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Torts: 1971 Survey of New York Law

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TORTS

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This year was not one of profound change in the area of tort law. In several significant cases the courts were called upon to make needed adjustments in developed doctrine, and for the most part they responded affirmatively. The extension of the constitutional law of defamation to private individuals involved in events of public concern will require a reassessment of several New York decisions. The issue of contributory negligence was presented in a variety of contexts with the courts, including the Court of Appeals, which expressed dissatisfaction with the law and attempted to soften its harshness. In the area of products liability a tentative step was taken towards providing recovery for bystanders. Even the moribund area of landlord and tenant tort law came under scrutiny as one court reimbursed a slum dweller for the costs of preventing the lead poisoning of his children.

A. Tort Liability of the State

One of the more significant decisions of this year suggests expanded municipal liability for failure to perform a statutorily imposed duty. The Court of Appeals held New York City liable for the death of a construction worker because one of its sewer construction inspectors failed to halt work on an improperly braced trench.[1]

Decedent, employed by a subcontractor in the construction of a private sewer line, was killed by the cave-in of the 11 1/2 foot deep trench in which he was working. The trench had not been safeguarded as required by the applicable safety code[2] and the city-approved construction plans. Decedent's supervisor was not present, but as the decedent descended into the trench, the city sewer construction inspector assigned to the project said, "it is pretty solid there" and "I don't think it needs to be shored."[3] The Court of Appeals determined that the city's inspector had the duty to inspect the trench to see that it was shored to meet safety requirements and had the power in case of safety rule violations

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1. Smullen v. City of New York, 28 N.Y.2d 66, 268 N.E.2d 763, 320 N.Y.S.2d 19 (1971).
2. 12 NYCRR § 23.8(b)(1) (1963).
3. *Supra* note 1, at 69, 268 N.E.2d at 764, 320 N.Y.S.2d at 20.

endangering life or property to stop the work and require the workers to vacate the site. The city's argument, accepted by the majority in the Appellate Division, Second Department, was that there should be no liability for failure to enforce a statute. The Court of Appeals, however, was not persuaded. It found the facts suggestive of the situation in the *Runkel* cases[4] and the *Schuster* case[5] because the city had actual knowledge of the dangerous condition, but failed to take any corrective action while its inspector was present. Moreover, he violations were so blatant and the mortal danger so obvious that the inspector's statements were not mere errors of judgment, but instead were positive assumptions and an exercise of control by the only person in authority then present.

Although the Court of Appeals concluded that it was reasonable and sufficient for a jury to find that the inspector had assumed direction and control of decedent's activities, it perceived an alternative basis for liability. Noting that "tort liability has been held to exist where there has been some relationship on the part of the defendant to the plaintiff creating a duty to use due care for the benefit of particular persons,"[6] it said that the jury was warranted in finding the type of relationship envisioned in *Schuster*, with the extension of a duty to a particular individual because of acts or omissions directly affecting him. It reasoned:

> Out of the facts in the instant case, there may be perceived a basis for such a special duty, created by the mere presence of the inspector and this failure to prevent decedent from entering the trench, if only by exercise of the city's undoubted power to halt the work.[7]

Although denied by the majority, this reasoning suggests the imposition of liability for failure to perform a general protective governmental function.

The dissenters foresaw the possibility that the city would be made,

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4. Runkel v. Homelsky, 286 App. Div. 1101, 145 N.Y.S.2d 318 (2d Dep't 1955), *aff'd mem.*, 3 N.Y.2d 857, 145 N.E.2d 23, 166 N.Y.S.2d 307 (1957); Runkel v. City of N.Y., 282 App. Div. 173, 123 N.Y.S.2d 614 (2d Dep't 1953).

5. Schuster v. City of N.Y., 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

6. *Supra* note 1, at 72, 268 N.E.2d at 766, 320 N.Y.S.2d at 23, *citing* Motyka v. City of Amsterdam, 15 N.Y.2d 134, 139, 204 N.E.2d 635, 637, 256 N.Y.S.2d 595, 598 (1965).

7. *Supra* note 1, at 72, 268 N.E.2d at 766, 320 N.Y.S.2d at 23. In support of its conclusion that a "special duty" may have been created, the Court quoted from Judge Cardozo's opinion in H.R. Moch Co., Inc. v. Rennselaer Water Co., 247 N.Y. 160, 167, 159 N.E. 896, 898 (1928):

> If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in withholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward.

through its inspectorial staff, "an insurer of safety, although the purpose of its staff are related only to handling violations."[8] They believed that "unless inspectors are to be gagged," the majority's decision would expose the city to an unforeseeable number of future liabilities.[9]

The question of the state's liability for a brutal murder by a parolee was presented in *Taylor v. State*.[10] The claimant alleged that his daughter's murder was caused by the state's improper release and inadequate supervision of a parolee. Concerning improper release, he alleged that the parolee was a known prior sexual offender with a history of psychiatric treatment. The court declared that the state would not be an insurer of the acts of those released on parole.[11] Where release was predicated on the professional judgment of a qualified physician and there was substantial support in the record for the parole board's action, the court would not substitute its evaluation of the possibility for successful parole for that of the board. The court emphasized, however, that the state's obligation did not end with the prisoner's release, but included a duty of supervising him while on parole, with the extent of the duty a function of the case history of the inmate released.[12] Because the parolee had an extensive background of violent deviant behavior, and because his last psychiatric report indicated that his release should be "intelligently *guarded* and *closely* supervised,"[13] the extent of the state's duty of supervision was at issue as was the foreseeability of the parolee's actions if that duty had been breached. The court decided, however, that no facts giving rise to a cause of action based on negligent supervision had been alleged. Hence, the state's motion to dismiss the claim was granted, without prejudice to the service of an amended complaint. The dissent argued that the factual allegations were particular enough to raise the

8. *Id.* at 73, 268 N.E.2d at 767, 320 N.Y.S.2d at 24 (Breitel, J., dissenting).

9. *Id.* at 74, 268 N.E.2d at 768, 320 N.Y.S.2d at 25.

10. 36 App. Div. 2d 878, 320 N.Y.S.2d 343 (3d Dep't 1971) (mem.).

11. *Id.* at 878, 320 N.Y.S.2d at 345.

12. In reaching this conclusion the third department followed *Wasserstein v. State*, 32 App. Div. 2d 119, 300 N.Y.S.2d 263 (3d Dep't 1969), *aff'd mem.*, 27 N.Y.2d 627, 261 N.E.2d 665, 313 N.Y.S.2d 759 (1970) which was reported in Alexander, *Torts, 1969 Survey of New York Law*, 21 SYRACUSE L. REV. 677, 680 (1970). *Cf.* O'Hara & Wolff, *Torts, 1970 Survey of New York Law*, 22 SYRACUSE L. REV. 423, 429 n.34 (1971). There a parolee from a state juvenile institution shot a pedestrian walking along the street. The Court of Appeals affirmed the third department's dismissal of the claim of negligent supervision against the state on the ground that the parolee's past history and record had not shown any prior acts of physical violence, and that a parole officer acting as a reasonable man was not required to guess that the parolee, declared delinquent because of truancy and absence from the home, would shoot a pedestrian.

