. You can expect to speak to a Lawyer Assistance professional who has extensive experience with the issues and with the lawyer population. You can expect the undivided attention you deserve to share what's on your mind and to explore options for addressing your concerns. You will receive referrals, suggestions, and support. The LAP professional will ask your permission to check in with you in the weeks following your initial call to the LAP office.

Q. Can I expect resolution of my problem?

A. The LAP instills hope through the peer assistant volunteers, many of whom have triumphed over their own significant personal problems. Also there is evidence that appropriate treatment and support is effective in most cases of mental health problems. For example, a combination of medication and therapy effectively treats depression in 85% of the cases.

Personal Inventory

Personal problems such as alcoholism, substance abuse, depression and stress affect one's ability to practice law. Take time to review the following questions and consider whether you or a colleague would benefit from the available Lawyer Assistance Program services. If you answer "yes" to any of these questions, you may need help.

1. **Are my associates, clients or family saying that my behavior has changed or that I don't seem myself?**
2. **Is it difficult for me to maintain a routine and stay on top of responsibilities?**
3. **Have I experienced memory problems or an inability to concentrate?**
4. **Am I having difficulty managing emotions such as anger and sadness?**
5. **Have I missed appointments or appearances or failed to return phone calls? Am I keeping up with correspondence?**
6. **Have my sleeping and eating habits changed?**
7. **Am I experiencing a pattern of relationship problems with significant people in my life (spouse/parent, children, partners/associates)?**
8. **Does my family have a history of alcoholism, substance abuse or depression?**
9. **Do I drink or take drugs to deal with my problems?**
10. **In the last few months, have I had more drinks or drugs than I intended, or felt that I should cut back or quit, but could not?**
11. **Is gambling making me careless of my financial responsibilities?**
12. **Do I feel so stressed, burned out and depressed that I have thoughts of suicide?**

There Is Hope

CONTACT LAP TODAY FOR FREE CONFIDENTIAL ASSISTANCE AND SUPPORT

The sooner the better!

1.800.255.0569

NEW YORK STATE BAR ASSOCIATION

Join Our Section

☐ As a NYSBA member, **PLEASE BILL ME $40 for Torts, Insurance and Compensation Law Section dues.** (law student rate is $5)

☐ I wish to become a member of the NYSBA (please see Association membership dues categories) and the Torts, Insurance and Compensation Law Section. **PLEASE BILL ME for both.**

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

_____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

Home phone (_____) _____

Fax number (_____) _____

E-mail address _____

Date of birth _____ /_____ /_____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:
MEMBER RESOURCE CENTER,
New York State Bar Association, One Elk Street, Albany NY 12207
Phone 800.582.2452/518.463.3200 • FAX 518.463.5993
E-mail mrc@nysba.org • www.nysba.org

Join a Torts, Insurance and Compensation Law Section Committee(s)

All active Section members are welcome and encouraged to join one or more Committees or Divisions at no additional cost. Please indicate the group/s you would like to join:

___ Alternative Dispute Resolution (TICL3100)
___ Automobile Liability (TICL1100)
___ Business Torts and Employment Litigation (TICL1300)
___ Class Action (TICL1400)
___ Construction and Surety Law Division (TICL4000)
___ Continuing Legal Education (TICL1020)
___ Diversity (TICL4200)
___ Ethics and Professionalism (TICL3000)
___ General Awards (TICL1600)
___ Governmental Liability (TICL1700)
___ Information Technology (TICL2900)
___ Insurance Coverage (TICL2800)
___ Laws and Practices (TICL1800)
___ Membership (TICL1040)
___ Municipal Law (TICL2100)
___ No Fault (TICL4400)
___ Premises Liability/Labor Law (TICL2700)
___ Products Liability (TICL2200)
___ Professional Liability (TICL2300)
___ Social Media (TICL4600)
___ Sponsorships (TICL4500)
___ Toxic Tort (TICL4300)
___ Workers' Compensation Law Division (TICL4100)

2019 ANNUAL MEMBERSHIP DUES

Class based on first year of admission to bar of any state. Membership year runs January through December.

ACTIVE/ASSOCIATE IN-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2011 and prior	$275
Attorneys admitted 2012-2013	185
Attorneys admitted 2014-2015	125
Attorneys admitted 2016 - 3.31.2018	60

ACTIVE/ASSOCIATE OUT-OF-STATE ATTORNEY MEMBERSHIP

Attorneys admitted 2011 and prior	$180
Attorneys admitted 2012-2013	150
Attorneys admitted 2014-2015	120
Attorneys admitted 2016 - 3.31.2018	60

OTHER

Sustaining Member	$400
Affiliate Member	185
Newly Admitted Member*	FREE

DEFINITIONS

Active In-State = Attorneys admitted in NYS, who work and/or reside in NYS
Associate In-State = Attorneys not admitted in NYS, who work and/or reside in NYS
Active Out-of-State = Attorneys admitted in NYS, who neither work nor reside in NYS
Associate Out-of-State = Attorneys not admitted in NYS, who neither work nor reside in NYS
Sustaining = Attorney members who voluntarily provide additional funds to further support the work of the Association
Affiliate = Person(s) holding a JD, not admitted to practice, who work for a law school or bar association
*Newly admitted = Attorneys admitted on or after April 1, 2018

NYSBA

TABLE OF CONTENTS

Please note: additional online materials can be accessed at
www.nysba.org/TICLSum19book

The 10 Commandments of Trial Practice and Tactics: Observations from The Bench and Caution from Counsel

Hon. Anthony Cannataro
New York Supreme Court Justice | New York County

Cody McCone, Esq.
O'Dwyer & Bernstein

Thomas J. Maroney, Esq.
Maroney O'Connor, LLP

Hon. George J. Silver
New York Supreme Court Justice | New York County

Maroney O'Connor LLP

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tmaroney@maroneyoconnorllp.com
FAX: 212.504.2754

The Commandments of Trial Practice and Tactics: Observations from The Bench and Caution from Counsel

(With Apologies to the Ten Commandments)

Thou Shalt:

MAKE THE CASE WHAT IT SHOULD BE ABOUT

What's the core issue? Liability? Damages?
Don't argue collateral issues.

NOT WASTE THE COURT'S TIME

Get to the point – the Court has a calendar of cases and you have one case.

BE PREPARED

Know the short and long version of the case – "cliff notes version" but prepare for detail
Never say "It's not my case"
Always ask yourself how is that case in a better place that you appeared?

DEFENDANT –

Email the Claim Professional the same day.

PLAINTIFF & DEFENDANT –

Do what you promised your adversary & the Court as soon as you get back to the office.
Be the person that does what they promise, it's your reputation.
Email the other side when you have done what you promised.
Do it before you get sidetracked.

BE RESPECTFUL TO THE COURT, COURT STAFF AND YOUR ADVERSARY AT ALL TIMES

Never interrupt the Court or another attorney.
You will have an opportunity to be heard.
Wait your turn and take good notes.
When you are not talking, listen and pay attention.
You may learn something and get a different perspective.

CALL THE OTHER SIDE

Before the first substantive conference.

SUBSEQUENT CONFS - KNOW WHAT HAPPENED AT THE LAST CONF

Call the other side, discuss and at least agree on that. No surprises on either side.

IF BOTH SIDES HAVE AGREED TO DISAGREE

Be right up front on that with the Court and frame the issue for the court.

THE COURT IS THERE TO BRING BOTH SIDES TOGETHER

If there is a recommendation by the Court, report that right away.

THE UNCIVIL ADVERSARY

Dealing with the disagreeable adversary – always be civil – don't become the other idiot.

BE CONCISE IN YOUR PRESENTATION

Know when to stop talking.

THEME

What is the theme of your case?

BRIAN O'DWYER∞
GARY SILVERMAN
CHRISTOPHER DOWNES*
VICTOR GRECO
JASON S. FUIMAN∞ Δ *
CODY K. McCONE
J. P. DELANEY
STEVEN ARIPOTCH
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PAUL O'DWYER (1907-1998)
OSCAR BERNSTIEN (1885-1974)
FRANK DURKAN (1930-2006)

OF COUNSEL:
MICHAEL CARROLL
CHRISTOPHER A. SOUTH

* ALSO ADMITTED IN NJ
Δ ALSO ADMITTED IN PA
∞ ALSO ADMITTED IN DC

WRITER'S DIRECT DIAL

7TH COMMANDMENT

You Shall Not Bear False Witness Against Your Neighbor.

P.J.I. 1:22 *Falsus in Uno*

Be careful what you wish for as the Court does not define "material fact" as an "important matter;" rather than "unbelievable," the court uses unworthy of belief.

8TH COMMANDMENT

Thou Shall Not Covet They Neighbor's House.

Counsel are not permitted to discuss the law in jury selection, during opening statements or closing arguments. Counsel are permitted to discuss evidence using language consistent with jury instructions, but this may be a very fine and tenuous line.

Counsel may not instruct the jury during *Voir Dire.* See 1A NY PJI3d 1:1 at 15 to 28 (2019).

The State of Affairs for Artificial Intelligence, Algorithms and Machine Making Decisions

Thomas J. Hamilton
VP Legal Strategy | ROSS Intelligence

James P. O'Connor, Esq.
Maroney O'Connor, LLP

AI PRIMER - An Explanation of Training Data in AI Systems

By Thomas Hamilton

Introduction

As a former attorney and now the VP of Strategy & Operations at a technology company doing ground breaking research in artificial intelligence (AI), I've had an advance view of both the benefits, and the pitfalls, of the current wave of AI technology which is now beginning to transform the practice of law. Because of this privileged vantage point I've been asked to share some of the insights I've learned over the past 4 years in this volume. Specifically, I've been asked to speak to the importance of data in the creation of AI systems – a concept that becomes more important every day as the scope and power of AI software increases exponentially.

I felt the best way to explore the importance of data sets would be to examine them in the same way that I initially came to learn of their importance – by starting with the basics. We'll first define AI broadly before examining the four pillars which comprise modern AI. From there we'll discuss how breakthroughs in deep learning, many of which were pioneered in my home province of Ontario, Canada, have in the last few years dramatically advanced what is possible with AI systems. From there, armed with a proper foundational understanding, we'll then turn to the role that data plays in both supervised and supervised learning systems, both at a general level and then specifically to law. Lastly we'll consider the risks and enormous possibilities that this data provides, now that we live in a world where the AI systems relying on it to make their decisions are becoming increasingly powerful.

PART 1: What is AI

In 2019 Artificial Intelligence is generally defined by AI researchers as software which learns to perform intelligent tasks which we previously believed only a human could perform. This is a useful definition in that it implicitly takes into account the fact that what society considers as AI is a constantly moving target. When Apple debuted their Siri voice recognition AI software in the iPhone 4s in 2011 it was seen as revolutionary technology. Now, less than a decade later, a smart phone coming equipped with voice recognition technology is simply a given and no longer considered by lay people as AI.

Broadly, when AI is being discussed in 2019, it is referring to 4 interrelated concepts: machine learning, natural language processing, vision recognition and speech recognition. Let's briefly examine each of these, before diving into the details

The first is machine learning, which underpins everything that is possible with modern AI systems. Machine learning describes the capacity for a software system to take data points, process them to improve performance of a task, and then create an improvement feedback loop wherein it can continue performing the task while continuously improving. The power of machine learning systems is that they now allow for software to learn to perform tasks they were never explicitly explained how to perform.

The second category is vision recognition, which is the capacity for software systems to interpret images, identify them and describe them. Through machine learning feedback loops, these vision recognition systems are now becoming highly sophisticated, but are not without error.

The third category is speech recognition, which is the capacity for a software system to speak and interpret oral language, allowing for back and forth interaction. Apple's Siri would be a great example.

Lastly is natural language processing, which is the capacity for a software system to understand human language. This means that the AI can interpret the actual meaning of human communication, allowing it to decipher intent and return highly relevant answers and search results to even very complex queries. It is recent advances in machine learning methods (described below) and natural language processing that have opened up enormous opportunities for AI technology in law.

While these 4 concepts have existed for some time, their real world applications have been severely limited due to insufficiency of computing power, data, and theoretical understanding of machine learning. While the purpose of this piece is to ultimately describe and discuss the role of training data in AI systems, this cannot be easily separated from the role of compute power and theoretical breakthroughs. Consequently, let's examine those in some detail, along with their interactions with Big Data, before then moving on to a substantial discussion of the role of training sets. Let's begin by examining the importance of recent breakthroughs in machine learning theory.

PART 2: What has made the AI revolution possible

Defining deep learning

Deep learning is a field of machine learning focused on designing algorithms that learn how to do things by looking at examples of how to do them (training data) rather than being instructed how to do them through explicit programming. As a subset of machine learning, deep learning focuses on computer algorithms which can both learn and improve on their own. These algorithms are called deep neural networks and are loosely inspired by the network of neurons in the human brain.

Defining neural nets

Traditionally, programmers enable computers to perform a task by explicitly writing the instructions of how to do it using a computer programming language. The inherent limitation in this process is that computer programmers can only program tasks which they know how to articulate logically, resulting in computer applications that solve only problems that their programmers already understand and know how to solve. In the past this was sufficient, but as the scope of our ambition with respect to what we expect software to be able to do has increased, this has proven a major limiting factor.

How do you tell a computer to recognize objects like tumors in CAT scans, for instance, and provide solutions to problems the programmer has never seen before and has little understanding of? In the past this sort of programming would have been impossible, but it is exactly these types of challenges which neural networks were built to tackle. On a high-level, neural networks function as a black box. Data is input on one end and the neural network then renders a response on the other end. Inside of this black box is a network of artificial neurons. When data is input, pathways in the network fire, producing a response.

At first, these responses are random like those in the brain of a newborn baby, but with time programmers are able to teach or "train" a neural network to intelligently respond. Returning to the CAT scan example, with sufficient training a neural network which is fed a CAT scan with a tumor present will return "positive". During training, machine intelligence engineers tune and refine how a neural network's pathways fire by comparing its responses to our desired responses in its training data (human-generated examples of correct responses). With the arrival of sufficient compute power, it is important to note that this tuning is not done by hand: It is done automatically by a training algorithm

that analyzes millions or even billions of training examples. Once it finishes training, the network can give “intelligent” responses to similar inputs it has never seen before.

The concept of deep neural networks, then, is a marriage of the above concepts. In a similar way to the nerve cells (i.e. neurons) which make up the human brain, neural networks comprise layers (neurons) which are connected in adjacent layers to one another. The greater the number of layers, the “deeper” the neural network is.

Supervised and unsupervised learning

Neural networks learn through two separate and distinct methods (although in reality, often a hybrid approach is taken). Looking in a bit more detail about these neural networks learn will inform our later conversation on training sets, so let’s dive a bit deeper by first looking at what is known as supervised learning.

Supervised learning is the method of instructing a neural network through specifically labelled training data. To illustrate, let’s imagine that we want to use supervised learning to train our neural network to recognise photos which have at least one bird. The problem, of course, is that there are so many different types of birds, and very few of them look alike. Additionally, different photos of the same type of bird still might not show those birds at the same angle, resolution, or even in the same light. In order to get around this, we’ll create an enormous training set of thousands of images, some of which include birds and some of which do not. Each of those which include birds will be labelled “bird”, and those which do not include birds will be labelled “not bird.”

These images are fed into the neural network, which then converts each image into data, as neurons within the network assign different weights to different elements. Ultimately, the final output layer assembles and aggregates these elements and states either “bird” or “not bird.” If it gives the wrong answer, then the neural network will make note of its error and go back and adjust the weightings that its neurons have provided. This process, repeated at scale ad infinitum, will begin to train the neural network on identifying birds all without having ever been explicitly instructed how to do so.

Let’s now take a look at unsupervised learning. Unlike with supervised learning which involves intensive labelling of data, unsupervised learning uses completely unlabeled data. Because it does not involve training sets, the goal of unsupervised learning is to discover hidden trends and patterns in the data or to extract desired features, which is why it has such enormous potential in the face of massive data sets. In situations where it is either impossible or impractical for a human to propose trends in the data, unsupervised learning can provide initial insights that can then be used to test individual hypotheses.

At a high level, this is generally done using methods drawn from statistics, such as clustering, anomaly detecting and probability. Interestingly, as these systems have increased in sophistication and following high profile breakthroughs by groups such as Google’s Deep Mind team, knowledge from biological neuroscience is now being successfully used to push the boundaries of what is possible in computational neuroscience.

Because of the pros and cons of both approaches, many complex solutions require a solution that falls somewhere in between the two methods. This semi-supervised learning solution is able to access reference data where it exists, while leveraging unsupervised learning techniques to make best guesses in the short term while also unearthing unexpected insights.

Recently, the above theoretical work gathered significant momentum and practical application through the creation and refinement of convolutional neural networks, as well as the continued pioneering work by a number of researchers in the field.

The big data revolution

Big Information and Big Data are pretty much synonymous. They refer to the vast volumes of data that our computers have collected and produced like financial transactions, videos, emails, texts, call records, medical records, etc. Analytics refers to the set of techniques that we have to analyze and model this data. Deep learning is just one of these analytical methods.

We'll examine the role of data in more detail below, but for now the key takeaway should be that prior to the arrival of computer systems collecting and sharing enormous quantities of information, AI systems rarely had sufficient data to perform complex tasks even if the theoretical breakthroughs in deep learning, and sufficient compute power, had both been present. Additionally of note has been the proliferation of large, standardized data sets such as those created through Image Net.

The continued computing power revolution

The final concept which has led to the current surge of AI technology is the arrival of sufficient compute power at affordable rates. The famous Moore's Law states that the number of transistors on a microchip have historically doubled every two years while at the same time the cost of computers is halved. At present, the doubling of transistors occurs roughly every 18 months. This means that the hardware powering the AI algorithms discussed above continues to improve at such a speed that even with no additional theoretical breakthroughs we would continue to see the power of AI systems increase.

PART 3: What is the role of data in AI?

Raw data is the input of a ML system, and is the fuel which makes AI systems runs. Without data there is no AI. As discussed above, it wasn't until the arrival of Big Data that many of the modern breakthroughs in AI application became possible.

Big Data refers to the vast volumes of information that our computers collect and produce. Since the internet revolution, Big Data has grown exponentially in size and scope and includes but is not limited to records of financial transactions, videos, emails, text messages, call records, medical records, publicly available government records, vast troves of information on online search and click patterns, and many other varied sources of data.

Because of the exponential growth in both Big Data as well as compute power, the potential for deep learning methods continues to grow at a blistering speed, as do the size and scope of the risks created by these systems as they scale enormously in their capabilities.

Risks with data

Risks with bias in training data for supervised learning systems

Broadly, there exists two risks with the data used with your AI system. Let's begin with the simpler of the two - issues with training data used in the supervised learning of an ML system.

Training data serves as the textbook which teaches a supervised learning system how to perform a specific task. Training data can be used in a number of different ways, all with the ultimate goal of

increasing the accuracy of an AI system's predictions. It accomplishes this goal through the variables outlined in the data, and in identifying and categorizing these variables and evaluating their impact on an AI algorithm, data scientists are able to strengthen a supervised learning system through many rounds of subsequent adjustments. Consequently, the best data will be extremely rich in detail, which will allow it to continue improving your AI system even after hundreds of rounds of training cycles.

There are generally three risks associated with the use of training data. The first is poorly labelled / messy data.

You'll remember that the majority of training data will contain pairs of input information and corresponding labeled answers (i.e. in our example earlier, this would be "bird" and "no bird"). . In some fields, it will also have highly relevant tags, which will help your AI to make more accurate predictions.

The first risk is that your data set itself was poorly labelled due to human error and forgetfulness. For instance, perhaps you were using unpaid summer interns to tag your photos with "bird" and "bird" and some of the labelling was done sloppily and includes false positives. More importantly, imagine a substantially more complex set of training data, and how much attention to detail would be required. Perhaps the underlying information wasn't properly compiled as well, meaning that some of the students never received the photos they were expected to be labelling. There are a myriad of ways in which human error or organizational issues can unintentionally skew data sets.

A common refrain, which will apply to a number of the examples we will be discussing, is the concept of "garbage in, garbage out." Remember that if data is the fuel of an AI system, if you put in messy, incomplete or outright wrong data, the accuracy of your AI system's prediction models will suffer accordingly.

If issues with messy data are our first step into the world of data risk, the next would be a complete training data set, but which is biased. To illustrate, let's once again begin with a simplistic example - in this case text recognition.

Neural networks are now being created to suggest the topic of a sentence. Let's imagine two sentences:

"Down the first 11 rounds, heavy weight champ rallies to deliver a crushing KO in the 12th"

"New legislation means that online gambling is now sometimes legal in Kansas"

Most readers would agree that these two sentences fall fairly cut and dry into obvious high level buckets. The first would be categorized as "sports" and the second as "legal." But let's now imagine that these examples become a bit more complex, and are being tagged by someone who is required by their job to tag hundreds of these sentences per hour. Imagine the sentences now say:

"Down the first 11 rounds, heavy weight champ rallies to deliver a crushing KO in the 12th to an opponent who was no longer defending themselves and is still in intensive care 48 hours later - police investigation into foul play now underway"

"New legislation means that online gambling on college sports will be legal in Kansas with tax proceeds to provide scholarships for elite athletes to attend Kansas division 1 schools"

Here it becomes more difficult to agree on how you might tag these sentences as one category. Certainly the first still is about a sporting event, but it appears to be veering into a criminal investigation so could conceivably be tagged as "legal." The second sentence still involves the legality of online betting, but that discussion now could be viewed as secondary to the impact that legislation will have on college sports in Kansas.

These simple examples show the issues inherent with subjectivity in creation of training sets, and the difficulty in controlling for this bias.

Lastly, insufficient amounts of training data can also cause problems as a supervised learning system will not have sufficient data to make intelligent decisions. While this risk has decreased over time as AI systems become more sophisticated and consequently require less training data, it is still an important consideration.

Risks with data for Unsupervised Learning Systems

Just as the potential for unsupervised learning systems is enormous in the law, the risks are equally large. Let's begin with a simple example before looking at broader implications and some real world examples.

The law, especially in common law jurisdictions where so much of the legal logic supporting a decision is written down and available to a researcher, is an extraordinarily rich data set for machine learning systems, especially those with a strong basis in Natural Language Processing. By simply uploading all of published and unpublished case law from a given state in the last 100 years, our AI systems could give us correlations and probabilities for different sentencing verdicts that could potentially save overworked judges, clerks, attorneys and paralegals thousands of hours per year. This could have the benefit of both reducing the workload of the overburdened judicial system, while also reducing the burden shouldered by tax payers while in fact increasing the accuracy and thoroughness of judicial decision making.

Unfortunately, the above would only be true if the data (in this case, the sum total of all case law over the past 100 years) was free of any bias. As we saw above, garbage in garbage out. So just as a supervised learning system will run into issues where patterns of sloppy tagging or unintentional bias creep into the creation of the training data, so too will unsupervised learning systems fail to provide objectively accurate and fair predictions when the underlying data that is being input is rife with bias. There are numerous, well documented examples bias in judicial decision making.

While the legal profession has rightly steered away from fully automating decisions based on past case law, one need look no farther than the recent disasters in automated loan approval systems or AI hiring algorithms to understand the speed with which pernicious biases built upon decades of implicit sexism, racism, homophobia and any number of other biases hidden in past codified decisions will wildly skew the decisions of an AI system basing its decisions on that biased data.

The scope of this risk increases exponentially as we move away from the current era of narrow applications of artificial intelligence (AI software that can outperform a human at a very narrowly defined task such as winning a game of chess, flagging problematic provisions in contract review, tagging photos that include a car, etc.) into what is known as general artificial intelligence (AI software that can outperform a human at complex, multi-faceted tasks that also involve some degree of "intuition" or "common sense"). While the claims of the impending AI apocalypse are sensationalized and in many

instances irresponsibly spread by the vendors of out of date legal technology, they do include a kernel of truth and should not be taken lightly.

On the other hand, law as a profession should not stand idly by as AI transforms other industries, professions and cultural forces for the better. Chat bot technology being used to increase the speed and quality of service for major airlines should adopted where possible to do the same for legal aid clinics. Sentiment analysis technology used to identify rogue actors inside of a large corporation should also be used by lawyers and researchers to unearth previously hidden trends of judicial bias. Lastly, natural language processing technology breakthroughs that are changing journalism and web search should be also available to attorneys no longer interested in slogging through hours or unproductive and inaccurate research.

Conclusion

The field of AI research, while many decades old, is undergoing a kind of renaissance through the confluence of several factors and appears to be only beginning to reach its full potential.

While we are likely many years away from even primitive forms of general AI, the current era of strong narrow AI systems is already dramatically streamlining and modernizing the practice of law in ways in which even a few years ago lawyers across the world told me were impossible. Within a few more years, these AI systems will have not only continued to improve by virtue of being machine learning systems, but will also have moved beyond the “early adopter” phase into mainstream usage.

I see the publication of this short essay as a wonderful sign that we are well on our way towards this very near future where AI provides a set of tools that are both understood by the average lawyer but also employed by them to provide better, faster and more accurate client service. The law is a wonderfully abundant source of data that if harnessed correctly and ethically can bring about almost unimaginably positive change for the average citizen’s access to both legal information as well as affordable and high quality legal services. I hope you’ve enjoyed reading this short piece even half as much as I’ve enjoyed writing it, and will carry the information I’ve shared with you in the months and years to come when assessing and implementing these AI systems in your work and your home.

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Measuring the safety impact of road infrastructure systems on driver behavior: Vehicle instrumentation and real world driving experiment

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ABSTRACT

Featured in this pilot experimental study is the construction and design of an instrumented vehicle that is able to capture vehicle trajectory data with an extremely high level of accuracy and time resolution. Once constructed and properly instrumented, the various data collection systems were integrated with one another and a driving experiment was conducted on northern Virginia roadways with 18 participants taking part in the study. Trajectory data were collected for each of the drivers as they traversed a predefined loop of four roadway segments with varying numbers of lanes and varying shoulder widths. Data collected from the experiment were then used to calibrate the parameters of the prospect theory car-following model through a genetic algorithm calibration procedure. Once all model parameters were successfully calibrated, significance testing was carried out to determine the impacts that the varying roadway infrastructure had on driving behavior. Results indicated that there were significant changes in behavior when comparing one lane roadways to their two lane counterparts—specifically in cases where the roadway featured a wide shoulder. Additional testing was conducted to ensure that there was no variation based on gender, as nine study participants were female and nine were male. The successfulness of this first study conducted with the newly constructed instrumented vehicle creates the opportunity for a variety of additional studies to be conducted in the future.

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car-following models; driver behavior; genetic algorithm calibration; on-road experiment; vehicle instrumentation

Introduction

Roadway infrastructure impacts driving behavior, which, in turn, has significant implications when analyzing vehicle-to-vehicle interactions and assessing macroscopic transportation network performance. The main question of interest is: How does the road surrounding environment impact the aggressive (risk attitudes) driving behavior from a traffic flow theory perspective? In order to address this question, the objective of this research is to conduct a real-world driving experiment featuring a vehicle instrumented to collect trajectory, location, and vehicle diagnostic data. Data from this experiment are then utilized to explicitly formulate the structure of the relationship between various car-following model parameters and one of the geometric features (shoulder width/number of lanes) shown to be significant in previous studies (Hamdar & Schorr, 2013).

Motivation and contribution

If total collisions are considered a surrogate measure for safety, the motivation for the examination of the different factors leading to unsafe driving conditions is highlighted by the 5,615,000 collisions that occurred on United States roadways in 2012 (an increase from the previous 3 years) (NHTSA, 2014). Additionally, these collisions resulted in 33,561 fatalities (an increase from the previous 2 years), and when considering vehicles miles traveled (VMT) as a measure of congestion—the problem is exacerbated as the total VMT in 2012 was 2,969 billion, producing a fatality rate of 1.13 fatalities per 100 million vehicle miles traveled (both the total VMT and the fatality rate have increased over the previous 2 years) (NHTSA, 2014). What becomes clear is that roadways are trending in a direction that is both less safe and increasingly congested. Various methods of vehicle instrumentation have been utilized over the past 40 years in an effort to gain additional insights into the factors that contribute to decreased safety on roadways (Lenne, 2013). New technologies allow for faster and more accurate data collection methods, which allow for a more detailed examination of driver behavior. It is up to research practitioners to demonstrate the capabilities of new data collection methods and to identify the

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potential applications in terms of safety, congestion, and driver behavior (among others).

Objectives

The main objective of this study is to demonstrate how data collected by a highly accurate instrumented vehicle can be used to enrich our understanding of the impact that changes in roadway geometry have on driving behavior. To realize this main goal, the specific objectives of this study are as follows:

- Construct an instrumented vehicle such that trajectory and headway data can be collected at a high time resolution and subsequently synced together.
- Design a real-world driving experiment utilizing the instrumented vehicle on roadway segments with varying geometric characteristics.
- Calibrate the parameters of the prospect theory model using the data gathered from the driving experiment.
- Determine the impacts that specific roadway geometric characteristics have on driving behavior through statistical analysis of calibrated model parameters.

Background

While data-driven approaches (predominately focused around the modeling and evaluation of collision data) are commonplace in the transportation research community, new and affordable technologies have led to advancements in the collection of real-time driving data. The quantification of driving behavior in real time is an important advancement in the assessment of roadway safety—allowing for new insights through a variety of different methodologies and their subsequent applications. Three main approaches are used for the collection of real-time data: driver simulators, naturalistic studies, and instrumented vehicles, all of which have an associated set of pros and cons.

