TORT LAW

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I. ASSUMPTION OF THE RISK

In New York State, pursuant to the doctrine of primary assumption of the risk, a participant who engages in a sport or recreational activity consents to "those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation."[1] The doctrine of primary assumption of the risk survived the adoption of the comparative fault statutes,[2] and when the doctrine is

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1. Morgan v. State, 90 N.Y.2d 471, 484, 685 N.E.2d 202, 207, 662 N.Y.S.2d 421, 426 (1997); Turcotte v. Fell, 68 N.Y.2d 432, 440-41, 502 N.E.2d 964, 969, 510 N.Y.S.2d 49, 54 (1986).

2. *Turcotte*, 68 N.Y.2d at 439, 502 N.E.2d at 968, 510 N.Y.S.2d at 53.

applicable, it acts as a complete bar to liability based on the defendant's alleged negligence.[3]

In *Trupia ex. rel. Trupia v. Lake George Central School District*, the Court of Appeals had an opportunity to revisit the scope and application of primary assumption of the risk.[4] In *Trupia*, the infant plaintiff, Luke Anthony Trupia, was injured while participating in a summer school program administered by defendants.[5] While on a break from classes, the "plaintiff attempted to slide down the banister of a stairway."[6] He fell, and as a result sustained skull and brain injuries.[7] Plaintiff's father brought suit in supreme court against the School District, and after the close of discovery and the filing of the note of issue, the District moved pursuant to Civil Procedure Law and Rules (CPLR) section 3025(b) for leave to amend their answer in order to add the affirmative defense of primary assumption of the risk, which the court granted.[8] Plaintiffs appealed, and the Appellate Division, Third Department, reversed the supreme court decision, noting that the Third Department has limited the application of the doctrine of primary assumption of the risk "to situations in which a plaintiff has been injured 'while voluntarily participating in a sporting or entertainment activity.'"[9] In voting to unanimously reverse the supreme court decision, and denying defendant's motion to amend the answer, the Third Department noted that there was a split in the appellate departments as to the scope and extent of the application of primary assumption of the risk.[10] The court noted that "the Second and Fourth Departments have expanded application of the doctrine beyond sporting and recreational activities."[11] The Third Department, in a unanimous

3. *Id.* at 438-39, 502 N.E.2d at 968, 510 N.Y.S.2d at 53; Burleigh v. Gen. Elec. Co., 262 A.D.2d 774, 775, 691 N.Y.S.2d 662, 663 (3d Dep't 1999); Roe v. Keane Stud Farm, 261 A.D.2d 800, 801, 690 N.Y.S.2d 336, 337 (3d Dep't 1999).

4. 14 N.Y.3d 392, 393-94, 927 N.E.2d 547, 548, 901 N.Y.S.2d 127, 128 (2010).

5. Trupia *ex. rel.* Trupia v. Lake George Cent. Sch. Dist., 62 A.D.3d 67, 68, 875 N.Y.S.2d 298, 299 (3d Dep't 2009).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 69, 875 N.Y.S.2d at 300 (citing Roe v. Keane Stud Farm, 261 A.D.2d 800, 801, 690 N.Y.S.2d 336, 337 (3d Dep't 1999)).

10. *Trupia*, 62 A.D.3d at 68-70, 875 N.Y.S.2d at 299-300.

11. *Id.* at 69, 875 N.Y.S.2d at 300. For examples of cases extending the doctrine's application, see Sy v. Kopet, 18 A.D.3d 463, 463-64, 795 N.Y.S.2d 75, 76 (2d Dep't 2005) (holding that the "plaintiff assumed the risk of injury in attempting to enter his room through the second story window by climbing window-guardrails and a gutter on the outside of the house"), *appeal denied*, 6 N.Y.3d 710, 846 N.E.2d 477, 813 N.Y.S.2d 46 (2006); Lamandia-Cochi v. Tulloch, 305 A.D.2d 1062, 1062, 759 N.Y.S.2d 411, 411 (4th Dep't

decision, declined to apply the doctrine under the facts of this case, noting that "[e]xtensive and unrestricted application of the doctrine of primary assumption of the risk to tort cases generally represents a throwback to the former doctrine of contributory negligence, wherein a plaintiff's own negligence barred recovery from the defendant."[12]

The Third Department, because of the broader use of the doctrine permitted by the Second and Fourth Departments, certified the question to the Court of Appeals: "whether it erred 'in reversing, on the law, the order of the Supreme Court by denying defendants' motion for leave to amend their answer to include the affirmative defense of primary assumption of risk?"[13] Chief Judge Lippman wrote the opinion for the Court with concurrences by Judges Ciparick, Graffeo, and Jones.[14] Judge Smith wrote a separate opinion in which Judges Read and Pigott concurred.[15] The Court of Appeals found that there was "[n]o suitably compelling policy justification . . . advanced to permit [the] assertion of assumption of the risk in the present circumstances" of this case.[16] In coming to its conclusion, the Court found:

> The injury-producing activity here at issue, referred to by the parties as "horseplay," is not one that recommends itself as worthy of protection, particularly not in its "free and vigorous" incarnation, and there is, moreover, no nexus between the activity and defendants' auspices, except perhaps negligence. This is, in short, not a case in which the defendant solely by reason of having sponsored or otherwise supported some risk-laden but socially valuable voluntary activity has been called to account in damages.[17]

In coming to this conclusion, the Court noted that if the doctrine of primary assumption of the risk were to be applied under these circumstances, "[l]ittle would remain of an educational institution's obligation adequately to supervise the children in its charge."[18]

Judge Smith, in the concurring opinion, took the position that

2003) (holding that the plaintiff's son assumed the risk of injury when he slid down a wooden handrail adjacent to outside steps of the defendant's home).

12. *Trupia*, 62 A.D.3d at 69, 875 N.Y.S.2d at 300 (citing Pelzer v. Transel Elevator & Elec. Inc., 41 A.D.3d 379, 381, 839 N.Y.S.2d 84, 86 (1st Dep't 2007)).

13. Trupia *ex. rel.* Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 394, 927 N.E.2d 547, 548, 901 N.Y.S.2d 127, 128 (2010).

14. *Id.* at 398, 927 N.E.2d at 551, 901 N.Y.S.2d at 131.

15. *Id.*

16. *Id.* at 396, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.

17. *Id.*

18. *Trupia*, 14 N.Y.3d at 396, 927 N.E.2d at 549-50, 901 N.Y.S.2d at 129-30 (citing Mirand v. City of New York, 84 N.Y.2d 44, 49, 637 N.E.2d 263, 266, 614 N.Y.S.2d 372, 375 (1994)).

"assumption of the risk cannot possibly be a defense [in this case], because it is absurd to say that a twelve-year-old boy 'assumed the risk' that his teachers would fail to supervise him."[19] Judge Smith's concurring opinion goes on to say that: "[T]he majority's dictum invites a number of questions that the majority makes no attempt to answer. Most obvious among them: [w]hat exactly is 'athletic or recreative' activity? Indeed, why was Luke Trupia's chosen activity—sliding down a banister—not 'recreative'"?[20]

II. LABOR LAW

The 2010 survey year was perhaps the most active ever by the Court of Appeals in the area of labor law, and especially section 240(1) and section 241(6) of the Labor Law.[21] In all, there were six Court of Appeals cases that had dramatic impact in the area of labor law, and two that primarily changed the way that many courts will look at Labor Law section 240(1) cases.