13. Taylor v. State, *supra* note 10, at 879, 320 N.Y.S.2d at 345.

negligent supervision issue and suggested that amplification of the claim could be obtained by demand for a bill of particulars.

In *Kulaga v. State*,[14] although the state was found negligent in its supervision of an escaped murderer who assaulted and raped claimants, the trial judge found that claimants were barred from recovering damages because they had assumed the risk and were contributorily negligent. The Appellate Division, Fourth Department, reversed, and its decision was affirmed by the Court of Appeals. The proof established that claimant wife was responsible for maintaining her widowed mother's unoccupied premises. Aware that her mother's house had probably been broken into, that a gun had been left in the house, and that an escaped murderer was loose in the area, she nonetheless went with her husband to inspect the house. Upon entering they were confronted by the escapee, who was holding a gun. He bound the claimants, raped the wife, took their money, and fled in their car.

On the assumption of the risk point, the appellate division agreed that because claimants did not have such knowledge as to fully appreciate the danger into which they were entering, they were not barred from recovery.[15] On the contributory negligence point, the members of the court used slightly different approaches to reach the same result. Three justices decided that:

> [j]ust as negligence is actionable only on account of the harm which was within the scope of the risk, so claimant's entry into [the] house may have been negligent with respect to the hazard of being set upon by children or teenage vandals, but was unrelated to the risk of being raped and robbed by an escaped killer.[16]

Thus, although the claimants might not have exercised reasonable care with regard to a foreseeable risk of injury from one cause, they were not contributorily negligent because they were injured in a way that could not have been foreseen.[17] Three concurring justices decided that claimants were guilty of contributory negligence and that this negligence was the direct cause of their injuries. But, finding the *Wagon Mound*[18] case persuasive, they also concluded that the consequences, although direct,

14. 37 App. Div. 2d 58, 322 N.Y.S.2d 542 (4th Dep't 1971).

15. *Id.* at 59, 322 N.Y.S.2d at 343, *citing* McEvoy v. City of N.Y., 266 App. Div. 445, 448, 42 N.Y.S.2d 746, 750 (2d Dep't 1943) *aff'd mem.*, 292 N.Y. 654, 55 N.E.2d 517 (1944).

16. *Id.* at 61-62, 322 N.Y.S.2d at 546.

17. W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 431-32 (3d ed. 1964).

18. Overseas Tankship [U.K.], Ltd. v. Morts Dock & Eng'r Co. [The Wagon Mound], [1961] A.C. 388 [1961] 2 W.L.R. 126; [1961] 1 ALL E.R. 404 (D.C. Austl.).

were not foreseeable. The concurring justices also noted that the doctrine of contributory negligence has been much criticized, and that the commentators have made suggestions for its limitation.[19]

The state's authority to hold a patient found to be free of mental disorder but known to be a potential danger to the community was an issue which caused the fourth department to divide sharply.[20] The patient in question had long history of bizarre sexual and assaultive conduct and had threatened future attacks on women. Characterized by the state hospital authorities as a "potentially dangerous psychopath," the patient was nonetheless released, five days after admission, when the doctors found him to be without "mental disorder." A little over a month later he attacked and severely injured a young woman with a butcher knife and meat cleaver.

The court of claims held that the patient's release could not be the basis for liability since it was predicated on a professional medical judgment, but it imposed liability because the patient had been discharged without reasonable precautions having been taken for community safety. The fourth department reversed, stating that there was no legal requirement for post-release care and, therefore, no justification for a finding of negligence. Crucial to the result was the fact that since the doctors found the patient to be without mental disorder, he was entitled to be released under the Mental Hygiene Law.[21] Advised that the patient would receive continued private care, and that they would be required to release the patient once his parents requested they do so, the hospital authorities had no continuing duty to exercise a "parental role" over the discharged patient. Two dissenting judges believed that the state hospital had the power to retain a person found to be dangerous but who was without mental illness, and that the state should be held liable for the negligent failure of its employees to utilize that power. The majority disagreed, however, being unwilling to require involuntary preventive detention of those without mental illness in the absence of specific statutory authorization.[22]

This year brought two more police chases of supposed law violators

19. Kulaga v. State, *supra* note 14, at 66, 322 N.Y.S.2d at 550 (Witmer, J., concurring), *citing, e.g.*, 2 HARPER & JAMES, LAW OF TORTS, §§ 22.3, 22.4 (1956); W. PROSSER, *supra* note 17, at 428.

20. Cameron v. State, 37 App. Div. 2d 46, 322 N.Y.S.2d 562 (4th Dep't 1971).

21. N.Y. MENTAL HYGIENE LAW § 87(1)(b) (McKinney 1971).

22. *Cf.* Alexander, *Torts, 1969 Survey of New York Law*, 21 SYRACUSE L. REV. 677, 682-83 (1970).

with resultant injury to innocent persons. In both instances the *Stanton* standard, discussed in the last two year's Surveys, was the basis for deciding the issue of state liability.[23]

In *Strobel v. State*,[24] the infant claimant sustained serious permanent personal injuries while a passenger in an automobile that was being pursued by a state trooper. The driver of the car was trying to elude the trooper when the chase led into the city of Kingston. The trooper pursued the car with his siren and lights on. Finally, the pursued vehicle failed to turn at a dead end, went hurtling through an open field, shot over a 200-foot precipice, crashed into a tree, exploded, and began burning. The claimant was trapped inside the burning car for some time before he was rescued. The Court of Claims found that by continuing the chase within the city limits the officer conducted the pursuit in a negligent manner and that his negligence, together with that of the driver of the pursued car, was a proximate cause of the accident. The third department reversed, holding that good police practice and the exercise of reasonable care did not require the trooper to abandon the chase. Citing *Stanton*, the court noted that "[t]he privilege accorded an emergency vehicle driver can only be denied when there is evidence of an exercise of these privileges that is not reasonable under the circumstances."[25] Since the trooper had always kept his lights and siren on while driving in the city, watched others on the highway, and continually reevaluated the wisdom of continuing the chase, his conduct was reasonable, even though there might have been alternative courses of action open to him.

In a federal decision, *Myers v. Town of Harrison*,[26] the Second Circuit found that the *Stanton* standard was not met. There, a patrolman of the Harrison Police Department positioned his car, with its rooflight flashing, diagonally across the road at the bottom of a hill so steep that a driver would not have been able to see it until he was some 600 to 800 feet away. He did this in order to aid in the apprehension of a vehicle that he knew was being chased through the Town of Harrison at speeds of up to 100 miles per hour. It was demonstrated that a vehicle

23. Stanton v. State, 29 App. Div. 2d 612, 285 N.Y.S.2d 694 (3d Dep't 1967), *aff'd mem.*, 26 N.Y.2d 990, 259 N.E.2d 494, 311 N.Y.S.2d 28 (1970). O'Hara & Wolff, *Torts, 1970 Survey of New York Law*, 22 SYRACUSE L. REV. 423-24 (1971); Alexander, *Torts, 1969 Survey of New York Law, supra* note 22, at 678.

