

OPENING STATEMENT

As those of us who are involved in the defense of bodily injury suits, New York City juries present a challenge to defendants and their counsel because of the varied demographic issues which arise between the 5 counties comprising New York City. It is challenging to the defense to understand the dynamics which cause the jury verdicts awarded in the five counties comprising New York City to differ greatly for similar injuries sustained by plaintiffs of similar ages and occupations.

NEW YORK CITY JURY VERDICTS AND THEIR APPELLATE REVIEW

By: Jade M. Priest

New York City juries, when deliberating in personal injury actions, rarely hesitate to give high awards. Often, pain and suffering constitutes a large part of the award.

- Prior to 1986, the standard of appellate review in verdicts was whether an award "shocked the conscience". Since 1986, as part of a tort reform act, the appellate courts were empowered, pursuant to CPLR §5501(c), to review monetary awards to determine if they were excessive or inadequate. NYLJ, 3/18/02

- CPLR §5501(c) provides, *inter alia*

In reviewing a money judgment in an action in which an itemized verdict is required by rule forty-one hundred eleven of this chapter in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award, the appellate division shall determine that an award is excessive or inadequate if it **deviates materially from what would be reasonable compensation.** (Emphasis added.)

There is no doubt that the appellate courts have the responsibility to review verdicts and to reduce damages where the awards are unreasonable. However, the new standard left the appellate courts with a conflict as to which method should be used in determining if an award is excessive. Consequently, the standard was expressed in Donlon v. City of New York, 284 A.D.2d 13, 727 N.Y.S.2d 94 (1st Dept. 2001). The reason given by the appellate court in Donlon for reducing the award to the plaintiff was "[t]he legislative scheme, fashioned as a remedy for an insurance crisis marked by spiraling costs

and unavailability of liability coverage, requires that we look to similar appealed verdicts and exercise our judgment to promote greater stability in the tort system and greater fairness for similarly situated defendants". Donlon, *supra* at 15. Since this decision was rendered, the courts have used analogous cases as a benchmark in determining whether an award is excessive. NYLJ, *supra*

- In order to determine what the awards have been in recent years, informal research was conducted on verdicts for injuries commonly alleged in personal injury actions: torn meniscus, torn rotator cuff, ankle fracture, and disc herniations. A search of 100 random cases for each injury was obtained from the New York Jury Verdict Reporter for the years 2000 - 2003.

- The attached results show the highest, lowest and average verdicts for each county and injury. It should be noted that although there are no verdicts for Richmond County. Verdicts from that county either were not reported to the New York Jury Verdict Reporter or did not come up in the search. However, anecdotal evidence and experience concludes that jury awards in Richmond County are, by far, the most conservative in New York City (and, not surprisingly, the least numerous.

Of the four counties in which verdict were reported, Queens County had the lowest range and lowest average verdict, while Bronx had the highest. The New York County average was skewed by a shock verdict of nearly \$3 million in one case.

While the demographic, economic and sociological reasons for the skew between counties within New York City between New York City and the rest of New York are beyond the scope of this article, it is hoped that it will be informative as to the verdict range for commonly alleged injuries in lawsuits venued in New York City.

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§ 274A, McKinney's Labor Law §§ 200, 241, 241, subd. 6.)

Moreover, the Court in Majlinger held that the interpretation afforded to the IRCA by the United States Supreme Court in Hoffman required the conclusion that plaintiff should not be permitted to recover for lost wages, as a matter of law, given his inability to prove he is legally authorized to work in this country. Finally, the Court held that it would be consistent with Hoffman to reserve lost wages awards only to those workers who have demonstrated a right to be lawfully employed and reinstated in their jobs.

In conclusion, given the volume of ongoing construction projects in New York, and the ethnic diversity found within the State, the issue of recovery of lost wages by illegal aliens is an unavoidable question associated with litigating Labor Law claims. As lost earnings claims within this realm can be substantial, new developments in this area must be closely followed by defense counsel. It should be noted that, realizing its decision was contradictory to prior caselaw, the Court in Majlinger concluded with a plea for guidance by the Appellate Courts. Consequently, a review of this issue by the Appellate Division can be expected in the near future.