A. Forces of Gravity and Section 240(1)

In *Runner v. New York Stock Exchange, Inc.*:

> [The] [p]laintiff and several coworkers had been directed to move a large reel of wire, weighing some 800 pounds, down a set of about four stairs. To prevent the reel from rolling freely down the flight [of stairs] and causing damage, the workers were instructed to tie one end of a ten-foot length of rope to the reel and then to wrap the rope around a metal bar placed horizontally across a door jamb on the same level as the reel. The loose end of the rope was then held by plaintiff and two coworkers while two other coworkers began to push the reel down the stairs. As the reel descended, it pulled plaintiff and his fellow workers, who were essentially acting as counterweights, toward the metal bar . . . [P]laintiff was drawn horizontally into the bar, injuring his hands as they jammed against it. Experts testified that a pulley or hoist should have been used to move the reel safely down the stairs and that the jerry-rigged device actually employed had not been adequate to the task.[22]

The case went to trial in federal district court, and "the jury, having been instructed that liability pursuant to Labor Law § 240(1) could not be assigned unless the plaintiff's injuries had been attributable to a

19. *Id.* at 397, 927 N.E.2d at 550, 901 N.Y.S.2d at 130.
20. *Id.*
21. *See* N.Y. LAB. LAW §§ 240(1), 241(6) (McKinney 2009).
22. 13 N.Y.3d 599, 602, 922 N.E.2d 865, 866, 895 N.Y.S.2d 279, 280 (2009).

gravity-related risk, and having found that no such risk had been implicated, returned a verdict for the defendants."[23]

Plaintiff made a motion to set aside the verdict, and the motion was granted, as "the District Court found, as a matter of law, that the movement of the reel down the stairs presented a gravity-related risk; that an adequate safety device had not been used to manage the risk; and that the failure had been a substantial factor in causing plaintiff's injury."[24] The defendants appealed to the Second Circuit, and after its initial review of the matter, certified two questions to the New York State Court of Appeals:

> I. Where a worker who is serving as a counter-weight on a makeshift pulley is dragged into the pulley mechanism after a heavy object on the other side of a pulley rapidly descends a small set of stairs, causing an injury to plaintiff's hand, is the injury (a) an "elevation related injury," and (b) directly caused by the effects of gravity, such that section 240(1) of New York's Labor Law applies?
>
> II. If an injury stems from neither a falling worker nor a falling object that strikes a plaintiff, does liability exist under section 240(1) of New York's Labor Law?[25]

The defendants contended that the accident was not sufficiently elevation-related to fall within section 240(1).[26] Relying on *Ross v. Curtis-Palmer Hydro-Electric Co.*,[27] the defendants contended that "the special hazards covered by section 240(1) are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured."[28] The defense also relied on *Narducci v. Manhasset Bay Associates*,[29] where the Court of Appeals succinctly noted that "Labor Law § 240(1) applies to both 'falling worker' and 'falling object' cases."[30] The Court of Appeals, based on the facts and arguments before it, held as follows:

> Manifestly, the applicability of the statute in a falling object case such as the one before us does not under this essential formulation depend upon whether the object has hit the worker. The relevant inquiry—

23. *Id.*

24. *Id.*

25. *Id.* at 602-03, 922 N.E.2d at 866, 895 N.Y.S.2d at 280; Runner v. New York Stock Exch., Inc., 568 F.3d 383, 389 (2d Cir. 2009).

26. *Runner*, 13 N.Y.3d at 603-04, 922 N.E.2d at 867, 895 N.Y.S.2d at 281.

27. 81 N.Y.2d 494, 501, 618 N.E.2d 82, 85, 601 N.Y.S.2d 49, 52 (1993).

28. *Runner*, 13 N.Y.3d at 604, 922 N.E.2d at 867, 895 N.Y.S.2d at 281 (citation and quotation omitted).

29. 96 N.Y.2d 259, 267, 750 N.E.2d 1085, 1089, 727 N.Y.S.2d 37, 41 (2001).

30. *Runner*, 13 N.Y.3d at 604, 922 N.E.2d at 867, 895 N.Y.S.2d at 281.

> one which may be answered in the affirmative even in situations where the object does not fall on the worker—is rather whether the harm flows directly from the application of the force of gravity to the object. Here, as the District Court correctly found, the harm to plaintiff was the direct consequence of the application of the force of gravity to the reel. Indeed, the injury to the plaintiff was every bit as direct a consequence of the descent of the reel as would have been an injury to a worker positioned in the descending reel's path. The latter worker would certainly be entitled to recover under section 240(1) and there appears no sensible basis to deny plaintiff the same legal recourse.[31]

The Court went on to hold:

> The elevation differential here involved cannot be viewed as de minimis, particularly given the weight of the object and the amount of force it was capable of generating, even over the course of a relatively short descent. And, the causal connection between the object's inadequately regulated descent and the plaintiff's injury was, as noted, unmediated—or, demonstrably, at least as unmediated as it would have been had plaintiff been situated paradigmatically at the rope's opposite end.[32]

In conclusion, the Court found that the plaintiff's injuries were "[a] direct consequence of a failure to provide statutorily required protection against a risk plainly arising from a workplace elevation differential."[33] As a result, the Second Circuit affirmed the judgment of the district court, and remanded the case back to the district court to enter judgment in conformity with the decision accordingly.[34]

The expansive findings of *Runner* were immediately apparent in the Appellate Division, Fourth Department, decision of *Potter v. Jay E. Potter Lumber Co.*[35] In *Potter*, the plaintiff commenced a negligence as well as a Labor Law section 240(1) action against the defendants for damages resulting from injuries he sustained while constructing a barn on property owned by defendants, Jay E. Potter Lumber Co., Inc., ("Potter Lumber").[36] Potter Lumber supplied the building materials for the project, including aluminum sheeting to be used in constructing the roof of the barn.[37] The plaintiff's employer, R&R, used a forklift to

31. *Id.* at 604, 922 N.E.2d at 868, 895 N.Y.S.2d at 282.
32. *Id.* at 605, 922 N.E.2d at 868, 895 N.Y.S.2d at 282.
33. *Id.*
34. Runner v. New York Stock Exch., Inc., 590 F.3d 904, 905 (2d Cir. 2010).
35. 71 A.D.3d 1565, 900 N.Y.S.2d 207 (4th Dep't 2010).
36. *Id.* at 1566, 900 N.Y.S.2d at 208.
37. *Id.*

unload the aluminum, while plaintiff, along with three other R&R employees, positioned themselves on the back of the forklift to act as "counterweights for the load."[38] As the forklift lifted the aluminum sheeting off the flatbed truck, the load become unstable, tipping the forklift over and "catapulting the plaintiff approximately ten feet into the air."[39] Plaintiff landed on the aluminum sheeting in front of the forklift, resulting in his injuries.[40]

During the trial of the action, supreme court granted plaintiff's motion for directed verdict against the defendants with respect to Labor Law section 240(1) at the close of proof.[41] Defendants appealed, contending that Labor Law section 240(1) did not apply in this case "because plaintiff neither fell from an elevated work surface nor was struck by a falling object."[42] The Fourth Department, in a memorandum decision relying on *Runner v. New York Stock Exchange, Inc.*, found that the harm to the plaintiff flowed directly from the application of the force of gravity to the load of aluminum hoisted by the forklift "when the forklift operator was unable to control the descent of the load, and the forklift tipped forward, catapulting [the] plaintiff into the air."[43]

The Court of Appeals' expansive rationale stated in *Runner* again became readily apparent in the case of *Luongo v. City of New York*.[44] In *Luongo*, the plaintiff sustained injuries as a result of bracing a hydraulic jack that was being used to lift a steel girder beneath an elevated subway line.[45] Steel shim plates were placed on the top of the jack, as "spacers," in order to give it more height.[46] Because the spacers kept falling off, plaintiff attempted to hold the spacers in place by hand.[47] When the jack "jumped and then the steel fell down," the spacers either shifted or fell, resulting in injuries to the plaintiff's left hand.[48]

The plaintiff moved for summary judgment under section 240(1), in Supreme Court, Bronx County, and the motion was granted on the

38. *Id.*

39. *Id.*

40. *Potter*, 71 A.D.3d at 1566, 900 N.Y.S.2d at 208.

41. *Id.*, 900 N.Y.S.2d at 209.

42. *Id.*

43. *Id.* (citing Runner v. New York Stock Exch. Inc., 13 N.Y.3d 599, 604, 922 N.E.2d 865, 868, 895 N.Y.S.2d 279, 282 (2009)).

44. 72 A.D.3d 609, 899 N.Y.S.2d 235 (1st Dep't 2010).

45. *Id.* at 609, 899 N.Y.S.2d at 236.