24. 36 App. Div. 2d 485, 321 N.Y.S.2d 11 (3d Dep't 1971).

25. *Id.* at 487, 321 N.Y.S.2d at 13-14.

26. 438 F.2d 294 (2d Cir. 1971).

travelling at such a rate of speed could not possibly have stopped in less than 1750 feet. Plaintiff's intestate, operating a taxicab, stopped his taxi when he came upon the police car to find out what was happening. Just then the pursued vehicle came over the top of the hill at the speed of 90 miles an hour. The policeman jumped safely out of the way as the speeding car collided with his patrol car and the taxi, killing the cab driver instantly.

Noting that under *Stanton* the normal standards of negligence do not apply to the operator of an emergency vehicle, the court observed that the jury had found the patrolman's conduct to be unreasonable under the applicable standard. It agreed that the positioning of the patrol car and the failure to take any precautions to warn approaching motorists were both sufficient to present to the jury quesions of fact on the issues of negligence and proximate cause.

A municipality's duty to use reasonable care in assuring the safety of its streets was the issue presented to the Court of Appeals in *Procida v. City of New York*.[27] Plaintiff, a bus driver for the City Transit Authority, was injured when his bus struck a large hole in the sreet. Since it was conceded that the city itself had not caused the defect, the city's liability could arise only if it had actual or constructive notice of the dangerous condition.[28] Testimony revealed that because of sewer construction in the area, the street was unpaved at the time of the accident, that the city had received prior complaints concerning holes in the street near the scene of the accident, and that city sewer inspectors had been near the accident scene at all times during the period of construction. The second department had dismissed the complaint against the city on the ground that the evidence presented was insufficient to establish notice to the municipality of the defect. The Court of Appeals reversed, holding, in effect, that the temporary presence of a city sewer inspector in the construction area constituted sufficient circumstantial evidence of notice of defects in that area. The dissent, objecting to the result reached by the majority, stated:

> By its holding, the requirement of proof of notice in street and sidewalk cases has for all practical purposes become a nullity. For instance, police officers are charged with the duty of reporting defective street conditions. Since they are present on the city streets every day, is the city to

27. 28 N.Y.2d 681, 269 N.E.2d 399, 320 N.Y.S.2d 737 (1971) (mem.).

28. Clemmons v. Cominskey, 2 N.Y.2d 958, 142 N.E.2d 423, 162 N.Y.S.2d 357 (1957) (mem.); Orsen v. City of N.Y., 193 N.Y. 537, 540, 86 N.E. 523, 524 (1908).

be charged with actual notice, although no evidence is presented that a policeman actually saw the defect?[29]

The statute of limitations of the Court of Claims Act was construed by the third department in a decision that should prove helpful to plaintiffs who are unable to ascertain the extent of their damages within 90 days after the accrual of a cause of action against the state. In *Bronxville Palmer, Ltd. v. State*,[30] appellant had filed a claim some four months after the state had allegedly negligently installed pile drivers into its land. The court of claims dismissed the claim for lack of jurisdiction. In so doing it relied on Section 10(3) of the Court of Claims Act which provides that "a claim to recover damages for injuries to property . . . caused by the tort of an . . . employee of the state . . . shall be filed within ninety days after accrual of such claim." The third department reversed, reasoning that the phrase "claim accrued" is synonymous with "damages accrued," rather than "cause of action accrued." Thus, the ninety days would not start to run until the extent of damages could be ascertained.[31] Moreover, if for some reason it is impossible to evaluate the damages when the wrong occurred, the time for filing a claim would not begin to run until such an evaluation could be made.[32]

B. Intentional Torts

A very significant development in the area of libel actions extended the *New York Times*[33] doctrine to private individuals seeking damages for defamatory reports by the news media of their involvement in events of general or public concern.

In *Rosenbloom v. Metromedia Inc.*,[34] a distributor of nudist magazines brought a diversity libel action under Pennsylvania law against Metromedia (WIP) for alleged defamatory statements made in two series of radio news broadcasts. In the first series, defendant's report of plaintiff's arrest by the police for possession of obscene literature failed to describe the confiscated material as "allegedly" or "reportedly" obscene, although this omission was corrected in subsequent broadcasts. When the plaintiff later sought an injunction prohibiting police interfer-

29. Procide v. City of N.Y., *supra* note 27, at 686, 269 N.E.2d at 402, 320 N.Y.S.2d at 741 (Jasen, J., dissenting).

30. 36 App. Div. 2d 647, 318 N.Y.S.2d 412 (3d Dep't 1971).

31. *Id.* at 687, *citing* Taylor v. State, 302 N.Y. 177, 185, 96 N.E.2d 765, 768 (1951).

32. *Id.* at 648, 318 N.Y.S.2d at 413.

33. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

34. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971).

ence with his business and further publicity of the earlier arrest, WIP newscasts, although not referring to the plaintiff by name, called the action an attempt by "smut distributors" to force the authorities to "lay off the smut literature racket."[35] Following the broadcasts, but before the subsequent libel action was commenced, the distributor was acquitted of the criminal charges on the ground that the material in question was not obscene as a matter of law.[36]

In the libel action the district court held that *New York Times* did not apply, because before his arrest and the attendant publicity plaintiff was not a public figure.[37] Thus, the court instructed the jury that in accordance with Pennsylvania law defendant should be held to a "reasonable care" standard. The verdict was for the plaintiff who was awarded general and punitive damages. The Third Circuit reversed, holding that an "actual malice" standard was required where the subject matter of the broadcast was of legitimate public interest. The Supreme Court of the United States affirmed, holding in effect that a private citizen seeking damages for a defamatory report of his involvement in an event of public or general concern may recover only upon a showing that the false statement was made with knowledge of its falsity or with reckless disregard for its truth.[38]

Although contributing greatly to the goal of uninhibited and wide open debate on public issues, the Court's decision raises some troublesome problems that will have to be resolved in the future. Since the Court did not establish the parameters of the "issue of public or general concern" standard, the media could delineate the scope of the privilege merely by deciding what events are "newsworthy"—an undesirable result. With the further erosion of defamation as a tort that *Rosenbloom* portends, since most publications may be defended as dealing with matters of public concern, private citizens will have little recourse for protection of their reputational interests short of proving actual malice. The Court's suggestion that a private citizen's inadequate ability to respond can be remedied by the states through enactment of right of reply stat-

35. *Id.* at 34.

36. Rosenbloom v. Metromedia, Inc., 289 F. Supp. 737, 742 (E.D. Pa. 1968).

37. *Id.* at 742.