Driver simulators have been used extensively in a wide range of applications including (but not limited to) assessment of driver distraction (Young et. al, 2013), the performance of active safety and information systems (Liu & Wen, 2004; Ma, Smith, & Fontaine, 2015), and the evaluation of impaired drivers (Akerstedt, Peters, Anund, & Kecklund, 2005), as well as those with certain medical conditions (Frittelli et al., 2009). Driver simulators are particularly useful as they allow for simulated driving experiences to be conducted in a safe and controlled environment where various scenarios (including complicated and high-risk environments) can be created and held constant for all participants in a given study (Bifulco, Pariota, Galante, & Fiorentino, 2012). However, the obvious drawback to these studies is that they do not take place on actual roadways and are unable to capture the natural interactions that occur between drivers in the real-world environment (Carston, Kircher, & Jamson, 2013). As such, on-road data collection methods such as naturalistic studies and instrumented vehicles are becoming increasingly popular in order to better understand road safety crash risks and risk factors (Lenne, 2013).

Naturalistic approaches utilize unobtrusive methods (typically in participants' own vehicles) to collect data in real traffic conditions (Lenne, 2013). Again, the applications of naturalistic studies are vast, including (but not limited to) the examination of risks to heavy vehicle operators through the use of data acquisition systems, internal and external cameras, and daily activity registers (Soccolich et al., 2013); assessment of heavy vehicle operator response to a forward collision warning system through the use of gaze monitoring and brake pedal position (Wege, Will, & Victor, 2013); examination of older driver engagement in secondary activities at intersections through the use of a video camera system as well as a vehicle diagnostic logging system (Charlton, Catchlove, Scully, Koppel, & Newstead, 2013); analysis of rapid deceleration events for older drivers through the use of a custom driver monitor system that featured a two-axis accelerometer (Keay et al., 2013); and impacts of a forward distance warning system on car driving performance through the Australian Transport Accident Commission's SafeCar project (Young et al., 2007). Naturalistic studies allow for the collection of large amounts of data (in terms of both the number of participants and the number of trips made) over an extended period of time. Furthermore, the instruments used to collect data are unobtrusive (Heuer et al., 2010), and these types of studies do not require a researcher to be present in the vehicle during data collection (the collection of these "baseline" data is intended to reflect "normal driving"; Carsten et al., 2013). However, practical and analytical challenges can impact naturalistic studies, as data sets are large and complicated, often requiring the processing of hundreds or even thousands of hours of vehicle-based and video data (Lenne, 2013). Additionally, since no variables are controlled by the researcher, causal conclusions cannot be drawn from naturalistic driving studies (Carsten et al., 2013).

Similar to naturalistic studies, field operational tests (FOT) are long-range studies and again involve some sort of instrumentation. In these studies objective data on situation and behavior are collected through an automated process and subjective data are usually collected manually or electronically (Carsten et al., 2013). These studies have been used to make a variety of observations on driving behavior, including the evaluation of the safety

impacts associated with adaptive cruise control (Rakha, Hankey, Patterson, & Van Aerde, 2001). In addition to the studies mentioned to this point, controlled on-road studies involving instrumented vehicles offer opportunities for unique data collection through the use of multiple methods (Lenne, 2013). These controlled on-road studies are defined by their reliance on a predetermined route in order to identify differences in performance and behavior under varying driving conditions (Carsten et al., 2013). Furthermore, from a behavior perspective, field studies utilizing instrumented vehicles are frequently regarded as the ultimate validation stage for assessing behavioral models, safety measures, and improved road infrastructure design (Santos, Merat, Mouta, Brookhuis, & De Waard, 2005), as well as addressing their adoption. Still, the potential drawbacks of these controlled on-road studies must be mentioned, as the studies do not collect data over a long time period (Lenne, 2013) and many require a researcher to be present in the vehicle (potentially impacting the driver's behavior) (Lenne, 2013; Carsten et al., 2013). With that being said, these types of studies are well suited to address research questions that are independent of exposure and that utilize independent factors that are stable over shorter periods of time (such as age and personality), and are excellent tools in the early stages of system development and FOT design (one example of this being a situation where drivers' headway is impacted, and thus the need for additional sensors [such as LIDAR sensors] is required; Carsten et al., 2013). Examples of studies utilizing this type of instrumented vehicle data collection include examination of the number and nature of errors committed by drivers in distracted and undistracted states (Young, Salmon, & Cornelissen, 2013), analysis of the situational awareness of both novice and experienced drivers at rail crossings (Salmon, Lenné, Young, & Walker, 2013), and evaluation of an intersection violation warning system (Neale, Perez, Lee, & Doerzaph, 2007; Brewer, Koopmann, & Najm, 2011). In addition, instrumented vehicles have been used in driver training through the benchmarking of experienced drivers (Underwood, 2013).

In addition to the behavioral applications mentioned already, driver simulators, field studies, and instrumented vehicles can allow for collection of trajectory data in order to assess and calibrate car-following models. Car-following models describe the behavior of the following vehicle as a function of the lead vehicle's trajectory, allowing for estimation or prediction of the following vehicle's trajectory in response to the actions of the lead vehicle (Soria, Elefteriadou, & Kondyli, 2014). Driver simulator experiments have been conducted to evaluate car-following behavior under both normal and evacuation scenarios (Xu, Kuan Yang, Hua Zhao, & Jie Li, 2012), and field tests have been conducted using loop detector data to determine distance gaps under different congestion regimes (Dijker, Bovy, & Vermijs, 1998). While these types of studies are most certainly useful in understanding car-following behavior, instrumented vehicles allow for more detailed data collection and thus have been used frequently in both data collection and calibration efforts (Soria et al., 2014).

Examples of instrumented vehicles being used for data collection and the assessment of driver behavior variability in car-following include two studies by Brackstone, Sultan, and McDonald (2002, 2009), where headways for drivers following the instrumented vehicle were recorded in the first study, and then the research was extended (in the second study) to study the factors that influence the decision-making process of car following. While the drivers in Brackstone's studies knew they were part of an experiment, Kim et al. (2007) used an instrumented vehicle equipped with an infrared sensor, a differential global positioning system (DGPS) inertial distance measuring instrument, a vehicle computer, and a digital video camera to measure the position, speed, and acceleration (as well as demographic information collected from the video recordings) of the following vehicles, whose drivers were unaware that they were being monitored as part of the study. In an effort to quantify driver reaction times, Ma and Andreasson (2006) equipped a vehicle developed by Volvo Technologies with a GPS system, an on-board computer, two LIDAR sensors (facing front and rear), and cameras corresponding to the sensors. The study was conducted on Stockholm, Sweden, roadways, and the "follow-the-leader" behaviors of random vehicles behind the instrumented vehicle were observed.

Once data from instrumented vehicles are collected, the next step in evaluating car-following models is the calibration stage. One such study was conducted by Panwai and Dia (2005), who evaluated AIMSUN, PARAMICS, and VISSIM models using instrumented vehicle data collected in Stuttgart, Germany. In this case, the instrumented vehicle was equipped with radars to record the differences in speed and headway between the instrumented vehicle and the vehicle immediately in front of it (Manstetten, Krautter, & Schwab, 1997). Similarly, Punzo and Simonelli (2005) examined Newell's model, the Gipps model, an intelligent driver model, and the MITSIM model though the use of trajectory data recorded from four instrumented vehicles. Here, the four vehicles were all instrumented with GPS devices and Global Navigation Satellite System receivers (GLONASS) to record vehicle spacing data and drove in a platoon on both urban and "Sextraurban" roadways in Naples, Italy (Punzo, Formisano, & Torrieri, 2005). One final example of a study focused around car-following model calibration

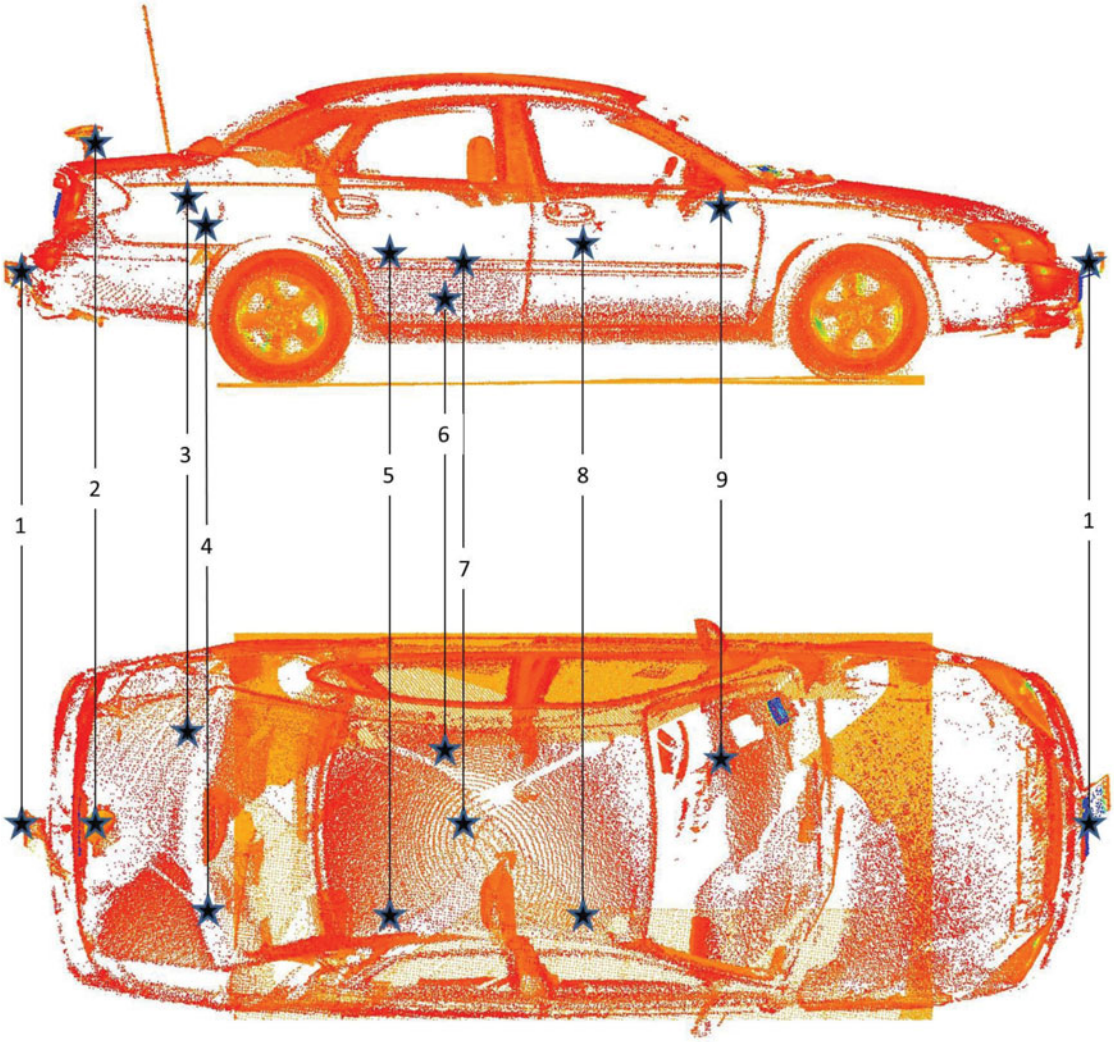

Figure 1. Vehicle instrumentation.

using data from instrumented vehicles was conducted by Soria et al. (2014). Here, a Honda Pilot sports utility vehicle (SUV) was equipped with four wide-coverage digital cameras, a Honeywell mobile digital recorder, a GPS system, and a laptop to record geographical position, speed, spacing, left–right turn signal activation, video clips, and audio recordings. The instrumented vehicle was positioned as the follower and only the front camera was used to determine the spacing between the leader and the follower (Soria et al., 2014). The authors then used the data obtained from the instrumented vehicle to calibrate the Gipps model, the Pitt model, the MITSIM model, and the modified Pitt model.

Research methodology

Vehicle instrumentation

The instrumented vehicle used for data collection in this experiment is comprised of three systems working in unison: a LIDAR system, a DGPS system, and an on-board diagnostics (OBD) monitoring system. Data from all three systems are received by an in-vehicle laptop, which generates a local time stamp for synchronization purposes. A schematic for the vehicle instrumentation (overlaid on a laser scan of the actual vehicle) is provided in Figure 1; Table 1 then lists the various components.

Table 1. Vehicle instrumentation key.

Instruments		
Number	Instrument name	Data collected
1	Lidar sensors (2)	Trajectory data
2	DGPS antenna	Vehicle position data
3	External computing unit	
4	Sync box	
5	Ethernet switch	
6	DGPS receiver	Vehicle position data
7	Power box	
8	Laptop	
9	On-board diagnostics logger	Vehicle diagnostic data

Experimental setup

The driving experiment in this study allows for observation of moment-by-moment local interactions among drivers, and measures drivers' preferred traffic measures with known attributes (gender, age, and attitude). Furthermore, experimental set-up involves testing one of the exogenous geometric factors shown to impact safety. For this pilot study, the authors have selected shoulder width and the number of lanes as the test variables, and a driving experiment was conducted in an interrupted flow scenario. In order to combat the potential impact that other geometric factors may have on experimental results, the selected roadway segments were all at least 1 mile in length and featured changes in both vertical and horizontal alignment. Figure 2 displays a GoogleEarth image of the northern Virginia roadway segments selected for this experiment generated by the differential GPS data recorded during experimentation. The black line in the figure is the actual DGPS path traveled by a study participant, and the base stations zdc11910 and lwx11910 (used to increase the accuracy of the DGPS recordings) are seen in the top left and bottom center of the figure. Additionally, each of the four segments is highlighted in the figure where the red lines mark the start and/or end point of a segment. Segment 1 is a two-lane roadway with a wide shoulder, segment 2 is a one-lane roadway with a wide shoulder, segment 3 is a two lane roadway with a narrow shoulder, and segment 4 is a one-lane roadway with a narrow shoulder.

For the experiment, 18 drivers (nine males and nine females between the ages of 20 and 33 years) drove the instrumented vehicle through all four roadway segments. Drivers were instructed to behave as they would normally, with the exception that they were not permitted to pass the lead vehicle at any point during the test run. While it would be impossible to conduct all test runs in identical traffic conditions, a no-passing restriction was imposed by instructing drivers to imagine that, when on the two lane segments, there was a stream of vehicles next to them such that they could not pass the lead vehicle. This restriction was imposed as to try to create a similar traffic flow scenario for all study participants and to eliminate data collection problems associated with free-flowing vehicles (no leader). The lead vehicle was operated by an author of this study and speed was varied (±7 mph from the posted speed limit) on as consistent a basis as possible (given the surrounding traffic conditions), at approximately the same locations throughout each of the four segments.

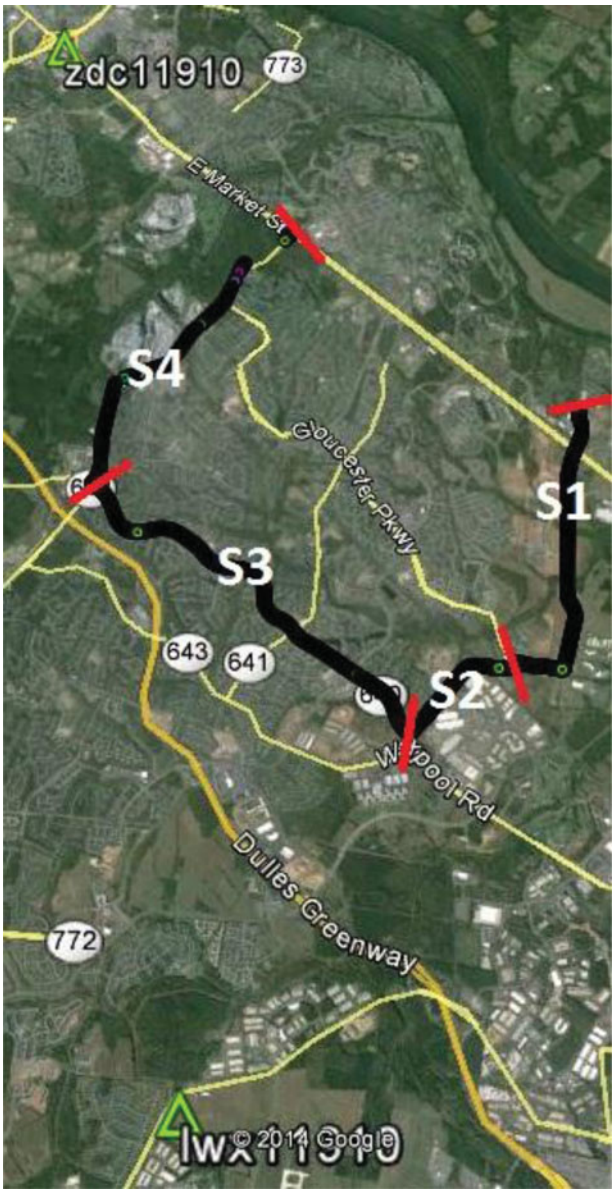

Figure 2. Roadway segments used in this pilot study. Roadway segment image is courtesy of GoogleEarth, retrieved July 23, 2014.

Modeling and calibration

Drivers evaluate their acceleration choice options based on the resulting potential gains and losses. Prospect theory (Kahneman & Tversky, 1979) has been used to model this decision-making process (Hamdar, Treiber, Mahmassani, & Kesting, 2008). Here, drivers frame the stimulus where different utilities are assigned to different acceleration choices considering different weights for gains and losses, and then "edit" the choices based on a prospect index calculated in the same way as expected utility are calculated. The prospect theory value function is formulated as:

$$U_{PT}(a_n) = \frac{\left[\omega_m + (1-\omega_m)\left(\tanh\left(\frac{a_n}{a_0}\right)+1\right)\right]}{2} \times \left[\frac{\left(\frac{a_n}{a_0}\right)}{1+\left(\frac{a_n}{a_0}\right)^2}\right]^{\gamma} \quad (1)$$

where U_{PT} is the acceleration value function, a_0 is the normalization parameter, $\gamma > 0$ is a sensitivity exponent indicating how sensitive a driver is towards gains or losses in travel times (i.e., speeds), and w_m is the relative weight of losses compared to the gains. Here, a driver choosing a_n as his or her desired acceleration will gain U_{PT} unless he or she is involved in a rear-end collision. The value of a_0 is set as a constant equal to 1 m/s^2. This nonvaried model parameter indicates the subjective scale of the acceleration: accelerations $|\dot{v}_{\text{int}}| < a_0$ are considered to be "near the reference point," leading to increased sensitivity. In other words, this parameter may be considered as the scaling unit of the acceleration to be used inside exponentials or noninteger powers requiring dimensionless arguments (i.e., Eq. (1)). Furthermore, a crash seriousness term $k(v, \Delta v)$ is used to calculate the disutility resulting from a crash as follows:

$$U(a_n) = \left(1 - p_{n,i}\right) U_{PT}(a_n) - p_{n,i} w_c k(v, \Delta v) \quad (2)$$

where $p_{n,i}$ is the subjective probability of driver i in vehicle n being involved in a crash at the end of a car-following duration; $p_{n,i}$ is approximated by a normal distribution given that drivers are assumed to estimate the future speed $v_{n-1}(t + \Delta t)$ of vehicle $n - 1$ to be normally distributed with a mean equal to the current speed $v_{n-1}(t)$ and a standard deviation of $\alpha * v_{n-1}(t)$ (α is a velocity uncertainty parameter); $U_{PT}(a_n)$ is derived from Eq. 1; and w_c is a crash weighting function which is lower for drivers willing to take a higher risk. The value of $k(v,\Delta v)$ is set equal to 1 for simplicity since the model estimations are only based on velocity. Regarding w_c, a higher w_c corresponds to conservative individuals while a lower value corresponds to drivers willing to take a higher risk; this parameter is the subjective weighing factor associated with a collision-related loss (i.e., collision weight). A more elaborate explanation of the model parameters may be found in Hamdar, Mahmassani, and Treiber (2015).

Additionally, a logistic functional form given here is employed to reveal the stochastic nature of acceleration choice:

$$f(a_n) = \begin{cases} \dfrac{e^{(\beta_{PT} \times U(a_n))}}{\int_{a_{min}}^{a_{max}} e^{(\beta_{PT} \times U(a'))} da'}, a_{min} \le a_n \le a_{max} \end{cases} \quad (3)$$

where β_{PT} is the sensitivity of choice to the total utility and $f(a_n)$ is the probability density function. The physical meanings of the estimated parameters given in the fourth section are listed Table 2.

These safety parameters are all estimated from the experimental data using 1–3 presented in the preceding and the calibration method defined next using Eq. 4.

Trajectory data recorded by the instrumented vehicle (velocity, acceleration and space headway) at a resolution of 0.1 s is used to calibrate the model just presented.

Table 2. Physical meanings of estimated parameters.

Parameter	Description
Γ	Driver sensitivity of gains or losses (in travel times)
w_m	Driver's relative weight of losses compared to gains (risk aversion)
w_c	Crash weighting function
B	Driver sensitivity to surrounding environment (impatience)
α	Driver uncertainty of leading vehicle's velocity

Since headway data were not always recorded at the same time resolution as the vehicle motion data, values were interpolated based on the change in vehicle velocity between recorded headway values. Calibration was then performed on a segment-by-segment basis for each driver using a genetic algorithm procedure. Genetic algorithm calibration falls under the umbrella of artificial intelligence systems—an evolving field of research that has definite applications in the transportation research community, including the calibration of car-following models (Colombaroni & Fusco, 2013). Defining the architecture of the genetic algorithm calibration procedure (Hamdar, 2009), the fitness function takes the following form:

$$F_{mix}\left[v^{sim}\right] = \sqrt{\frac{1}{\left|v^{data}\right|} \frac{\left(v^{sim} - v^{data}\right)^2}{\left|v^{data}\right|}} \quad (4)$$

where v^{sim} is the experimental data (time series), v^{data} is the empirical data (time series), and $\langle . \rangle$ is the temporal average of a time series of duration ΔT. The fitness function has a mixed form, as it considers both the relative error (sensitive to differences at individual time steps) and the absolute error (sensitive to differences in the time series as a whole). Furthermore, chromosomes represent sets of the target calibration parameters, and at each chromosome generation, fitness is determined by the mixed error function just shown (greedy selection is used to select the parameters with the 10 best fitness scores). Chromosomes are then generated from these parents and then recombined to generate children, with a crossover point chosen through random selection, and (excluding the chromosome with the single best fitness score) genes are mutated (random selection) with a probability and rate of 10%. Initially, a fixed number of generations are evaluated, and the process is terminated when the fitness score drops below 10% or there is no improvement for 20 consecutive chromosome generations.

Results and discussion

Calibration results and significance testing

Table 3 displays the descriptive statistics for the calibration results. This includes the average and standard deviation values for the calibration parameter, velocity, and

Table 3. Descriptive statistics for all segments.

Segment	Stat	Vel (m/s)	Space (m)	Head (s)	ψ	γ	Wm	Wc	Tmax	α	β	Tcorr	RT (s)	Vel error
1	Avg	15.18	33.03	2.21	5.97	0.73	3.66	89833	5.26	0.21	6.33	17.83	0.63	0.173
	Dev	1.60	7.94	0.66	3.73	0.62	2.18	23796	1.57	0.09	3.39	5.23	0.73	0.074
2	Avg	13.99	33.09	2.41	5.40	1.09	2.83	97944	4.83	0.11	7.08	20.39	0.36	0.100
	Dev	1.07	13.12	1.14	4.90	0.72	1.98	16913	2.07	0.06	2.81	4.02	0.36	0.056
3	Avg	14.71	30.52	2.10	5.64	0.63	4.11	95000	5.16	0.19	5.60	20.83	0.72	0.169
	Dev	1.14	6.99	0.55	4.50	0.46	2.24	25752	0.91	0.06	2.90	4.59	0.53	0.072
4	Avg	15.70	29.69	1.90	4.27	0.71	3.94	100778	5.67	0.13	6.63	20.22	0.62	0.137
	Dev	1.50	7.46	0.48	3.91	0.58	2.46	19283	1.72	0.06	3.03	3.81	0.47	0.059

Table 4. Descriptive statistics for number of lanes.

Lanes	Stat	Vel (m/s)	Space (m)	Head (s)	ψ	γ	Wm	Wc	Tmax	α	β	Tcorr	RT (s)	Vel error
1	Avg	14.84	31.39	2.16	4.83	0.90	3.39	99361	5.25	0.12	6.86	20.31	0.49	0.119
2	Avg	14.95	31.77	2.15	5.81	0.68	3.88	92417	5.21	0.20	5.96	19.33	0.68	0.171

Table 5. Descriptive statistics for shoulder widths.

Shoulder	Stat	Vel (m/s)	Space (m)	Head (s)	ψ	γ	Wm	Wc	Tmax	α	β	Tcorr	RT (s)	Vel error
Wide	Avg	14.58	33.06	2.31	5.68	0.91	3.25	93889	5.05	0.16	6.71	19.11	0.49	0.137
Narrow	Avg	15.21	30.10	2.00	4.96	0.67	4.02	97889	5.42	0.16	6.11	20.53	0.67	0.153

Table 6. Descriptive statistics for males and females.

Gender	Stat	Vel (m/s)	Space (m)	Head (s)	ψ	γ	Wm	Wc	Tmax	α	β	Tcorr	RT(s)	Vel error
Female	Avg	15.01	27.00	1.82	5.48	0.62	3.49	94861	5.25	0.14	6.68	20.06	0.653	0.143
Male	Avg	14.78	36.16	2.49	5.16	0.96	3.78	96917	5.21	0.18	6.14	19.58	0.514	0.147

space and time headways for each segment. Additionally, these descriptive statistics are provided for geometric characteristics (number of lanes and shoulder width) and gender in Tables 4, 5, and 6, respectively.

The parameters listed in the tables that are not previously defined are the reaction time (RT), driver's anticipation/maximum anticipation time horizon T_{max}, and correlation time of intra-driver variability T_{corr}. Parameter T_{corr} is calibrated once the acceleration distribution is known by using the Wiener Process (Mehdi, 1994).

In order to interpret the statistical significance of the change in calibration parameters based on number of lanes, shoulder width and gender, multiple multivariate analysis of variance (MANOVA) tests were conducted (using the SAS software). Results of the MANOVA test indicate whether or not you can reject the null hypothesis—the null hypothesis being that a certain exogenous characteristic has no statistically significant impact on the change in calibration parameters. For statistical significance and the rejection of the null hypothesis, the p value must be less than .05. Table 7 displays the MANOVA results for the impacts of number of lanes, shoulder width, and gender on the calibration parameters. In addition, the impact of changing segments is included at the top of this table to demonstrate that the null hypothesis can be rejected for the change in segments. If the null hypothesis could not be rejected for the changing segments as a whole, then there would be no statistical significance of the calibration results for this study.

From the table, it is clear that a change in the number of lanes has the most statistically significant impact

Table 7. General MANOVA testing.

	Segment		
Statistic	Value	*F* Value	*p* Value
Wilks' lambda	0.484	1.84	0.0106
Pillai's trace	0.615	1.78	0.0146
Hotelling–Lawley trace	0.872	1.90	0.0094
Roy's greatest root	0.571	3.93	0.0005
Shoulder width statistic			
Wilks' lambda	0.784	1.90	0.0684
Pillai's trace	0.216	1.90	0.0684
Hotelling–Lawley trace	0.276	1.90	0.0684
Roy's greatest root	0.276	1.90	0.0684
Lanes statistic			
Wilks' lambda	0.688	3.13	0.0036
Pillai's trace	0.312	3.13	0.0036
Hotelling–Lawley trace	0.454	3.13	0.0036
Roy's greatest root	0.454	3.13	0.0036
Gender statistic			
Wilks' lambda	0.787	1.86	0.0745
Pillai's trace	0.213	1.86	0.0745
Hotelling–Lawley trace	0.271	1.86	0.0745
Roy's greatest root	0.271	1.86	0.0745

Table 8. MANOVA testing for changing number of lanes based on shoulder width.

No shoulder—Changing lanes			
Statistic	Value	*F* Value	*p* Value
Wilks' lambda	0.717	1.14	0.3704
Pillai's trace	0.283	1.14	0.3704
Hotelling–Lawley trace	0.395	1.14	0.3704
Roy's greatest root	0.395	1.14	0.3704
Wide shoulder—Changing lanes			
Statistic	Value	*F* Value	*p* Value
Wilks' lambda	0.555	2.31	0.0458
Pillai's trace	0.445	2.31	0.0458
Hotelling–Lawley trace	0.801	2.31	0.0458
Roy's greatest root	0.801	2.31	0.0458

on the change in the calibration parameters. With this in mind, the data set was separated based on shoulder width and a MANOVA test was again conducted for the number of lanes. These results are displayed in Table 8.

Here, it is clear that the null hypothesis cannot be rejected when considering a change in the number of lanes on roadways with narrow shoulders, but it can be rejected for a change in the number of lanes on roadways with wide shoulders.

Finally, to ensure that there was no statistically significant difference based on gender, a final MANOVA test was carried out for each segment using gender as the dependent variable. These results (Table 9) demonstrate that the null hypothesis cannot be rejected based on gender for any of the segments.