46. *Id.*

47. *Id.*

48. *Id.* at 609, 899 N.Y.S.2d at 236.

issue of liability.[49] The defendant appealed, and the Appellate Division, First Department, affirmed the finding of liability under Labor Law section 240(1).[50] In applying the rationale of *Runner*, the First Department found that:

> Labor Law § 240(1) was designed to prevent those types of accidents in which the . . . protective device proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*.[51]

The court concluded by stating that the plaintiff in this case "was injured as a direct result of the gravitational force of the improperly secured girder, jack and spacers and the absence of a securing device."[52]

Defendant's argument that the jack and spacers were not positioned significantly above plaintiff's head was of no moment to the court, given the fact that the plaintiff's injury was a direct result of the application of the force of gravity to an object or person.[53]

Runner was also heavily relied upon by the First Department in the case of *Apel v. City of New York*.[54] The plaintiff there was injured when he attempted "to move a barge containing materials for the Williamsburg Bridge reconstruction project from the Manhattan to the Brooklyn side of the bridge."[55] Part of the process involved a 125-pound steel "keeper pin" that needed to be inserted into a "toggle hole."[56] As the plaintiff and a coworker were inserting the pin into the hole of one spud, the crane dropped the spud; and the pin came up "like a seesaw," "snapping" plaintiff's left arm and "hurling" him across the deck of the barge.[57]

The court found that there could be no question that:

> [T]he harm to plaintiff was the direct consequence of the application of the force of gravity to the spud, [and] that the risk to be guarded against "arose from the force of the very heavy object's unchecked, or insufficiently checked, descent."[58]

49. Luongo v. City of New York, No. 6969/2004, 2009 N.Y. Slip Op. 52774(U), at 1, 7 (Sup. Ct. Bronx Cnty. 2009).

50. *Luongo*, 72 A.D.3d at 611, 899 N.Y.S.2d at 237.

51. *Id.* at 610-11, 899 N.Y.S.2d at 236 (quoting Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 604, 922 N.E.2d 865, 867, 895 N.Y.S.2d 279, 281 (2009)).

52. *Id.* at 611, 899 N.Y.S.2d at 237.

53. *Id.* at 610-11, 899 N.Y.S.2d at 236.

54. 73 A.D.3d 406, 901 N.Y.S.2d 183 (1st Dep't 2010).

55. *Id.* at 406, 901 N.Y.S.2d at 183.

56. *Id.* at 406-07, 901 N.Y.S.2d at 184.

57. *Id.*, 901 N.Y.S.2d at 183-84.

58. *Id.* (citing Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 603-04, 922 N.E.2d 865, 867, 895 N.Y.S.2d 279, 281 (2009)).

The lessons from the *Runner* case appear to be clear and expansive. It seems to be the intention of the Court of Appeals that if you show a connection between the forces of gravity, injury, and the lack of a safety device, section 240 of the Labor Law should apply, and the plaintiff should recover. In doing so, it is clear that the courts in the State of New York are being more expansive in the application of Labor Law section 240(1).[59]

In *Keane v. Chelsea Piers, L.P.*, the First Department made an attempt to clarify when a Labor Law section 240(1) action is based upon the effects of gravity.[60] In *Keane*, the "[p]laintiff was injured while working under a pier when the action of waves caused the floating stage upon which he was kneeling to drop while plaintiff was sawing a board."[61] This drop caused the board to fall on top of the plaintiff, causing him injuries.[62] However, the wave subsequently lifted him up and knocked him against the bottom of the pier, which again injured him.[63] The First Department, in a unanimous decision, found that the injuries caused by the floating stage dropping because of the wave action was as a direct result of the forces of gravity and were plainly contemplated by Labor Law section 240(1).[64] However, the court found that plaintiff's other injuries, "caused by the wave lifting him up and knocking him against the bottom of the pier, [were] not similarly covered."[65]

B. Falls from Trucks and Section 240(1)

In a case involving a fall from a truck, the Appellate Division, Third Department, took up the case of *Intelisano v. Sam Greco Construction, Inc*.[66] Generally, it has been well established in the State of New York that workers who fall from the bed of a truck are not entitled to recovery under Labor Law section 240(1), as it is not the type

59. *See* Rivera v. 800 Ala. Ave., LLC, 70 A.D.3d 798, 799, 892 N.Y.S.2d 915, 915-16 (2d Dep't 2010) (affirming the trial court's partial grant of summary judgment on the issue of liability in a Labor Law section 240(1) case where the plaintiff fell from a ladder, injuring his hand).

60. 71 A.D.3d 593, 594, 899 N.Y.S.2d 153, 154 (1st Dep't 2010).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* (citing Dooley v. Peerless Imps., Inc., 42 A.D.3d 199, 200, 837 N.Y.S.2d 720, 721-22 (2d Dep't 2007); Runner v. New York Stock Exch., Inc., 13 N.Y.3d 599, 604, 922 N.E.2d 865, 867, 895 N.Y.S.2d 279, 281 (2009)).

65. *Keane*, 71 A.D.3d at 594, 899 N.Y.S.2d at 154.

66. 68 A.D.3d 1321, 890 N.Y.S.2d 683 (3d Dep't 2009).

of elevation-related hazard contemplated by the statute.[67] In *Intelisano*, the "[p]laintiff was hanging from a ten-foot high stack of insulation bundles, with his hands fourteen feet above the ground, and was trying to swing his body to that height when he fell."[68] The court found that "[t]hese circumstances constitute an elevation-related risk greater than merely falling from the bed of a trailer," and inasmuch "[a]s no safety devices were provided to assist plaintiff in reaching the insulation or prevent him from falling from [such] a height, . . . defendants violated the statute and that violation constituted a proximate cause of the accident."[69]

C. Who is an "Owner" under Section 240(1) and Section 241(6)

Scaparo v. Village of Ilion was another significant opinion decided by the Court of Appeals during the survey year.[70] In *Scaparo*, village employees were injured in a collapse of a sewer trench located on the property of the Herkimer County Industrial Development Agency (the "Agency"), as they were connecting sewer lateral lines to a chapel owned by a church that agreed to pay for the costs of the materials.[71] A claim was brought pursuant to Labor Law section 241(6), and the issue arose as to whether the Agency was an owner as contemplated under that statute.[72] It should be noted that although this case deals solely with section 241(6) of the Labor Law, the term "owner" for purposes of section 241(6) must be consistent with both section 240(1) and section 241(a) under the doctrine of *in pari material*.[73]

In this case, the Court of Appeals determined that the Agency was not an "owner" as defined by the statute as it did not contract for the work performed on the property, and there was no nexus between the owner and the worker, whether by a lease agreement or grant of

67. *See* Toefer v. Long Island R.R., 4 N.Y.3d 399, 408, 828 N.E.2d 614, 618, 795 N.Y.S.2d 511, 515 (2005); Lavore v. Kir Munsey Park 020, LLC, 40 A.D.3d 711, 712, 835 N.Y.S.2d 708, 710 (2d Dep't 2007), *lv. denied*, 10 N.Y.3d 701, 883 N.E.2d 369, 853 N.Y.S.2d 542 (2008); Amantia v. Barden & Robeson Corp., 38 A.D.3d 1167, 1168, 833 N.Y.S.2d 784, 785 (4th Dep't 2007).

68. *Intelisano*, 68 A.D.3d at 1323, 890 N.Y.S.2d 683, 684-85.

69. *Id.*, 890 N.Y.S.2d at 685 (citing Ford v. HRH Constr. Corp., 41 A.D.3d 639, 640-41, 838 N.Y.S.2d 636, 638 (2d Dep't 2007); Berg v. Albany Ladder Co., 40 A.D.3d 1282, 1284-85, 836 N.Y.S.2d 720, 723 (3d Dep't 2007), *aff'd*, 10 N.Y.3d 902, 891 N.E.2d 723, 861 N.Y.S.2d 607 (2008); Monroe v. Bardin, 249 A.D.2d 650, 652, 671 N.Y.S.2d 191, 193 (3d Dep't 1998)) .

70. 13 N.Y.3d 864, 921 N.E.2d 590, 893 N.Y.S.2d 823 (2009).

71. *Id.* at 866, 921 N.E.2d at 591, 893 N.Y.S.2d at 824.

72. *Id.*; N.Y. LAB. LAW § 241(6) (McKinney 2009).