38. The Court's extension of the *Times* privilege was by a plurality of three—Justice Brennan wrote the plurality opinion in which Chief Justice Burger and Justice Blackmun joined. Justice Black concurred, reiterating his position that the first amendment bars libel judgments against the press. *Supra* note 34, at 57. Justice White also concurred in the result, but would have limited the holding to reports of official actions of public servants. *Id.* at 62.

utes[39] is a sound one, provided the states are diligent in enacting the needed legislation.

The *Rosenbloom* standard may require reversal of a case reported in last year's Survey,[40] *Kent v. City of Buffalo*,[41] which was affirmed by the fourth department[42] several months before *Rosenbloom* was decided.

Plaintiff Kent and three other suspects had been arrested for armed robbery. Defendant's cameraman took a film of the four men in handcuffs. Kent was released the same day at 8:30 P.M. when the police learned that he was not involved. Nonetheless, defendant televised the film along with an account of the robbery on news broadcasts at 11:00 P.M. that day and at noon on the following day. The trial court charged the jury that defendant could not be held liable for mere negligence or want of sound judgment; that to impose liability the jury must find that defendant acted with malice, which might consist of publishing a libel with such negligence and carelessness as to indicate a wanton or reckless disregard of plaintiff's rights.[43] The jury returned a verdict for plaintiff, awarding him $5,000 in punitive damages but no compensatory damages.

The fourth department unanimously agreed that the publication was false and that punitive damages could be awarded without compensatory damages. It split, however, on whether the record supported a finding of malice. Interestingly, dissenting Justice Moule argued that the *New York Times* standard should be applied. Using that standard, he decided that plaintiff's picture was not televised "with the high degree of awareness of [its] probable falsity demanded,"[44] nor could defendant have "in fact entertained serious doubts as to the truth of [its] publication."[45] He concluded that:

> An inference of gross carelessness cannot be drawn from the fact that a mistake was made, and since the record contains no evidence of reckless conduct, the verdict should be set aside and the complaint dismissed.[46]

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39. *Id.* at 47, n. 15.

40. O'Hara & Wolff, *Torts, 1970 Survey of New York Law*, 22 SYRACUSE L. REV. 423, 434-35 (1971).

41. 61 Misc. 2d 142, 304 N.Y.S.2d 949 (Sup. Ct., Erie Co. 1969).

42. Kent v. City of Buffalo, 36 App. Div. 2d 85, 319 N.Y.S.2d 305 (4th Dep't 1971).

43. *Id.* at 86, 319 N.Y.S.2d at 307.

44. *Id.* at 90, 319 N.Y.S.2d at 310 (Moule, J. dissenting), *citing* Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

45. *Id., citing* St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

46. *Id.* at 90, 319 N.Y.S.2d at 311.

The majority affirmed the judgment for plaintiff and reasoned that the dissent's position was derived from "cases involving public officials and public figures, and the rule of law set forth in those cases is not applicable to actions for libel brought by a private individual."[47] Of course *Rosenbloom* now compels a different conclusion.[48]

This year's right of privacy cases featured an irate participant in a St. Patrick's Day parade, and a disgruntled flugelhorn player. Plaintiff in *Murray v. New York Magazine Co.*[49] had been photographed at the 1967 St. Patrick's Day parade in Manhattan wearing typically Irish garb. The photograph appeared two years later in defendant's magazine under the title of the lead article, "The Last of the Irish Immigrants." Plaintiff was not named in the article, nor was reference made to the cover photograph. Plaintiff alleged that defendant had violated Section 51 of the Civil Rights Law by publishing the photograph "for advertising purposes or for the purposes of trade" without first obtaining his written consent.[50]

The Court of Appeals ruled that the picture was published in connection with the presentation of a matter of legitimate public interest to readers, and since it bore a reasonable relation to that presentation and was not an advertisement in disguise, its use on the magazine cover was not actionable under the Civil Rights Law.[51] Hence, it granted defendant's motion for summary judgment.

Frank Man, a professional musician, mounted the stage at the Woodstock festival to play "Mess Call" on his flugelhorn before the assembled people and movie cameras. His forty-five second bravura performance was used by Warner Bros. in its movie "Woodstock" without his consent and he brought suit under Section 51 of the New York Civil Rights Law in federal court. In *Man v. Warner Bros., Inc.*,[52]

47. *Supra* note 42, at 89, 319 N.Y.S.2d at 309.

48. The Court of Appeals has reversed the fourth department in Kent v. City of Buffalo, 29 N.Y.2d 818, 277 N.E.2d 669, 327 N.Y.S.2d 653 (1971) (mem.), and has approved the rationale of the dissenting opinion in the appellate division, stating that due to the *Rosenbloom* rule, "we find the evidence too insubstantial to constitute 'clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Id.* at 819, ___ N.E.2d at ___, ___ N.Y.S.2d at ___, *quoting from* Rosenbloom v. Metromedia, *supra* note 35, at 52.

49. 27 N.Y.2d 406, 267 N.E.2d 256, 318 N.Y.S.2d 474 (1971).

50. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1948).

51. *Supra* note 49, at 409, 267 N.E.2d at 258, 318 N.Y.S.2d at 477. *See* Pagan v. N.Y. Herald Tribune, 32 App. Div. 2d 341, 301 N.Y.S.2d 120 (1st Dep't 1969), *aff'd*, 26 N.Y.2d 941, 258 N.E.2d 727, 301 N.Y.S.2d 327 (1970) (mem.).

52. 317 F. Supp. 50 (S.D.N.Y. 1970).

the court made short shrift of his complaint. Characterizing defendant's incidental use of Man's brief performance as *de minimis*,[53] the court ruled that:

> Section 51 may not be applied to afford relief either to a public figure or in a matter of public interest in the absence of proof that the defendant published false material with knowledge of its falsity or in reckless disregard of the truth.[54]

An important consideration for the courts in both the *Murray* case and the *Man* case was plaintiff's voluntary participation in events of considerable public interest.

In a related development a gasoline service station operator failed to make out a cause of action under Section 51 of the Civil Rights Law but stated a cause of action in prima facie tort. Plaintiff Catalano was licensed to conduct motor vehicle inspections in the Albany area. Defendant Capital Cities Broadcasting Corporation, owner and operator of a television station in the same area, had learned that it was difficult for motorists to get their cars inspected at licensed stations and conducted an independent investigation of the problem. To collect evidence it sent an employee to plaintiff's gas station with a concealed tape recorder to inquire about an inspection; a hidden camera photographed the resulting conversation. Defendant's subsequent news telecast showed a woman driving into plaintiff's station and requesting an inspection. Plaintiff's employee replied, "we cannot inspect your car."[55] Plaintiff contended that defendant deliberately omitted part of the recorded conversation, including his employee's explanation of why the car could not be inspected right away, in order to support its contention that inspections were hard to get. Plaintiff alleged a substantial loss of business as a result of the incident.[56]

Defendant argued that the only possible cause of action sounded in defamation, but that because the taped conversation had been erased by its employee, plaintiff could not allege or prove the exact conversation

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53. *Id.* at 53.