Vicariously Liable Automobile Owners May Contest Liability Where a Default Judgment Is Entered Against the Driver

By: Marc Zaroni

It is not uncommon for insurers to be presented with the conundrum of how to defend an automobile liability bodily injury actions against the named insured owner and his uncooperative driver. This problem is magnified in the case of taxi or livery cabs where the driver is often unable to be located. In these situations, it is not uncommon for the insurer to learn of an action against the driver from the plaintiff's attorney only after a default judgment has been taken, rather than from the driver, himself. The entry of a default judgment against the driver prevents him from later contesting liability.

Where the driver would not be entitled to coverage under the named insured's policy (e.g.: as a result of his late notice, lack of cooperation, etc.), the question of whether the default judgment against the driver also estops the owner from contesting liability becomes crucial to plaintiffs and insurers, alike.

While it would seem unjust to transfer the negative effects of a default to an appearing party, until recently, the only case law suggested that, in fact, a vehicle owner was vicariously liable for the default of the driver. In Ha v. Y.W. Smith Corp., 714 N.Y.S.2d 873 (Kings County Sup. Ct. 2000), while defendant truck company interposed an answer, no answer was interposed on behalf of the truck driver. The court granted plaintiff's motion for summary judgment against the truck company based upon Vehicle and Traffic Law §388. Although the court was admittedly "troubled" by the result, the court held that he statute, coupled with the procedural posture of the case, "provided no alternative."

However, in August 2003 the Appellate Division, Second Department, addressed the issue directly in Balanta v. Stanlaine Taxi Corp., 307

company did not interpose an answer on behalf of the driver and the plaintiff obtained a default judgment against the driver. When the defendant moved for summary judgment pursuant to Insurance Law §5102(d), plaintiff cross-moved for summary judgment based upon Vehicle & Traffic Law §388. The court noted the incongruous decision in Ha, but squarely held that "the granting of a default judgment against Singh [the driver] does not preclude Stanlaine [the owner] from contesting the issue of Singh's negligence."

As a practical matter, an insurer and counsel will want to obtain the driver's cooperation, and in such cases, will most likely appear on his behalf, in any event. However, the Balanta case eases the risks of a default judgment where, as sometime occurs, it is not possible to vacate the default judgment against the driver. So long as the insured owner appears in the action, there would appear to be no limitations on the defense of the action.

• RECENT CASE DEVELOPMENTS

• Labor Law-Contractual Indemnification

In Cases & Points, Vol. V, issue 2 (Spring 2003), we reported on Flores v. Lower East Side Service Center, Inc., a case handled by AGF&J, in which the Court dismissed the third-party action for contractual indemnification by the owner against the subcontractor/employer of the plaintiff because the claim was premised upon a contract which was unsigned on the date of the accident. The dismissal of the contractual indemnification claim was crucial because the injury (the loss of an eye) did not qualify as a "grave injury" within the meaning of § 11 of the Workers Compensation Law and thus, the owner could not maintain a third-party action for common law indemnification.

On January 29, 2004, the Appellate Division, First Department, unanimously affirmed the summary judgment dismissing the third-party Complaint, holding that:

A contract that was not actually entered into before the occurrence of an accident is not available for indemnification against the employer, notwithstanding the latter's supervision, direction and control of the work site and its general compliance with the terms of the unexecuted contract (___ A.D.2d ___, ___ N.Y.S.2d ___).

For more information about the holding in Flores and its impact upon other third-party actions for indemnification call Steven DiSiervi or e-mail him at sdisiervi@agfjlaw.com.

• Negligence-Breach of a Contractual Obligation to One Party to the Contract Does Not Create a Duty of Care Owed to Third-Parties

In Fernandez v. Otis Elevator Co., ___ A.D. ___, ___ N.Y.S.2d ___, decided by the Appellate Division, First Department on February 3, 2004, the Court unanimously reversed the decision of the trial court which had denied Otis' motion for summary judgment and, instead, dismissed the causes of action against Otis for negligence and product liability.

n Fernandez, the plaintiff, a janitor employed by the College of Mount St. Vincent, was injured when he fell down an elevator shaft in one of the college's dormitories. Plaintiff alleges that he was attempting to close a hoist-way door in the shaft on the floor below the one where the elevator had become stuck. Otis argued instead that plaintiff was trying to climb out of the elevator by wiggling through an 8 inch opening at his feet when he fell and was injured.