73. *See* Allen v. Cloutier Constr. Corp., 44 N.Y.2d 290, 300, 376 N.E.2d 1276, 1279, 405 N.Y.S.2d 630, 634 (1978).

easement or other property interest.[74] The Court determined that although the accident occurred on the Agency's property, inasmuch as there was no contract with the village to have the sewer lateral installed, and it did not grant the village an easement or other property interest creating the right-of-way, that the Agency should not be determined to be an "owner" for purposes of the statute.[75] The Court also determined that:

> [A]lthough the Church agreed to pay for the costs of the materials, the Church had no interest in the property over which the sewer lateral was being placed . . . no representative from the Church was present at, or gave directions during, the excavation work [and] the testimony . . . indicated that the Village [of Frankfort] assumed full responsibility for installing the lateral sewer line and acknowledged that the lateral would be available for use by future property owners in the area who wished to connect to the village sewer system.[76]

D. Preemption

In *Lee v. Astoria Generating Co.*, the Court of Appeals was "called upon to determine whether a barge containing an electricity generating turbine [was] a vessel under the Longshoreman and Harbor Workers' Compensation Act (LHWCA) and whether that provision preempts New York State Labor Law § 240(1) and § 241(6) claims."[77] In this case, the plaintiff's supervisor instructed him to enter the turbine's exhaust well through a hatch in order to weld some fixtures inside.[78] Plaintiff was required to use a ladder to access the exhaust well and entered the hatch, and further, was required to climb down the base of the exhaust well.[79] While climbing down, his feet slipped from under him and he fell eight feet to the base of the exhaust well, injuring his back.[80] Following the accident, plaintiff initiated a claim and was awarded benefits under the LHWCA, which provides workers' compensation to *land*-based [marine] employees.[81]

Plaintiff also commenced a state court action against the owner of

74. *Scaparo*, 13 N.Y.3d at 866, 921 N.E.2d at 591, 893 N.Y.S.2d at 823 (citing Abbatiello v. Lancaster Studio Assocs., 3 N.Y.3d 46, 51, 814 N.E.2d 784, 787, 781 N.Y.S.2d 477, 480 (2004)).

75. *Id.*, 921 N.E.2d at 591, 893 N.Y.S.2d at 824.

76. *Id.* at 866-67, 921 N.E.2d at 591, 893 N.Y.S.2d at 824.

77. 13 N.Y.3d 382, 387, 920 N.E.2d 350, 352, 892 N.Y.S.2d 294, 296 (2009).

78. *Id.* at 388, 920 N.E.2d at 352, 892 N.Y.S.2d at 296.

79. *Id.*

80. *Id.*

81. *Id.*, 920 N.E.2d at 352-53, 892 N.Y.S.2d at 296-97 (citation and quotation omitted).

the vessel pursuant to Labor Law sections 200, 240(1) and 241(6), as well as common-law negligence claims.[82] The defendant moved to dismiss the plaintiff's complaint pursuant to 33 USC § 905(a), arguing that federal law precludes lawsuits against it by injured workers, and that such state claims were preempted by 33 USC § 905(b) and federal maritime law.[83]

In a five to two decision, the Court of Appeals dismissed the plaintiff's complaint under the New York State Labor Law, finding that "the LHWCA expressly preempt[ed] plaintiff's Labor Law § 240(1) and § 241(6) claims."[84] The Court noted that "[w]hile it is true that federal maritime law does not generally supercede state law, in this case, where Congress explicitly limited claims against the vessel owner to [the] federal act, state law claims are preempted."[85]

Judge Ciparick, who wrote the dissenting opinion in which Chief Judge Lippman concurred, argued that "[i]f there is no remedy provided by section 905(b), there is no 'exclusive remedy' that preempts state law actions."[86] Thus, argued the dissenters, "to determine whether a plaintiff's state claims are preempted by the 'exclusive remedy' language of section 905(b), a court must first ascertain whether the plaintiff can state a maritime tort claim for vessel negligence against the vessel owner."[87] In applying the connection test of *Sisson v. Ruby*,[88] the dissent concluded that the fact that the "plaintiff recovered workers' compensation benefits under the LHWCA is of no import . . . [and that it] is distinct from the question [as to] whether [the plaintiff] can recover in maritime tort for vessel negligence under section 905(b)."[89] The dissent went on to argue that "here, the injured employee has no cause of action for vessel negligence under maritime law, [and as a result,] section 933 of the LHWCA expressly recognizes and preserves state law causes of action against third parties, including vessel owners who are not also employers."[90]

82. *Lee*, 13 N.Y.3d at 388, 920 N.E.2d at 353, 892 N.Y.S.2d at 297.

83. *Id.*

84. *Id.* at 392, 920 N.E.2d at 355, 892 N.Y.S.2d at 299.

85. *Id.* (citing Cammon v. City of New York, 95 N.Y.2d 583, 587, 744 N.E.2d 114, 117, 721 N.Y.S.2d 579, 582 (2000)).

86. *Id.* at 393, 920 N.E.2d at 356, 892 N.Y.S.2d at 300 (Ciparik, J., dissenting).

87. *Lee*, 13 N.Y.3d at 393, 920 N.E.2d at 356, 892 N.Y.S.2d at 299.

88. 497 U.S. 358, 363, 364 n.2, 365 (1990).

89. *Lee*, 13 N.Y.3d at 396, 920 N.E.2d at 358-59, 892 N.Y.S.2d at 302-03 (Ciparick, J., dissenting).

90. *Id.* at 397, 920 N.E.2d at 359, 892 N.Y.S.2d at 303.

E. Recalcitrant Worker Defense

Another major decision coming out of the New York State Court of Appeals this year was *Gallagher v. New York Post*.[91] In *Gallagher*, the plaintiff was an ironworker that "was assigned to remove a section of decking from the second floor of a building in the Bronx."[92] While using a power saw to enlarge an opening created by other workers, the blade jammed, propelling him forward and causing him to fall through the uncovered opening and sustain injuries.[93] Plaintiff commenced actions for violations of New York State Labor Law sections 200, 240(1), and 241(6), alleging that the New York Post failed to provide adequate safety devices to prevent a fall from an elevated work site in violation of Labor Law section 240(1).[94] Supreme court denied plaintiff's motion for summary judgment on the ground that there was a question of fact as to whether safety devices had been provided to the plaintiff.[95] The Appellate Division, First Department, agreed, but two judges dissented, and the appellate division granted plaintiff's leave to appeal.[96] The defendant relied, very heavily, upon *Montgomery v. Federal Express Corp.* and *Robinson v. East Medical Center, LP*, the two most often cited cases with regard to recalcitrant employees.[97]

Judge Pigott, writing for the majority, noted that "there [was] no evidence in the record that [the plaintiff] knew where to find the safety devices that NYP argue[d] were readily available or that he was expected to use them."[98] The Court reversed the First Department, and granted plaintiff's motion for summary judgment.[99] In deciding this case, the Court made clear that there are three significant criteria that a defendant must comply with in order to invoke the recalcitrant worker doctrine.[100] These include that the defendant must show where the safety devices were located, that the plaintiff knew that he or she was obliged to use them and knew where they were, and they were available

91. 14 N.Y.3d 83, 923 N.E.2d 1120, 896 N.Y.S.2d 732 (2010).

92. *Id.* at 85-86, 923 N.E.2d at 1121, 896 N.Y.S.2d at 732.

93. *Id.* at 86, 923 N.E.2d at 1121, 896 N.Y.S.2d at 732.

94. *Id.*, 923 N.E.2d at 1121, 896 N.Y.S.2d at 733.

95. *Id.* at 87, 923 N.E.2d at 1122, 896 N.Y.S.2d at 733; *see also* Gallagher v. New York Post, No. 400957/05, 2007 NY Slip Op. 34452(U), at 5 (Sup. Ct. N.Y. Cnty. 2007).

96. *Gallagher*, 14 N.Y.3d at 87, 923 N.E.2d at 1122, 896 N.Y.S.2d at 734.

97. *Id.* at 88, 923 N.E.2d at 1122-23, 896 N.Y.S.2d at 734; *see generally* Montgomery v. Fed. Express Corp., 4 N.Y.3d 805, 828 N.E.2d 592, 795 N.Y.S.2d 490 (2005); Robinson v. East Med. Ctr., LP, 6 N.Y.3d 550, 847 N.E.2d 1162, 814 N.Y.S.2d 589 (2006).

98. *Gallagher*, 14 N.Y.3d at 88, 923 N.E.2d at 1123, 896 N.Y.S.2d at 734.

99. *Id.* at 89, 923 N.E.2d at 1123, 896 N.Y.S.2d at 735.