54. *Id.* at 51, *citing* Time, Inc. v. Hill, 385 U.S. 374 (1967). The Supreme Court's test for the application of the *New York Times* privilege in the privacy area, set forth in Time, Inc. v. Hill was whether the issue discussed was of public interest; the plaintiff's status as a public or private figure was of little moment. Thus, the *Time, Inc.* decision presaged the result reached in Rosenbloom v. Metromedia, Inc., *supra* note 34, where the *Times* privilege was applied in a libel action.

55. Catalano v. Capital Cities Broadcasting Corp., 63 Misc. 2d 595, 596, 313 N.Y.S.2d 52, 54 (Sup. Ct., Albany Co. 1970).

56. *Id.* at 596, 313 N.Y.S.2d at 54.

as required by New York law.[57] The court responded that there was a cause of action for prima facie tort because

> [t]he creation and/or distortion of news with an intent to give it wide exposure to the public through a communication media, knowing or being charged with knowledge that it would damage another, generates the necessary requirements for a charge of malice.[58]

A cause of action under Section 51 of the Civil Rights Law was dismissed because there was no showing defendant's publication was for commercial purposes.[59]

The looseness of the court's language is unfortunate because it suggests that the prima facie tort doctrine is being applied in a manner violative of the constitutional standard articulated by the United States Supreme Court in *Rosenbloom v. Metromedia, Inc.*[60] Actually, however, even if the "created" news event was of public concern, the facts as plaintiff alleged them indicate publication of false material with knowledge of its falsity.

A harassed school bus driver who attempted to take his noisy charges to a police station was held liable along with his employer for false imprisonment. In *Sindle v. New York City Transit Authority*,[61] the infant plaintiff boarded a school bus owned by the Transit Authority and operated by defendant driver. At first, the bus proceeded on its scheduled route, but then, because the children were noisy and damaging the bus, the driver announced he was taking them to a police station. As the bus departed from its normal route some of its passengers began jumping out the windows. Plaintiff was preparing to jump when the bus slowed for a turn. The bus ran over a curb, jarred the infant loose from the window, and caused injury when he fell under its wheels.

The court, after a trial without a jury, ruled that

> When the driver, acting on his announced intention of taking the plaintiff and the others to the police station, failed to stop at his scheduled stops, failed to open the bus doors and departed from the scheduled route, he imposed unlawful restraints on the freedom of the infant plaintiff. These deliberate, intentional, and willful acts constitue false imprisonment . . . and since the driver was acting within the scope of his employment, his employer, the Transit Authority, is also liable.[62]

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57. N.Y. CPLR § 3016(a) (McKinney 1963).
58. *Supra* note 55, 63 Misc. 2d at 597, 313 N.Y.S.2d at 55.
59. *Id.* at 598, 313 N.Y.S.2d at 56.
60. *Supra* note 34.
61. 64 Misc. 2d 993, 316 N.Y.S.2d 657 (Sup. Ct., Richmond Co. 1970).
62. *Id.* at 995, 316 N.Y.S.2d at 660.

In a related opinion the court was called upon to assess the damages for false imprisonment.[63] Defendants argued that the infant was contributorily negligent and was barred from recovery. The court concluded, however, that

> the infant had a right to try to escape; that he was not negligent; that his attempt to escape was foreseeable and the proximate result of his imprisonment and that he is entitled to recover in full measure, damages for the bodily injuries he sustained.[64]

To support its conclusion the court decided that "[i]f peril, negligently imposed, invites escape . . . , then certainly false imprisonment invites escape."[65] Moreover, it was concerned lest the law be more restrictive in allowing damages for an intentional tort than for a negligent one.

C. *Unintentional Torts*

Products Liability.—One of the most significant recent developments in the area of tort law has been the extension of strict tort liability beyond the consumer to the bystander in suits against the manufacturer.

In the leading case, *Elmore v. American Motors Corp.*,[66] the California Supreme Court held that the driver and passenger of a vehicle struck by an automobile defectively manufactured by defendant could recover against the manufacturer and retailer under a theory of strict liability. The court was emphatic that "the doctrine of strict liability may not be restricted on a theory of privity of contract."[67] Similarly, in

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63. Sindle v. N.Y. City Transit Authority, 64 Misc. 2d 995, 316 N.Y.S.2d 657, 660 (Sup. Ct., Richmond Co. 1970).

64. *Id.* at 996, 316 N.Y.S.2d at 661. In finding that the infant was not negligent either in the method of escape or in the manner of its execution the court reasoned: "He must be judged by the standards of a 14-year-old boy faced with the circumstances in which he found himself." *Id.* at 997, 316 N.Y.S.2d at 662.

65. *Id.* at 996, 316 N.Y.S.2d at 661.

66. 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).

67. 70 Cal. 2d at 586, 451 P.2d at 88, 75 Cal. Rptr. at 656. The court went on:

> [L]iability [is] based upon the existence of a defective product which caused injury to a human being. . . .
>
> . . . .
>
> If anything, bystanders should be entitled to greater protection than the consumer or user where injury to bystanders from the defect is reasonably foreseeable. Consumers and users, at least, have the opportunity to inspect for defects and to limit their purchases to articles manufactured by reputable manufacturers and sold by reputable retailers, where as the bystanders ordinarily has no such opportunities. In short, the bystander is in greater need of protection from defective products which are dangerous, and if any distinction should be made between bystanders and users, it should be made . . . to extend greater liability in favor of the bystanders.

Id. at 586-87, 451 P.2d at 88-89, 75 Cal. Rptr. at 656-57.

Lamendola v. Mizell,[68] a New Jersey court decided that concepts of privity were out of place in products liability actions and held that a bystander injured by a defective automobile driven by the consumer could sue the manufacturer and seller on a strict liability theory where the injuries were foreseeable.[69]

New York, however, has been content to let its products liability law develop more slowly. In *Goldberg v. Kollsman Instrument Corp.*,[70] the Court of Appeals held that a manufacturer's implied warranty of fitness ran in favor of all its intended users, despite the absence of privity. Its theory was that "[a] breach of warranty . . . is not only a violation of the sales contract out of which the warranty arises but is a tortious wrong suable by a noncontracting party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer."[71]

The problem facing bystanders under this New York approach is thus apparent. The implied warranty or contemplated user limitation makes it difficult even for bystanders whose injuries were foreseeable to state a cause of action. Indeed, the fourth department refused to extend a strict liability recovery to bystanders in *Berzon v. Don Allen Motors, Inc.*[72]

Clearly, an implied warranty theory, dependent as it is on such commercial notions as user or consumer of the defective product, would block the gradual development of liability to bystanders.[73] However, in *Cawley v. General Motors Corp.*,[74] Supreme Court Justice Yesawich extended the implied warranty theory to bystanders. In that case, plaintiff brought an action to recover damages sustained by a vehicle manufactured by General Motors. One cause of action was in implied warranty; plaintiff asserted that the striking vehicle's defective accelerator system caused the accident. Defendant moved to strike the warranty cause of action, contending that under *Berzon* privity barred recovery by bystanders. Noting that courts in other states have extended liability without privity to bystanders, the court stated:

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68. 115 N.J. Super. 514, 280 A.2d 241 (Super. Ct. 1971).