Table 9. MANOVA testing based on gender by segment.

Segment 1—Gender			
Statistic	Value	*F* Value	*p* Value
Wilks' lambda	0.364	1.56	0.2725
Pillai's trace	0.636	1.56	0.2725
Hotelling–Lawley trace	1.749	1.56	0.2725
Roy's greatest root	1.749	1.56	0.2725
Segment 2—Gender			
Statistic	Value	*F* Value	*p* Value
Wilks' lambda	0.235	2.90	0.0745
Pillai's trace	0.765	2.90	0.0745
Hotelling–Lawley trace	3.258	2.90	0.0745
Roy's greatest root	3.258	2.90	0.0745
Segment 3—Gender			
Statistic	Value	*F* Value	*p* Value
Wilks' lambda	0.372	1.50	0.2895
Pillai's trace	0.628	1.50	0.2895
Hotelling–Lawley trace	1.687	1.50	0.2895
Roy's greatest root	1.687	1.50	0.2895
Segment 4—Gender			
Statistic	Value	*F* Value	*p* Value
Wilks' lambda	0.466	1.02	0.4940
Pillai's trace	0.534	1.02	0.4940
Hotelling–Lawley trace	1.148	1.02	0.4940
Roy's greatest root	1.148	1.02	0.4940

Discussion of results and parameter explanation

Based on the significance testing conducted in the preceding, results from this pilot experimental study indicate that drivers change their behavior significantly on roadways with wide shoulders when there are a varying number of lanes. With this in mind it is important to interpret the parameter values from segments 1 and 2 (displayed earlier, in Table 3). Interpretation of the changes in the calibration parameters between these two segments requires an explanation of the "physical meaning" for each of the parameters individually. Beginning with the gamma parameter (γ), this can be thought of as a driver's sensitivity to perceived gains and losses. That is, if the value function of the Prospect Theory model generally has the form seen in Figure 3, increasing gamma would be indicative of an increase in the amplitude of the curve derived from Eq. 1.

Furthermore, the parameter w_m represents the relative weight a driver puts on losses as compared to gains. Increases in this parameter are therefore indicative of a driver who is "valuing" potential risks more than that of potential gains, that is, becoming more risk averse. Increasing the alpha parameter is indicative of a driver being more uncertain of the leader vehicle's velocity, and the beta parameter can be thought of as the drivers' sensitivity to the surrounding environment. Increasing the beta parameter could be indicative of a number of things, including a more experienced driver or one who has become impatient. The T_{max} parameter can be thought of as the anticipation of the driver, as increasing values indicate a driver that is thinking multiple steps ahead and decreasing values indicate a driver who has a myopic view and is thinking about what is occurring "in the moment."

Looking at the changes in average calibrated values for these parameters between segments 1 and 2 we see that the one-lane segment (segment 2) features higher values for beta and gamma and lower values for alpha, T_{max}. and w_m. The combined impacts of increased gamma and decreased w_m demonstrate that not only is the driver putting less weight on perceived losses, but the driver is

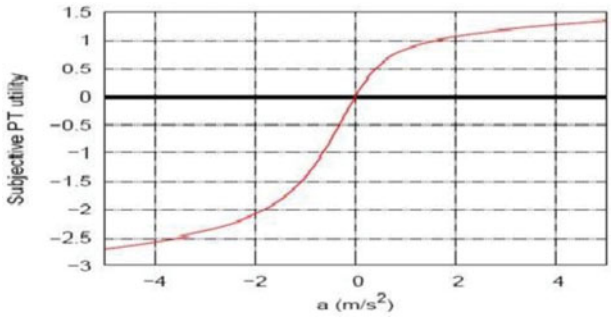

Figure 3. Prospect theory value function (Hamdar, 2009).

also increasing his or her sensitivity to perceived gains and losses. This result is further explained by an increase in the beta parameter, which, in combination with the impacts discussed earlier, seems to indicate that drivers became increasingly impatient during this segment of the experiment. Reaffirming this notion is the decrease in the value for T_{max}, which demonstrates that drivers are thinking more in the moment, rather than anticipating what maneuvers they may make in the future (which seems to indicate a growing level of frustration). Finally, the largest percentage decrease in any parameter value is seen in that of alpha, indicating that the driver is very certain of what the vehicle in front of him or her is doing, once again reaffirming the notion that drivers became increasingly impatient and frustrated while traversing this segment of the experiment.

In addition to the driving environment discussed in the preceding, significance testing indicated that drivers change their behavior when moving between one and two lane roadways in general. The most significant changes in terms of the individual calibration parameters are seen in alpha, beta, and gamma. Here we once again observe that drivers on one-lane roadways are much more certain of the lead vehicle's velocity (decreased alpha), become increasingly sensitive to their environment (or potentially increasingly impatient—increased beta), and become increasingly sensitive to perceived gains and losses (increased gamma—with a slight decrease in the risk aversion parameter w_m).

While the changes in calibration parameters were not statistically significant for shoulder width or gender, it is interesting to observe that drivers had a higher average velocity, lower space headway, and thus much lower time headway on roadways with narrow shoulders. That is, when shoulder width narrowed, drivers followed the lead vehicle much more closely. The same was true when comparing female drivers to male drivers, as female drivers had an average time headway that was nearly 0.7 s less than their male counterparts. These changes in average values were not observed when comparing one-lane to two-lane roadways, as the average velocity, spacing, and time headway were almost identical in this case.

Conclusions and future work

This pilot real-world study featured the construction of an instrumented vehicle that was able to successfully capture high-time-resolution trajectory data through the use of multiple instruments working in unison. Furthermore, a driving experiment was successfully conducted with 18 participants driving a predefined "loop" that featured four segments with varying number of lanes and shoulder widths. Data collected from the driving experiment were then effectively calibrated using a genetic algorithm calibration procedure. Finally, significance testing was conducted on the calibrated parameters for the prospect theory value function and results indicated that there were significant changes in driver behavior for varying number of lanes—specifically when the roadway featured a wide shoulder as opposed to a narrow one.

Research conducted in this study differentiated itself from that of previous studies not only with the combination of instruments that were used, but also in the accuracy and time resolution of the data that were collected. Further differentiating this study from previous works, the driving experiment that was conducted tested the differences in behavior based on changing roadway geometry and then used the collected trajectory data to successfully calibrate the parameters of the prospect theory car-following model.

Given that this was the first study for this instrumented vehicle, construction and data synchronization posed significant challenges that needed to be overcome before the actual driving experiment could take place. With these major obstacles out of the way, opportunity abounds for additional driving experiments to be conducted with a seemingly limitless potential for different types of experimental setups. Furthermore, the vehicle used in this study was constructed in such a manner that additional instruments can easily be integrated in the vehicle and instrumentation design, once again opening the door for a wide variety of future applications and testing.

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Product Liability: Warnings, Defects and More

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Product Liability: Warnings, Defects and more.

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Legal Standards That Are Used To Determine Liability

1. Contract/Breach of Warranty:
    a. Express warranties;
    b. Implied warranties;
    c. Misrepresentations; and
    d. Fraud.
2. Strict liability in tort:
    a. Defect in design;
    b. Defect in manufacture; and
    c. Failure to warn.

Contract/Breach of Warranty

- A manufacturer may be subject to products liability on causes of action premised on breach of express or implied warranties, misrepresentation or fraud.

Breach of Warranty

- Breach of Express Warranty
- Breach of Implied Warranty
  - Fitness for a particular purpose

- Misrepresentation
- Fraud
  - Consumer Protection Statutes
  - Treble Damages
  - Attorneys' fees

The elements of a liability claim:

- The existence of a defect;
- The attribution of that defect to the "seller"
  - Seller – anyone in the "chain of distribution" to the ultimate purchaser;
- A casual relationship (legal cause) between the defect and the injuries to the claimant.

Healey v. Firestone Tire & Rubber Co., 87 N.Y.2d 596, 601, 640 N.Y.S.2d 860, 663 N.E.2d 901 (1996)

- Strict liability does not require proof of negligence.
- There is no single, precise definition for a product defect in all situations.

- In general, “defective condition” is defined as existing when a product “leaves the seller’s hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.”

Robinson v. Reed-Prentice Div. of Package Mach. Co., 49 N.Y.2d 471, 479. 403 N.E.2d 440, 443 (1980)

Strict Liability in Tort

Design Defect

- There is no variance from the product's specifications, but the design causes or fails to prevent injuries to users.

Scarangella v. Thomas Built Buses, Inc., 93 N.Y.2d 655, 659, 695 N.Y.S.2d 520, 522, 717 N.E.2d 679, 681 (1999)

Manufacturing Defect

- A defectively manufactured product deviates in some material way from its design, specifications or performance standards.
- A manufacturing defect typically results from an error in the manufacturing process.

Caprara v. Chrysler Corp., 52 N.Y.2d 114, 129, 436 N.Y.S.2d 251, 417 N.E.2d 545 (1981)

Failure to Warn

- A product may be found to be unreasonably dangerous if the manufacturer fails to adequately warn about a danger related to the way the product is designed.
- A manufacturer is required to provide adequate warnings and instructions for the safe and effective use of its product and against any dangers not within the knowledge of, or obvious to, the ordinary users.

Rastelli v. Goodyear Tire & Rubber Co., 79 N.Y.2d 289, 297, 582 N.Y.S.2d 373, 591 N.E.2d 222;

Lugo v. LJN Toys, 75 N.Y.2d 850, 552 N.Y.S.2d 914, 552 N.E.2d 162;

McLaughlin v. Mine Safety Appliances Co., 11 N.Y.2d 62; , 226 N.Y.S.2d 407, 181 N.E.2d 430

There is no duty to warn for open and obvious dangers and **un**foreseeable misuses of a product.

Liriano v. Hobart Corp., 92 N.Y.2d 232, 242, 700 N.E.2d 303, 308 (1998)

Factors considered in determining whether a warning is legally adequate include:

- Whether the warning is conspicuous (is the warning in such a form that it could reasonably be expected to catch the attention of a reasonably prudent person?); and
- Whether the content of the warning is understandable and sufficiently coveys the risk of danger associated with the product.

Johnson v. Johnson Chem. Co., 183 A.D.2d 64, 70, 588 N.Y.S.2d 607, 611 (1992)

- Types of Claims/Allegations Involving Warnings:
  - Insufficient Warnings
  - Poor placement of warnings
  - Unclear warnings
  - Too many warning are ineffective

Requiring a manufacturer to warn against obvious dangers could greatly increase the number of warnings accompanying certain products….Requiring too many warnings trivializes and undermines the entire purpose of the rule *Liriano* v. *Hobart Corp*., 92 N.Y.2d 232, 242, 700 N.E.2d 303, 308 (1998)"

Most Recent NY Court of Appeals Case

Fasolas v. *Bobcat of New York, Inc.,* 2019 N.Y. Slip. Op. 03657, N.E.3d (2019) WL 2030249

Defenses to a Product Liability Claim

Defenses

Compliance with standards and regulations is not a defense to a claim that a product is defective.

- In general, a manufacturer's compliance with federal/government regulations creates a rebuttable presumption that the product is not defective.

Lugo by Lopez v. LJN Toys, Inc., 146 A.D.2d 168, 171, 539 N.Y.S.2d 922 (1st Dep't 1989), aff'd, 75 N.Y.2d 850, 552 N.Y.S.2d 914, 552 N.E.2d 162 (1990); *Stone v. Sterling Drug, Inc.,* 111 A.D.2d 1017, 1019, 490 N.Y.S.2d 468 (3rd Dep't 1985)

- On the other hand, a manufacturer's violation of a standard or regulation often establishes that a product is defective in design.
- In the U.S., a plaintiff can look to standards outside of the U.S. in an effort to establish a standard of care.

Martin v. Herzog, 126 NE 814, 815 (N.Y. 1920)

- Plaintiff assumed the risk of his alleged damages and on that account the defendant is not liable to plaintiff.

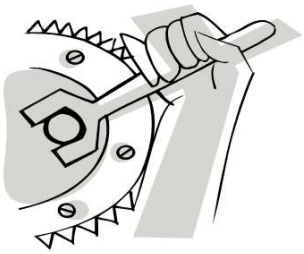
- The damages allegedly sustained by plaintiff was caused or contributed to by plaintiff's own negligence or culpable conduct and the manufacturer is, therefore, not liable to plaintiff or, alternatively, the manufacturer's liability to plaintiff is partial only and should be reduced in accordance with the plaintiff's share of culpability.

- The product at all times conformed with the current state-of-the-art or knowledge of trade or industry customs and standards applicable at that time in the industry which produced such products.
  - Note: A product is defective, if at all, at the time it left the possession of the seller.

- The alleged damages were the result of the product having been used in a manner not intended by the manufacturer or in a manner not in accordance with the instructions and labels provided with it or with known safety practices.
  - **Unforeseeable** misuse

- If the product was dangerous or defective as alleged by plaintiff, then such condition was **open and obvious** and plaintiff by the exercise of reasonable care would have discovered the defect and perceived the danger.

- Plaintiff's claim is barred based on the applicable statute of repose.



- Connecticut bars all claims arising out of workplace accidents brought more than ten years after the date the seller parted with possession of the product, as long as the useful safe life of the product has not expired.

10

Indemnification/Contribution

Fault of Others

- In most states, the manufacturer has the legal right to demand indemnification from component part manufacturers who produce a defective party.

General Approach

- Given the cost of defending a case, it may make economic sense, without regard to liability, to resolve certain claims and eliminate any further defense costs as well as the risk of an adverse jury verdict.

Post-Delivery Continuing Duty to Warn

- When a manufacturer learns of a defect in its product after the original sale of the product, it must convey sufficient warnings to all users of the product.
- Rationale: the manufacturers are in the best position to gather information concerning any performance problems and disseminate this information to purchasers.

Problems presented by the post-sale duty to warn:

- The warning cannot be attached to the product because the product already has been sold.
- The manufacturer cannot locate the product due to the passage of time.
- The product may have changed hands many times or the purchaser may have relocated.
- These difficulties increase with the length of the product's life.
- Even if the effort to identify and contact the current product users can be successful, the cost of such an effort might be intolerable.

Solutions

A manufacturer must invest at least as much care and effort in the warnings and instructions accompanying its products as it does on the products' design and manufacture.

It must also insure traceability of its products.

Product Literature

A. Owner's manual
B. Warnings
C. Instructions

Failure to warn is the most dangerous products liability claim.

Teach consumers how to property use and maintain products to avoid accidents.

Safetymatters

Purpose: Shift responsibility to the user for the accident.

Nature of Warnings

- The warnings must be sufficient to alert the user to foreseeable risks associated with using the product, but there cannot be too many warnings.
- The warnings must be sufficient to convey the nature of the risk(s), but easily understandable.
- The warnings must be sufficient to convey the nature of the risk(s), but succinctly (briefly) worded.
- The warnings must be clear and not ambiguous but cannot be too narrow in scope.
- The warnings must be clear and not ambiguous, but cannot be too broad in scope

The Signal Words

DANGER:

- Indicates an imminently hazardous situation which, if not avoided, will result in death or serious injury.

WARNING:

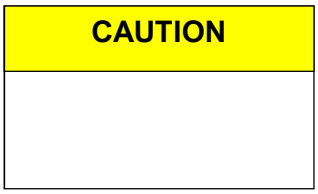
- Indicates a potentially hazardous situation which, if not avoided, could result in death or serious injury.

CAUTION:

- Indicates a potentially hazardous situation which, if not avoided, may result in minor or moderate injury.

CAUTION:

- Used without the safety alert symbol indicates a potentially hazardous situation which, if not avoided, may result in property damage.



DANGER:
- Signal words: white lettering/red background
- Safety Alert Symbol: white triangle/red exclamation point

Symbol: on white background

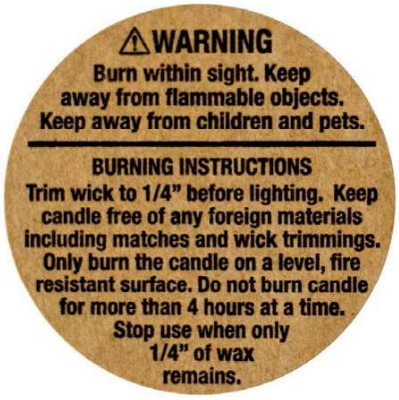
WARNING:
- Signal words: black lettering/orange background
- Safety Alert Symbol: black triangle/orange exclamation point

Word Message: Black lettering on white background **(or)** White lettering on black background

CAUTION:
- Signal words: black lettering/yellow background
- Safety Alert Symbol: black triangle/yellow exclamation point

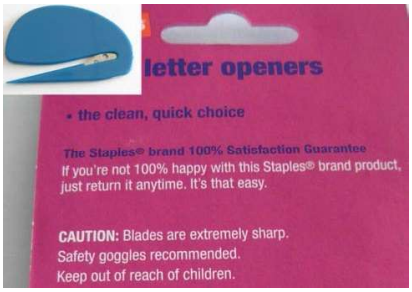
Format can be extended to provide additional space for the word message.

Examples of Good Warnings:



Examples of Bad Warnings:

Examples of warnings "gone too far":



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Sports & Recreational Liability: "Game Over? Or Let the Games Begin!"

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Sports and Recreational Activities – Game Over? Or, Let the Games Begin!

"It's all fun and games until somebody loses an eye." (Unknown. A long time ago).

The phrase is said to originate from Ancient Rome, where the only rule to wrestling matches was no eye gouging. There was immediate disqualification if you poked your opponent's eye out. Today, it may be more accurate to say, "it's all fun and games until somebody gets sued."

BRIEF OVERVIEW OF PREMISES LIABILITY

In New York, it is well settled that a landowner has a duty of care to maintain their property in a reasonably safe condition, whether the property is open to the public or not, and it does not matter if plaintiff was an invitee, licensee, or trespasser.[1] Reasonableness is determined by viewing all of the "circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk."[2] In the arena of sports or recreational activity, the property owner's duty of care is to make the conditions as safe as they appear to be.[3]

PRIMARY ASSUMPTION OF RISK

Numerous cases involving sporting or recreational activity have been decided regarding the application of the primary assumption of risk doctrine. The Court of Appeals has limited the

[1] Peralta v. Henriquez, 100 N.Y.2d 139, 143-144 (2003).
[2] Basso v. Miller, 40 N.Y.2d 233, 241 (1976).
[3] Turcotte v. Fell, 68 N.Y.2d 432, 439 (1986).

expansion of the doctrine to those cases that present a social value and those that occur within a designated recreational venue. However, the courts still look to the inherent dangers of the sport, whether the plaintiff appreciated those risks, the skills of the plaintiff, and if the condition was open and obvious. If found to apply, the assumption of risk doctrine, provides a complete defense to property owners, overriding an application of plaintiff's comparative negligence. The Court of Appeals has drawn distinctions as to what type of activities will permit an application of the assumption of risk doctrine, and where those activities took place.

The assumption of risk doctrine arises when one is aware of and appreciates the risks inherent in the activity and "voluntarily assumes the risk" by participating.[4] The participant must have knowledge and appreciation of the risk. Awareness of the risk, should be measured against the "background of the skill and experience of the particular plaintiff."[5] The assumption of risk doctrine has been applied to the layout and construction of a playing field,[6] as well as the activity. It has also been applied to where there is an open and obvious conditions where the sport is played.[7] Determining if a defendant violated a duty of care to participants in sports and activities, "should include whether the conditions caused by defendants' negligence are 'unique and created a dangerous condition over and above the usual dangers that are inherent in the sport."[8]

Assumption of risk is not justified for reckless or intentional conduct by property owners.[9] If a plaintiff can show the defendant acted negligently, or a defendant's inaction was a

[4] Morgan v. State, 90 N.Y.2d 471, 484 (1997).
[5] Maddox v. City of New York, 66 N.Y.2d 270, 278 (1985).
[6] Bryant v. Town of Brookhaven, 135 A.D.3d 801, 802 (2d Dep't 2016).
[7] Sanchez v. City of New York, 25 A.D.3d 776 (2d Dep't 2006).
[8] Owen v. R.J.S. Safety Equip., 79 N.Y.2d 967, 970 (1992).
[9] Turcotte, 68 N.Y.2d at 439 (1986) (citations omitted).

"substantial cause of events which produced the injury," plaintiff will not have assumed the risks of their sport.[10]

In Trupia v. Lake George Cent. School Dist., 14 N.Y.3d 392 (2010), the Court of Appeals held that while assumption of the risk protects the social value of athletic and recreative activities, it does not apply outside of this limited context.[11] Thus, in Trupia, an infant-plaintiff sliding down a banister was not an activity of the kind of social value that warranted the protection afforded under the assumption of the risk doctrine.[12] The Court found that if the plaintiff's harm was attributable to his own actions and not to negligence on behalf of the defendants, his actions would be taken into account under the comparative fault provision of the CPLR.[13]

In Custodi v. Town of Amherst, 20 N.Y.3d 83 (2012), the Court of Appeals declined to apply the assumption of risk doctrine to those cases where the activity did not take place within a "designated venue."[14] Therefore, the plaintiff, who fell while rollerblading across a height differential in the street, did not assume the risks inherent to rollerblading as she would have had she been in a rink, skating park or competition.[15]

FIELD OF PLAY PARTICIPANTS

Courts look to Plaintiff's skills and experience to evaluate an application of primary assumption of risk

The assumption of the risk doctrine will apply when a defendant can prove that the plaintiff's skill and experience afforded the plaintiff an appreciation of the risk involved in his/her sport.

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[10] Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650, 659 (1989).
[11] Trupia v. Lake George Cent. School Dist., 14 N.Y.3d at 395.
[12] Id. at 396.
[13] Id.
[14] Custodi v. Town of Amherst, 20 N.Y.3d at 89.
[15] Id.

In Maddox v. City of New York, plaintiff, New York Yankee outfielder, Elliot Maddox, suffered a career ending injury when he slipped and fell on a wet and muddy field.[16] The Court of Appeals found, that his experience of playing professional baseball coupled with his testimony that he was aware of the condition (he had complained to groundskeepers about the condition), and his playing in the field constituted plaintiff assuming the risk of his injury.[17]

Similarly, in Morgan v. State, plaintiff was driving a two-person bobsled during a national championship race, when their bobsled tipped over and his teammate fell out of the bobsled. Plaintiff was an Olympic bobsledder who had over 20 years of experience and had raced down the very same run at issue numerous times.[18] The Court of Appeals held summary judgment was properly granted to defendants under the assumption of risk doctrine, based on plaintiff's over 20 year experience in bobsledding, and familiarity with the bobsled course at issue.[19]

In Lomonico v. Massapequa Public Schools, 84 A.D.3d 1033 (2nd Dep't 2011), Plaintiff an 11th grade cheerleader, alleged she suffered from post-concussion syndrome when she was struck in the head by another student when practicing a stunt. The stunt involved one girl (the flyer) being lifted into the air by three other girls. The flyer is lifted on one foot and then to dismount, rotates 360º and lands cradled in the arms of the bases and backstop. Plaintiff alleged a lack of instruction and supervision and failure to provide protective mats.[20] The Second Department found the cheerleader could not demonstrate the school district's liability due to the

[16] Maddox, 66 N.Y.2d at 275.
[17] Id. at 278-279.
[18] Morgan, 90 N.Y.2d at 480, 486
[19] Id. at 486.
[20] Lomonico v. Massapequa Public Schools, 84 A.D.3d at 1034.

extent of her cheerleading experience and with this stunt in particular. She clearly knew of the risks inherent in the activity.[21]

The effects of conditions of the field/facility under assumption of risk

A property owner or facility operator can be awarded a defense under assumption of the risk when the condition is open and obvious. A defense will not be awarded when a property owner or facility operator was found to have neglected, or intentionally created the condition, increasing the dangers over and above the usual dangers inherent to the sport.

The Court of Appeals held in Turcotte v. Fells, that plaintiff assumed the risks of his injuries, when he participated in three prior races on the same day, observed the conditions of the track prior to the eighth race, and his general knowledge of the possibility of "cupping" conditions on the track.[22]

In Sykes v. County of Erie, 94 N.Y.2d 912 (2000), the Court of Appeals held that plaintiff, injured when he stepped into a recessed drain while playing basketball, had assumed the risk as the condition of the court was open and obvious. Further there was no evidence that the drain was defective or improperly maintained.

The plaintiff, in Siegel v. City of New York, 90 N.Y.2d 471 (1997), was injured when he caught his foot in the bottom of the net dividing the indoor tennis courts.[23] Plaintiff had been a member of the club for 10 years, and had been playing tennis there once a week.[24] Plaintiff testified that he knew the net had been ripped for over two years, although he never notified the facility's management about the issue, he knew others had.[25] Defendants were granted summary

[21] Id. (See, Digose v. Bellmore – Merrick Cent. High School Dist., 50 A.D.3d 623, 624 (2d Dep't 2008)).
[22] Turcotte, 68 N.Y.2d at 443. (plaintiff alleged foul riding by another jockey, and that the racetrack was negligently watered and groomed) Id. at 436 (cupping comes from over watering of the race track). Id. at 443
[23] Siegel v. City of New York, 90 N.Y.2d at 482.
[24] Id.
[25] Id.

judgment on the grounds that plaintiff assumed his risk by electing to play on a tennis court that he knew had a torn net for a long time.[26] The Court of Appeals reversed the decision, finding that the torn net was not "inherent" to tennis, it was more of an "allegedly negligent condition occurring in the ordinary course of any property's maintenance…"[27]

Plaintiff, in Siegel v. Albertus Magnus High School, 153 A.D.3d 572 (2d Dep't 2017) (lv denied, 30 N.Y.3d 906 (2017)), was assisting the coaches of his son's baseball team, and alleges when he was running from third base into foul territory, he slipped and fell on a tile mat that was covering a drainage grate.[28] Plaintiff argued the tile was negligently placed by defendants which caused a defect in the playing field as the tile was not a part of the playing field.[29] The Appellate Division, Second Department found that summary judgment was properly granted against the defendants as the 12" x 12" white/creamish colored tile was an open and obvious condition and starkly contrasted the color of the grass.[30] Additionally, plaintiff could not show that the tile was defective. Further the court relied upon plaintiff's testimony - that he had previously been to, and played/coached on the field; sat on the sideline near the tile; and had volunteered to be on the field at least three prior occasions - and found that plaintiff by volunteering, "assumed the obvious risk of slipping on the grass or on the tile by electing to play baseball on that field."[31]

BYSTANDERS & SPECTATORS

In the past 5 years, publicity surrounding MLB parks due to the number of serious injuries spectators have incurred while attending baseball games has led to increased scrutiny surrounding spectator safety. According to a September 9, 2014 Bloomberg article, there were

[26] Id.
[27] Id. at 488-89.
[28] Siegel v. Albertus Magnus High School, 153 A.D.3d at 573.
[29] (citing to Siegel v. Albertus Magnus High school, 2015 WL 12805935, 3 (Rockland Sup.Ct., 2015).
[30] Siegel, 153 A.D.3d at 575.
[31] Id. (citation omitted).

roughly 1750 injuries to spectators from foul balls.[32] Further, in a June 1, 2019 New York Times article, there have been nearly 14,000 more foul balls hit in the 2018 season than there were in 1998.[33] The issue of bystander and spectator safety has been clearly addressed by the Court of Appeals which has held "that an owner or operator of an athletic field or facility 'is not an insurer of the safety of its spectators.'"[34] While the assumption of risk doctrine extends to bystanders and spectators, there is still a duty by the landowners or occupiers to take reasonable measures to prevent injury to those present on the property.[35] The assumption of risk doctrine, will not apply where there is a "reckless or intentional conduct, or concealed or unreasonably increased risks" to those spectators.[36]

Facilities need to provide protection to spectators where the risk of being hit is the greatest

All baseball parks include some sort of netting to protect spectators in certain parts of the stadium, mainly behind home plate and dugouts, but there has recently been public discussions to extend the netting to protect more spectators in the ballparks, with some MLB teams actually doing so. In Akins v. Glens Falls City School Dist., 53 N.Y.2d 325 (1981), plaintiff was hit by a foul ball, but the Court of Appeals found that because plaintiff chose to stand behind a 3' fence along the third base line, instead of in the stands behind a 24' high fence, she assumed the risk of being hit by a foul ball.[37] Further, the Court of Appeals found that ball park owners need only provide protection behind home plate where the danger of being hit by a ball is the greatest.[38]

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[32] David Glovin, Baseball Caught Looking as Fouls Injury 1750 Fans a Year, Bloomberg (September 9, 2014, 4:05 PM), https://www.bloomberg.com/news/articles/2014-09-09/baseball-caught-looking-as-fouls-injure-1-750-fans-a-year

[33] Billy Witz, A Foul Ball, an Injured Little Girl and Another Cycle of Anguish, (June 1, 2019), https://www.nytimes.com/2019/06/01/sports/fan-hit-foul-ball-almora.html

[34] Akins v. Glens Falls City School Dist., 53 N.Y.2d at 329.

[35] Id.

[36] Smero v. City of Saratoga Springs, 169 A.D.3d 1169, 1170 (3d Dep't 2018) (citations omitted).

[37] Akins, 53 N.Y.2d at 328.

[38] Id. At 331.