100. *Id.* at 88, 923 N.E.2d at 1122-23, 896 N.Y.S.2d at 734.

at the time that the plaintiff was expected to use them.[101]

F. Indemnification

In *Cunha v. City of New York*, the Court of Appeals sought to determine whether or not the City of New York could recover against an engineer inspecting firm, HAKS Engineers, PC ("HAKS"), subsequent to a settlement with an injured plaintiff at the time of trial.[102] In that case, the "[p]laintiff was injured while working on a roadway excavation in Brooklyn."[103] "The City of New York had hired plaintiff's employer, JLJ Enterprises, Inc., as the prime contractor for the work and HAKS Engineers, PC, to perform engineering inspection services [for] the project."[104] An action was brought by the plaintiff pursuant to New York State Labor Law sections 200, 240, and 241(6).[105] "In turn, the City commenced a third party action against HAKS seeking to recover on theories of contractual and common-law indemnification."[106]

The Labor Law section 200 claim was dismissed before trial, and on the date that trial was to commence, the City and HAKS collectively agreed to pay the plaintiff $1,200,000, of which the City paid $800,000 and HAKS paid $400,000.[107]

> The City conceded a violation of Labor Law § 241(6) premised on a violation of Industrial Code (12 NYCRR) § 23-4.1 *et. seq* . . . . Despite the settlement agreement, the City and HAKS disputed the issue of liability and apportionment between them and the case proceeded to trial on the third-party action. At the end of the trial, the jury was asked to answer three questions on the verdict sheet, namely (1) "[w]as the defendant [HAKS] negligent?"; if so, (2) "[w]as the negligence of the defendant [HAKS] a substantial factor in bringing about the accident?"; and (3) "[w]hat is the percentage of fault of: Defendant [HAKS]?" . . . . The jury found [that the defendant] HAKS [was] negligent, [and] that its negligence was a substantial factor in bringing about the accident, but that [HAKS] was only 40% at fault for [the] plaintiff's accident. The jury was not asked to, and did not, say where the other 60% of the fault lay.[108]

Following the discharge of the jury, the City moved for a verdict

101. *Id.*
102. 12 N.Y.3d 504, 507, 910 N.E.2d 422, 424, 882 N.Y.S.2d 674, 676 (2009).
103. *Id.* at 506, 910 N.E.2d at 423, 882 N.Y.S.2d at 675.
104. *Id.*
105. *Id.* at 507, 910 N.E.2d at 423, 882 N.Y.S.2d at 675.
106. *Id.*
107. *Cunha*, 12 N.Y.3d at 507, 910 N.E.2d at 423, 882 N.Y.S.2d at 675.
108. *Id.* at 507, 910 N.E.2d at 423-24, 882 N.Y.S.2d at 675-76.

directed against HAKS in the total 100% of the contract indemnification clauses, which the supreme court denied and the City appealed.[109] "The [Second Department] reversed on the law and remitted to the supreme court for an entry of an amended judgment conditionally in favor of the City and against HAKS in the amount of 100% of the damages recovered by the plaintiff from the City."[110] The Second Department held that because the City was only vicariously liable for violating the provisions of the Labor Law, it was entitled to full common law indemnification from HAKS, the party actually responsible for the incident.[111] The Court of Appeals granted leave to appeal.[112]

In affirming the Second Department's decision granting 100% indemnification to the City of New York, the Court noted that:

> [N]o apportionment for any other third party was requested by HAKS at any time during the proceedings. No evidence was submitted at trial that any other entity was negligent, nor could have any other entity been found negligent based upon the instructions provided to the jury, the verdict sheet, or the charge provided to the jury.[113]

Thus, the Court found that "once HAKS was found to be negligent and since HAKS was the only possible negligent party to the lawsuit-the City was entitled to 100% indemnification from HAKS."[114]

III. MUNICIPAL LIABILITY

A. Special Relationship and Municipal Liability

On March 31, 2009, the New York State Court of Appeals drastically changed the landscape in municipal liability actions when they issued their decision in *McLean v. City of New York*.[115] The long followed rule in New York was "that an agency [or] government entity is not liable for the negligent performance of a governmental function unless there existed a 'special duty to the injured person in contrast to a general duty owed to the public.'"[116]

109. *Id.* at 507-08, 910 N.E.2d at 424, 882 N.Y.S.2d at 676.

110. *Id.* at 508, 910 N.E.2d at 424, 882 N.Y.S.2d at 676; *see also* Cunha v. City of New York, 45 A.D.3d 624, 625, 850 N.Y.S.2d 119, 120 (2d Dep't 2007).

111. *Cunha*, 45 A.D.3d at 625-26, 850 N.Y.S.2d at 121.

112. Cunha v. City of New York, 11 N.Y.3d 709, 897 N.E.2d 1086, 868 N.Y.S.2d 602 (2008).

113. *Cunha*, 12 N.Y.3d at 510, 910 N.E.2d at 426, 882 N.Y.S.2d at 678.

114. *Id.*

115. 12 N.Y.3d 194, 905 N.E.2d 1167, 878 N.Y.S.2d 238 (2009).

116. *Id.* at 199, 905 N.E.2d at 1171, 878 N.Y.S.2d at 242 (citations omitted). *See generally* Pelaez v. Seide, 2 N.Y.3d 186, 198-99, 810 N.E.2d 393, 399, 778 N.Y.S.2d 111, 117 (2004); Lauer v. City of New York, 95 N.Y.2d 95, 101, 733 N.E.2d 184, 188, 711

There developed a narrow class of cases in which a "special relationship" can arise from a duty voluntarily undertaken by a municipality to an injured person.[117] Under *Cuffy*, in order for such a special relationship to exist, four elements must be met:

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured;
>
> (2) knowledge on the part of the municipality's agents that inaction could lead to harm;
>
> (3) some form of direct contact between the municipality's agents and the injured party; and
>
> (4) that party's justifiable reliance on the municipality's affirmative undertaking.[118]

It has also been well established through Court of Appeals' decisions that "governmental tort liability [has] long distinguished between discretionary and ministerial acts of government officials."[119] Some cases, through their language, have held that a public employee's discretionary acts may not result in the municipality's liability even when the conduct is negligent, and that ministerial acts are not considered tortious unless the plaintiff can show a duty running directly to the injured person—the duty breached that must be more than that owed to the public generally.[120]

However, other cases from the Court of Appeals have seemed to indicate that in a narrow exception to the rule, the Court of Appeals has upheld tort claims when the plaintiffs have established a special relationship with the municipality, even given discretionary acts.[121]

N.Y.S.2d 112, 116 (2000); Kircher v. City of Jamestown, 74 N.Y.2d 251, 255, 543 N.E.2d 443, 445, 544 N.Y.S.2d 995, 997 (1989); Garrett v. Holiday Inns, Inc., 58 N.Y.2d 253, 261, 447 N.E.2d 717, 721, 460 N.Y.S.2d 774, 778 (1983).

117. Cuffy v. City of New York, 69 N.Y.2d 255, 260, 505 N.E.2d 937, 940, 513 N.Y.S.2d 372, 375 (1987).

118. *Id.*

119. *McLean*, 12 N.Y.3d at 202, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244; *see also* Tango v. Tulevech, 61 N.Y.2d 34, 40, 459 N.E.2d 182, 185, 471 N.Y.S.2d 73, 76 (1983).

120. *McLean*, 12 N.Y.3d at 202, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244; *Tango*, 61 N.Y.2d at 40, 459 N.E.2d at 185, 471 N.Y.S.2d at 76; *Lauer*, 95 N.Y.2d at 100-01, 733 N.E.2d at 187-88, 711 N.Y.S.2d at 115-16.

121. *See, e.g.*, Kovit v. Estate of Hallums, 4 N.Y.3d 499, 506, 829 N.E.2d 1188, 1190, 797 N.Y.S.2d 20, 22 (2005) (holding that plaintiff's claim of municipal liability could not lie in the absence of a "special relationship"); Pelaez v. Seide, 2 N.Y.3d 186, 199-200, 810 N.E.2d 393, 400, 778 N.Y.S.2d 111, 118 (2004) (holding that a special relationship can arise in one of three circumstances: "(1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction and control in the face of a known, blatant and

In *McLean*, the Court of Appeals sensed that inconsistency of language and held that "*Tango* and *Lauer* are right, and any contrary inference that may be drawn from the quoted language in *Palez* and *Kovit* is wrong."[122] In *McLean*, the Court further held that even if the conduct that the plaintiff complained of was ministerial in nature, without a showing of special duty, there can be no liability.[123]

The Court of Appeals was called upon to apply the *McLean* rule in *Dinardo v. City of New York*.[124] In *Dinardo*, the plaintiff taught special education in a New York City public school.[125] She was seriously injured when she attempted to "restrain one student from attacking another."[126] This particular student had a history of verbal and physical aggression that had persisted for several months, and the plaintiff had repeatedly relayed concerns to her supervisors regarding her safety in the classroom.[127] She was told by the school supervisor of special education and the principal, that "things were being worked on, things were happening" and they further urged her to "hang in there because something was being done" in order to have the student removed.[128] Following the altercation and her subsequent injury, "plaintiff commenced this action alleging, among other things, that by [making] these assurances the Board of Education of the City of New York had [undertaken] an affirmative duty to take action with respect to the removal of the student and that she justifiably relied upon these assurances."[129] The plaintiff alleged that her injury resulted because the student was not removed in a "timely fashion."[130]

At the supreme court level, the plaintiff obtained a jury verdict in her favor, and the Board of Education moved to set aside the verdict under CPLR section 4404(a).[131] The supreme court denied both motions, and the Appellate Division, First Department, affirmed judgment awarding the plaintiff damages.[132] Because two justices dissented on a question of law, the Board of Education appealed to the

dangerous safety violation." The Court found that none of those circumstances were presented in the case before it).