69. *See* Metchell v. Miller, 26 Conn. Sup. 142, 214 A.2d 694 (Super. Ct., New Haven Co. 1965).

70. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

71. *Id.* at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.

72. 23 App. Div. 2d 530, 256 N.Y.S.2d 643 (4th Dep't 1965) (mem.).

73. Donnelly, *Commercial Law, 1970 Survey of New York Law*, 22 SYRACUSE L. REV. 167, 168-69 (1971).

74. 67 Misc. 2d 768, 324 N.Y.S.2d 246 (Sup. Ct., Broome Co. 1971).

> In New York the course taken to afford greater protection to the public has been to extend the concept of implied warranty. Now, it is clear, that notwithstanding the absence of privity, a cause of action for personal injuries arising from a breach of implied warranty does exist in favor of strangers to the contract of sale . . . . Since the requirement of privity has been abandoned, and the breach alleged herein rests upon a tortious act from which the likelihood of injury to the plaintiff was reasonably to be foreseen, [defendant's] motion is denied.[75]

The result appears sound. Since under *Goldberg* a breach of implied warranty involving a defective dangerous instrumentality is by itself a tortious wrong, distinct from breach of the sales contract, there is little logic in denying relief to foreseeable bystanders merely because they were not users of the defective product.[76]

By limiting the result in *Cawley* to reasonably foreseeable bystanders, Judge Yesawich put acceptable limits on the incidence of liability. A manufacturer who places a defective product on the market creates the risk of severe injury to bystanders within the zone of danger following that risk. Injury to such nonusers is within the "reasonable contemplation" of the manufacturer,[77] and courts should impose liability. It would be possible to extend liability even further if primary emphasis is placed upon the ability to distribute risk. Then, it is clear that even an unforeseeable bystander is no better prepared to absorb the cost of an injury caused by a defectively manufactured product than is a foreseeable bystander.[78]

A manufacturer of a machine which is inherently dangerous because of the way it functions is under a duty to make it free from latent defects or concealed dangers not known to a user.[79] Should this rule be extended to apply to unsafe design characteristics which do not cause an accident but only aggravate damages? The third department answered negatively in *Edgar v. Nachman.*[80] Plaintiff's decedent was involved in an accident when his westbound car was struck head-on by an eastbound vehicle operated by defendant Nachman which crossed into the west-

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75. *Id.* at 769, 324 N.Y.S.2d at 247-48.

76. Indeed, the third department has so held in a case with facts almost duplicating those in *Cawley*, Codling v. Paglia, ___ App. Div. 2d ___ (3d Dep't 1972). [See New York Lawyer's Letter, January 27, 1972].

77. *See* Goldberg v. Kollsman Instrument Corp., *supra* note 70, at 436, 191 N.E.2d at 82, 240 N.Y.S.2d at 594.

78. *See* note 67, *supra.*

79. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

80. 37 App. Div. 2d 86, 323 N.Y.S.2d 53 (3d Dep't 1971).

bound lane of travel. Plaintiff alleged that, after impact, the gas cap flew off decedent's car, causing the car to burst into flames. Allegedly, the gas cap and gas tank were not designed to withstand a collision and this defect caused or contributed to decedent's death. There was no contention that the parts were improperly installed or that the design was responsible for the accident.

Plaintiff's cause of action against the manufacturer for aggravation of injuries was dismissed. Relying on *Campo v. Scofield*,[81] the court ruled that liability may not be imposed on a manufacturer solely because his product is dangerous to use and he has failed to make safety provisions against all anticipated risks.[82] Although it noted that some jurisdictions have allowed recovery where the car's design did not cause the accident but enhanced the damages,[83] it decided that New York does not allow recovery against the manufacturer for design defects which do not cause the accident.[84]

Again, the warranty basis of New York's products liability decisions raised a conceptual hurdle to imposing liability on the manufacturer. The Court of Appeals stated that *Greenburg v. Lorenz*[85] and its successors "did not expand the law to make manufacturers responsible for warranting that their cars were safe in design."[86] Jurisdictions that have gone beyond warranty as a predicate to liability can take a different approach. For example, in *Badorek v. General Motors Corp.*,[87] a case with facts almost identical to those in *Edgar*,[88] a California court held General Motors strictly liable in tort for enhanced injuries caused by a defectively designed gas tank because the injuries were foreseeable. Since

81. 301 N.Y. 468, 95 N.E.2d 802 (1950). In *Campo* plaintiff's hands were caught and badly injured in an "onion topping" machine. He brought suit against the machine's manufacturers alleging that they had been negligent in failing to equip it with proper safety devices. Since there was no privity between the parties—a crucial requirement when the case was decided—plaintiff's complaint could not be sustained on a theory of implied warranty. *Id.* at 471, 95 N.E.2d at 803. As to the negligence theory of action, the Court decided that the complaint was properly dismissed "since the duty owed by a manufacturer to remote users does not require him to guard against hazards apparent to the casual observer or to protect against injuries resulting from the user's own patently careless and improvident conduct." *Id.* at 475, 95 N.E.2d at 806.

82. Edgar v. Nachman, *supra* note 80, at 88, 323 N.Y.S.2d at 55.

83. *See, e.g.*, Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).

84. Edgar v. Nachman, *supra* note 80, at 88, 323 N.Y.S.2d at 55.

85. 9 N.Y.2d 195, 173 N.E.2d 773, 213 N.Y.S.2d 39 (1961).

86. Edgar v. Nachman, *supra* note 80, at 88, 323 N.Y.S.2d at 55.

87. 11 Cal. App. 3d 902, 90 Cal. Rptr. 305 (1970).

88. In *Badorek* plaintiff was injured when the car in which she was a passenger was struck from behind. The car's gas tank ruptured on impact, and the plaintiff suffered additional injuries from flaming gasoline.

highway accidents are a readily foreseeable misuse of motor vehicles,[89] and a product's defective design may cause an unreasonable risk of aggravated injury to the user unfortunate enough to be involved in an accident, failure to extend liability for such injury in effect countenances manufacturer unwillinginess to design safer cars.

Negligence.—The issue of a vehicle owner's liability to victims injured by a thief's negligent operation of the automobile was presented in *Guaspari v. Gorsky*.[90] Defendant Gorsky had attended a V.F.W. field day event with a friend and had parked his car nearby. About an hour after his arrival, his car was stolen by two youths. As a result of the negligence of the thief who drove the car, the Gorsky vehicle collided with a car driven by plaintiff Guaspari, and occupied by his wife and daughter. Plaintiff brought actions against the defendant for personal injuries, medical expenses, property damage, and wrongful death. The actions were based on defendant's alleged violation of Section 1210(a) of the Vehicle and Traffic Law,[91] with plaintiff claiming that defendant had negligently left his car keys in the ignition of the stolen vehicle. Conflicting testimony was elicited concerning the location of the keys. The court charged that if the jury found as a fact that the keys were in the glove compartment, as Gorsky and his friend contended, he did not violate the statute and there could be no recovery, but that if the jury found as a fact that the keys were in the ignition, then Gorsky violated the statute and such violation constituted negligence on his part. The court added that before the jury could hold Gorsky liable for violating the statute, they would have to find that such violation was the proximate cause of the damages.[92] Jury verdicts were rendered for he plaintiff; defendant appealed on the law and the facts. The Fourth Department affirmed, holding that the issues of defendant's negligence and proximate cause were properly submitted to the jury and that the ver-

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89. Dyson v. Gen. Motors Corp., 298 F. Supp. 1064 (E.D. Pa. 1969).