In Zlotnick v. New York Yankees Partnership, 154 A.D.3d 588 (1st Dep't 2017), plaintiff was struck in the eye by a foul ball while attending a Yankee's game.[39] Plaintiff was sitting in his assigned seat about halfway down the first baseline and a few rows back. The First Department affirmed the decision granting the Yankees summary judgment, finding there was no breach of duty by the defendants, as there was appropriate netting behind home plate, and there were plenty of seats available in that section. Additionally, the disclaimers on tickets and regular announcements made over the PA system advised spectators to notify a stadium employee of any particular concerns during the course of watching a game, even to request a seat change![40]

Similarly, cases have generally held owners of hockey rinks have not breached their duty to spectators if they have provided "screening around the area behind the hockey goals, where the danger of being hit by a puck is the greatest, as long as the screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire to view the game from behind such screening."[41] However, summary judgment was denied to defendants in Smero v. City of Saratoga Springs, where the infant-plaintiff was struck in the head by a puck while watching a youth hockey team practice.[42] It was alleged that defendants were negligent in failing to install proper netting/barriers in the area where she was injured, failure to supervise, control and maintain the activities occurring on the ice, and failure to construct or maintain the ice rink in a safe manner.[43]

In Smero, the ice rink had 4'7" boards surrounding the rink, with 3' plexiglass panels on top of the dasher boards running along the sides of the rink, and 6' panels of plexiglass behind

[39] Zlotnick v. New York Yankees Partnership, 154 A.D.3d at 588.
[40] Id.
[41] Gilchrist v. City of Troy, 113 A.D.2d 271, 273-74 (3d Dep't 1985).
[42] Smero, 169 A.D.3d at 1169.
[43] Id at 1169-70.

the goal nets.[44] Behind the goals there was also protective netting, but the netting did not extend along the sides of the rink.[45] On the date in question though, the goals were not set up lengthwise at the ends of the rink as usual, rather the goals were set up width wise to accommodate two different practices.[46] Plaintiff was walking along the side of the rink, when a player took a shot at the goal net, launching the puck over the dasher board and plexiglass and hitting the plaintiff. The Third Department found, there was an issue of fact as to whether defendants breached their duty to plaintiff because the goals were set up in an area where there was a significant gap in protective screening, thereby increasing the likelihood of spectators being placed in danger of a flying puck.[47]

The assumption of risk doctrine can extend to consenting bystanders and spectators even if they are not actively watching the sporting event or activity.[48] In Thomas v. State, 59 Misc.3d 1234(A) (N.Y. Ct. Cl. 2018), plaintiff, an inmate at a correctional facility, was struck in the eye by an errant softball.[49] Plaintiff had gone out to the recreation yard for a cigarette, and walked to a bench behind the fenced off area behind home plate before the softball game was underway.[50] He had been at the bench for around 10 minutes, when someone yelled "heads up."[51] He looked up and was immediately struck in the eye by a softball. The Court of Claims found that the State fulfilled their duty to protect inmate bystanders from softballs by having a fence behind home plate.[52] Although Plaintiff was a bystander, he still assumed the risks of his injuries by standing

[44] Id. at 1171.
[45] Id.
[46] Id.
[47] Id. at 1172.
[48] Newwcomb v. Guptill Holding Corp., 31 A.D.3d 875, 876 (3d Dep't 2006) (See Roberts v. Boys & Girls Republic, Inc., 51 A.D.3d 246 (1st Dep't 2008)).
[49] Thomas v. State, 59 Misc.3d at 2.
[50] Id.
[51] Id.
[52] Id.

within close proximity to the softball field.[53] Additionally, the court found the State did not have to warn their inmates that the "readily observable softball field may become active if and when other inmates elected to use the field to play softball.[54]

Design/Defects inherent to the facility

The condition of the outdoor basketball court came up in Leitner v. The City of New York, 60 Misc.3d 1209A, (N.Y. Sup. Ct. 2013), where plaintiff was watching his kids play basketball at an outdoor basketball court, when a basketball rebounded towards him.[55] He went to get the ball, twisting his ankle in a crack in the court.[56] The City of New York moved for summary judgment on the grounds that they did not breach a duty to plaintiff as he was a spectator to the basketball game.

The court in Leitner, found that the cracks in the basketball court were not inherent to game of basketball, and the court was not designed with cracks in it.[57] The court found the City of New York was still liable for its failure to maintain the premises in a reasonably safe condition.[58]

Assumption of the risk can extend to bystanders and spectators if the conditions or risks are open and obvious

A plaintiff assumes the risk of injury arising from any open and obvious condition of the place where the activity is being carried out.[59] Mud in front of a dugout was found to be an open and obvious condition and not inherently dangerous when a grandmother who was watching her

[53] Id. (See, Starke v. Town of Smithtown, 155 A.D.2d 526 (2d Dep't 1989).
[54] Id. (See, Cherry v. Hofstra Univ., 274 A.D.2d 443 (2d Dep't 2000).
[55] Leitner v. The City of New York, 60 Misc.3d at 1.
[56] Id.
[57] Id. at 2.
[58] Id.
[59] Maddox, 66 N.Y.2d at 277.

grandson's little league game, fell while walking across the mud to say good-bye to her grandson.[60]

Further, in Roberts v. Boys and Girls Republic, Inc., plaintiff was struck in a head by a bat being swung at her son's baseball practice.[61] The First Department found that bats being swung are inherent to the game of baseball, and knowledge of the sport of baseball is not required to appreciate the risk of an injury from a swung bat, as it is perfectly obvious.[62]

PLAYGROUNDS

It is well established that schools "are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances."[63] However, a school is not "an insurer of safety, and cannot be expected to continuously supervise and control all of the students' movements and activities."[64] Where playgrounds are involved, a school district has a duty to supervise students on how to safely use the playground equipment, the breach which can result in liability.[65]

The condition of the playground facility and equipment will be critically assessed by expert proof

In A.C. by Fajardo v. Brentwood Union Free School Dist., 63 Misc.3d 1204(A), 1 (Nassau Sup. Ct. 2019), plaintiff, a second grade student, fell while using the zip line apparatus in the playground of his school.[66] Plaintiff asserted claims of negligent supervision, instruction, and the existence of a dangerous and defective conditions, (i.e. failing to provide proper padding beneath the zip line, and failing to have "proper non-slip material" on the zip line handle).[67] In deciding

[60] Sirianni v. Town of Oyster Bay, 156 A.D.3d 739, 740 (2d Dep't 2017).
[61] Roberts, 51 A.D.3d at 247.
[62] Id. at 248.
[63] David v. County of Suffolk, 1 N.Y.3d 525, 526 (2003)
[64] Mirand v. City of New York, 84 N.Y.2d 44, 48 (1994)
[65] Merson v. Syosset Central School District, 286, A.D.2d 668 (2d Dep't 2011).
[66] A.C. by Fajardo v. Brentwood Union Free School Dist., 63 Misc.3d 1204(A), 1. (Note, a motion to reargue/reconsider is currently pending in Nassau County).
[67] Id.

the unopposed summary judgment motion brought by defendants, the Nassau County Supreme Court found there was a triable question of fact as to whether the plaintiff was properly instructed as to how to use the zip line apparatus.[68] Discrepancies existed in the testimony of the plaintiff and the gym teacher who was on the playground with the students.[69] The plaintiff testified that he did not receive any instruction on how to use the zip line apparatus, and just followed how the other kids were using it.[70] The gym teacher testified that he instructed the students, to hold the zip line handle with two hands, to make sure there were no students underneath them, and no students standing on the landing dock.[71] According to affidavits provided by defendants' experts, the zip line apparatus was inspected and found to be in "excellent" condition, additionally, the "engineered wood fiber ground cover underneath the apparatus conformed to all applicable safety standards, and was to help prevent life-threatening head injuries, not to prevent all types of injuries.[72] As to the non-slip material on the handle, there were no safety specifications, standards or regulations saying that it was required.[73] The court concluded that the zip line apparatus was not dangerous or defective.[74]

Similarly, in Valenzuela v. Metro Motel, LLC, 170 A.D.3d 780 (2d Dep't 2019), an action alleging a defective condition was brought against the landowner on behalf of an infant-plaintiff whose leg became caught in a gap between two platforms on playground equipment.[75] Through an expert affidavit, Defendants were able to show, that there was no defective

[68] Id. at 2.
[69] Id.
[70] Id. at 3.
[71] Id.
[72] Id.
[73] Id.
[74] Id. at 2.
[75] Valenzuela v. Metro Motel, LLC, 170 A.D.3d at 780.

condition, the playground was maintained in a reasonably safe condition, and the gaps did not violate any applicable guidelines or standards.[76]

Summary judgment was denied to defendants in Adriana G. v. Kipp Washington Heights Middle School, 165 A.D.3d 469 (1st Dep't 2018), where Infant-Plaintiff's ring finger was amputated after it got caught in a playground fence.[77] A triable question of fact was found as to whether the fence was in a reasonably safe condition at the time of the accident.[78] Defendants' expert's affidavit asserted the fence was in compliance with the New York City School Construction Authority's (NYCSCA) standards, while plaintiff's expert's affidavit asserted that the fence was not in compliance with the NYCSCA's standards, as the fence had sharp edges that were present at the time of the accident.[79]

NEW YORK STATUTES

New York General Obligation Law § 9-103 Recreational Use

The New York statute was enacted to limit liability of landowners that allows the use of their land without a fee. The statute provides where a user engages in one or more of a number of enumerated activities that protection can be afforded to a property owner if he can establish that:

1. The injured party was pursuing one of the enumerated activities[80] on the premises;
2. The property was physically conducive to the activity[81]; and

[76] Id. (See, Moseley v. Philip Howard Apts Tenants Corp., 134 A.D3d 785, 787 (2d Dep't 2015), Y.H. v. Town of Ossining, 99 A.D.3d 760, 761 (2d Dep't 2012), Newman v. Oceanside Union Free School Dist., 23 A.D.3d 631, (2d Dep't 2005), Belkin v. Middle Country Cent. School Dist., 261 A.D.2d 563 (2d Dep't 1999).
[77] Adriana G. v. Kipp Washington Heights Middle School, 165 A.D.3d at 469.
[78] Id. at 470.
[79] Id. (See, Schmidt v. One N.Y. Plaza Co. LLC, 153 A.D.3d 427, 428–429, (1st Dep't 2017); Griffith v. ETH NEP, L.P., 140 A.D.3d 451, (1st Dep't 2016), *lv denied* 28 N.Y.3d 905, (2016)); (See also, *Berr v. Grant*, 149 A.D.3d 536, 537, (1st Dep't 2017); Alvia v. Mutual Redevelopment Houses, Inc., 56 A.D.3d 311, 312, (1st Dep't 2008)).
[80] hunting, fishing, organized gleaning as defined in section seventy-one-y of the agriculture and markets law, canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs.

3. The property is of a type that is appropriate for pursuing the activity at issue.[82]

The intent of the statute was to encourage landowners to allow the public to use their land to engage in certain recreational activities without fear of liability for the injuries suffered by those participants.[83] In Albright v. Metz, 88 N.Y.2d 656 (1996), plaintiff was injured when he was motorbiking on defendants property which was being used as a gravel mine and landfill.[84] The Court of Appeals found that the property was used numerous times by motorbikers and, as such the land was physically conducive for the activity. The plaintiff tried to avoid the statutory bar by arguing that the landfill was hazardous and not appropriate for motorbiking. The Court declined to accept that argument and determined the land was suitable for motorbiking therefore affording the land owner immunity under the statute.[85]

However, in Sena v. Town of Greenfield, plaintiff was injured when sliding down a hill that was supervised by the town for the purposes of sledding.[86] The Court of Appeals held that the statute did not provide immunity to municipalities who still had a duty in the operation and maintenance of a supervised public park and recreational facility.[87]

New York General Obligation Law § 18 Skiing

New York has recognized that skiing is a voluntary activity that may be hazardous, regardless of all feasible safety measures that can be undertaken by ski area operators. New York has also recognized, in section 18-101, that there are inherent risks to skiing caused by "variations in terrain or weather conditions surface or subsurface snow, ice, bare spots or areas of

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[81] In determining if a property is conducive to the activity in question, courts should look to see if the property has been used by recreationists in the past for the same activity. (Iannotti v. Consolidated Rail Corp, 74 N.Y.2d 39, 45 (1989).
[82] Id.
[83] Sena v. Town of Greenfield, 91 N.Y.2d 611, 615 (1998), (See, Franham v. Kittinger, 83 N.Y.2d 520,523 (1994), Ferres v. City of New Rochelle, 68 N.Y.2d 446, 451 (1986)).
[84] Albright v. Metz, 88 N.Y.2d at 660.
[85] Id. At 662-663.
[86] Sena, 91 N.Y.2d at 613.
[87] Id. At 615, (citing, Ferres v. City of New Rochelle, 68 N.Y.2d at 452).

thin cover, moguls, ruts, bumps; other persons using the facilities; and rocks, forest growth, debris, branches, trees, roots, stumps or other natural objects or man-made objects that are incidental to the provision or maintenance of a ski facility."[88] Section 18-106 of the statute provides that ski area operators have additional duties to:

1. post at every point of sale or distribution of lift tickets, a "warning to skiers" about the inherent risks of skiing;
2. make ski instruction and education as to the inherent risks of skiing available at a reasonable price; and
3. post a notice to skiers as to the availability of a refund to those who feel unprepared or unwilling to ski due to the inherent risks.

Section 18-106 additionally states that skiers have a duty to seek out information to make an informed decision as to their participation in the sport.

In Sytner v. State, 223 A.D.2d 140 (3d Dep't 1996), snow making was in progress on the right side of Mohican Trail, leaving only the left side of the trail open for skiers.[89] There were no signs at the start of the trail notifying skiers that snow making was in progress.[90] The left side of the trail however contained an icy patch about 25 feet to 35 feet wide and 40 feet to 50 feet in length.[91] The ice patch also contained a bare spot.[92] Plaintiff, a novice skier, was following her neighbor down the left side of the trail,[93] when she lost control on the ice, and was unable to avoid the bare spot causing her skis to abruptly stop and send her flying into the air.[94] The Third Department noted that although icy patches similar to the one plaintiff skied over are deemed

[88] New York Obligations Law § 18-101.
[89] Sytner v. State, 223 A.D.2d at 142.
[90] Id.
[91] Id.
[92] Id.
[93] Plaintiff's neighbor was able to maneuver over the ice and avoid the bare spot. Id.
[94] Id.

inherent to skiing under Section 18-101, the section was not meant to encompass an icy patch as large as the one at issue. Additionally, the defendant did not comply with section 18-103, because they did not maintain the proper signage at the top of ski slopes and trails regarding trail maintenance including snow making.

In Fest v. Apel Capital, LLC, 171 A.D.3d 1016 (2d Dep't 2019), the Second Department determined that the snow mound (commonly known as a snow whale), that infant-plaintiff used to "catch some air" was intentionally placed by the defendant for that purpose and to preserve artificial snow. The snow whale constituted an inherent risk to snowboarding.[95] Additionally, the crevice that plaintiff fell into after catching air, was a natural occurrence of "variations surface and subsurface snow conditions," and considered an inherent risk under section 18-101.[96] For these reason's the Second Department granted the defendant's summary judgment motion.

New York General Obligation Law § 5-326 Waivers

Attending a baseball game is perhaps America's favorite pastime, but few patrons read the fine print on their ticket to a Major League Baseball game. All tickets include a disclaimer generally saying that spectators assume all risks of attending a baseball game. The disclaimers are intended to shield the MLB from liability.

New York's statute addressing waivers provides that a waiver will be deemed to be void as against public policy if:

1. the agreement entered into is between the owner or operator of a recreational facility and the participant;
2. it exempts the owner or operator from liability; and
3. that owner or operator receives a fee in exchange for use of the facility.

[95] Fest v. Apel Capital, LLC, 171 A.D.3d at 1017-18.
[96] Id. at 1018.

The New York General Obligation Law § 5-326 reads:

> Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

Under this section, a waiver can be upheld if the fee paid by a plaintiff was not paid to the owner/operator of the facility, and the language of the waiver must clearly spell out the intent to relieve the defendant of any liability for injuries incurred.[97]

New York General Business Law § 399-dd Play Grounds

New York's playground statute sets forth the following pertaining to the installation, inspection and maintenance of playgrounds:

1. The State shall promulgate rules and regulations for the design, installation, inspection and maintenance of playgrounds and playground equipment in substantial compliance with the handbook for public playground safety produced by the United States Consumer Products Safety Commission; and
2. Play grounds shall be constructed or installed in accordance to the rules and regulations pursuant to this section. (One, two and three-family residential real property are exempt from the requirements of this section).

In Boland v. North Bellmore Union Free School Dist, 169 A.D.3d 632 (2d Dep't 2019), the court found that plaintiff raised a triable issue of fact through her expert's affidavit

[97] Bufano v. National Incline Roller Hockey Assn., 272, A.D.2d 359, 360 (2d Dep't 2000) (See also, Brookner v. New York Road Runners Club, 51 A.D.3d 841-842 (2d Dep't 2008)).

which opined that the ground cover underneath the apparatus from which infant-plaintiff fell, did not meet the standards established by Consumer Product Safety Commission.

OTHER ISSUES SURROUNDING STUDENT ATHLETES

Recent years of heighted attention to the risk of head injuries to NFL players, and the emergence of chronic traumatic encephalopathy (CTE), has now brought heightened attention surrounding the NCAA student athletes, even K-12 public schools,[98] and how to properly assess and treat head injuries before a player is allowed to return to play. Recently the NCAA has been faced with numerous class actions surrounding the concussions suffered by student athletes of all sports, not just football.

The NCAA governs the rules and regulations of players of over 24 different collegiate sports, including what kind of protective equipment can be worn by student-athletes. The rules may differ between male and female athletes for the same sport, like lacrosse. In 2015, the NCAA passed legislation amending Article 3 of their Constitution, requiring Division I Institutions to submit its Concussion Safety Protocol to the Concussion Safety Protocol Committee by May 1 of each year.[99]

Although land owners and operators of the facilities will be able to assert an affirmative defense under assumption of the risk doctrine, when faced with claims of breaching their duty of care, whether other organizations that set standards and regulate sports activities and equipment such as the NCAA will be deemed to have a duty of care to the student athletes as well seems to be the next development in this area.

[98] In 2012, New York enacted 8 N.Y.C.R.R. 136.5 which lays out the minimum standards for public schools and concussion management. (The regulation is mandatory for public schools and charters, and may be implemented by nonpublic schools, if they choose). See Appendix for full statute.

[99] Prior to 2015, the NCAA's Constitution only required that Division I institutions have a Concussion Management Plan for student-athletes. The plan did not have to be submitted to the NCAA for approval.

In Greiber v. Nat.Collegiate Athletic Ass'n, 2017 WL 6940498 (2017), plaintiff a student-athlete alleged she suffered from two concussions from playing women's collegiate lacrosse. The first concussion occurred in 2013, when a ball ricocheted off bleachers, hitting plaintiff in the head.[100] The second concussion occurred almost a year later, when plaintiff and another player slipped on wet grass colliding heads.[101] Plaintiff brought suit against the NCAA (among others), alleging the NCAA had a duty to plaintiff to supervise, regulate, monitor and provide reasonable and appropriate rules to minimize risk of injury to student athletes.[102] In support of her allegations, plaintiff argued that while men were required to wear hard helmets when playing men's collegiate lacrosse, women were not, and by not allowing women to wear helmets, the NCAA exacerbated the risk of sustaining a head injury. The NCAA, in a motion to dismiss for failure to state a cause of action, argued that they did not breach any duty to plaintiff, arguing the NCAA is made up of over 1,000 autonomous member institutions, and did not have a special relationship with plaintiff or any of the other 460,000 student athletes.[103] The NCAA further argued that plaintiff assumed the inherent risks of participating in contact sports.[104] The Supreme Court, Nassau County, denied the NCAA's motion finding that the NCAA prohibited plaintiff from utilizing protective head gear, as they had the authority to make rules and exercised those rules over the safety equipment worn by student-athletes.[105]

[100] Greiber v. Nat. Collegiate Athletic Ass'n, 2017 WL 6940498, at 2.
[101] At the time of plaintiff's accidents, schools were not required to submit their Concussion Management Plan for review.
[102] Id.
[103] Id. at 4.
[104] Id.
[105] Id. at 5.

CONCLUSION

Before you pick up those golf clubs, attend your kid's little league game, or enjoy a trip to Busch Gardens, make sure you read the fine print on your entry ticket, watch where you step and steer clear of foul balls. "Be safe out there."

Appendix

Resources

American National Standards Institute (https://www.ansi.org/)

ASTM International (https://www.astm.org/)

Consumer Product Safety Commission (https://www.cpsc.gov/Regulations-Laws--Standards)

NCAA Sports Science Institute (http://www.ncaa.org/sport-science-institute)

National Operating Committee on Standards for Athletic Equipment (https://nocsae.org/)

Medicine & Science in Sports & Exercise (https://journals.lww.com/acsm-msse/pages/default.aspx)

Statutes

8 NYCRR 136.5 (Concussion management and awareness)

New York General Business Law § 399-dd (Playgrounds)

New York General Obligation Law § 5-326 (Waivers)

New York General Obligation Law § 9-103 (Recreational Use)

New York General Obligation Law § 18-101 (Skiing)

New York General Obligation Law § 18-103 (Skiing)

New York General Obligation Law § 18-106 (Skiing)

Articles

Bowler, T. (Spring, 2015). Legal Corner. The NCAA softball bullpen without a backstop. *The Bulletin, 61* (2), 15-16.

Bowler, T. (Spring, 2013). Legal Corner. Crawford v. Prosser Consolidated School District, failure in planning for an emergency. *The Bulletin, 59* (2), 12-15.

Bowler, T. (Fall, 2012). The "big wooden slide" has a giant splinter leading to litigation. *The Bulletin, 59* (1), 11-14.

Connecticut Association for
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The BULLETIN

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LEGAL CORNER

THE NCAA SOFTBALL BULLPEN WITHOUT A BACKSTOP

Tom Bowler

Disclaimer: *The views represented within this article are solely the opinions and views of the author and not the Connecticut Association for Health, Physical Education, Recreation and Dance. This article is not intended to give legal advice. If legal advice is needed, one should consult with an appropriate attorney within the field.*

Author's Note: *This will be my last article, in the series of several articles, since I am consolidating my work load in consulting. It has been my sincere pleasure serving CTAHPERD over the last thirteen years as your author within this area, which has been a passion of mine within my career.*

In order to protect the identities of the defendant school and plaintiff, I have masked their names and used fictitious names. (This is an actual case that I consulted on back in 2013, which is now settled). The case facts involved the following. The host school (Calin College) located in Calin, Wyoming is a division III college. The plaintiff was attending Kelly College located in Patrick, Wyoming approximately one hour to the south. On April 22, 2012, the catcher on the visitor's team (Kelly College) was removing her catcher's gear at the end of the dugout. On the opposite end of the dugout her teammate was warming up in the bullpen area. When the pitcher was warming up, an errant pitch came over the roof of the dugout and hit the catcher in the face as she was straightening up after removing her gear. Her injuries were significant, since she sustained dental injuries to several of her teeth (namely # 7, 8, 9, 23, 24, and 25). Her dental work had to be redone several times according to the expert witness serving in the capacity of a dentist. Additionally, a plastic surgeon indicated as an expert witness that a scar she sustained on her upper lip could be reduced, however it will always be visible. (As an aside, it should be noted within litigation cases, several experts may be retained for matters which need the services of several professionals to prove their case. In this matter, a dentist, a plastic surgeon and myself were retained by the plaintiff's attorney. In this fashion, each has a contributing area of expertise to add to the plaintiff's position within the case.

I met the attorney representing Lon Augusta (plaintiff) on June 20, 2013, in Calin, Wyoming. The day was perfect with bright sunshine and the air was dry with low humidity. The temperature was in the mid-sixties at the outset of the inspection. My inspection took three (3) hours and twenty (20) minutes. An in depth inspection, of any type of venue will take approximately two to three hours, if it is done correctly. One needs to remember, this inspection was pre-arranged via permission from opposing counsel. This is an important point to remember, which will be revisited within this article. Therefore, as the saying goes, " you only get one bite from the apple". If you fail or forget to take a critical measurement/ photograph in haste, it will cost you in the long run. To do a thorough job, it takes time!

The preliminary steps within my inspection took the form of finding directionality (i.e. the north/south line). The surfacing of the material in the dugout was noted as crushed stone. The only signage within the entire area was the scoreboard. Now, in earnest, once the standard operating notations were made, I set out to determine the height of the dugout. The attorney I was working with placed a stake next to the dugout with a red umbrella for visibility on top of the stake. This represented Lon Augusta's head. The height of the plaintiff was five (5) feet and eight (8) inches. The height of the dugout was five (5) feet and one-half (1/2) inch. Therefore, the "perfect storm" was in place for an injury, if the opposite side of the bullpen was unprotected.

The bullpen did not have a backstop to prevent errant balls from being contained within the area. Notice was given within this case, since an errant ball previously to this incident had come within the dugout. As a makeshift solution, an infield screen was positioned in the bullpen behind the warm-up catcher (not to be confused with Lon Augusta who was at the opposite end of the dugout removing her gear). Since, no backstop was constructed with this bullpen, there were some risk management solutions which may have helped. These are three options which will be discussed in further detail:

- Pitcher had the option of throwing in the opposite direction away from dugout
- Pitcher could have warmed up outside the field of play and the dugout
- Appropriate chain linked fencing could have been provided at the time of construction.

The first option seems so simple, however it is contrary to the NCAA Softball Rules & Interpretations of 2012 and 2013. Rule 2.6 states in part,

> ...The bullpen(s) shall be equipped with regular-size home plates and pitcher's plates placed at regulation distance apart. The pitching plates should be set in dirt, and the home plates **shall have a backstop** if outside the field of play. It is recommended that bullpens be set up **so that pitchers will be throwing in the same direction in practice as when they throw in the game.** (Bold emphasis not in the original p. 30-31)

However, for safety since there was no enclosed sides to the dugout, there should have been at least a bullpen backstop. Rule 2.9 of the NCAA Softball Rules & Interpretations of 2012 and 2013 states in part,

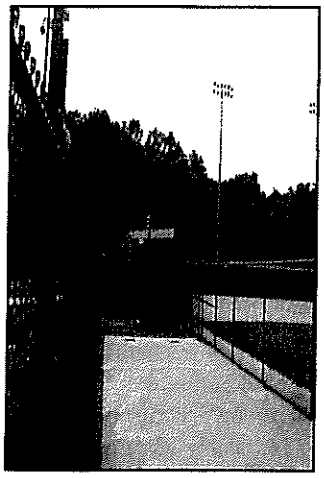
> It is recommended that all intercollegiate softball facilities have dugouts that are enclosed at each end and at the rear. Each dugout must be large enough to accommodate all players and team personnel (approximately 25 people). (p. 31).

In the rules regarding the need for a backstop for the bullpen and enclosed sides of the dugout, defendant attorneys will emphasize the fact the word "recommended" is used.

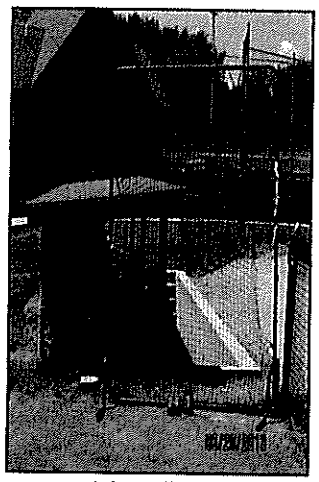
It is not enforceable from their point of view. What is the standard of care? Why do we enclose dugouts and place backstops in bullpens? Ultimately, the answer is for the protection and safety of the players. Using legalese of attorneys, "the burden would have been slight" on the part of Calin College to construct sides to the dugout, as well as, constructing the appropriate backstop. In saving a few dollars for construction, a visiting athlete's life was forever changed.

After, taking several measurements and photographs, the attorney that I was retained by suggested that we should take a look at the men's baseball facilities for comparison's sake. I drove my vehicle to the batting cages area, while he ventured off to the baseball field. I was only at the batting cages area for a few moments and was spotted by a couple of maintenance workers for this private college.They wanted to know what I was doing. Within virtually a minute or so, they called campus security. The attorney came back from his viewing of the baseball field at that point in time. My camera was demanded by their officials. The attorney I was working for would not consent to letting them have the photographs. The "take-away" to be learned is an inspection is only confined to the litigation area. You cannot venture to other areas in the campus, since this was not agreed upon by counsel. Litigation is a learning experience even when you at this game for over twenty years!

We left this campus and headed off to see another softball complex to compare their facilities with the defendant college we just inspected. This drive was relatively short, however the results were not fruitful, since the standard of care was not being observed here either. The attorney indicated he needed to get back to his office and would meet me at another college later that afternoon. He got tied up and I took photographs of this third college bullpen area by myself. On June 25, 2013, I traveled to Eastern Connecticut State University to compare their facilities to the standard of care within the industry. Certainly, one can say their softball facilities are right out of the rule book. As one can see from the photographs, there is a wide range of differences within the spectrum.



Eastern Connecticut State University



Calin College

One needs to check the NCAA rule book, when analyzing a case such as this one. Some may argue rule books do not set standards, however I would disagree. Two other most valuable resources would be Sawyer's book on facilities and Puhalla, Krans and Goatley's on baseball and softball fields.