122. *McLean*, 12 N.Y.3d at 203, 905 N.E.2d at 1173, 878 N.Y.S.2d at 244.

123. *Id.*, 905 N.E.2d at 1173-74, 878 N.Y.S.2d at 244-45.

124. 13 N.Y.3d 872, 874, 921 N.E.2d 585, 586, 893 N.Y.S.2d 818, 819 (2009).

125. *Id.* at 873, 921 N.E.2d at 586, 893 N.Y.S.2d at 819.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Dinardo*, 13 N.Y.3d at 873, 921 N.E.2d at 586, 893 N.Y.S.2d at 819.

130. *Id.*

131. *Id.*

132. *Id.* at 874, 921 N.E.2d at 586, 893 N.Y.S.2d at 819.

Court of Appeals pursuant to CPLR section 5601(a).[133] Citing *McLean*, the Board of Education argued that the alleged promise to act was a "discretionary government action, which cannot be the basis of liability."[134]

The Court found that there was no way that the actions of the school officials could be considered ministerial, and as a result, there was "no rational process by which a jury could have found liability" under the law as expressed in *McLean* and *Tango*.[135] As a result, the Court found that the Board of Education was entitled to judgment as a matter of law.[136]

Chief Judge Lippman, who took no part in the *McLean* decision, "disagree[d] with the majority's conclusion that a rational jury could not have found that a special relationship existed between plaintiff and defendant Board."[137] Noting the history of the child prior to the event that caused injury, the student's increasing behavioral problems, and the concern about the student's behavior and classroom safety risks, Judge Lippman, in a concurring opinion, felt that a jury could rationally have concluded that a special relationship existed between the plaintiff and the Board.[138] However, noting that in *McLean* the Court held that government action, if discretionary, may never form the basis of municipality liability even if a special relationship exists between the plaintiff and the municipality, Chief Judge Lippman felt he was constrained to concur with the majority's result.[139]

Chief Judge Lippman's conclusion was that "[w]hether the municipality's act [was] characterized as ministerial or discretionary should not be, and never has been, determinative in special duty cases."[140] Chief Judge Lippman concluded his concurring opinion by stating:

> Unfortunately under the rule announced in *McLean*, a plaintiff will never be able to recover for failure to provide adequate police protection, even when the police voluntarily and affirmatively promised to act on that specific plaintiff's behalf and he or she

133. *Id.*

134. *Dinardo*, 13 N.Y.3d at 874, 921 N.E.2d at 586, 893 N.Y.S.2d at 819; *see also* McLean v. City of New York, 12 N.Y.3d 194, 202-03, 905 N.E.2d 1167, 1173-74, 878 N.Y.S.2d 238, 244-45 (2009); Tango v. Tulevech, 61 N.Y.2d 34, 40-41, 459 N.E.2d 182, 185-86, 471 N.Y.S.2d 73, 76-77 (1983).

135. *Dinardo*, 13 N.Y.3d at 874, 921 N.E.2d at 586, 893 N.Y.S.2d at 819.

136. *Id.* at 875, 921 N.E.2d at 587, 893 N.Y.S.2d at 820.

137. *Id.* (Lippman, C.J., concurring).

138. *Id.*, 921 N.E.2d at 587-88, 893 N.Y.S.2d at 820-21.

139. *Id.* 876, 921 N.E.2d at 588, 893 N.Y.S.2d at 821.

140. *Dinardo*, 13 N.Y.3d at 877, 921 N.E.2d at 589, 893 N.Y.S.2d at 822.

> justifiably relied on that promise to his or her detriment. This is particularly disturbing given our recognition that the "police cases . . . all but occupy the special relationship field."[141]

The Appellate Division, First Department, reluctantly applied the *McLean*/*Dinardo* rationale in *Valdez v. City of New York*.[142] The plaintiff in *Valdez*, who renewed an order of protection against her ex-boyfriend, testified that the ex-boyfriend called her and threatened to kill her.[143] She called the police precinct, where an officer told her that the police would arrest him immediately.[144] Plaintiff was then shot and seriously wounded outside her apartment while taking the garbage out approximately twenty-four hours after the telephone conversation with the police.[145]

The First Department found that there was "[no] need to reach the issue of whether the action [of the police] was discretionary or ministerial since the plaintiff ultimately fail[ed] to establish the element of justifiable reliance for a special duty exception."[146] In reaching that conclusion, the Court said that it was inconceivable that the Court of Appeals "intended to eliminate the special duty exception upon which liability in police cases can be found without explicitly reversing the position it appears to solidly reiterate by citing *Cuffy* at length in the [*McLean*] decision."[147] The Court went on to say that "both *McLean* and *Dinardo* support the position that the starting point of any analysis as to government liability is whether a special relationship existed; and not whether the governmental action is ministerial or discretionary."[148] The Court found that "any reliance [by the plaintiff] . . . would not have been justified since she understood [that] the police needed time to locate Perez in order to arrest him."[149]

B. Duty to Supervise Students

In the case of *Brandy B. v. Eden Central School District*, the Court of Appeals was confronted with the question of how much proof, as a matter of law, is necessary to hold a school district responsible to a

141. *Id.* (citing Pelaez v. Seide, 2 N.Y.3d 186, 205, 810 N.E.2d 393, 403, 778 N.Y.S.2d 111, 121 (2004)).

142. 74 A.D.3d 76, 77-78, 901 N.Y.S.2d 166, 167 (1st Dep't 2010).

143. *Id.* at 77, 901 N.Y.S.2d at 167.

144. *Id.*

145. *Id.* at 80, 901 N.Y.S.2d at 169.

146. *Id.* at 78, 901 N.Y.S.2d at 168.

147. *Valdez*, 74 A.D.3d at 78, 901 N.Y.S.2d at 167.

148. *Id.*

149. *Id.* at 81, 901 N.Y.S.2d at 170.

plaintiff seeking to recover for injuries that a student allegedly sustained when she was sexually assaulted by another student.[150]

In *Brandy B.*, a five-year-old child was allegedly sexually assaulted on a bus by an eleven-year-old student.[151] One of the issues that was presented to the Court was whether "the school district had sufficiently specific knowledge or notice of the dangerous conduct which caused the injury so that the third-party act could have been reasonably anticipated . . . ."[152] In a five to two decision, authored by Judge Jones, the Court carefully reviewed the troubled history of the eleven-year-old child (Robert F.), and determined that "the alleged sexual assault against [the infant plaintiff] was an unforeseeable act that, without sufficiently specific knowledge or notice, could not have been reasonably anticipated by the school district."[153]

In distinguishing this case from *Mirand v. City of New York*,[154] the Court opined that it was "well-settled that schools have a duty to adequately supervise their students, and 'will be held liable for foreseeable injuries proximately related to the absence of adequate supervision.'"[155] The Court noted that here the school authorities did not have "'specific knowledge or notice of the dangerous conduct which caused injury [and/or] that the third-party acts could reasonably [not] have been anticipated.'"[156] As a result, the Court of Appeals affirmed the appellate division decision dismissing the case against the defendant.[157]

Judge Ciparick, with whom Chief Judge Lippman concurred in part, dissented stating that there was enough proof before the Court such that "'a jury could find that [the alleged sexual assault] was a reasonably foreseeable consequence of the District's failure to provide adequate supervision . . . even in the absence of notice of a prior sexual assault.'"[158]

150. 15 N.Y.3d 297, 300, 934 N.E.2d 304, 305, 907 N.Y.S.2d 735, 736 (2010).