90. 36 App. Div. 2d 225, 319 N.Y.S.2d 708 (4th Dep't 1971).

91. N.Y. VEHICLE AND T. LAW § 1210(a) (McKinney 1970) provides in relevant part:

> No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ingition, [and] removing the key from the vehicle. . . .

92. Guaspari v. Gorsky, *supra* note 90, at 227, 319 N.Y.S.2d at 711. Regarding proximate cause the court charged:

> [Would] a reasonably prudent person, situated as defendant was at the time and place involved, . . . have foreseen the possibility of a thief stealing his automobile if the keys were left in the ignition and . . . also have foreseen that a thief having stolen the car, might have recklessly driven it, thereby endangering the lives of other people on the highway.

Id. at 229, 319 N.Y.S.2d at 712.

dicts were supported by the proof.[93]

In reaching its decision the court noted that section 1210(a) changed the common law[94] and made it clear "that the intervention of an unauthorized person no longer operates to break the chain of causation."[95] Moreover, the purpose of the statute was to protect life and property by conferring a cause of action on those damaged through its violation.[96] Thus, if a car owner negligently created an opportunity for theft by violating the statute, the only questions remaining concerned the foreseeability of the theft under the relevant circumstances, and the foreseeability of the resultant accident.[97]

Although it appears that the New York statute alters the common law solution to the question of liability on the *Guaspari* facts, it may not be the final answer. A decision rendered a little over a month after *Guaspari* held as a matter of law that an owner would not be liable for the negligence of a thief in causing injury to third parties where the stolen vehicle was left unattended on *private* property. In *General Accident Groups v. Noonan*,[98] the car owner left his station wagon unattended in the driveway of his home, some 30 feet off the public highway. The car was unlocked, and the key was in the ignition. The car was stolen during the night and was involved in a collision. The injured driver commenced a law suit against the owner whose insurer disclaimed coverage; he then filed a claim under the uninsured motorist endorsement of his own policy. His insurer subsequently brought suit to determine its obligation to pay. In resolving this issue the court stated:

> The legislative history indicates that section 1210 (subd. [a]) was designed to obviate the risk of theft and injurious movement of vehicles. . . . Although the same harm may ultimately result whether the

93. *Id.*

94. The common law rule held the owner not liable as a matter of law for the negligence of a thief because the thief's use of the car intervened between the owner's negligence and the thief's negligent driving. *See, e.g.*, Lotito v. Kyriacus, 272 App. Div. 635, 74 N.Y.S.2d 599 (4th Dep't 1947), *motion for leave to appeal denied*, 297 N.Y. 1027, 80 N.E.2d 542 (1948); Walter v. Bond, 267 App. Div. 779, 45 N.Y.S.2d 378 (2d Dep't 1943) (mem.), *aff'd* 292 N.Y. 574, 54 N.E.2d 691 (1944).

95. Guaspari v. Gorsky, *supra* note 90, at 228, 319 N.Y.S.2d at 712. For support, the court obliquely referred to Annot., 51 A.L.R.2d 633, 639-43, which collects cases decided in other jurisdictions.

96. *Id.* at 228, 319 N.Y.S.2d at 711.

97. The court's holding on this point was presaged by *In re* Smith, 34 App. Div. 2d 629, 309 N.Y.S.2d 536 (1st Dep't 1970), which it cited. Guaspari v. Gorsky, *supra* note 90, at 228, 319 N.Y.S.2d at 711.

98. 66 Misc. 2d 528, 321 N.Y.S.2d 483 (Sup. Ct., Nassau Co. 1971).

> car is left parked on a public highway or in a private driveway, there are competing public considerations of at least equal significance, and these involve the right of people to use their property as they see fit.[99]

The court then applied the common law formula[100] and found no liability. Thus far, the distinction between parking in the street or in one's own driveway is controlling. The logic of this distinction is less than compelling, however, without a showing that the likelihood of theft is greatly reduced when automobiles are parked on private land.

The liability of absentee owners under Section 388 of the Vehicle and Traffic Law was litigated in three important cases. In *Payne v. Payne*,[101] the Court of Appeals decided that in cases of co-ownership it is a question of fact whether the operation of an automobile by one co-owner is with the consent of the other. In the absence of other evidence the necessary consent may be presumed from proof of co-ownership and use. The presumption is not conclusive, however, and may be rebutted by a showing that co-owners have not in fact consented among themselves to possession and use by both. Plaintiff, injured by the negligent operation of a motor vehicle by one of its two co-owners, and suing both, met her burden of proof by demonstrating co-ownership. Since it appeared from the record, however, that the negligent driver was unlicensed, the presumption arising from proof of co-ownership and use was rebutted. Thus, the case should have gone to trial and summary judgment was not an appropriate disposition.[102]

Two separate decisions by the Civil Court of the City of New York held that a lessee's violation of fine-print terms and conditions in a truck leasing agreement did not deprive an injured third party of his cause of action against the lessor under section 388.

In *Platt v. Hertz Corp.*,[103] the lessee authorized an employee to use a rented truck in making a delivery. The employee was unlicensed, a fact not known to his employer, and was involved in an accident. In *Febbraro v. Hertz Corp.*,[104] the lessee authorized one who was not an employee to drive a leased truck. The driver's negligence led to an accident. The injured third parties both brought suit against Hertz. Hertz argued that it was not liable in either case because the use of the truck by an unli-

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99. *Id.* at 531, 321 N.Y.S.2d at 486.
100. *See* note 94, *supra*.
101. 28 N.Y.2d 399, 271 N.E.2d 220, 322 N.Y.S.2d 238 (1971).
102. *Rev'g* 34 App. Div. 2d 375, 313 N.Y.S.2d 312 (4th Dep't 1970).
103. 64 Misc. 2d 752, 315 N.Y.S.2d 780 (N.Y.C. Civ. Ct. 1970).
104. 64 Misc. 2d 794, 315 N.Y.S.2d 702 (N.Y.C. Civ. Ct. 1970).

censed driver in *Platt*, and the use of the truck by a non-employee in *Febbraro*, were both in violation of the terms of the lease. The court rejected the Hertz position, finding it sufficient that the person driving the truck at the time of each accident was authorized to do so by the lessee. It doubted whether

> any contractual arrangements between lessor and lessee even if established so as to give a cause of action to the owner against the lessee for a violation of the agreement would be binding on third-party members of the public in light of [section 388].[105]

When a plaintiff suffers amnesia and loses his memory of the events causing his injury, should the jury be instructed that he is held to a lesser degree of proof than a plaintiff who could have testified to the events? The Court of Appeals held that it should be so instructed, but added some important qualifications in *Schechter v. Klanfer*.[106]

Plaintiff Schechter and a companion, both 14 years old, were motoring across a lake in a boat at night. The companion testified that the night was clear, the boat's lights were on, and plaintiff was taking a straight course at about four miles an hour when defendant's boat, travelling at about 30 miles an hour, rammed it. Defendant disputed the testimony regarding his speed and the lighting of plaintiff's boat. Plaintiff testified, but not about the accident, claiming that as a result of the collision he had no memory of the events. His medical expert testified that he had been comatose for several days after the accident and had suffered amnesia because of brain damage.