Lastly, I was never deposed within this matter and the case never went to trial. With most personal injury cases in sports law, most are settled out of court and there is never a need to go to trial. I have been consulting with attorneys throughout the country for over twenty years. In approximately 360 matters, I have been deposed 57 times and only 10 went to trial. The percentage going to trial in my cases works out to slightly below three (3) percent. Attorneys rather settle if they could do so, since the insurance companies will make an offer, which is guaranteed if the plaintiff is willing to accept the offer. Trials are "crap" shoots with juries. Sometimes you win and sometimes you will lose. It is most difficult to "read" how jurors will react. Slam dunk cases don't always mean large settlements. You may lose cases you think are slam dunks!

In closing, as I am finishing my last article, it is my sincere hope that the membership has gained some insights into the legal profession. I have enjoyed writing these articles over the last thirteen years. Sometimes the deadlines didn't always match perfectly with my overloaded work schedule. Hence, the reason for backing off at this point in time. My sincere best wishes to the CTAHPERD membership.

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Physical Activity In The News

Los Angeles Times, July 28, 2014

People who jogged or ran for as little as five minutes a day reduced their risk of premature death by nearly one-third and extended their lives by about three years, according to a new study.

Researchers examined the exercise habits of more than 55,000 adults in the Dallas area who were monitored for six to 22 years. About 24% of the adults described themselves as runners.

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LEGAL CORNER

THE "BIG WOODEN SLIDE" HAD A GIANT SPLINTER LEADING TO LITIGATION

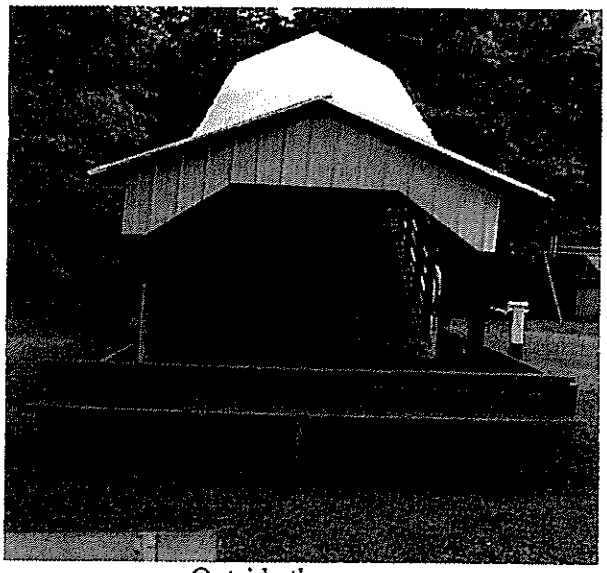
Tom Bowler

Disclaimer: *The views expressed within this article are not the official opinions of the Connecticut Association for Health, Physical Education, Recreation and Dance. I have expressed many personal opinions. If legal advice is needed by the reader in the future, one should seek the expertise of an attorney competent within this field.*

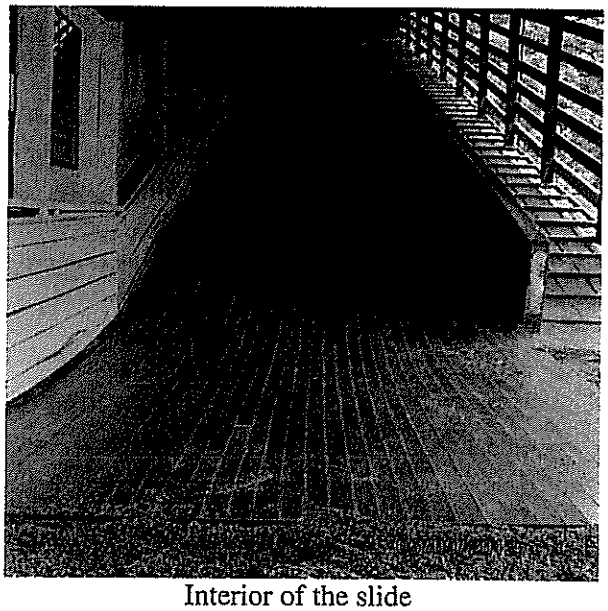
Physical Characteristics of the Sliding Board

I was retained by a firm in Rockville, Maryland recently to investigate a sliding board incident, which occurred on land owned by two combined churches. The sliding board was somewhat different from the usual "run of the mill" sliding boards, which one would encounter at an elementary school or a public park. This sliding board was enormous in stature. To give some perspective, it was twenty-two [22] feet off the ground. To get to the top, one had to walk up a ramp, which had wooden cleats nailed to the incline. The slide had a roof enclosure. One wall on the west side was completely enclosed. The opposite wall had wooden boards nailed with spaces which actually created head entrapments issues. However, this had nothing to do with the incident and would not be admissible in court, since it would be prejudicial to the opposing side. The sliding surface was seven [7] feet wide. The total length from the top to the bottom sawdust pit was seventy-four feet [74'] and six inches [6"] long! The wooden surface was made from hardwood maple and had four [4] undulating ripples overall. The participants would use burlap sacks to gain speed going down the incline.

After doing some research on this case, there is only one other wooden slide, in the United States, which could be compared to the incident slide which is located in Rocky Ridge, Maryland. The other wooden slide is located in Philadelphia at East Fairmount Park at the Smith Memorial Playground. This playground is one of the oldest in the United States, since its inception was 1899. I had the honor of investigating a defendant matter there a number of years ago, however it was not in 1899!



Outside the canopy



Interior of the slide

Background of the Incident on the Giant Slide

On August 17, 2010 an eight year old boy was attending the annual firemen's carnival at Mount Tabor Park, located in Rocky Ridge, Maryland. [Rocky Ridge, Maryland is approximately one hour north of Baltimore, Maryland]. It is a rural community with many farms. The wooden slide was originally built in 1950 and burned down. Shortly after that occurrence, it was rebuilt again. It has been a tradition for the public within the community to use the slide, in spite of the fact, it is on private property. It is a known fact the slide was open to the public. There is signage indicating "Use All Facilities At Own Risk" and "Not Responsible for Accidents". It should be pointed out there was another splinter issue with a former case in 2006. Therefore, the churches had actual notice of a previous occurrence. Inspections for this slide occurred

on a random basis, without a designated person being in charge. No written records were kept on inspections. Therefore, there was no paper trail to actually see how and what was inspected. The minutes of the board of directors for the churches were sketchy and did not give a great amount of detail. However, the slide was addressed in many meetings.

Nature of the Injury

An eight [8] year old boy decided to slide down on his stomach from the top of the slide. Approximately halfway down the long slide bed, he was impaled by a wooden splinter reported to be anywhere from one quarter [1/4] of an inch wide to twelve [12] inches long! In fact, the ambulance record reported the splinter to be as long as eighteen [18] inches and anywhere from one-quarter [1/4] to two [2] inches in width. [Tom Bowler's personal notes]. The splinter impaled his abdomen area. He was pinned on the slide for approximately forty-five [45] minutes, until emergency personnel were able to free him off the slide. The emergency personnel used a utility knife, an air saw, and a screwdriver to help free him from being impaled on the slide. [Tom Bowler's personal notes]. The rescue effort was made very difficult by the nature of the slide, since it was very slippery. The father of the boy was able to support him on the slide, while rescue workers attempted to free him. Fortunately, some emergency medical personnel were on site, since it was a carnival for the firemen's annual festival. The boy was flown via life star helicopter for treatment. It should be noted part of the splinter was still lodged in the boy, when he was air lifted.

Inspection of the Slide

This slide did not fit the "cookie cutter" specifications of the U. S. Consumer Product Safety Commission, nor the voluntary standards of the American Society for Testing and Materials International. Therefore, these documents could not be cited within this case. I flew from Bradley International Airport to Baltimore/Washington International Airport [BWI] on May 08, 2012. I stayed just a few minutes from the airport at a Fairfield Inn for the evening. My inspection was scheduled for 11:00 am the next morning in Rocky Ridge, Maryland. I scheduled a driver to pick me up the next morning. The complete fee would be $260.00 for the roundtrip [approximately two hours, plus "wait" time for my inspection]. Certainly, this was most reasonable.

My driver was most prompt and picked me up at the front of the lobby at the agreed time. He was most congenial and we were able to make it to the site with plenty of time to spare. He was not trained in playground safety, however upon being presented with this slide, he immediately indicated to me it was dangerous!

As with most legal inspections, attorneys from the various parties will be on the premises to protect their client's interests. The boy's father was the first to arrive. I had spoken on the phone with the two plaintiff attorneys who retained me, however we had never met previously. They arrived and we greeted one another. The president of the combined church board was in attendance. The plaintiff attorneys also retained a photographer to take high resolution pictures of the slide. I usually take approximately one hundred [100] photographs at any inspection, however I am not a professional photographer. Lastly, the defendant attorney was also on the premises.

Generally speaking, most attorneys do not comprehend or understand the complete nature of inspections. Legal inspections are not a "walk through" with a clipboard and a fifteen [15] minute "see you later" investigation and a "walk in the park". The following items need to be addressed during any inspection and recorded: date and time; weather conditions; indoor vs. an outdoor site; approximate temperature; name of site/school; street location; city and state; compass reading for directionality; type of venue, i.e. playground or field; type of element i. e. slide vs. horizontal ladder; manufacturer; surfacing material; depth of surfacing if applicable; listing of tools utilized to ascertain measurements and evaluation; and a diagram with measurements [if necessary].

I calculated the height of the slide by dropping down the metal blade of a twenty-five [25] foot tape to one of the plaintiff attorneys to hold it, while I was on the take-off decking above. Some websites listed the height as forty [40] feet, however this was not accurate. Even with the distance to the roof canopy, this would not be accurate. I was able to measure the width of the slide and total length. I used my compass to determine the north/south line. My garden trowel came in handy in assessing the depth of the sawdust material. Certainly, an essential "tool" to any inspector is a camera to record what was present during the inspection. It is critical to make a CD-Rom as soon as time permits as a back-up source, when the inspection is complete. Saving the photographs under a file labeled "pictures" is fine, if the computer does not "crash". With a CD-Rom, you are insured the pictures will be saved. Some of my sites are literally across the entire span of the United States, if your computer crashes, or the photographs are accidentally erased by someone, the valuable evidence is lost.

It was our understanding the slide had obviously been repaired since the August 17, 2010 incident. Therefore, the evidence was not the same. Critical to the proximate cause of the injury was a splinter, therefore any telltale sign of this would be helpful to any investigator. It was pointed out a repair had been made with wood putty in a divot in one of the tongue and groove boards. Whether this was the actual incident site, it is unknown. As in many cases, the attorneys are busy with other cases and it is not their sole purpose to stay for an entire inspection many times. The two plaintiff attorneys left along with the president of the church board, the plaintiff's photographer and the plaintiff's father. This left just the defendant attorney and myself at the scene. Certainly, a cardinal rule would be not to discuss any opinions or findings with this opposing attorney. We exchanged just pleasantries regarding my present residence in Florida. Within a few minutes, I had enough photographs. Lastly, I did want to measure the anticipated gaps in the east side wall to determine, if head entrapments existed. Within a few minutes of finishing, my driver and myself were back on the road heading to my motel. Prior to the plaintiff attorneys leaving they were joking with the defendant attorney, if she wanted to take my deposition, when I completed the inspection. [Obviously, this was only a joke, since a deposition would require a court reporter to be at the scene to record all questions and answers electronically]. Additionally, it would never be wise for an expert to "roll into" a deposition immediately after an inspection. One needs time to assess the data and reflect on it. Also, I would never go to a deposition without being properly dressed [i.e. business suit, white dress shirt, tie, and dress shoes] as would be the expectation in the legal field.

Deposition of Tom Bowler

My deposition was scheduled for June 28, 2012. Astute attorneys will want to prepare their experts one day in advance, with sample questions which may be raised by the opposing side. The plaintiff attorneys had a conference call with me on June 27, 2012. To save money the defendant attorney wanted to do a video deposition, in order that I would not need to fly to Maryland from Florida. I found a reporting service in Rockledge, Florida which is just a twenty [20] minute drive from Merritt Island. The two defendant attorneys and the two plaintiff attorneys were back in Maryland and I was able to see them on the monitor. In turn, they were able to see me. I anticipated the typical two hour deposition, however the deposition lasted only one hour and I was free to leave. The lead defendant attorney on the case wanted to know my opinions relative to the matter. One critical opinion was the fact the churches' inspections were random and there were no written records. I cited the East Fairmount Park playground, where a similar wooden slide exist and it is inspected every Monday.

One significant point was the signage. Stating "Use All Facilities At Own Risk" would NOT be descriptive of exactly what the risk is one is trying to avoid. The user has no indication of the dangerous areas. Perhaps, a better warning may have been, "Use the Slide At Your Own Risk, Beware of Wooden Splinters!"

The deposition went well. The plaintiff attorney wanted to speak with me via telephone at some point in time. When we chatted a week or so later, he indicated the defendant attorney wanted copies of some lectures I had given, which are listed on my curriculum vitae. We discussed the fee to be associated with researching all of his request. It appeared they were serious in getting information they hoped would assist them at trial. The trial was scheduled for the week of October 03, 2012. On July 11, 2012, I received to my astonishment an e-mail from one of the plaintiff attorneys that the case settled at mediation! In the legal field, you just never know.

Settlement

The original complaint within this matter was seeking $500,000.00 for damages. However, attorneys know their claims will not be realized, so they aim higher to get some sort of a settlement. Attorneys for a plaintiff really never want to go to trial, if a legitimate settlement offer is "on the table". At a trial, many things can go wrong, in which case, the plaintiff may go home without any verdict in their favor and perhaps bills to pay for the attorney's services. It is akin to going to The Mohegan Sun and gambling. It is not a sure bet, no matter how much the case seems like a "slam dunk". The plaintiff attorney will try to "read" the jury to see, if they are winning over some members. However, this is difficult to do, since there is absolutely no communication between parties. The jurors have no contact during breaks with the attorneys or the experts. One needs to be careful traveling within the court hallways to avoid coming into contact with jurors. The court cafeteria would be a common space, an expert may eat and find jurors there. The best course of action, if time permits, is to leave the premises and eat somewhere else as an expert.

The damages sought within the complaint were not realized in this case. The mediation agreed upon a court settlement of $60,000.00. See, www.thedailyrecord.com/.../md-boy-church-settle-big-splinter-injury-suit/ This is a far cry from $500,000.00. However, professionals do study verdicts in cases. One cannot expect to exceed what an injury is worth.

Summary

The "take away" lessons from this case are many. First of all, not all recreational facilities fit neatly into a standard one can cite. Secondly, in spite of the fact, several head entrapments existed, this was not proximate to the child's injury and had no basis for being cited. Thirdly, I believe research within this case proved helpful. The slide in East Fairmount Park showed this element was inspected on a regular basis each Monday. Lastly, what one seeks in a complaint and what one actually receives as a settlement are quite different at times. In the environmental movie, *Civil Action*, which casts John Travolta as the plaintiff's advocate, [i.e. Atty. Jan Schlichtmann] one famous quote from this movie is, "The odds of a plaintiff's lawyer winning in civil court are two to one against. Think about that for a second. Your odds of surviving a game of Russian roulette are better than winning a case at trial. 12 times better. So why does anyone do it? They don't. They settle."

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www.tbd.com/.../boy-impaled-by-foot-long-splinter-speaks.

Tom Bowler taught in the Vernon Public Schools for thirty-three [33] years prior to his "retirement" in 1999. Most of his career was spent at Maple Street School in the Rockville section of Vernon. He has been involved in over three hundred and twenty [320] cases in the last twenty [20] years acting as an expert witness on behalf of either the plaintiff party or defendant party. He has been deposed forty-seven [47] times. He has testified at trials in New York State, Connecticut, Massachusetts and Maryland for a total of ten [10] appearances. He has also appeared at one [1] arbitration hearing for a case. Tom received his B. S. degree in physical education from the University of Connecticut in 1966. His master's degree [M.Ed.] was earned at Springfield College in 1973 in physical education. Tom has a Certificate of Advanced Graduate Studies [CAGS] [30 credits] from the University of Connecticut in 1981 in the administration and supervision of special education. At Eastern Connecticut State University, Tom served as an adjunct, as well as director of intramurals and recreation. Tom was also an adjunct at Central Connecticut State University teaching a course to exercise science majors in "the application of tort law to physical activity". He taught a graduate course at Central entitled, "sport, physical education, athletics and the law". He is certified by two nationally recognized playground agencies. Namely, he earned his Certified Playground Safety Inspector [CPSI] from the National Recreation and Park Association. Also, he earned his S. A. F.E. certification from the National Program for Playground Safety. He keeps both certifications current. Tom currently splits his residence between Florida and Connecticut during the year with his wife, Lonny, who he has been married to for forty [40] years.

Connecticut Association for
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Recreation, and Dance

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CRAWFORD V. PROSSER CONSOLIDATED SCHOOL DISTRICT

FAILURE IN PLANNING FOR AN EMERGENCY

Tom Bowler

Disclaimer: *The views expressed within this article are not the official opinions of the Connecticut Association for Health, Physical Education, Recreation and Dance. I have expressed many personal opinions. If legal advice is needed by the reader in the future, one should seek the expertise of an attorney competent within this field.*

Chalyn Crawford was a middle school student attending the Housel Middle School located in Prosser, Washington. On October 15, 1996, she was in a mandatory physical education class running the mile on the school's track. Approximately, fifty yards from the finish line, she started to stumble. At that point, her physical education teacher, thought she was tiring and cheered her on with some encouragement. She ultimately fell. Actually, Chalyn was going into cardiac arrest. She was without oxygen for a significant amount of time. Therefore, she is impaired today and requires 24/7 care. What follows shows the school's lack of appropriate planning for emergencies.

Note: The dome marker to the right of the measuring tape is the approximate location where Chalyn stumbled and fell. [Photo by Tom Bowler, Housel Middle School, Prosser, Washington, 8/12/2010].

When Chalyn was down on the track, she was moved off to the side. Her teacher came over to her along with some students. The physical education teacher was doing rescue breathing and checking for her pulse. Another teacher on a lower field came up and indicated to her that she had to do chest compressions as well. Amidst all the confusion, several students [both boys and girls] were sent off to the office which was a considerable distance away. It was reported by one assistant secretary that there were ten to fifteen students that were in the office. At first, it was difficult to understand them, since they were obviously excited and out of breathe. At that time, a "911" call was initiated.

The physical education class ended at 1:50 pm in the afternoon. We do not know the precise time Chalyn fell down and was going into cardiac arrest. However, using this as a baseline and making the assumption she went down at this time, the ambulance records indicated they departed at 2:04 pm from their site and arrived at 2:06 pm. If we assume this is the best case scenario, Chalyn was without expert emergency medical care for at least sixteen minutes. In fact, the emergency medical technician indicated within her deposition, she didn't have a heartbeat. They gave her one shock and did CPR for one minute. Ultimately, they did pick up a pulse. From 2:15 pm to 2:22 pm, Chalyn was suctioned, hyperventilated and an IV was then started in the ambulance. Because of her anoxic injury, she had cognitive nerve injury and neuromuscular injury which will limit her in the future regarding her total physical/mental capacities.

The Crawford family initiated the lawsuit in December of 1999. However, when the lawsuit was originally tried, the settlement amount was only $585,000. The Crawfords did not want to consent to this settlement, since it would not meet Chalyn's long term requirements for care. They in turn, retained the firm of the Connelly Law Offices out of Tacoma, Washington. I was contacted on this matter and retained by this high profile firm. In addition to myself being retained, the Connelly Law Offices hired two pediatric neurologists, an athletic trainer, a former superintendent of schools, a physical education department head at Minnesota State University, a human factors expert, a communications device expert, an emergency response planning expert from the University of Florida, a life care planner, an economist, and a vocational rehabilitation expert. High profile firms can and will spend the money to enhance their chances of winning.

In August of 2010, I flew from Orlando to Tacoma, Washington for the purpose of inspecting the school site. Within litigation, it is paramount to always inspect the site first hand, prior to giving any type of testimony. I left for Tacoma on Wednesday, August 11, 2010. On August 12th, I met two plaintiff attorneys at their office a short walk from the hotel where I was staying. Additionally, I met another colleague from the University of Florida. The four

of us had a three hour trip west going out to Prosser, Washington. We arrived at the middle school. Not all the aforementioned experts were assembled there for this inspection exercise. However, there were at least five experts on site for the investigation. The day was sunny and dry, however it was hot at approximately eighty degrees. My inspection started at 11:58 am and concluded at 2:00 pm. The task was to measure a pre-determined pathway the runners sent to the office took that fateful afternoon of October 15, 1996. I used in lieu of a walking wheel, a three hundred foot tape measure. The human factors expert along with his secretary tagged along with me to record our distances. Since, the entire measurement was in excess of three hundred feet, we kept on moving the tape and would have to add up the cumulative scores. As I totaled the measurements that evening, the total distance ran was approximately one-quarter of a mile. In fact, Atty. Connelly on our way out to Prosser, Washington, called ahead to get some middle school youngsters to run the course to determine how long it would take them to cover the distance from the field to the office. As with most investigations which take place over time the school configuration had changed as well as the original office.

After my investigation was complete, we settled in for lunch at a nearby restaurant. The trip back to Tacoma would place us there in excess of 5 pm. At that time, more material was given to the expert from the University of Florida and to myself to review that evening. The two of us had supper and then headed back to our respective hotel rooms to prepare for our depositions on Friday, August 13, 2010. My deposition took most of the morning. The expert from the University of Florida went in the afternoon. We were able to meet for supper that evening. I flew out of Tacoma the next day on Saturday, August 14th for Orlando.

The life of an expert can be very stimulating, however at the same time very tiring! The three hour time zone change doesn't help your body clock. With little time to adjust from traveling, the next day you are doing an inspection with the follow-up day as the testimony day. Ideally, it would have been easier to have another day to prepare for the deposition, however attorneys will not pay for excessive expenses.

The defense filed a motion for summary judgment on this matter. Summary judgment is defined as, "A judgment granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law". [Black's Law Dictionary, 1999, p. 1449]. In other words, summary judgment if granted, means there are no facts which support the other party's position which would necessitate the reason to move forward with a trial. The defense motion was denied this motion on January 21, 2011. The plaintiff did prevail in the amount of $2.5 million. Again considering Chalyn Crawford's need for lifelong continual care, this money is not the astronomical figure it appears to be. It was interesting to note the settlement date for this case was January 28, 2011, which was one week prior to trial. As with most personal injury cases within physical education, recreation, athletics and playgrounds, most of them settle out of court without the benefit of going to trial. As has been mentioned previously within this column, a trial is a crap shoot and one can lose everything. Attorneys' fees can be very financially draining on your income. It is always better to settle for a lesser amount than going away with nothing at all. However, the Crawford matter is an example of a family pulling together and not accepting the offer in the initial case by having the case tried again.

What was the key issue within this case? The school system did not have in place a written emergency action plan. The communication devices used back in the middle 1990's were just becoming the standard of care within the profession. Cell phones were used by the Prosser School Consolidated District, however they were used to alert parents waiting for athletic teams to return back to school. Walkie talkies were being used at the elementary school level for recess, however, neither the device of the cell phone or walkie talkie were used on October 15, 1996, thus creating a great deal of confusion for all concerned. Sending students as messengers is the least desirable way to communicate with the front office personnel during an emergency situation. The physical education teacher was trained in CPR, however she panicked and did not respond appropriately to the situation. She probably acted as most physical educators would under the circumstances. It must be remembered that heart attacks are extremely rare with this population. However, that does not negate the formulation of a sound written plan.

Emergency action plans were just coming into their own within the 1990's. There is one significant landmark case to point to, which is often used as the "poster child" as to how not to perform in emergency situations. This is the *Kleinknecht v. Gettysburg College* case, in which a lacrosse player suffered a heart attack and died. This significant case in emergency action plans or lack thereof, is often cited in the literature in sports law. Drew Kleinknecht was practicing lacrosse at Gettysburg College in the fall of 1988. On September 16, 1988, he dropped onto the field and never recovered. He died of a heart attack. Coach Janczyk and Coach Anderson did not have communications devices with them. Additionally, neither was trained in CPR. Student trainers were not part of this fall practice. The telephone nearest to the incident site was 200-250 yards away. [In Cotten & Wolohan, p. 113-116]. Ultimately, an EMT came along to assist the Head Trainer,

Joseph Donolli with CPR. Within the case description, this EMT assisted Head Trainer, Joseph Donolli, and it states, " Donolli saw that Drew was not breathing, and turned him on his back to begin CPR with the help of a student band member who was certified as an emergency medical technician and had by chance arrived on the scene." [In Cotten & Wolohan, p. 113].

The mystery of who this phantom emergency medical technician has been finally solved. Sometimes you just get lucky with research. In doing research regarding the Kleinknecht case for a presentation with two other colleagues, I recalled a faculty member at my school had a son who went to Gettysburg. I communicated with him. His son graduated in the spring of 1988, however his wife did still go there in the fall of 1988. By coincidence, they just so happened to have a friend from Gettysburg College visiting this winter. They began talking and the gentleman identified himself as the EMT within the Kleinknecht matter. His name is Jeff Herman. He was a senior when this incident occurred to Drew Kleinknecht. However, according to my dialogue with him, he did not come upon the incident by chance, which has been reflected within the reporting of the case. He had a pager and initially was told a lacrosse player got struck in the throat. Mr. Herman got on his motorcycle and went to the scene and began chest compressions while the head trainer continued with mouth to mouth resuscitation. He continued chest compressions for forty-five minutes. However, he knew at that point in time Drew was dead. His airway was completely blocked. It is often reported that Ms. Traci Moore, a student trainer, from Musselman Stadium, was there, however, he knew her, but did not recall her being at the incident scene. [Personal telephone call between the author and Mr. Jeff Herman, winter, 2013].

The cases [Crawford and Kleinknecht] are extremely alike in many regards and have interesting parallels. These can be enumerated as follows:

1. *Both students collapsed.*
2. *Both students went into cardiac arrest.*
3. *Both students had no history of heart problems.*
4. *Both cases demonstrate the confusion after an emergency.*
5. *Both cases had no radio or communication devices.*
6. *Both cases maps were developed to determine how long it would take runners to get to telephones.*
7. *Both cases demonstrate the responses which existed at that time, i.e. 1988 and 1996.*
8. *Both cases demonstrate there were no written emergency action plans.*
9. *Both cases were sent to another court to be heard again.*
10. *Both cases had dire results-Chalyn Crawford is still alive, however needs constant care.*

Does your school have an emergency action plan? If you are a student teacher, do you know what to do at your assigned school in the case of an emergency situation? Many times I pose this question, to students who are out in the field significantly into their student teaching experience. Unfortunately, many have not inquired of their master teacher as to the appropriate protocol, when an emergency occurs. Training and knowing exactly what to do is critical to the situation. Every teacher in the United States needs to know the timing it would take for an ambulance to reach their school in a time of crisis. Every teacher in the United States needs to know what the "back-up" ambulance time would be, if the primary server was out on another call. When I taught, the time for an ambulance to reach Maple Street School in Rockville, Connecticut was five minutes. However, the back-up ambulance would be responding from Tolland, Connecticut and it would take fifteen or more minutes to reach our school. Therefore, the first responder's time would be excellent, however the second responder's time would not be ideal as applied to the Chalyn Crawford's fact pattern.

Conclusions

We are much more sophisticated now than we were twenty-five years ago since the Kleinknecht matter. We are certainly more prone to using communication devices now, as opposed to the Chalyn Crawford matter, which occurred in 1996. The technology is more sophisticated. Cell phones have become small computers in and by themselves. The size is greatly reduced and the functions with a smart phone are greatly enhanced. I would implore any professional reading this column to investigate their school's plan to bring their emergency action plan up to date. With the Crawford case, it was reported by one of the neurologists that Chalyn beat the odds and it was a miracle that she even lived. Most students with similar circumstances would have succumbed.

Emergency action plans are not just for catastrophic injuries. Certainly, within a school setting a variety of injuries may occur. It is rare that a cardiac arrest would occur to students. Perhaps, faculty members, administrative support help and custodial help would be more prone to cardiac problems within a school population. Lastly, do you know how to act if someone within your classroom had an emergency? Do you have a written plan? If not, would you consider developing one for your school?

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Personal files, Exhibit 2, from deposition of Tom Bowler, Connelly Law Offices, Tacoma, Washington. August 13, 2010.

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S A F.E. certification from the National Program for Playground Safety. He keeps both certifications current. Tom currently splits his residence between Merritt Island, Florida and Niantic, Connecticut during the year with his wife, Lonny, who he has been married to for forty [40] years.

Ethical Concerns Facing Modern Litigation: Integrity, Impartiality and Competence

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Administrative Judge of Civil Matters | Supreme Court Broz County

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Defense Counsel Ethical Considerations Presentation
by Rod Coyne

We all set out as attorneys-at-law in New York State by taking an oath. It is the oath that binds us to our ethical obligation so let's begin with it.

The Oath:

Section 466 of the Judiciary Law provides:

> Each person, admitted as proscribed in the chapter must, upon his [or her] admission, take the constitutional oath of office in open court, and subscribe the same in a Roll or a book, to be kept in the office of the clerk of the appellate division of the supreme court for that purpose.