151. *Id.*

152. *Id.*

153. *See id.* at 300-02, 934 N.E.2d at 305-06, 907 N.Y.S.2d at 736-37.

154. 84 N.Y.2d 44, 637 N.E.2d 263, 614 N.Y.S.2d 372 (1994).

155. *Brandy B.*, 15 N.Y.3d at 302, 934 N.E.2d at 306, 907 N.Y.S.2d at 737 (quoting *Mirand*, 84 N.Y.2d at 49, 637 N.E.2d at 266, 614 N.Y.S.2d at 375).

156. *Id.* at 302, 934 N.E.2d at 306, 907 N.Y.S.2d at 737.

157. *Id.* at 303, 934 N.E.2d at 307, 907 N.Y.S.2d at 738.

158. *Id.* at 304, 934 N.E.2d at 308, 907 N.Y.S.2d at 739 (Ciparick, J., dissenting) (quoting Doe v. Fulton Sch. Dist., 35 A.D.3d 1194, 1195, 826 N.Y.S.2d 543, 544 (4th Dep't 2006)).

C. Application of Vehicle and Traffic Law Section 1104(e)

In *Ayers v. O'Brien*,[159]

> [P]laintiff . . . a Broome County Deputy Sheriff, was on patrol in the Town of Chenango . . . [when he] execut[ed] a U-turn to pursue a speeding vehicle, [and] his car was struck by another vehicle, owned and operated by [the] defendants. [The plaintiff then] commenced [an] action alleging serious injury as a result of [the] defendants' common-law negligence. In their answer, defendants denied the material allegations of the complaint and asserted four affirmative defenses, including . . . "culpable conduct, including contributory negligence and assumption of the risk, attributable to [the plaintiff]" . . . . [Plaintiff then] moved to dismiss defendants' comparative fault defense, arguing that the liability standard for drivers of authorized emergency vehicles under Vehicle and Traffic Law § 1104(e) is "reckless disregard," and that he had not acted recklessly. Supreme Court granted the motion striking the defense . . . . The Appellate Division [Third Department] reversed and reinstated the defense, holding that [plaintiff was] not entitled to the protections afforded under Vehicle and Traffic Law § 1104(e). The Appellate Division [Third Department] then certified the [issue to the Court of Appeals as to] whether it had erred as a matter of law.[160]

In a decision written by Judge Pigott, the Court concluded "that the Appellate Division did not err, and . . . that the reckless disregard standard of liability does not apply in determining the culpable conduct of the operator of an emergency vehicle when he or she is the individual bringing the action."[161] The Court concluded that "Vehicle and Traffic Law §1104(e) cannot be used as a sword to ward off a comparative fault defense."[162]

In *Kabir v. County of Monroe*, the Appellate Division, Fourth Department, took up the issue of when section 1104 applies.[163] In this case, the plaintiff brought actions to recover for damages sustained when she was rear-ended by a Monroe County Deputy Sheriff.[164] Defendants moved for summary judgment to dismiss the complaint and the amended complaint upon "the ground that as a matter of law the Deputy was not driving with reckless disregard for the safety of others

159. 13 N.Y.3d 456, 923 N.E.2d 578, 896 N.Y.S.2d 295 (2009).

160. *Id.* at 457-58, 923 N.E.2d at 579-80, 896 N.Y.S.2d at 296-97; *see* N.Y. VEH. & TRAF. LAW § 1104(e) (McKinney 1996).

161. *Ayers*, 13 N.Y.3d. at 458, 923 N.E.2d at 580, 896 N.Y.S.2d at 297.

162. *Id.* at 459, 923 N.E.2d at 580, 896 N.Y.S.2d at 297; *see* N.Y. VEH. & TRAF. LAW § 1104(e).

163. 68 A.D.3d 1628, 1629, 892 N.Y.S.2d 714, 716 (4th Dep't 2009).

164. *Id.* at 1628, 892 N.Y.S.2d at 715.

pursuant to Vehicle and Traffic Law §1104(e)."[165]

"The accident occurred when the Deputy received a dispatch to respond to a burglary and looked down at his mobile data terminal to ascertain the location of the burglarized premises."[166] When he looked up, "he was unable to avoid a rear-end collision with the plaintiff's vehicle."[167] The Fourth Department concluded, in a three to two decision, that "the 'reckless disregard' standard of liability contained in section 1104(e) is not applicable to this action because the Deputy's conduct did not fall within any of the four categories of privileged activities set forth in section 1104(b)."[168] The court rationalized that the statute lists, in section 1104(b):

> [T]hose privileges that the driver of an authorized emergency vehicle may exercise, [including]: (1) stop, stand or park regardless of the provisions of the Vehicle and Traffic Law; (2) proceed past a steady or flashing red light or stop sign after slowing down to ensure the safe operation of the vehicle; (3) exceed the maximum speed limits so long as he or she does not endanger life or property; and (4) disregard regulations concerning directions of movements or turning.[169]

The court further noted that section 1104(e) states that "[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons."[170] The court thus rationalized that the deputy sheriff's conduct in this case did not fall within any of the four categories, and as a result, section 1104(e) did not apply.[171]

Judges Martoche and Peradotto dissented, first because the argument relied upon by the majority was not raised by the plaintiff in supreme court, and secondly, because the deputy sheriff was engaged in an emergency operation at the time of the incident, which would give him the benefit of the protection of the statute.[172] It appears highly likely that this case will be subject to Court of Appeals review in the coming year.

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165. *Id.* at 1628-29, 892 N.Y.S.2d at 715-16.

166. *Id.* at 1629, 892 N.Y.S.2d at 716.

167. *Id.*

168. *Kabir*, 68 A.D.3d at 1629, 892 N.Y.S.2d at 716.

169. *Id.*; *see* N.Y. VEH. & TRAF. LAW § 1104(b) (McKinney 1996).

170. *Kabir*, 68 A.D.3d at 1629-30, 892 N.Y.S.2d at 716.

171. *Id.* at 1630, 892 N.Y.S.2d at 717.

172. *Id.* at 1635-36, 892 N.Y.S.2d at 720-21 (Martoche, J. & Peradotto, J., dissenting) (citing O'Banner v. Cnty. of Sullivan, 16 A.D.3d 950, 952, 792 N.Y.S.2d 230, 232 (3d Dep't 2005); N.Y. VEH. & TRAF. LAW § 114-b (McKinney 2005) (defining "emergency operation" as "[t]he operation . . . of an authorized emergency vehicle, when such vehicle is . . . responding to . . . [a] police call").

D. Constructive Notice in Highway Defect Cases

In *Napolitano v. Suffolk County Department of Public Works*, the Appellate Division, Second Department, dealt with a conflict of laws between the Suffolk County Charter section C8-2A, which provided for prior written notice before an action could lie against the County and Highway Law section 139(2), which provides for constructive notice of a highway defect, irrespective of whether or not the local statute provides for such an exception.[173] The plaintiff in this matter was injured when he ran his motorcycle into a pothole on a county highway in Suffolk County.[174] The court noted that in the defendants' motion for summary judgment "they failed to submit any admissible evidence on the issue of whether or not they had constructive notice of the alleged defect."[175] As a result, the court found that "they failed to meet their burden of showing their entitlement to summary judgement [sic] dismissing the complaint."[176]

IV. PRODUCT LIABILITY

A. Strict Liability Versus Failure to Warn

In *Adams v. Genie Industries, Inc.*, the plaintiff was injured when he fell from a lift "designed, manufactured and sold by [the] defendant . . . ."[177] Plaintiff's defective design claim was predicated on the fact that the lift had no outriggers, nor were there interlock devices requiring outriggers, attached at the time the plaintiff was using the lift.[178] Such outriggers would have prevented the tipping and, ultimately, plaintiff's injuries.[179]

The defendant had "sold the lift with outriggers, but the outriggers were detachable, so that the lift, when not in use, could be moved through narrow openings like doorways."[180] A label was attached to the lift warning that "'[a]ll outriggers must be installed before operating.' But . . . plaintiff's employer ignored the warning, and . . . the outriggers were lost—at least, none were to be found on the day of plaintiff's

173. No. 7500/05, 2009 N.Y. Slip Op. 06319(U), at 1-2 (2d Dep't 2009); N.Y. HIGH. LAW § 139(2) (McKinney 2001).

174. *Napolitano*, 2009 N.Y. Slip Op. 06319(U), at 1.

175. *Id.* at 3-4.

176. *Id.* at 4.