Otis had manufactured and installed the elevator in 1923 and, at the time of accident, had entered into an elevator maintenance contract with the College under which it was obligated to regularly conduct service examinations, clean the elevator, lubricate certain components and make minor adjustments. Replacement of the reverse phase relay which had malfunctioned and caused the elevator to become stuck, was not a part of its contractual obligations.

The court below denied Otis' motion for summary judgment seeking dismissal of the negligence and product liability claims against it, finding that Otis had not made a *prima facie* showing that its parts were not defective in 1923, when they were manufactured. On appeal, however, the Court found that Otis had no duty to plaintiff and thus, dismissed the common-law negligence claim. It also found that, in addition, because the elevator was not defective at the time of its manufacture in 1923, the products liability claim should be dismissed, as well.

In relying on well-settled law of New York, the Court found that absent special circumstances, a contractual obligation, standing alone will not give rise to a tort liability in favor of a third-party. The Court stated the three exceptions to the rule: (1) where the contracting party, fails to exercise reasonable care in the execution of the contract and creates an unreasonable risk of harm to others; (2) where a plaintiff detrimentally relies on the defendant's continued performance of a contractual obligation; and (3) where the contracting party comprehensively agrees to assume and displace the promisee's (in this case the owner's) safety related obligations.

However, in examining the undisputed facts, the Appellate Division found that none of these exceptions applied and thus, dismissed the negligence claim against Otis.

In dismissing the products liability claim, as well, the Court found that the elevator was not defective at the time of its installation in 1923 and that although Otis supplied the elevator and serviced it after installation, strict liability for a defect which developed after installation was completed, had not been created. ///

OLD In Palermo v. Hamdan and Martinez, (decided May 27, 2003) Judge Baily-Schiffman of the Civil Court, Queens County, found that the excuse proffered by the third-party defendant that it was not negligent in striking the co-defendant's vehicle in the rear because, despite his efforts to stop, he skidded on a wet construction plate were insufficient, as a matter of law.

In granting the second car's motion for summary judgment, the Court found that those allegations were insufficient, as a matter of law to rebut the inference of negligence and to raise a triable issue of fact as to liability.

The moving defendant (Martinez) was represented by Manna Morejon of Abrams, Gorelick, Friedman & Jacobson, P.C. For more information on that decision, please call or e-mail mmorejon@agflaw.com.

Other Cases of Interest

Indemnification Agreements Must Be in Writing and Signed Prior to the Loss, to Be Enforceable

In Flores v. Lower East Side Service Center, Inc., the third-party defendant/employer was sued by the premises owners for defense and indemnification.

In Flores, plaintiff commenced action against the owner of the premises alleging that as the result of an incident at the workplace, he suffered severe injuries to his eye. The owner commenced a third-party action against the contractor/employer of plaintiff, Procida Realty & Construction Corp.

Procida moved to dismiss the third-party action seeking common law and contractual indemnification. The common law cause of action was dismissed because the Court found that the injury did not qualify as a "grave injury" within the definition of § 11 of the Workers Compensation Law. Thus, the third-party action for common law indemnification was precluded by statute.

The Court also dismissed the claim for contractual indemnification because it was brought on a written, but un

- - **AGFJ DEVELOPMENTS**

AGFJ Developments

- AGFJ has been significantly strengthened by the addition of several new attorneys. Barry Jacobs and Leonard G. Kamlet, formerly named partners at Heller, Jacobs & Kamlet, LLP., have become members of the firm.

Barry is

Len is

Robert A. Fishkin, formerly of counsel to Heller, Jacobs & Kamlet, has become of counsel to AGF&J. Rob is a graduate of State University of New York at Albany and New York Law School. His practice involves fraud defense for SIU units of insurance companies, as well as the defense of general liability and automobile actions.

Also joining us as associates from that firm are John O. Fronce and Stacey D. Finley.

John is a graduate of _____ and _____ and has defended and tried a wide array of liability cases. Stacey is a graduate of _____ and _____ and was a formerly trial attorney in the Bronx County District Attorney's Office in the Sex Crimes Unit.

- Mike Gorelick has recently been interviewed and extensively quoted on the insurance coverage issued involved in the World Trade Center insurance coverage trial and on trial tactics in that case, in the February 9, 2004 issue of National Underwriter Magazine.

- **PUBLIC EDUCATION SERVICE**

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