Section 1 of Article XIII of the New York State Constitution sets forth the language of the oath:

> I do solemnly swear (or affirm) that I will support the constitution of the United States and the constitution of the State of New York and that I will faithfully discharge the duties of the office of [attorney and counselor-at-law], according to my ability.

The terms of the oath requires, among other things, that attorney in assuming the legal concerns of his or her clients to give sound legal advice, and loyally and conscientiously fulfill the tasks associated with the transaction of the client's legal business.

The Rules of Professional Conduct:

These Rules, adopted by each Appellate Division in 2009, provide the standard for measuring attorney misconduct.

Statement of Client's Rights:

22 NYCRR 1210.01 requires every attorney with a New York office to post a Statement of Client's Rights in a manner visible to clients.

Defense Counsel Perspective:

Rule 1.5 (b) requires an attorney to communicate to the client the scope of the representation and the basis for the rate of the fee and the expenses for which the client

will be responsible - before or within a reasonable time following the commencement of representation.

A lawyer is obligated to consult with a client about the means by which a client's objectives are to be accomplished and to keep the client reasonably informed about the status of his or her legal matter including material developments in the client case (Rule 1.4). The decision to accept or reject a settlement offer is within the province of the client, not the lawyer (Rule 1.2).

Irrespective of whether an attorney was retained or assigned, the failure to properly communicate with a client is a source of frequent complaints, and may result in disciplinary action.

Tripartite Relationship in Settlement Proceedings - (Not always three part harmony!):

When a defense is provided to a client pursuant to a liability policy it creates a tripartite relationship among the client, the carrier and defense counsel. [add citation]

This relationship in certain instances may lead to conflicts during settlement negotiations.

> [W]hen a plaintiff makes a settlement offer within the policy limits, "an inherent conflict arises between the insurer's desire to settle the claim for as little as possible, and the insured's desire to avoid liability in excess of the policy limits." *Pinto v. Allstate Ins. Co.*, 221 F. 3d 394, 399 (2nd Cir. 2000) (citing *Smith v. General Accident Ins. Co.*, 91 NY 2d 648, 697 NE 2d 168,
>
> 170-171 (1998)).

A typical G.L. policy provides:

> [The insurer] will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any "claim" or "suit" that may result.

The Rules of Professional Conduct still apply to defense counsel representing a client within the context of the tripartite relationship.

When attorneys are retained by insurance companies to defend their insureds in an action for damages covered by their policy, the insureds are nonetheless clients of the retained attorneys. *Turzio v. Ravenhall*, 34 Misc. 2d 17, 227 NYS 2d 103 (N.Y. City Ct. 1962). When the attorney, compensated by the carrier, assumes the duty of representing

the policy holder the attorney owes the client — the carrier's insured— an undeviating and single allegiance.

Instances where problems arise:

- Defense counsel does not convey to client (insured) probability that a jury would find in favor of the plaintiff and render a verdict in excess of client's coverage.

- Defense counsel fails to convey to client plaintiff's willingness to settle within policy limits/possibility of client's exposure to excess verdict.

- Defense counsel fails to communicate to client that it may retain own counsel to get involved in settlement discussions considering verdict in excess of coverage.

Consideration beyond strictly ethical considerations:

Counsel assigned by primary insurance carrier will also be well advised to keep its excess carrier(s) apprised of negotiations. The excess carrier will, of course, have a strong interest in seeing that a matter is resolved within the limits of the primary layer. The excess layer of coverage gives rise to what is sometimes referred to as the "quadpartite relationship." A failure to keep the excess carrier apprised of negotiations – coupled with a damages verdict – beyond the primary layer of coverage may well result in a lawsuit by excess against defense counsel. No one wants that.

Bad faith:

A failure by defense counsel to communicate clearly and effectively regarding settlement negotiations has been deemed an important component in a "bad faith" action by the client against the carrier. See for example Tavares v. American Transit Co. 2011 slip opinion where the court ruled that the carrier knowingly ignored the probability that a jury would find in favor of plaintiff and render an excess verdict – and failed to communicate to the insured (defense counsel's client) that plaintiff in the underlying personal injury action) was willing within the policy limits.

168 A.D.3d 428, 88 N.Y.S.3d 875 (Mem), 2019 N.Y. Slip Op. 00057

*1 Steven Grant, Appellant,
v
Arcodio A. Almonte, Respondent.

Supreme Court, Appellate Division, First Department, New York
20112/14E, 8025N
January 3, 2019

CITE TITLE AS: Grant v Almonte

HEADNOTE

Stipulations
Stipulation in Open Court
Requirements

Parker Waichman LLP, Port Washington (Jay L.T. Breakstone of counsel), for appellant.
Marjorie E. Bornes, Brooklyn, for respondent.
Order, Supreme Court, Bronx County (Doris M. Gonzalez, J.), entered December 12, 2017, which denied plaintiff's motion to restore the action to the trial calendar, unanimously reversed, on the law, without costs, and the motion granted.

The requisite formality necessary to accord an oral agreement binding effect as an "open court" stipulation under CPLR 2104 was not present when, following a pre-trial conference at which an unidentified per diem attorney appeared for plaintiff, the matter was marked "settled" in the court's records. There was no indication of the terms of the settlement, and the agreement was never further recorded, memorialized, or filed with the County Clerk (*see Velazquez v St. Barnabas Hosp.*, 13 NY3d 894 [2009]; *Andre-Long v Verizon Corp.*, 31 AD3d 353, 354 [2006]; *compare Harrison v NYU Downtown Hosp.*, 117 AD3d 479 [1st Dept 2014]).
Concur—Sweeny, J.P., Gische, Kahn, Oing, Singh, JJ.

McKinney's Consolidated Laws of New York Annotated
Civil Practice Law and Rules (Refs & Annos)
Chapter Eight. Of the Consolidated Laws
Article 21. Papers

McKinney's CPLR Rule 2104

Rule 2104. Stipulations

Effective: July 14, 2003
Currentness

An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

Credits
(L.1962, c. 308. Amended L.2003, c. 62, § 28, eff. July 14, 2003.)

Editors' Notes

SUPPLEMENTARY PRACTICE COMMENTARIES

by Thomas F. Gleason

2016

CPLR 2104 Stipulations.

Sylla v. 90-100 Trinity Owner LLC (135 A.D.3d 501 [2016]) points out that a valid stipulation can deprive the court of jurisdiction for appellate review, because neither stipulating party is aggrieved by an order to which they stipulate. In *Sylla*, the First Department declined to entertain an appeal of an order entered upon a written stipulation signed by counsel in accordance with CPLR 2104, and "so ordered" by the court below.

The order sought to be appealed granted a motion for summary judgment dismissing the complaint. The order was not affirmed by the Appellate Division, but rather the appeal was "dismissed." The dismissal reflects the lack of jurisdiction to entertain the appeal, because there is no case or controversy on matters on which the parties agreed in a CPLR 2104 stipulation.

Papers Constituting A Written Stipulation.

In *Matter of George W. & Dacie Clements Agricultural Research Institute, Inc. v. C. Bruce Green, Assessor of the Town of Lisbon, et al.* (130 A.D.3d 1422 [2015]), the Appellate Division Third Department considered an appeal from an order of the Supreme Court denying petitioner's motion for summary judgment to enforce a settlement between the parties to a real property tax dispute. The proceedings were brought under the Real Property Tax Law on behalf of a not-for-profit corporation that sought an exemption from real property taxes based on its non-profit activities. The petitioner operated a farm, a restaurant and a bed-and-breakfast, but also provided the public with training and educational information concerning organic and biodynamic farming and gardening. The requested tax exemption was denied, and in the course of the ensuing tax challenges the representatives of the parties engaged in written correspondence concerning potential settlement.

The Supreme Court, after a careful review of the writings that formed the basis for the purported settlement, concluded that no binding agreement to settle had been reached. On appeal, the Third Department affirmed. Justice Devine's opinion explains how writings between parties discussing the possibility of settlement can form the basis for a subsequent settlement, if the proposed settlement is adequately described, and the later writings confirm consent to the proposed agreement. Such writings taken together must indicate mutual accord and all the material terms of the agreement.

Thus, a settlement agreement can result when writings explicitly incorporate the terms of other documents prepared in anticipation of settlement. By way of contrast, however, proposed settlement writings do not reflect agreement if they expressly anticipate a subsequent writing that will officially memorialize the existence of the settlement and the material terms of the accord.

In the documents before the court in *Matter of George W. & Dacie Clements Agricultural Research Institute, Inc.*, it was clear that one of the parties

"took pains to describe the proposed settlement hypothetically." Therefore, the writings taken together "evidence nothing more than an 'agreement to agree' to the amplified terms of a future writing ...." Such writings were "incomplete as to all terms necessary necessarily material to any settlement of the proceedings of the instant proceedings, "and thus no settlement ensued. The case represents the benefit of clarity that comes with a bilaterally signed document that complies with CPLR 2104.

Can Performance Reflect A Settlement Agreement?

In *Martin v. Harrington* (139 A.D.3d 1017 [2016]), correspondence was exchanged in an action involving property line dispute. The defendants in the case alleged that approximately six months after the action was commenced, the parties had entered into a settlement agreement. The plaintiff's then counsel had sent a letter to the defendants proposing that the plaintiff would discontinue the action if the defendants satisfied certain conditions. The defendants apparently satisfied the proposed conditions of the settlement, but the action was not discontinued. Approximately three years later the plaintiff (apparently with a new attorney) complained that the defendants still were encroaching upon her land.

The defendants moved to enforce the settlement and dismiss the complaint. The settlement was enforced and the complaint dismissed by the Supreme Court, and on appeal the Second Department affirmed, holding that the material terms of the settlement were contained in plaintiff's attorney letter, and the attorney had apparent authority to settle the case on plaintiff's behalf. The Appellate Division held that the exchange of correspondence between the attorneys for the parties, in conjunction with the defendants' completion of the tasks demanded in the settlement without any objection by the plaintiff, was sufficient to constitute an enforceable settlement agreement.

The paperwork in *Martin* was messy, and endangered the viability of the settlement. The defendants' failure to nail down the settlement in accordance with CPLR 2104 caused additional expense and exposure to a claim that the settlement had never become binding. The case is an object lesson that counsel should attend to the straightforward formalities of CPLR 2104, requiring the writing subscribed by a party, or their attorney.

Court Or Docket Notation Not Sufficient To Prove Settlement

In *GLM Medical, P.C. v. Geico General Insurance Company* (50 Misc.3d 104 [2015]), a provider sought to recover assigned first party no-fault benefits sued. A notation on the New York State Unified Court System E-Court's public website indicated that the matter had been "settled" on March 9, 2009. The plaintiff later moved to restore the action to the trial calendar, and though the motion was denied by the Civil Court of the City of New York, the Appellate Term reversed. The Appellate Term held that although the court could take judicial notice of the settlement notation on the OCA website, that "does not constitute a sufficient memorialization of the terms of the alleged settlement so as to satisfy the 'requirement of CPLR 2104.' " Accordingly, the Appellate Term ordered that the plaintiff's motion to restore the action to the trial court calendar be granted.

2015

C2104 Stipulations

The Practice Commentaries for Domestic Relations Law § 236(B)(3) describes case law applicable to divorce actions, and a requirement that under certain circumstances the signature on a nuptial agreement must be acknowledged in the manner sufficient for a deed to be recorded. *See*, *Scheinkman*, 2014 Practice Commentary C236B12.

Defilippi v. Defilippi, 48 Misc.3d 937, 11 N.Y.S.3d 813 (2015) involved a challenge to a Stipulation of Settlement in a divorce action that was not so acknowledged, and whether such a written agreement had to meet the acknowledgement requirement in addition to the requirements of CPLR 2104. In *Defilippi*, the Court declined to allow a collateral attack on the stipulation of settlement (*citing*, *Rio v. Rio*, 110 A.D.3d 1051 [2nd Dept. 2013]). Although meeting the requirements of CPLR 2104 was sufficient in that case, it remains prudent to carefully examine technical requirements of the Domestic Relations Law in disputes involving equitable distribution or nuptial agreements.

In another domestic relations case, *Fulginiti v. Fulginiti*, 127 A.D.3d 1382, 4 N.Y.S.3d 780 (3rd Dept. 2013), the Court construed a stipulation of settlement between the plaintiff wife and her defendant husband in open court. At the time of the stipulation the husband appeared *pro se* and agreed to resolve several issues on the record. The wife later claimed that the stipulation included an agreement by the husband to withdraw his answer, and although the wife had made an offhand comment to that effect, the husband did not voice agreement to that particular term. The Third Department noted that the parties intended to resolve many issues involving equitable distribution, maintenance and child support, but

the stipulation was not effective on those matters, because it was not clear that the husband actually agreed to withdraw his answer. As there was not enough evidence of a meeting of the minds, the Third Department held that the trial court erred in construing the Stipulation to be effective.

2014

C2104:4. Email Confirmation of Stipulations

The Appellate Division, Second Department in *Forcelli v. Gelco Corporation* (109 A.D.3d 244, 972 N.Y.S.2d 570 [2d Dept. 2013]) enforced an out-of-court oral settlement agreement that was later confirmed by an email. The email confirmation worked, but the case illustrates that oral or email stipulations remain risky. The email message satisfied the criteria of CPLR 2104 in *Forcelli* because it was "in writing" and made by an individual with authority. The problem was whether the email could be deemed "subscribed," as required by CPLR 2104.

The email message in question contained the author's printed name at the end of the message, and not an electronic signature as might be utilized under § 304 of the State Technology Law. However, the author of the email (Brenda Green), typed at the end "thanks Brenda Green," which indicated that she "purposely added her name to the particular email message." (*Forcelli,* 109 A.D.3d at 251, 972 N.Y.S.2d at 575). The name was not automatically added by the software (which is common with email messages), so the message was deemed sufficient to meet the "subscribe" requirement of CPLR 2104. Such informality certainly is not to be recommended for stipulations on important matters.

2013

C:2104:1 Stipulations in general

The Second Department has confirmed that an email message can satisfy the criteria of CPLR 2104 and become a binding and enforceable stipulation of settlement. (*Forcelli v. Gelco Corporation* (109 A.D.3d 244, 972 N.Y.S.2d 570 [2013]). The case involved an automobile accident that had progressed at the time of settlement to a pending motion and cross-motion for summary judgment.

Shortly after the motions were submitted, the parties negotiated a settlement via telephone. This was followed by an email message from defendant's counsel to plaintiff's counsel confirming the phone conversation. Releases were then

signed by the plaintiff and notarized by plaintiff's counsel, but before delivery, the Supreme Court issued an order on the summary judgment motion dismissing the complaint. The order was promptly served by the defendant with notice of entry. On the same day, plaintiff's counsel sent the signed release and a stipulation of discontinuance to defense counsel, which the defendant rejected with a letter stating that there had been no "... settlement consummated under New York CPLR 2104 between the parties."

Plaintiff then moved to vacate the order of dismissal and to enforce the settlement agreement, as set forth in the email message. The Supreme Court granted the plaintiff's motion to vacate and entered judgment in favor of the plaintiffs in the amount of the settlement. On appeal, the Appellate Division affirmed and held:

[G]iven the now widespread use of email as a form of written communication in both personal and business affairs, it would be unreasonable to conclude that email messages are incapable of conforming to the criteria of CPLR 2104 simply because they cannot be physically signed in a traditional fashion.

(*Forcelli v. Gelco Corporation* (109 A.D.3d 244, 972 N.Y.S.2d 570 [2013]; citing *Newmark & Co. Real Estate, Inc. v. 2615 East 17th Realty, LLC*, 80 A.D.3d 476, 477-478).

The Appellate Division referenced the State Technology Law and the Legislature's policy to support electronic commerce by "... allowing people to use electronic signatures and electronic records in lieu of handwritten signatures and paper documents."

Remember, however, that a CPLR 2104 written stipulation has to be "subscribed" by the party or their counsel. This requirement was deemed met in *Forcelli* because defendant's counsel had typed her name at the end of the email message. The Appellate Division emphasized this point, and that the addition of counsel's name on the email was not the result of the sender's email software being "... programmed to automatically generate the name of the email message sender, along with other identifying information, every time an email is sent." In holding that defense counsel had intended to "subscribe" the email for purposes of CPLR 2104, the Court stated:

Accordingly, we hold that where, as here, an email message contains all material terms of a settlement and a manifestation of mutual accord, and the party to be charged, or his or her agent, types his or her name under circumstances manifesting an intent that the name be

treated as a signature, such an email message may be deemed a subscribed writing within the meaning of CPLR 2104 so as to constitute an enforceable agreement.

This holding suggests that a separate typed "signature" is needed for the "subscription" requirement, but one wonders whether an automatically added signature could ever suffice for "subscribing" under CPLR 2106? The State Technology Law seems to suggest that this effect is at least possible, depending on intent, because § 302(3) defines an electronic signature as "... an electronic sound, symbol, or process, attached to or logically associated with an electronic record and executed or adopted by a person with the intent to sign the record." If an attorney clicks "send" with the knowledge and intent that a signature automatically be affixed, would that not constitute a sufficient signing act?

A similar issue arises in the context of the statute of frauds, which was addressed at some length but not resolved in *Naldi v. Grunberg and Grunberg, 55 LLC* (80 A.D.3d 1 [1st Dept. 2010]). While the court clearly was of the view that a contract satisfying the statute of frauds could be created by email, the emails in that case were not intended to do so. Thus, the court did not have occasion to decide the merit of defendant's objection that the automatically generated signature block was not "an intentional subscription for purposes of the statute of frauds." (80 A.D.3d 1, 16). Therefore, the issue appears to still be open and the careful practitioner should probably memorialize stipulations the old way for now--in a hard copy signed by both sides.

Another lesson from *Forcelli* is the importance of promptly advising the court of tentative settlements, by letter and a phone call to the law secretary. A request that the court hold the release of any decision can avoid the problem the plaintiff faced in *Forcelli*. This request not only avoids the court doing unnecessary work, it prevents a change in the circumstances that may have prompted the settlement.

One final point--the plaintiff's counsel in *Forcelli* had not signed the email stipulation, but the agreement was being enforced against the party whose counsel had "subscribed the argument." Therefore, an agreement enforceable against the signing party did result. Thus, it remains essential to obtain the signature of the party against whom enforcement is sought, and one party cannot confirm the agreement of the other party without their signature.

PRACTICE COMMENTARIES

by Thomas F. Gleason

C2104:1 Stipulations, In General.

Nothing smooths the course of litigation like cooperation among opposing counsel, implemented through stipulations. The parties may freely stipulate on most (but not all) aspects of a lawsuit. Stipulations are favored by judicial policy (*see Hallock v. State of New York*, 1984, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 474 N.E.2d 1178; *Nishman v. DeMarco,* 1980, 76 A.D.2d 360, 371, 430 N.Y.S.2d 339, 345 (2d Dep't), *appeal dismissed* 53 N.Y.2d 642, 438 N.Y.S.2d 787, 420 N.E.2d 979), but CPLR 2104 imposes important conditions on their enforceability.

Stipulations often are informal, but dangers lurk behind the CPLR 2104 requirements that stipulations be done by agreement in open court, in a signed writing, or in an agreement memorialized by a court order. This potential sand in the gears of practice usually is minimized by trust between lawyers, who freely but carefully rely on the word of opposing counsel on such matters as the due date for responsive papers, narrowing of disclosure requests, and scheduling of depositions.

But it is well to remember that there are three types of lawyers in this world: those for whom their word is their absolute bond; those of "flexible" memory with whom you had better get it in writing; and those with whom, even after getting it in writing, you should foresee how they will try to weasel out of a deal, when it suits their advantage. To the credit of the bar, the first category of lawyer is by far the most numerous, but to avoid subjecting the client's interests to our judgment of character, important agreements should always be confirmed in writing, or stated on the stenographic record in open court.

Certain things are beyond stipulation, such as an effort to confer subject matter jurisdiction when none exists, or laws and procedures that may not be waived for reasons of public policy. (*See Nishman v. DeMarco*, *supra*, 76 A.D.2d 360, 371, 430 N.Y.S.2d 339, 345). Other types of stipulations require approval of the court, such as settlements in class actions (CPLR 908); infant settlements (CPLR 1207); or wrongful death claims (EPTL § 5-4.6).

Stipulations are contracts and subject to contractual rules of interpretation, which will be in accordance with the parties' intent (*See, Kraker v. Roll*, 1984, 100 A.D.2d 424, 436, 474 N.Y.S.2d 527, 535-36 [2d Dep't]). The meaning of unambiguous stipulations will be determined within the four corners of the stipulation, or the actual words of the statements in court. Stipulations will not be lightly set aside, and to do so, good cause must be shown such as fraud, collusion, mutual mistake,

duress, unconscionability, or that the stipulation is contrary to public policy (*See McCoy v. Feinman*, 99 N.Y.2d 295, 302).

The stipulation must be definite, and not leave open essential terms. Thus, in *Velazquez v. St. Barnabas Hospital* (13 N.Y.3d 894, 895 N.Y.S.2d 286 [2009]), the Court of Appeals held a stipulation unenforceable even though the parties did not dispute that they had agreed on the specific amount to settle the action. They did not, however, finalize or definitively agree on the details of the confidentiality agreement, nor did they make the agreement in open court or file any document with the County Clerk. Enforcement of the stipulation under such circumstances might have required the court to enforce only part of an integrated bargain, because the remaining essential terms were in dispute, or perhaps enforce an agreement never fully gelled into final form.

The reticence of the Court to enter such a quagmire is explained as part of the fundamental policy of CPLR 2104 in *Bonnette v. Long Island College Hosp.*, (3 N.Y.3d 281 [2004]): "[I]f settlements, once entered, are to be enforced with rigor and without a searching examination into their substance, it becomes all the more important that they be clear, final and the product of mutual accord." (*id.* at 209).

Bonette was a very serious medical malpractice action brought by an infant and her mother against a doctor and hospital. The parties orally agreed outside of court to a three million dollar settlement to be paid by the hospital. The paperwork for the infant settlement was not finalized over the next year and one-half, while the mother sought to complete arrangements for the structured settlement. The child later died, which changed the economics of the settlement, so the hospital responded to news of the death by asserting that the settlement had not been finalized as required by CPLR 2104, and as a result the hospital considered "no settlement to exist." (*Bonnette v. Long Island College Hosp.*, 3 N.Y.3d 281, 284).

The hospital had sent correspondence that made the existence of the settlement agreement clear, but the letters did not contain all the material terms of the settlement. In rejecting mother's request to make the settlement binding, the Court of Appeals held: "To allow the enforcement of unrecorded oral settlements would invite an endless stream of collateral litigation over the settlement terms. This would run counter not only to the statute, which on its face admits of no exceptions, but also to the policy concerns of certainty, judicial economy, flexibility to conduct settlement negotiations without fear of being bound by preliminary offers and the prevention of fraud."

This was a very harsh lesson on the need to be very careful with CPLR 2104, especially with respect to settlements.

C2104:2 Formalities of Stipulations.

In the early stages of a lawsuit, attorneys frequently agree by telephone to extensions of time to answer or move to dismiss. Often an extension is granted orally, so it is important for benefiting counsel to send written confirmation, and request acknowledgement, sometimes by adding a signature line and a notation "the above is agreed" on the confirming letter. Careful counsel also may enclose a self-addressed stamped envelope, to make the process easy on the party stipulating to the extension.

Email also is now frequently used for such agreements and confirmation (*see* Commentary C2104:4 below on Email Stipulations), but the benefiting counsel should be careful as to the form of the confirmation, with CPLR 2104 in mind. For critical matters a letter or written document, signed by the party to be charged is the better practice. The attorney who fails to receive a prompt confirmation on any extension or accommodation would do well to follow up, and if necessary seek court approval of the extension. The important point is to act promptly, and never let a critical time expire. An oral stipulation generally will not be enforceable if one of the parties disavows the agreement. (*See, e.g., Klein v. Mount Sinai Hospital*, 1984, 61 N.Y.2d 865, 474 N.Y.S.2d 462, 462 N.E.2d 1180).

Fortunately, most judges (especially those with extensive prior practice experience) will have little patience for counsel who burdens the court by a failure to abide by oral agreements, but while courts may be liberal in vacating defaults in such circumstances (*See, e.g., Saltzman v. Knockout Chemical & Equipment Co.*, 1985, 108 A.D.2d 908, 485 N.Y.S.2d 794 [2d Dep't]; *Tate v. Fusco*, 1984, 103 A.D.2d 869, 478 N.Y.S.2d 110 [3d Dep't]), it is dangerous to rely on an oral stipulation in critical situations.

CPLR 2104 requires that the party to be bound to a written stipulation have subscribed (signed) it, but in *Stefaniw v. Cerrone*, 1987, 130 A.D.2d 483, 515 N.Y.S.2d 66 [2d Dep't], the party who drafted a written stipulation but did not himself sign it was held bound nevertheless after having sent it to the other side for their signature. Apparently, the court concluded that the transmittal act was the equivalent of written confirmation, removing any doubt as to the party's agreement to the stipulation terms.

Leemilt's Petroleum, Inc. v. Public Storage, Inc., 1993, 193 A.D.2d 650, 597 N.Y.S.2d 463 (2d Dep't), involved an oral extension of time to serve a pleading, which was held enforceable because the existence of a stipulation was admitted (although the precise terms were disputed), and the adversary relied upon the oral agreement. But the reliance on an oral agreement, especially at the commencement stage of an action is very dangerous. This was confirmed by the dissent in *Leemilt's*, arguing that any "reliance" exception should be sparingly applied and limited to cases where the evidence of an actual agreement is strong. Moreover, any dispute over the precise terms or extent of the oral stipulation may be fatal to even an undisputed portion of the agreement, and the Court of Appeals has been very strict in limiting the enforcement of oral stipulations, as explained in *Bonnette v. Long Island College Hosp.*, (3 N.Y.3d 281 [2004]), noted in Commentary C2104:1 above.

C2104:3 Stipulations Between Counsel in Open Court.

The policy in favor of enforcement of stipulations is tempered by the need that the terms of the agreement be clear--if a stipulation is not reduced to a writing, the requisite clarity can be accomplished "between counsel in open court." The recording of court room stipulations usually will be done by a stenographer, and so it has been held that the "open court" agreement can occur even in the judge's chambers, so long as the judge and the stenographer are present. (*See, e.g., Sontag v. Sontag*, 1985, 114 A.D.2d 892, 495 N.Y.S.2d 65 (2d Dep't), *appeal dismissed* 66 N.Y.2d 554, 498 N.Y.S.2d 133, 488 N.E.2d 1245; *Bernstein v. Salvatore*, 1978, 62 A.D.2d 945, 404 N.Y.S.2d 12 (1st Dep't). *Cf. Matter of Dolgin Eldert Corp.*, 1972, 31 N.Y.2d 1, 334 N.Y.S.2d 833, 286 N.E.2d 228). A stenographer alone apparently will not suffice, *Kushner v. Mollin*, 1988, 144 A.D.2d 649, 535 N.Y.S.2d 41 (2d Dep't.).

In *Trapani v. Trapani* (1990, 147 Misc.2d 447, 556 N.Y.S.2d 210 [Sup.Ct.Kings Co.]), the Court held that a stipulation of settlement recorded by a stenographer at a deposition did *not* meet the requirements of CPLR 2104. Therefore, if the terms of a stipulation are agreed to at a deposition the parties should have the transcript printed, and then attach it or otherwise include the terms in a written, signed stipulation.

Similarly, in *Conlon v. Concord Pools, Ltd.* (170 A.D.2d 754, 565 N.Y.S.2d 860 [1991]), the Appellate Division Third Department held that a settlement made on the record in front of judge's law clerk in chambers was insufficient. In *Conlon*, however, the court ultimately sustained the settlement on an estoppel theory, noting that the terms of the settlement were clear, and the parties had changed their circumstances in reliance upon it. As the Court held: "[W]hen there is no dispute between the parties as to the terms of a settlement agreement made during pending

litigation, the courts will refuse to permit the use of the statute (CPLR 2104) against a party who has been misled or deceived by the agreement to his detriment or who has relied upon the agreement." (170 A.D.2d at 754, 565 N.Y.S.2d at 862). It appears that it would advance the judicial policy in favor of stipulations if all agreements made clear by a stenographic transcript were enforced, but the Court of Appeals has noted that CPLR 2104 "on its face admits of no exceptions," so reliance on such an estoppel approach is dangerous.

The Third and Fourth Departments have held that the presence of a court reporter in addition to the judge is essential, because the transcript provides "irrefutable proof of the agreement" (*see Gonyea v. Avis Rent A Car System, Inc.*, 1981, 82 A.D.2d 1011, 1012, 442 N.Y.S.2d 177, 178 (3d Dep't). *See also, Kolodziej v. Kolodziej*, 1976, 54 A.D.2d 228, 388 N.Y.S.2d 447 (4th Dep't). However, other cases have enforced in-court stipulations if the agreement is memorialized in some form of official documentation such as a minute book. *See, e.g., Deal v. Meenan Oil Co.*, 1989, 153 A.D.2d 665, 544 N.Y.S.2d 672 (2d Dep't). *See also, Popovic v. New York City Health and Hospitals Corp.*, 1992, 180 A.D.2d 493, 579 N.Y.S.2d 39 (1st Dep't). The First Department also found "substantial compliance" with CPLR 2104 in a case in which the judge's personal notes detailed the settlement in chambers, at a time when the court stenographer was not available (*see Golden Arrow Films, Inc.*, 1972, 38 A.D.2d 813, 328 N.Y.S.2d 901 (1st Dep't).