177. 14 N.Y.3d 535, 539, 929 N.E.2d 380, 381, 903 N.Y.S.2d 318, 319 (2010).

178. *Id.* at 539-40, 929 N.E.2d at 382, 903 N.E.2d at 320.

179. *Id.* at 539, 929 N.E.2d at 382, 903 N.Y.S.2d at 320.

180. *Id.* at 540, 929 N.E.2d at 382, 903 N.Y.S.2d at 320.

accident."[181]

Plaintiff presented two theories for the jury, one that the lift should have had an interlock requiring the outriggers to be in place before the lift could be used, and the absence of such created a design defect.[182] Additionally, plaintiff claimed negligence in putting the lift on the market as designed in 1986.[183] Finally, the court submitted to the jury the question of whether the defendant "was negligent 'from June 1986 [up] until [the] plaintiff's accident in July 1997.'"[184] The jury responded to each of these questions in the affirmative and awarded damages to the plaintiff.[185]

The appellate division affirmed the order of the "Supreme Court, New York County . . . which denied [the] defendant's motion to set aside the jury verdict or for judgment in its favor . . . ."[186] The Court of Appeals found that the plaintiff's proof supported a design defect claim under *Voss v. Black & Decker Manufacturing Co.*[187] The Court found that the "evidence . . . was enough to support the jury's verdict that the product [defendant] sold to plaintiff's employer in 1986 was 'not reasonably safe.'"[188] Defendant argued "that the trial court erred in submitting to the jury the question of whether [the defendant's] post-sale conduct . . . was negligent."[189] The Court of Appeals agreed, but found the error to be harmless, noting that there was simply no "failure to warn case" that could survive given the proof in the case and the warning label that was on the machine.[190]

B. Need for Feasible Alternative Design

In *Chow v. Reckitt & Colman, Inc.*, the First Department dismissed strict product liability design and failure to warn claims against a drain

181. *Id.*

182. *Adams*, 14 N.Y.3d at 540, 929 N.E.2d at 382, 903 N.Y.S.2d at 320.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*; Adams v. Genie Indus., Inc., 53 A.D.3d 415, 415, 861 N.Y.S.2d 42, 43 (1st Dep't 2008).

187. *Adams*, 14 N.Y.3d at 542-44, 929 N.E.2d at 383-85, 903 N.Y.S.2d at 321-23. *See* Voss v. Black & Decker Mfg. Co., 59 N.Y.2d 102, 108, 450 N.E.2d 204, 208, 463 N.Y.S.2d 398, 402 (1983).

188. *Adams*, 14 N.Y.3d at 544, 929 N.E.2d at 385, 903 N.Y.S.2d at 323.

189. *Id.*

190. *Id.* at 544-45, 929 N.E.2d at 385-86, 903 N.Y.S.2d at 323-24 (citing Liriano v. Hobart Corp., 92 N.Y.2d 232, 240, 700 N.E.2d 303, 307, 677 N.Y.S.2d 764, 768 (1998); Cover v. Cohen, 61 N.Y.2d 261, 274-75, 461 N.E.2d 864, 871, 473 N.Y.S.2d 378, 385 (1984)).

cleaner manufacturer.[191] Plaintiff was seriously injured while using defendant's product when "caustic liquid splashed back into [his] face. . . ."[192] The First Department, in a three to two decision, dismissed plaintiff's claims of negligence and strict liability "based on theories of inadequate warning and design defect."[193] The inadequate warning claim was dismissed by the court on the basis that the plaintiff "made no attempt to read or . . . obtain assistance in reading the label," and as a result, "any purported inadequacies in the product's labeling were not a substantial factor in bringing about the injury."[194] As to the design defect, the court found that the plaintiff's expert failed "to raise a triable issue of fact because [he did] not set forth the foundation for his conclusion" that there were feasibly safer alternative designs and mixtures which could have been used.[195]

V. MOTOR VEHICLE

The First Department also decided the case of *Tselebis v. Ryder Truck Rental, Inc.*, which was "a two-vehicle accident at an intersection controlled by a traffic light."[196] Plaintiff moved for summary judgment against the defendant "on the issue of liability despite the fact that his own negligence might [have] remain[ed] [as] an open question."[197] The court found in favor of the plaintiff, noting that "[a] plaintiff's culpable conduct no longer [stood] as a bar to recovery in an action for personal injury, injury to property or wrongful death" under article 14 of the CPLR.[198] Thus, the court found, that in order "[t]o establish a prima facie case, a plaintiff 'must generally show that the defendant's negligence was *a substantial cause* of the events which produced the injury.'"[199]

It should be noted that in *Roman v. A1 Limousine, Inc.*, the Second

191. 69 A.D.3d 413, 413-16, 891 N.Y.S.2d 402, 403-06 (1st Dep't 2010).

192. *Id.* at 414, 891 N.Y.S.2d at 403.

193. *Id.*

194. *Id.* at 414, 891 N.Y.S.2d at 403-04 (citing Perez v. Radar Realty, 34 A.D.3d 305, 306, 824 N.Y.S.2d 87, 89 (1st Dep't 2006)).

195. *Id.* at 415, 891 N.Y.S.2d at 405 (citing Rose v. Brown & Williamson Tobacco Corp., 53 A.D.3d 80, 84, 855 N.Y.S.2d 119, 122 (1st Dep't 2008) (discussing the feasibility of a safer alternative design), *aff'd sub nom.*, Adamo v. Brown & Williamson Tobacco Corp., 11 N.Y.3d 545, 900 N.E.2d 966, 872 N.Y.S.2d 415 (2008), *cert. denied*, 130 S. Ct. 197 (2009)).

196. 72 A.D.3d 198, 199, 895 N.Y.S.2d 389, 390 (1st Dep't 2010).

197. *Id.* at 200, 895 N.Y.S.2d at 391.

198. *Id.* (citing N.Y. C.P.L.R. 1411 (McKinney 1997)).

199. *Id.* (citing Derdiarian v. Felix Contr. Corp., 51 N.Y.2d 308, 315, 414 N.E.2d 666, 670, 434 N.Y.S.2d 166, 169 (1980)).

Department, while recognizing the holding in *Tselebis*, "disagree[d] and decline[d] to follow that holding."[200]

VI. RIGHT TO APPEAL

In *Adams v. Genie Industries, Inc.*, the Court of Appeals took on the issue as to whether or not the defendant manufacturer had a right to appeal from the appellate division's order once the defendant agreed to the additur granted by the trial court justice following the trial on damages.[201]

In *Adams*, plaintiff received a jury award based on product liability claims against the defendant, and the trial judge in post-trial motions ordered a new trial unless the defendant agreed to additur on the issue of both past and future pain and suffering damages.[202] The appellate division affirmed.[203] After the appellate division affirmed, the defendant stipulated to the additur, and the appellate division then granted the defendant leave to appeal to the Court of Appeals.[204]

The Court of Appeals decided, in an opinion by Judge Smith, that the defendant should not be barred by appealing the liability issues in the case, as the defendant raised no issues with regard to the additur, but simply sought to overturn the jury findings with regard to strict product liability design and failure to warn.[205] As a result, the Court concluded that the defendant was an "aggrieved party" within the meaning of CPLR section 5511, and was entitled to appeal the matter to the Court of Appeals and have the Court make a determination.[206]

200. 76 A.D.3d 552, 553, 907 N.Y.S.2d 251, 252 (2d Dep't 2010) (citing Thoma v. Ronai, 82 N.Y.2d 736, 621 N.E.2d 690, 602 N.Y.S.2d 323 (1993)).

201. 14 N.Y.3d 535, 540, 929 N.E.2d 380, 382, 903 N.Y.S.2d 318, 320 (2010).

202. Adams v. Genie Indus., Inc., No. 116382/2000, 2007 N.Y. Slip Op. 34459(U), at 1 (Sup. Ct. N.Y. Cnty. 2007).

203. Adams v. Genie Indus., Inc., 53 A.D.3d 415, 416, 861 N.Y.S.2d 42, 44 (1st Dep't 2008).

204. *Adams*, 14 N.Y.3d at 540, 929 N.E.2d at 382, 903 N.Y.S.2d at 320.

205. *Id.* at 541, 929 N.E.2d at 383, 903 N.Y.S.2d at 321.

206. *Id.* at 542, 929 N.E.2d at 383, 903 N.Y.S.2d at 321; N.Y. C.P.L.R. 5511 (McKinney 1995).