While it is surprising to see a case in which a settlement before the court was sought to be disavowed, perhaps it was due to some disagreement with the recording of the agreement. For this reason, and especially in light of the Court of Appeals strict approach in *Bonette v. Long Island College Hospital* (2004, 3 N.Y.3d 281, 785 N.Y.S.2d 738, 819 N.E.2d 206), the better practice is to always ask for a stenographer, and state the agreement on the record before the judge. This also provides the court an opportunity to ask the client on the record to confirm that they agree, which is a common and salutary practice. If the stenographer is not available, it is best to wait for their arrival or find a convenient method to write out the agreement.

C2104:4 Email Confirmation of Stipulations.

An email agreement, with the attorney's name included at the end of the email, apparently will suffice to meet the "subscribed" requirement of CPLR 2104, at least in the First Department (*See, Williamson v. Delsener*, 2009, 59 A.D.3d 291, 874 N.Y.S.2d 41 (1st Dep't). In *Williamson*, the email traffic clearly indicated counsel's agreement to settle at 60% of the amount demanded, and the resulting enforceable contract was not avoided by counsel's subsequent refusal to execute releases and

a stipulation of discontinuance. However, in *The Options Group, Inc. v. Vyas* (91 A.D.3d 446, 936 N.Y.S.2d 172 [1st Dep't 2012]), the Court declined to treat an email as an acceptance of a settlement, but in that case the email did not contain all the essential terms of the settlement, and was later superseded by a formal settlement agreement drafted by plaintiff and signed by the defendant. The later agreement did contain all the essential terms and specifically cancelled all prior agreements. The Court considered this agreement binding even though it was not actually signed by the plaintiff, because "the record demonstrates that both parties intended to be bound." (*The Options Group, Inc. v. Vyas*, 91 A.D.3d 446, 447, 936 N.Y.S.2d 172, 173 [1st Dep't 2012]). For the present, email should only be used with care, and not for stipulations on anything really important.

C2104:5 Filing of Stipulations of Settlement.

CPLR 2104 was amended in 2003 to provide "[w]ith respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk." At the same time, CPLR 8020 was amended to require the defendant to pay the County Clerk $35 with the filing. The legislative history of these amendments makes clear that their purpose was to generate revenue, with the settlement filing fee enacted along with several other filing fee measures. (*See, e.g.*, CPLR 3217[d]; CPLR 8020[a], [d]). The background of the legislation was extensively analyzed by Professor Siegel in *Siegel's Practice Review*, Numbers 136, 137 and 139).

The important substantive issues raised by the filing requirement are how much detail must be included in describing the "terms of such stipulation," and what are the consequences to a party that fails to comply? For example, CPLR 2104 requires the defendant to do the filing, but does it really matter if the Plaintiff, who also has an interest in finality, files the terms of the stipulation and pays the fee? Hopefully not. Similarly, if a question arises as to the enforcement of a settlement, it makes sense to allow any defect to be corrected so long as the required fee is ultimately paid.

Confidentiality of settlements now is an issue under the CPLR 2104 requirement that the "terms of such stipulation" be filed as a public record. Two approaches may be workable here: first, if there really is good cause for confidentiality, the parties can seek to have the settlement sealed under section 216.1 of the Uniform Rules for the New York State Trial Courts. Secondly, the parties may seek to generally describe the terms of the stipulation, but of course as much specificity as is possible would be desirable. As the intent of the measure was to produce revenue and not

publicize settlements, it is to be hoped that courts will be liberal in allowing general compliance with the filing requirement so long as the fee is paid.

C2104:6 The Attorney's Authority to Settle.

An attorney acts as an agent for their client, and when authorized by the client, counsel will have the power to bind the client to a settlement. Obviously, an attorney would breach their duty to a client by settling without authorization, and it is the rare case in which the client seeks to disavow a settlement by claiming that settlement authority was not given to the attorney.

However, that is what happened in *Hallock v. State of New York*, 1984, 64 N.Y.2d 224, 485 N.Y.S.2d 510, 474 N.E.2d 1178, a case in which the attorney made an on-the-record settlement at a pre-trial conference. (It should be noted that the Uniform Rules require that the pretrial conference be attended by the party or an attorney "authorized to make binding stipulations." *See* Uniform Civil Rules 202.26[e]). *Hallock* involved a pre-trial on-the-record settlement, but the client was ill on that day and was not present. More than two months later, the client expressed dissatisfaction with the settlement and sought to disavow it on the ground that the attorney had acted beyond his authority.

As the Court of Appeals explained in *Hallock*, an attorney cannot compromise or settle a claim without a grant of authority from the client, and "settlements negotiated by attorneys without authority from their clients have not been binding" (*see Hallock*, *supra* at 230, citing *Countryman v. Breen*, 241 A.D. 392, *aff'd* 268 N.Y. 643; *Spisto v. Thompson*, 39 A.D.2d 598; *Leslie v. Van Vranken*, 24 A.D.2d 658; *Mazzella v. American Home Constr. Co.*, 12 A.D.2d 910; *see also Koss Co-Graphics, Inc. v. Cohen*, 1990, 166 A.D.2d 649, 561 N.Y.S.2d 76 [2d Dep't]).

Nevertheless, the Court of Appeals held the settlement in *Hallock* binding, because even if the attorney did not have actual authority to settle, he did have apparent authority. Apparent authority depends on the principal, in this case the client, "clothing" the agent with what appears to be the actual authority to do certain acts, such as bind the principal to a settlement. Generally speaking the nature of the attorney-client relationship provides an attorney with a certain level of actual authority to manage the litigation on behalf of a client, and this includes the authority to make many procedural or tactical decisions (*see* Rules of Professional Conduct, Rule 1.2; *Gorham v. Gale*, 7 Cow. 739, 744; *Gaillard v. Smart*, 6 Cow. 385, 388). But this general authority will not without more allow the attorney to enter a binding settlement agreement.

In *Hallock*, as in all cases of apparent authority, the principal by words or conduct caused a third party to reasonably believe that the agent did have the necessary authority to enter the settlement transaction and bind the principal. The attorney had been involved in extensive prior settlement negotiations, with the plaintiff present, and the attorney's presence at the final pretrial conference constituted "an implied representation by [the client] to defendants that [the attorney] had authority to bind him to the settlement...." Based on such words or conduct of the principal (the client), the client later is estopped from denying that the attorney possessed settlement authority. (*See Hallock*, *supra*, 64 N.Y.2d 224, 231, *see* Restatement, Agency 2d, section 27).

As a result, the settlement was binding on Hallock, who was "relegated to relief against their former attorney for any damages which [the attorney's] conduct may have caused them." (*Hallock*, *supra*, 64 N.Y.2d 224, 230). This type of situation can and should be avoided by the attorney being very clear as to the limits of settlement authority, and by obtaining the client's express consent to any settlement proposal. The *Hallock* case also illustrates why Judges often inquire, during open court settlements, whether each client accepts the stipulation that the attorneys have placed on the record.

C2104:7. Stipulations in Arbitrations and Other Proceedings.

By its terms, CPLR 2104 applies to stipulations "relating to any matter in an action," which implies that the on the record and writing requirements apply only in actions and special proceedings (*see* CPLR 105[b]), and not in arbitrations or administrative proceedings.

In one case an oral stipulation made on the record at the hearing of an arbitration proceeding was deemed equivalent to a stipulation made in open court, but the arbitration panel had drawn that conclusion and made an award based on the stipulation. (*See Central New York Regional Market Auth. v. John B. Pike, Inc.*, 1986, 120 A.D.2d 958, 503 N.Y.S.2d 462 (4th Dep't), *appeal denied* 69 N.Y.2d 602, 512 N.Y.S.2d 1025, 504 N.E.2d 395). Therefore, this result could ensue under CPLR article 75, which governs arbitrations and strictly limits the bases for vacating or modifying an arbitration award (*see* CPLR 7511). A mistake on the law generally would not provide a basis to vacate the award, so a mistake by the arbitrator as to whether or not a stipulation is binding might be beyond remedy after the award. (*See* Siegel New York Practice [5th ed.], section 602, pp. 1095-1099). It would appear wise to make arguments on the effect of any stipulation within the arbitration itself.

The Court of Appeals in *Silverman v. McGuire* (1980, 51 N.Y.2d 228, 231, 433 N.Y.S.2d 1002, 1003, 414 N.E.2d 383, 384), stated in dicta that CPLR 2104 was "not helpful" to a party claiming that a binding oral agreement had been reached, at least for the administrative proceeding at issue in that case. The Court reached this conclusion even though the alleged agreement was done in a proceeding "similar to a courtroom setting." CPLR 2104 does not by its terms apply outside actions or special proceedings, and would seem not to be applicable to administrative proceedings unless the applicable rules or statute cross reference to CPLR rules. In any event, CPLR 2104 speaks of only a subset of all agreements--those "as to any matter in an action" which are "not binding on a party" unless the requirements of CPLR 2104 are met. This leaves open to possible enforcement a whole range of other agreements not within the subset. (*See generally* Article 5 of the General Obligations Law and the statute of frauds, GOL § 5-701).

LEGISLATIVE STUDIES AND REPORTS

This rule is derived from rule 4 of the rules of civil practice. In the Fourth Report to the Legislature, the Revisers state that this provision works well in practice and that no change is made.

The provisions of § 790 of the civil practice act, dealing with stipulations in supplementary proceedings, have not been carried forward into CPLR. It is noted that its first two sentences, stating that such stipulations may be signed by either the parties or their attorneys and that approval of the court is not required, are consistent with the provisions of this rule. Its last sentence allows an attorney who issued a subpoena or restraining notice to vacate or modify it by "written stipulation." It is not clear whether this means the attorney may do so by a unilateral writing or whether a true "stipulation" with the adverse party is required. Cf. Polo v. Edelbrau Brewery, 185 Misc. 775, 60 N.Y.S.2d 346 (Sup.Ct.App.T.1945). If it means the latter, it adds nothing to this rule; if the former, it is implicit in §§ 5222 and 5223.

Official Reports to Legislature for this rule:

4th Report Leg.Doc. (1960) No. 20, p. 201.

5th Report Leg.Doc. (1961) No. 15, p. 358.

6th Report Leg.Doc. (1962) No. 8, p. 204.

Notes of Decisions (731)

McKinney's CPLR Rule 2104, NY CPLR Rule 2104
Current through L.2019, chapter 92. Some statute sections may be more current, see credits for details.

End of Document

Insurance Coverage: How Bad is Bad Faith?

John J. Rasmussen, Esq.
Insurance Recovery Law Group LLC

Joanna M. Roberto, Esq.
Gerber Ciano Kelly Brady, LLP

Lindsay Lankford Rollins, Esq.
Hancock Daniel & Johnson, P.C.

10:00 – 10:50 a.m. **Insurance Coverage: How Bad is Bad Faith?**
1.0 MCLE Credit | Areas of Professional Practice

A comparative analysis by both the policyholder and insurer's perspective of case law, recent decisions and fact patterns that have led to the ever-evolving discussion of bad faith.

Panelists

John J. Rasmussen | Insurance Recovery Law Group LLC
Joanna M. Roberto, Esq | Gerber Ciano Kelly Brady
Lindsay Lankford Rollins | Hancock Daniel

The Cannabis Quandary: Legal Issues vs. Moral Muddle

Richard W. Kokel, Esq.
Richard Kokel Law Office

Kaitlyn O'Connor, Esq.
Nixon Law Group

THE CANNABIS QUANDARY: Legal Issues vs. Moral Muddle

The Panel

Kaitlyn O'Connor, Esq., *Nixon Law Group*

Richard W. Kokel, Esq., *Richard W. Kokel, Attorney at Law*

Agenda

- Background
- New York vs. Virginia: Legal Landscape
- Overview of Federal Cannabis Law & Policy
- Practice Considerations – A quick look at:
  - Representing Cannabis Clients
  - Labor & Employment
  - Intellectual Property
  - Criminal Law
- Legal Issues and Morality
- Questions?

Background

Map courtesy of NORML

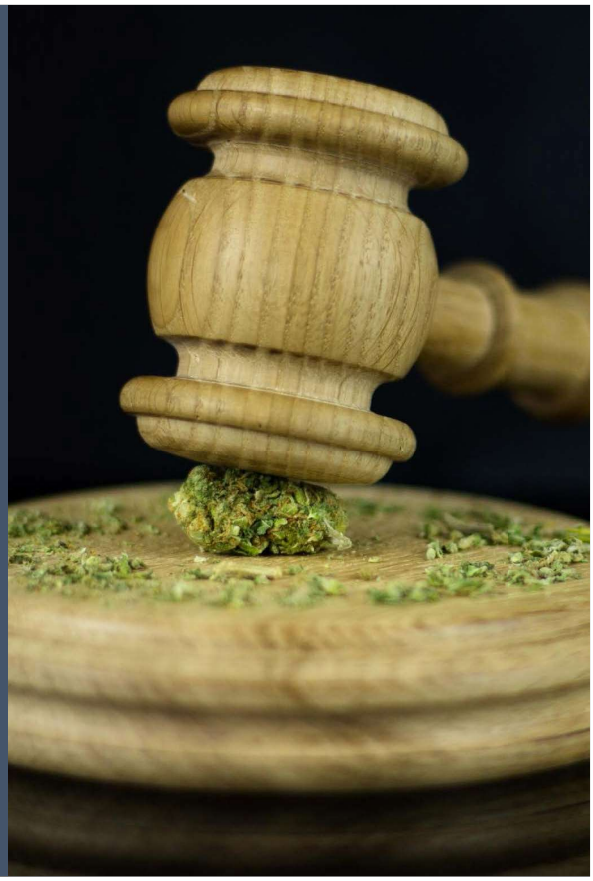
33 states plus Washington, D.C., Puerto Rico, Guam, and the U.S. Virgin Islands

New York vs. Virginia: Legal Landscape

	NEW YORK	VIRGINIA
Medical or Adult Use?	Medical (Compassionate Care Act, 2014)	Medical (VA Code § 18.2-250.1, 2018)
Affirmative Defense or Legal?	Legal	Affirmative Defense
# of Licenses/Facilities	10 companies, each with 4 dispensing and 1 manufacturing location	5 vertically integrated facilities
Who can issue recommendations?	Physician, NP, PA	Physician, NP, PA (As of July 1, 2019)
Qualifying medical conditions	Enumerated list, e.g. cancer, Parkinson's, MS, PTSD, among others	Any diagnosed condition or disease

Federal Cannabis Law & Policy

- Marijuana is still a Schedule I controlled substance
- Cole Memo – 2013
  - Federal gov't will not expend resources to enforce federal marijuana prohibition in states with regulated marijuana programs, except where it would undermine federal initiatives (e.g. prevent violence, prevent distribution to minors, etc.)
- Sessions Memo – 2018
  - Rescinded Cole Memo
  - However, several US Attorneys have stated they will continue to abide by the Cole Memo



Federal Cannabis Law & Policy – Tax & Finance

- Cannabis companies are still taxed on revenue
- 26 U.S.C. § 280E – Expenditures in connection with the illegal sale of drugs
  - NO deductions or credits allowed for companies engaged in trafficking Schedule I and II drugs
  - EXCEPT COGS
- "Two-Business Strategy" and *CHAMP v. Commissioner*
- *Canna Care v. Commissioner*
- FinCEN Memo
  - Issued in 2014 in connection with Cole Memo, has not been rescinded
  - Financial institutions servicing cannabis companies have to file "Marijuana Limited" SAR
- February 13, 2019: House Financial Services Committee hearing titled *Challenges and Solutions: Access to Banking Services for Cannabis-Related Businesses*
  - To examine banking difficulties faced by cannabis businesses

Practice Considerations - Representing Cannabis Companies

- **Engagement Agreements**
  - Clearly state that marijuana is still a Schedule I controlled substance under the CSA and that means it is illegal to manufacture, distribute, or dispense marijuana under the CSA
  - "As your attorneys, we will not engage or assist in illegal conduct, but we may discuss the legal consequences of a proposed course of conduct and may counsel or assist you in determining the validity, scope, meaning, or application of the law to that conduct."
- **Malpractice Insurance** – be sure to check with your carrier

Practice Considerations – Labor & Employment

- Federal Preemption
  - *Coats vs. Dish Network*
- Disability Discrimination
  - Treatment vs. Condition
    - *Shepherd v. Kohl's Dep't Stores*
    - *Ross v. RagingWire Telecommunications, Inc.*
  - State law claims tend to be more successful

https://www.nysba.org/Journal/2018/Jul/Medical_Marijuana_in_the_Workplace/

Practice Considerations - IP

- **Trademark**
  - USPTO will not accept trademark applications for federally unlawful industry
  - Start by trademarking the **brand** at the federal level for non-plant-touching products
    - e.g. bags, t-shirts, hats, website
  - State-level trademarks in states with regulatory programs OK
  - Couple state-level trademark for cannabis goods with federal protection for ancillary goods and services
- **Patent**
  - **Can** register federal patent for cannabis plants because patents protect the process/formula **not the product itself**
  - BUT can negate "trade secret" status because you have to disclose a process to patent it

Searching US Patent Collection...

Results of Search in US Patent Collection db for: cannabis OR marijuana: 5045 patents.
*Hits **1** through **50** out of **5045***

Practice Considerations - Criminal Law

TREND: Refusing to prosecute marijuana possession

- Norfolk Commonwealth's Attorney Gregory Underwood will not prosecute misdemeanor marijuana possession
- Baltimore State's Attorney Marilyn Mosby will not prosecute any Marijuana possession

- Individuals with a record may want to expunge for purposes of getting a job, etc., but **expungement is difficult**

- **Decriminalization** has been discussed but no movement on it thus far

Questions?

Tunatura/Shutterstock

Recreational marijuana FAQ

What we know – and what we don't – about legalizing pot in New York.

By REBECCA C. LEWIS

FEBRUARY 4, 2019

Gov. Andrew Cuomo unveiled a plan to legalize and tax recreational marijuana as part of his executive budget proposal. The section spelling out the many, many details of marijuana legalization spans a whopping 191 pages. That gives lawmakers, advocates and opponents a lot to sift through. Some questions are answered in the bill, while other questions will likely spark ongoing debate over the next year. Here are some of the most pressing questions regarding what now seems like the nearly inevitable legalization of recreational marijuana in New York.

How many other states allow legal marijuana?

A total of 10 states and the District of Columbia have fully legalized recreational marijuana for adult use: California, Nevada, Oregon, Washington, Alaska, Colorado, Michigan, Massachusetts, Vermont and Maine. New York would be somewhat unusual among these states by legalizing marijuana through a statute, rather than through a ballot referendum with additional laws and regulations established after the fact. The only other state to go this route was Vermont, whose law went into effect in July 2018.

But isn't this still technically illegal on the federal level?

Marijuana is still considered a Schedule I drug by the Drug Enforcement Administration, meaning the federal government considers it to have the highest risk for abuse and no accepted medical use. Under President Barack Obama, the Justice Department eased its enforcement of federal drug laws in states that had legalized marijuana. The Trump administration reversedthat decision, but no state has faced serious consequences for its medical or recreational marijuana programs yet.

Who will oversee recreational marijuana?

Cuomo has proposed creating a new Office of Cannabis Management to oversee not just recreational marijuana but medical marijuana and industrial hemp as well. The office would be part of the Division of Alcoholic Beverage Control in the state Liquor Authority. It would be in charge of licensing growers, processors and distributors, as well as certifying patients for medical use.

What happens to the state's existing medical marijuana program?

Much of the debate surrounding the legalization of recreational marijuana has centered around criminal justice and potential tax revenue. The fate of the state's medical marijuana program, established in 2014 through the Compassionate Care Act, has played a smaller role in the conversation. Under Cuomo's new budget proposal, patients with a "serious condition" must still receive certification from a doctor for medical marijuana, only now the Office of Cannabis Management would register patients, rather than the state Department of Health, which currently handles the program. This is still for the most part restricted to a limited number of conditions previously enumerated by the state, but Cuomo's proposal expands the list slightly to include Alzheimer's disease, muscular dystrophy, dystonia, rheumatoid arthritis and autism. It also gives the executive director of the Office of Cannabis Management the authority to add more conditions. Medical providers must also still register with the state after completing a short educational course. Overall, the proposal mostly transfers the program intact to the Office of Cannabis Management.

Are there any changes for patients using medical marijuana?

One notable change to the program is that patients would be able to grow their own marijuana at home, with a limit of four plants per registered patient. Patients previously were not allowed to grow marijuana, and the new proposal does not extend to recreational users. Further regulations regarding home growing would be determined by the executive director of the Office of Cannabis Management.

The program still faces a larger existential question in the face of recreational legalization, which only time will answer: whether the program will survive. Right now, medical marijuana is both expensive and difficult to come by. According to the Times Union, it can cost some patients close to $1,000 a month, and over a third of those who registered never got the drug last year. The possible proliferation of recreational marijuana may drive people away from the medical program in favor of self-medicating. Doctors involved with the program hope that competition from the recreational market will drive down medical marijuana prices. Those in the medical marijuana industry say allowing them to also sell recreational marijuana would lower prices.

While the circumstances are not identical to New York, Colorado did not see a significant decrease in medical marijuana patients following recreational legalization. Colorado also instituted a lower tax rate for medical products compared to its recreational counterparts.

What happens to those convicted of marijuana-related crimes?

The Office of Cannabis Management could review and seal past marijuana convictions, although the speed at which this might occur is not made clear in Cuomo's proposal. The process may involve resentencing for those currently imprisoned to reflect lesser charges under new laws.

Does this mean there will be no more marijuana arrests?

While marijuana would be legal under Cuomo's proposal, that does not mean that people will no longer be arrested on marijuana-related charges. Aside from DWI and DUI charges (discussed in more detail below), growing a cannabis plant or selling marijuana without a license would still be against the law. Depending on the pricing and availability of the drug, there is a good chance that a black market would still exist that does not comply with new state regulations. For the most part, those found in violation of new laws and regulations would be charged with misdemeanors.

So how much can I legally carry at once?

According to The Buffalo News, you would be able to carry up to 1 ounce of cannabis or 5 grams of concentrated cannabis. This is also the same amount that a retailer would be allowed to sell to a single person in one day.

What about hemp?

The cannabis plant comes in many varieties, not just those with high concentrations of tetrahydrocannabinol, or THC, the plant's main psychoactive component. Hemp comes from the cannabis sativa L variety of plant, which has a a THC concentration below 0.3 percent and is used for industrial purposes like clothing, paper, biofuel, food, body care and bioplastics. The state estimates hemp can be used to manufacture over 25,000 different products.

Hemp has long been classified as a Schedule I drug under federal law, lumped together with marijuana as a drug as dangerous as heroin. That changed in December 2018 when President Donald Trump declassified hemp as part of the 2018 Farm Bill, making it legal on the federal level, though leaving specifics on regulations up to individual states.

An industrial hemp pilot program already existed in New York under the state Department of Agriculture and Markets, established in 2015 and expanded in 2017 to include businesses and farmers. Cuomo's new proposal differentiates between industrial hemp, encompassing nearly all nondrug-related uses of the plant, and hemp cannabis, which refers specifically to cannabis grown to cultivate cannabidiol, a popular form of hemp oil.

John Gilstrap of Hudson Hemp, an industrial hemp company participating in the pilot program, predicted that hemp will become a multibillion-dollar industry, outpacing the recreational marijuana business. "The recreational is always a sexy topic to talk about," Gilstrap told City & State. "But people who are really into the science or to the business recognize that really, it's the molecules, it's all about the molecules in the end."

How will recreational marijuana be taxed?

The governor proposed imposing three taxes on recreational marijuana. The first would occur during cultivation, at a rate of $1 per gram of cannabis flower or $0.25 per gram of cannabis trim. The second is a 20 percent tax on the sale of marijuana from a wholesaler to a retail dispensary. The third is a 2 percent tax on the same sale, but with proceeds going toward the county where the dispensary is located. Cuomo predicted this will generate $300 million in new revenues each year. However, he estimated that the first legal sale of recreational marijuana would not occur until at least April 2020, and if other states are any indication, it may take several more years for New York to see robust returns.

How will that new tax revenue be used?

Many have already begun debating how best to use marijuana tax money, such as investing in public transportation or reinvesting it into communities of color that were hurt by marijuana policing. Cuomo's proposal earmarked money for the administration of the program and other program-related expenses; small-business development and loans; substance abuse and mental health treatment; and public health education. Each expense seems to be directly or indirectly related to the recreational marijuana program. Cuomo also said the Office of Cannabis Management could recommend other uses for the revenue.

Currently, it does not appear that the governor is specifically setting aside any of the money for the state's general fund.

Will driving become more dangerous?

The short answer is maybe. In states where recreational marijuana has become legal, traffic accidents have increased. While studies haven't proven a direct causal link between the two, the correlation is troubling. Part of the problem, according to state Sen. Todd Kaminsky, is that there is not enough public education about the dangers of driving high. Despite the fact that research has shown that driving while under the influence of marijuana slows reaction timesand increases the likelihood of crashes, and a general consensus that driving while high is bad, Kaminsky referenced polling that shows there still seems to be a disconnect about just how dangerous driving high can be. "If we don't have a conversation about road safety parallel to every other one about legalization, we're not going to be prepared and we're going to have fatalities," Kaminsky told City & State. He held a roundtable with stakeholders last month to begin discussing the issue.

Is there a test for driving while high?

Adding to the complications of safe driving in the age of recreational marijuana is that unlike with alcohol, there is no accurate field sobriety test for marijuana intoxication levels. Currently, the only way to determine someone's blood THC content is through a blood test, which attorney and cannabis law expert Elizabeth Kase said can back up the court and quickly cost lots of

money. Breathalyzer-like devices claiming to accurately detect THC are in development, but are not yet on the market.

There is also the matter of determining what level of THC in the blood constitutes impairment. Some states have set the level at 5 nanograms per millimeter of blood. But even this is imperfect, since different ingestion methods of the same amount of marijuana can lead to widely varying levels of THC in the blood.

In order to address some of the concerns regarding impairment, Cuomo plans to convene a traffic safety commission as part of his marijuana proposal.

What if you don't want recreational marijuana in your town?

As part of his proposal, Cuomo included the ability for counties and municipalities with populations over 100,000 to "opt out" of the new regulations by banning the cultivation, processing, distribution and sale of recreational marijuana within their jurisdictions. This does not mean that possession of marijuana would be illegal, but for the general consumer, one would need to purchase it somewhere else. New York is not the first state to provide this option, with many municipalities in Michigan choosing to opt out of its new recreational marijuana program. So far, North Hempstead on Long Island is the only places to opt out.

Kase warned that allowing municipalities to opt out can impede the rollout of the program. She pointed to Massachusetts, which has similar opt-out options and local zoning issues, where she said it has taken the recreational marijuana program longer than planned to get up and running following its 2016 ballot initiative. Currently, the state has eight dispensaries. "I think you're going to see more and more of this in upscale neighborhoods," Kase said. "That is going to put a crimp and cramp in the rollout – potentially."

How strict will New York's regulations be?

The answer to this question is still hard to determine as many specific regulations need to be established. But given the restrictive nature of New York's medical marijuana program, it wouldn't be a surprise if the state institutes a similarly strict recreational program.

How will sales and licensing work?

The state plans to offer individual licenses for cultivation, processing, distributing, retail and on-site consumption. Anyone with a cultivation license to grow marijuana would not be allowed to also have a retail license to sell it. A single entity can, however, hold a processing and distribution license. The idea is to avoid the vertical integration of the marijuana business and ensure a separation between the companies growing the product and those who ultimately sell it to consumers. This structure is different than the state's medical marijuana industry, in which the company that grows and processes the drug is the same that runs the dispensaries. There is an exception for organizations currently registered with the medical marijuana program that would

allow them to produce and sell recreational marijuana without being subject to the restrictions applied to other companies.

On-site consumption licenses permit consumers to use or ingest marijuana products within their premises. Those with a retail license may also have one for on-site consumption, though there are restrictions about consumption within locations that are also dispensaries. And don't expect to be able to purchase marijuana products at bars, as any location with a liquor license would not be allowed to have a retail license for marijuana.

Will there be a cap on licenses?

Cuomo's proposal may set a limit on the number of licenses issued, but leaves that decision up to the unnamed executive director of the Office of Cannabis Management. That person could choose a number, or choose not to impose a limit. If the rules turn out anything like the medical marijuana program, licensing could be fairly restrictive. Only 10 medical marijuana companies are allowed to operate in the state, up from five initially, and each can only have a maximum of four dispensaries.

Correction: The town of Hempstead will vote later this month on a one-year moratorium on dispensaries and sales of recreational marijuana. An earlier version of this story misrepresented the town's stance on the drug.

Clarification: Only counties and municipalities with populations over 100,000 can opt out of the new marijuana law.

Rebecca C. Lewis

is a staff reporter at City & State.

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Speaker Biographies

Hon. Suzanne J. Adams – Biography

Judge Adams is a New York City Civil Court Judge, currently sitting in Family Court in Kings County (Brooklyn). Prior to her election to the bench in November 2017, Judge Adams had nearly twenty years' experience as a litigator in New York State and Federal courts, specializing in personal injury and property damage cases. She has handled a wide variety of cases involving motor vehicle accidents, trucking accidents, premises liability on behalf of tenants, owners and municipalities, property damage, architectural malpractice, and construction site accidents implicating New York State Labor Law. Judge Adams is a member of the New York County Lawyers Association (formerly co-chair of the Civil Court Section), the New York State Trial Lawyers Association, the New York State Bar Association in the Torts Insurance and Compensation Law Section, Judges and Lawyers Breast Cancer Alert, the Columbian Lawyers First Judicial Department, and the NAACP Mid-Manhattan Branch. She is a graduate of Penn State University with a B.A. in Journalism, and received her J.D. from Hofstra University School of Law.

Tom Bowler – Bio

Total Playground Consulting Services does litigation support for both plaintiff and defendant attorneys throughout the country. Tom Bowler has a B.S. in physical education from the University of Connecticut, in 1966. He received his MEd. from Springfield College, in 1973, in physical education. In 1981, he attained his Certificate of Advanced Graduate Studies from the University of Connecticut in the Administration and Supervision of Special Education. In twenty-five years in the practice of doing litigation support, he has worked on 397 cases. He has been deposed 71 times and has testified at trial on 11 occasions. Tom consults on playground equipment, playground supervision, physical education cases, athletic cases and recreational cases. He currently lives in Merritt Island, Florida.

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Dennis chairs the firm's Transportation Practice Group, as well as its Retail, Food, Beverage and Hospitality Practice Group. His practice is also heavily focused on Construction and Product Liability matters. For over twenty years, he has protected clients in every aspect of civil litigation from discovery to trial and appeal. He has litigated matters in several states and tried cases to verdict in state and federal courts. The National Law Journal cited one of Dennis's matters as one of the most significant settlements of the year – further testament of the trust clients have in him to handle their most severe and complex matters. Throughout his career, he has litigated matters on behalf of many prominent national insurers, municipalities, large corporations, as well as public housing and transportation authorities. He is often sought as monitoring and trial counsel for catastrophic personal injury claims facing major airlines, Fortune 500 companies, as

well as some of the largest corporations in the transportation, food and hospitality industries. He regularly offers counsel on risk avoidance and provides direction to clients on insurance coverage in the context of first party, excess, self-insurance, and captive matters. Dennis is also a leader of the firm's 24-7-365 emergency response team.

Dennis understands that counseling and truly protecting clients requires understanding the intricacies and ultimate needs of their businesses. To this end, his life experience includes working on active construction projects, working for several transportation companies and many years of experience in the hospitality industry.

Dennis speaks and educates regularly at clients, trade groups, and professional organizations on topics ranging from New York's Labor Law, specifically, §§200, 240(1), 241(6) along with the applicable industrial and OSHA regulations and their application to gravity-related construction risks — commonly referred to as the "scaffolding law". Dennis understands the nuances of defenses to these claims, such as the recalcitrant worker doctrine and sole proximate cause. He also lectures on retail and hospitality exposure including "dram shop" claims and the role of security, and transportation issues ranging from aviation to commercial trucking with focus on the interrelation of Federal and State regulations and the common law.

As a result of his role in catastrophic matters, Dennis is well versed in wrongful death matters. He is adept when it comes to dealing with the reptile approach to claims. He sets a tone early that "pulling at the heartstrings" of the jury is unacceptable and will be challenged at trial. He prepares clients in relation to proper record retention, as well as ensuring all witnesses are ready for reptilian-style depositions. He has successfully filed motions *in limine* barring any mention, comment, reference, testimony or argument regarding the Golden Rule, personal safety, community safety, community fear and community conscience.

During law school, Dennis was invited to write for the St. John's University Law Review. He also interned for the Supreme Court of the State of New York, the New York State Attorney General's Office, and the Securities and Exchange Commission.

Hon. Anthony Cannataro

Anthony Cannataro is the Citywide Administrative Judge for the Civil Court of the City of New York and is a Justice of the New York State Supreme Court.

Justice Cannataro's first judicial assignment after being elected to the Civil Court in 2011 was as an Acting Judge of the Family Court in Kings County, where he sat from 2012 through 2013, working on child custody and visitation cases. He then sat as a judge in the Bronx County Civil Court from 2014 through 2015. In 2016, he was appointed Supervising Judge of the Civil Court for New York County. Justice Cannataro was elected to the Supreme Court in New York County in 2017 and, shortly thereafter, was appointed Administrative Judge for the Civil Court of the City of New York.

Justice Cannataro serves as Co-Chair of the High-Volume Courts Subcommittee of the Chief Judge's ADR Advisory Committee, a Commissioner on the Richard C. Failla LGBT Commission of the New York State Courts, and a member of the Plain Language Committee of the Permanent Commission on Access to Justice. He previously served as the Co-Chair of the LGBT Committee of the NYC Family Court Administrative Judge's Advisory Council. Justice Cannataro also serves on committees in several bar associations, including the New York State Bar Association, the New York County Lawyers Association, the New York Women's Bar Association (past) and the New York City Bar Association (past).

Born to parents who emigrated from Italy, Justice Cannataro received his B.A. from Columbia University (1993) and his J.D. from New York Law School (1996). Before becoming a judge, Justice Cannataro was a Law Clerk to the Hon. Carmen Beauchamp Ciparick of the New York Court of Appeals, and Law Clerk to the Hon. Lottie E. Wilkins in Supreme Court, New York County. Prior to his career in the courts, Justice Cannataro was an Assistant Corporation Counsel in the Manhattan Trial Unit of the New York City Law Department.

Daniel Damien Cassidy

150 Osceola Road

Wayne, NJ 07470

Law Office of Daniel D Cassidy, Pllc 881 Gerard Ave., Ste 200, Bronx NY 10452 2014-to date

Trial counsel for plaintiffs and defendants, NFL & CFL Certified agent, mediator, arbitrator

NYSBA house of Delegates member, Executive Board, TICL section, Charman of the Board, Bronx Bar Association

1998-2014 Partner, Mead, Hecht Conklin & Gallagher

PI defense firm, White Plains NY

JD Pace 1992

BA Boston University 1989

Football, Track(All American)

Wife Jamie

Children Conor (New York Law)

Morgan (Boston University)

Dan has been trying personal injury cases in the courts of the State of New York for almost 30 years. Now primarily acting as trial counsel to both numerous plaintiff's personal injury firms, as well as for several defense firms, and carriers, Dan has more than 100 jury verdicts. The immediate past president of the Bronx Bar association, Dan was instrumental in raising badly needed funds for those suffering from the effects of Hurricane Maria, and was recognized for his efforts by the NYS Assembly, the Borough President and a number of municipalities and organizations in Puerto Rico. He also is active as an Agent for professional football players in the NFL, CFL, and AAF. He has been active as an arbitrator and mediator. Both counsel for plaintiffs and defendants recognize that as one who has "been in the trenches" for both sides, Dan has a unique perspective of the challenges of litigation, and as such, has been successful in bringing parties together to resolve a high percentage of the cases brought before him.

Roderick J. Coyne - Biography

Roderick J. Coyne joined the partnership in August 2008 after nearly twenty years of experience in insurance defense.

EXPERIENCE

Rod litigates in many of the firm's major practice areas, including medical malpractice, legal malpractice, Labor Law construction site liability, general negligence and motor vehicle liability. He has tried many cases to verdict.

Rod has lectured at events sponsored by the New York State Bar Association.

EDUCATION

Rod graduated from Albany Law School of Union University in 1989 and received his undergraduate degree from the University of Notre Dame in 1986.

BAR ADMISSIONS

U.S. Southern District of New York; U.S. Eastern District of New York; New York State Courts; Rhode Island State Courts.

MEMBERSHIPS

New York State Bar Association (currently Chairman of the Professional Liability Committee for the Torts, Insurance and Compensation Law Section of the NYSBA) and Rhode Island Bar Association.

Justice Doris M. Gonzalez

In 1985 Justice Doris M. Gonzalez started her legal career in the insurance industry. She rose through the ranks to become a senior trial attorney, trying high profile cases. After 15 years of practice in the private sector, she went to work for a Supreme Court Judge in the Appellate Term 1st Department and then in Supreme Court Civil Division, Bronx County.

She was elected as a Civil Court judge in Bronx County, in November of 2006. In December 2009, she was appointed by Judge Pfau as Acting Supreme Court Justice. She sat in Supreme Criminal Bronx County for three years, Supreme Court Matrimonial Division for three years, and now sits in Supreme Court Civil Division Bronx County handling an array of civil matters in the Special Trial Part, and the Foreclosure Part. She was elected to Supreme Court in 2016. December 21, 2018, she was appointed by Judge Larry Marks as Administrative Judge of Supreme Court Bronx County Civil Matters.

Thomas Hamilton - Biography

Thomas Hamilton is the VP Strategy and Operations at ROSS Intelligence, where he co-ordinates efforts across the company to ensure that sole practitioners, legal aid groups, law firms, government agencies, corporate law departments, state bar associations and law faculties are able to benefit from cutting edge developments in artificial intelligence research.

Formerly an attorney at the multinational law firm Dentons, Thomas believes passionately in the ability of technology to improve access to justice worldwide, and as employee #1 at ROSS Intelligence, speaks to groups around the world on legal technology innovation, law firm strategy and the transformative economic potential of artificial intelligence technology.

Richard W. Kokel, Esq.

Currently, Mr. Kokel is a New York State No-Fault Arbitrator in New York, New York. He has been an Arbitrator since 2002. He is also a member of the Small Claims Arbitrator Association. Prior to becoming an Arbitrator he worked as a trial attorney for two prominent New York City law firms that specialized in personal injury litigation. Negligence, Labor Law/Construction site liability, Motor Vehicle liability and Medical Malpractice were the areas of his prior practice.

Richard graduated from Vermont Law School in 1981 and received his undergraduate degree from Siena College in 1977. He is admitted in the U.S. Southern District of New York; the U.S. Eastern District of New York; and, the New York State Courts.

He is a member of the New York State Bar Association, and is currently a member of its Membership Committee, and a Co-Chair of the No-Fault Committee for the Torts, Insurance and Compensation Law Section.

Thomas J. Maroney

A graduate of Siena College and St. John's University School of Law, Tom has dedicated his practice to high exposure, catastrophic and complex civil defense litigation. Tom has been called upon to serve as National Coordinating Defense Counsel for product liability matters involving foreign manufacturers and has been admitted pro hac vice in numerous jurisdictions outside of New York.

Tom served as Membership Chair and Co-Chair for the New York State Bar Association (NYSBA) from 2016-2019. Tom served as Chair of the NYSBA Torts, Insurance and Compensation Law (TICL) Section 2011-2012. Tom also serves on the NYSBA Committee to Review Judicial Nominations, Committee on Association Insurance Programs and has served in the NYSBA House of Delegates.

Tom served as the New York State Representative to the Defense Research Institute (DRI) from 2009 to 2015. He presently serves as Chair of the Steering Committee for the 2020 DRI Insurance Roundtable and as Vice Chair of the DRI Alternative Dispute Resolution (ADR) Committee.

Tom serves as Treasurer of the New York City Trial Lawyers Alliance (NYCTLA) Board and Chairs the Giving Committee that awards annual scholarships to law students that excel in Civil Trial Advocacy. The NYCTLA Board is composed of civil litigators that represent plaintiffs and defendants and hosts bench/bar events.

Tom has served as President of the Defense Association of New York (DANY) and as Chair of the DANY Board of Directors and continues as an active member of the DANY Board.

Tom serves on the Board of Directors of the New York Claim Association.

Tom continues to serve by appointment of the Presiding Judge, New York State Appellate Division, First Department, as a member of the First Department Character and Fitness Committee since 1998.

Tom serves as an officer of the Emerald Association of Long Island. The Emerald Association was founded in Brooklyn in 1839 and has operated since that time for the purpose of raising funds for the support of underprivileged children being cared for by the Diocese of Brooklyn.

Tom is the recipient of the DRI Outstanding State Representative Award, DRI Exceptional Performance Award, New York State Bar Association Section Diversity Challenge Champion Award as Chair of the TICL Section, The New York City Brehon Law Society Outstanding Attorney Award, The New York State Bar Association John E. Leach Memorial Award and The Institute of Jewish Humanities Defense Lawyer of the Year Award.

The Defense Association of New York presented the James S. Conway Award to Tom in recognition of his dedication to the ideals of diversity, equality, professionalism and dignity for all that seek justice through our Courts.

Tom has been selected for the New York Super Lawyers list, The Best Lawyers in America and the Irish Legal 100, a listing of leading attorneys of Irish Heritage across the United States.

Maroney O'Connor LLP

Maroney O'Connor LLP with offices in Downtown Manhattan, was formed in August 2005. The firm focuses its practice on providing quality legal services to insurance companies, municipalities and self-insured corporations.

Maroney O'Connor LLP works to cost-effectively manage and defend litigation resulting from serious construction site, product liability, premises liability, professional liability and transportation incidents. The firm also represents New York employers with respect to Third Party Grave Injury cases.

In addition to aggressively defending litigated matters, the firm's practice includes pre-suit activity to minimize loss adjustment expenses, litigation audits, excess coverage oversight, strategic consulting and advising clients with critical business initiatives including Safety Groups and Wrap Programs.

Cody McCone, Partner
cmccone@odblaw.com

Cody McCone joined O'Dwyer & Bernstien in April of 1987. He has earned a reputation as a tireless advocate for his clients, many of whom have been injured in construction site accidents in the New York area, including the Freedom Tower and Building #3 and #4 at the World Trade Center. He represents O'Dwyer & Bernstien's clients not only in the courts, but also before numerous administrative agencies.

Mr. McCone brings his broad experience in all phases of Personal Injury and Construction Accident Law to every case he handles for the firm. To cite just one example: A recent client was an undocumented worker who was injured on the job while working for an unlicensed and uninsured plumbing contractor in New York. Though the client faced what on the surface were extremely difficult legal circumstances, Mr. McCone secured a $2.5 million settlement for the client and his family. Mr. McCone also won at trial a sum of $3.1 million for a local 157 Carpenter who fell from a broken scaffold.

Among his accolades and honors, Mr. McCone serves as a judge at the New York Law School Annual Charles W. Froessel Moot Court Competition. He has lectured at Notre Dame Law School, the School of Law at Rutgers University, and at the Kings Inn and Mansion House in Dublin, Ireland, where he was a guest co-speaker with Justice Susan Denham of the Supreme Court of Ireland and the Right Honorable Michael Mulcahy, Lord Mayor of Dublin. Mr. McCone has also appeared as Counsel in the Coroners Inquest Court in Dublin. Mr. McCone serves on the Judicial Screening Panel for the Appellate Division, Second Department, State of New York, he is a member of the Board for the Sisters of Mercy, the Marriage and Relationships Institute, and Emerald Isle Immigration Center, and a volunteer for the Coney Island Annual Great Irish Fair. Mr. McCone was elected to and began serving on the Board of Directors of HeartShare St. Vincent's Services in July, 2015.

Mr. McCone's humanitarian approach to the law is evident in his affiliations. For the past 25 years, he has been an active supporter and defender of Irish human rights causes in the United States. A former candidate for the City Council of New York, he is a Past President of the Brehon Law Society, an Irish-American Bar Association of attorneys whose objective is to achieve peace and unity in Northern Ireland through the legal process. He also served as Acting President of Division Five, the Paul O'Dwyer Division, of the Ancient Order of Hibernians of Kings County. Mr. McCone won 2009 Brooklyn Irishman of the year, and 2010 Brooklyn Shamrock Football Club, Guest of Honor. Cody resides in Bay Ridge Brooklyn with his wife Rhea and their daughters, Ciara and Kaleigh.

Practice Areas
Personal Injury Law

Education
Juris Doctor: John Marshall Law School
Loyola University, B.A. Rhetoric
Augustinian trained and Jesuit educated

Bar Admissions:
United States Supreme Court
United States District Court, Southern District of New York, Eastern District of New York
New York State

Languages spoken (In addition to English): Portuguese

Glenn A. Monk is the managing partner of the Insurance Defense practice group at Harrington, Ocko & Monk, LLP. Glenn has over 30 years of experience as a trial attorney specializing in tort defense litigation. Areas of particular expertise include: construction accidents, premises liability and security, products liability, general liability and insurance coverage. He represents corporations in OSHA and other administrative proceedings, and advises on claims handling.
Glenn is a member of the New York State Bar Association where he serves on the Executive Committee of the Torts, Insurance & Compensation Law Section and Chairs the Premises Liability/Labor Law Committee and is a frequent lecturer at numerous New York State Bar Association programs on construction site accidents, negligent security, premises liability, accident investigation and preservation of evidence.

James P. O'Connor

A graduate of Boston College and Hofstra University School of Law, Jim has been a practicing attorney in New York State for 25 years. For seven years he represented the Long Island Lighting Company as staff counsel assigned to defend the Company in personal injury and property damage lawsuits.

In 1995, Jim was appointed by New York Governor George Pataki and The New York State Insurance Fund's Board of Commissioners as General Attorney of the New York State Insurance Fund.

In 2003, Jim was appointed by New York State Insurance Superintendent Gregory Serio to serve as Special Deputy Superintendent of Insurance with responsibility over New York's insurance insolvency program. Jim served as Special Deputy Superintendent until forming Maroney O'Connor LLP in August 2005.

Jim is an officer and director of the Defense Association of New York. Jim is also a member of the Executive Committee of the New York State Bar Association's Torts, Insurance and Compensation Law Section; and a member of the Defense Research Institute.

He is a Distinguished Past President of the County Seat Kiwanis (Mineola, NY), and a former Vice President of the Nassau-Suffolk Chapter of the Autism Society of America. He is also a former elected official in his community, having served as a Town Councilman in the Town of North Hempstead from 1997-2001. He has written many articles and given numerous lectures on insurance industry issues.

Kaitlyn O'Connor, Esq. is an Associate Attorney with Nixon Law Group, PLLC in Richmond, Virginia. Kaitlyn combines her knowledge of business law and healthcare to provide real-world solutions for clients navigating this uniquely complex intersection.

Kaitlyn's areas of practice include digital health, medical cannabis law and policy, telehealth, fraud and abuse, and HIPAA privacy/security. She provides legal, regulatory, and business guidance to healthcare providers across the spectrum of care, as well as early-stage companies and vendors serving the healthcare industry.

After graduating *magna cum laude* from Syracuse University, Kaitlyn attended William & Mary Law School, where she served as a member of the Business Law Review. She is a member of the Virginia Bar Association, the Virginia Bar Association Health Law Section, the Connected Health Initiative (CHI), and the Virginia Cannabis Industry Association (VCIA).

Kaitlyn is based in Nixon Law Group's Richmond office and resides in the city with her dog, Oshie.

John J. Rasmussen

John J. Rasmussen has focused on complex insurance issues for over two decades, first for insurers, then for insureds or others who depend on coverage, like tort victims. He has represented both groups at all stages of insurance disputes: pre-claim and pre-litigation, as well as in litigation from dispositive motions, to trial, to appeal. In doing so, he has appeared in matters in the federal courts of at least ten states, including the United States District Court for the Southern District of New York. He has also had successful results from three federal appellate courts. He graduated from the University of Virginia School of Law in 1995, and he received a B.A. with honors from Wesleyan University in 1990. He founded the Insurance Recovery Law Group, PLC, in 2006. www.insurance-recovery.com

Roberto, Joanna M.

Partner

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228 Park Avenue South Suite
97572
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New York, New York Hartford,
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Fax: (646) 395-7182
Email: jroberto@gerberciano.com

Practice Areas

1) Insurance Solutions
2) Professional Liability
3) General Litigation

Admissions

1)New York
2)U.S. District Court for the Eastern District of New York
3)U.S. District Court for the Southern District of New York
4)U.S. District Court for the Northern District of New York
5)Pennsylvania
6)Connecticut (1997)
7)U.S. District Court for the District of Connecticut
8)U.S. Court of Appeals, Second Circuit
9)U.S. Court of Appeals, Tenth Circuit

Biography:

Joanna concentrates her practice in complex insurance coverage, product liability, and commercial litigation. She serves as counsel for multi-national insurance carriers in numerous matters pending throughout the country. Joanna has litigated all phases of declaratory judgment actions and arbitrations. She has counseled large insurers on risk management, underwriting procedures, and policy rewriting and claims practices.

She also focuses her practice on professional liability claims, including errors and omissions; property claims; life, health, and disability; construction liability coverage; Coverage B litigation; and products liability. She recently chaired the Annual Meeting for the Torts Insurance and Compensation Law (TICL) Section of the New York State Bar Association.

Joanna is currently the editor of the *TICL Insurance Coverage eNews*, published by the New York State Bar

Association's Torts, Insurance, and Compensation Law Section. She is also a commentator for *Mealey's Litigation Report: Insurance Bad Faith*.

Joanna is multi-lingual and has attained a degree in linguistics in Florence, Italy. She has a familiarity with and appreciation for international claims handling practices as a result of her experience handling claims arising in Mexico, Italy, the United Kingdom, Spain and France.

Education & Honors:

EDUCATION

Pace University School of Law, J.D., 1997

Diploma di Conoscenza, Centro Linquisto, Florence, Italy, 1997 Hofstra University, B.A., 1994

HONORS

AV Preeminent Peer-Review Rating (Martindale-Hubbell)

New York Metro *Super Lawyers*, 2013-2016 (Thomson Reuters)

Chairperson of the Year Award, New York State Bar Association, Torts Insurance and Compensation Law Section, 2018

Professional Leadership:

New York State Bar Association

Member, Executive Committee Torts, Insurance, and Compensation Law Section:
Chair, Insurance Coverage Committee, Torts, Insurance, and Compensation Law Section
Editor, TICL Insurance eNews

Statewide Chair, Law School for the Claims Professional Member, Insurance and Reinsurance Legacy Association (IRLA) Defense Research Association
Member, Steering Committee, Insurance Law Committee

Chair, Directors and Officers Sub-committee, Insurance Law Committee Chair, Expert Witness Database
Presenter, multiple seminars
Author, multiple publications

NYC Chapter, National Association of Insurance Women

Languages:

Italian French

Publications:

Author, "Estoppel: The Reason Why Coverage Ends or, Really, Begins," Defense Research Institute, *Covered Events*, December 23, 2016
Author, "What You Need to Know: The Rise of Global Insurance Policies," Defense Research Institute, *For the Defense*, May 2016
Author, "NY Insurers May Benefit From Lower Disclaimer Standard," *Law360* July 17, 2014

Author, "Advertising Offenses," Defense Research Institute, *Coverage B: Personal and Advertising Injury Compendium*, May 2014
Author, "Professional Liability Insurance: A Compendium of State Law," Defense Research Institute, December 20, 2012

Presentations:

Statewide Chairperson, "Premises Liability Issues and Considerations," New York State Bar Association, New York March 2018
Statewide Chairperson, "Law School for Insurance Professionals," New York State Bar Association, New York, September 2017
Chair, "Northeast Regional Claims Conference," Defense Research Institute, Hartford, CT, November 2017
Chair, "Annual Fall Meeting" New York State Bar Association, Nashville, TN, November 2017
Statewide Chairperson, "Labor Law Claims, Coverage and Litigation," New York State Bar Association, New York, December 2016
Presenter, "Deep Dive into Defending," Insurance Coverage and Practice Symposium, Defense Research Institute, New York, NY,

December 9, 2016
Statewide Chairperson, "Handing and Taking Depositions," New York State Bar Association, New York, October 2016
Presenter, "Insurance Coverage Update 2016," New York State Bar Association, June 3, 2016
Statewide Chairperson, "Insurance Coverage Update 2015: Coverage Disputes and Litigation," New York State Bar Association, New York, May 2015
Statewide Chairperson, Insurance Coverage Update, New York State Bar Association, New York, New York, May 2011

Representative Matters:

***Paramount Aviation v. Agusta*, 288 F.3d 67 (3rd Circuit, 2002)**
After multiple motions in District Court, the 3rd Circuit addressed whether economic loss alone is ever recoverable under the strict liability law of New Jersey and, if so, when the causal nexus between the defect and alleged losses is too attenuated to permit recovery in strict liability.

***Zimmerman v. Peerless*, 85 AD3d 1021 (2nd Dept. 2011)**
Dismissal of action and finding of no duty to defend or indemnify insured where notice was provided six months after occurrence. The court rejected any reasonable belief of non- liability as an excuse to the late notice because the insured offered money to pay the claimant.

***Esposito v. Ocean Harbor Ins. Co.,* 2013 U.S. Dist. LEXIS 179262 (EDNY Dec. 19, 2013)**
One of the first matters where the court granted summary judgment to insurer to dismiss the bad faith and extra contractual claims in a Superstorm Sandy matter.

***Western Heritage Ins. Co. v. Jacob Development*, 2014 WL 297792 (E.D.N.Y., 2014)**
Matter was dismissed because there was no obligation for the insurer to defend or indemnify insured because ultimately policy exclusions applied to bar coverage.

***Kung v. Scottsdale Ins Co.*, 130 A.D.3d 878 (2nd Dept. 2015)**
Dismissal of a direct action where the claims were based on contractual claims that amounted to improperly performed work by the insured.

Lindsay Lankford Rollins

Lindsay Lankford Rollins is an attorney in the insurance coverage litigation and counseling group at Hancock Daniel in Richmond, Virginia. She represents insurance companies in a variety of insurance coverage litigation matters and she counsels insurers on coverage issues across a wide-range of personal and commercial product lines. Lindsay is the former Chair of the Policy Coverage Section of Virginia Association of Defense Attorneys and frequently writes and speaks on insurance coverage issues.

Justice Silver is a native Bronxite attending public schools from elementary school until his graduation from Christopher Columbus High school. After graduation, Justice Silver attended New York University where he was conferred a M.S. in Accounting and Management. He attended Hofstra University School of Law where he was conferred a J.D. in 1983. Justice Silver was also conferred a M.B.A. in Finance from New York University Stern Graduate School of Business in 1992. At the time he was also working full time as in house counsel for five private bus companies. Thereafter, he joined Fields & Rosen, a firm specializing in maritime law, commercial and real estate matters and personal injury actions, in addition to handling matters for the bus companies. After several years, Justice Silver became an equity partner in the firm whose name was changed to Fields, Silver & Santo, L.L.P. and ultimately Silver & Santo, L.L.P. In 2004, Justice Silver was elected to the Civil Court of the City of New York being initially assigned to Civil Court, Kings County until he was re-assigned in April 2009 to Family Court, Bronx County where he presided over juvenile delinquency matters. In January 2010, Judge Silver was appointed a Supreme Court Judge by designation and assigned to Supreme Court, New York County where he presided over the approximately two thousand motor vehicle cases pending in New York County. From April 2011 until October 5, 2015, Justice Silver presided over the Trial Assignment Part in Supreme Court, New York County. In 2012, Justice Silver was also asked to handle potential early settlement of Medical Malpractice Cases as part of a specialized grant program. In 2012, Justice Silver was elected to the Supreme Court of the State of New York. In October 2015 Justice Silver was asked to preside over a newly created Mediation Part called J-Med. in addition to his other assignments-the Medical Malpractice Early Settlement Part and an IAS Part handling general matters. In 2016, Justice Silver was assigned a limited Matrimonial caseload. As of July 2017, Justice Silver was appointed by Chief Judge DiFiore to the new position of Deputy Chief Administrative Judge for New York City Courts. He will be responsible for the handling of the day-to-day court operations for the Trial Courts in New York City. In addition, Justice Silver served as the interim Administrative Judge for New York County until December 2017. Thereafter, in addition to his role as the Deputy Chief Administrative Judge for New York City Courts, he served as the interim Administrative Judge for Bronx County from January 2018 until December 2018.

Justice Silver is also involved in many community-based and Bar Associations including the NAACP, the International Association of Gay and Lesbian Judges and the Jewish Lawyers Guild. He is currently co-chair of the Ethics and Professional Committee of The Torts, Insurance Compensation Law Section of the New York State Bar Association.

Hon. Adam Silvera Justice of the Supreme Court, New York County

Justice Silvera took his undergraduate degree at Queens College - CUNY in 1994 and his law degree at Brooklyn Law School in 2001. Justice Silvera was elected to the Civil Court in 2013, appointed an Acting Supreme Court Justice in 2017 and was elected to the Supreme Court in 2017.

Prior to election to the bench, Justice Silvera was a Senior Associate at the law firm of Paul B. Weitz & Associates. From January 2014 through January 2016, Justice Silvera was assigned to Family Court, Kings County, in a general custody and visitation part. In February 2016, Justice Silvera was assigned to Civil Court, Kings County, in a dedicated consumer credit and Self-Represented part involving actions for monetary damages of $25,000.00 or less. In February 2017, Justice Silvera served in the Civil Court, New York County, in a dedicated consumer credit and Self-Represented part involving actions for monetary damages of $25,000.00 or less. In June 2017, Justice Silvera was assigned to the "Forum Selection" Part as well as handling cases in small claims, no fault, and commercial landlord and tenant cases. In August 2017, Justice Silvera was promoted to Acting Supreme Court Justice handling the Integrated Domestic Relations Part in Family Court, New York County presiding over matrimonial actions arising out of Family Court proceedings. Currently, since January 2018, Justice Silvera is assigned to the Motor Vehicle Part handling over 2,000 personal injury actions resulting from an automobile accident.