Concerning the degree of proof needed to meet plaintiff's burden on contributory negligence, the trial court initially instructed the jury that if it found plaintiff's amnesia to be genuine, he should be held to a lesser degree of proof than a plaintiff who could have testified to the accident.[107] Upon defendant's objection, however, the charge was withdrawn, plaintiff taking exception. There was a verdict for defendant which the appellate division affirmed. The Court of Appeals reversed and ordered a new trial.

By analogy to a decedent's burden in wrongful death cases,[108] and to an imbecile's burden of proof,[109] the Court held that plaintiff should

105. *Supra* note 103, at 755, 315 N.Y.S.2d at 783-84; *supra* note 104, at 796, 315 N.Y.S.2d at 705.

106. 28 N.Y.2d 228, 269 N.E.2d 812, 321 N.Y.S.2d 99 (1971).

107. *Id.* at 230, 269 N.E.2d at 813, 321 N.Y.S.2d at 100.

108. Noseworthy v. City of N.Y., 298 N.Y. 76, 80 N.E.2d 744 (1948).

109. Berg v. State, 40 Misc. 2d 354, 243 N.Y.S.2d 267 (Ct. Cl. 1963).

be subject to a lesser degree of proof, especially since defendant's acts impaired his ability to describe the accident.[110] The Court was explicit in its explanation that this result did not shift the burden of proof or eliminate plaintiff's need to make out a prima facie case; "[T]he jury must rest its findings on some evidence to establish negligence and also the absence of contributory negligence."[111] However, the Court concluded that plaintiff had met his burden of producing evidence and therefore should be held to a lesser standard of jury persuasion, adding:

> [A]mnesia is easily feigned. The dangers may be ameliorated. Plaintiff has the burden of proof on the issue of amnesia as on other issues. A jury should be instructed that before the lesser burden of persuasion is applied, because of the danger of shamming, they must be satisfied that the evidence of amnesia is clear and convincing, supported by the objective nature and extent of any other physical injuries sustained, and that the amnesia was clearly the result of the accident.[112]

Although the Court resolved the problem of an amnesiac's burden of proof, the first department found the standard a difficult one to apply in *Wartels v. County Asphalt, Inc.*[113] There, plaintiff sustained severe personal injuries in a thruway accident when his car struck a 45-foot tractor-trailer straddling both lanes while making an improper U-turn, at a time when rain allegedly had reduced visibility. As a result of the accident, plaintiff, suffering from retrograde amnesia, was unable to testify to events immediately preceding the accident. The jury was instructed that because of his condition, which defendant did not dispute, plaintiff's burden of proof on the issue of contributory negligence was lessened. The jury rendered a verdict in favor of plaintiff for $250,000. However, the trial court than granted defendant's motion to dismiss the complaint, upon which it had reserved decision. The first department affirmed, agreeing with the trial court that since plaintiff had failed completely to demonstrate freedom from contributory negligence he was

110. Schechter v. Klanfer, *supra* note 106, at 232, 269 N.E.2d at 815, 321 N.Y.S.2d at 103. The court quoted from the comment to a Pattern Jury Instruction recommending plaintiff be held to a lesser degree of proof because of the "unfairness of allowing the defendant, who has knowledge of the facts, to benefit by standing mute when plaintiff's inability *results from defendants acts*." *Id., quoting* 1 NEW YORK PATTERN JURY INSTRUCTIONS 36 (1963) (emphasis in original).

111. *Id.* at 233, 269 N.E.2d at 815, 321 N.Y.S.2d at 103.

112. By requiring plaintiff to meet a burden of proof on the issue of amnesia, the court propounded a more severe test than that suggested by the Pattern Jury Instructions, but thought it "a small price to pay for a liberal rule treating amnesiac plaintiffs on a par with representatives of decedents in death actions," especially where the risk and ease of shamming were so great. *Id.*

113. 36 App. Div. 2d 394, 321 N.Y.S.2d 273 (1st Dep't 1971).

not entitled to be held to a lesser burden of persuasion.[114]

Two justices dissented. Apparently they were concerned that because plaintiff was alone in his automobile he was simply unable to produce testimony like that offered by plaintiff's companion in *Schechter*. They believed that where defendant's negligence was excessive, and could not reasonably have been anticipated, plaintiff's "freedom from contributory negligence was a question of fact for the jury to determine from all the facts surrounding [the] accident and the inferences reasonably to be drawn therefrom."[115]

The dissent's position is supported by language from the Court of Appeal's opinion in *Rossman v. La Grega*.[116] The Court there had occasion to examine the "rigidities of the doctrine of contributory negligence in New York," and concluded that the "general softening" of the doctrine "may be seen in recent cases where the injured person is himself suing and thus had the burden of showing he was not negligent. The tendency is to treat it almost always as a question of fact."[117] Moreover, the Court demonstrated a reluctance to "extend the perimeters of this unsatisfactory doctrine wider than we need to," reasoning that

> there is a qualitative difference, when it comes to imposing liability on such a theory as tort, between one whose negligent act does harm to others and one whose negligent act does harm to himself, and the same mechanistic standard ought not be applied undifferentially as to both.[118]

The *Wartels* majority's approach indeed seems needlessly mechanistic. If an amnesiac is unable to produce any evidence on his own behalf because of his condition, a reduced burden of proof never comes into

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114. *Id.* at 396, 321 N.Y.S.2d at 275, *citing* Schechter v. Klanfer, *supra* note 106.

115. *Id.* at 398-99, 321 N.Y.S.2d at 277-78 (Nunez, J., dissenting).

116. 28 N.Y.2d 300, 270 N.E.2d 313, 321 N.Y.S.2d 588 (1971). In *Rossman*, defendant was driving decedent home from work when he had a flat tire on an expressway. He pulled over to the extreme right lane but not off the highway, and told decedent to stand in front of the left door of the car and wave traffic away while he went to a phone. Apparently, defendant's lights were not on at the time. A second car, traveling in the same direction, went slightly out of control and struck defendant's car on the left side, killing decedent. Defendant argued that decedent was contributorily negligent. The Court of Appeals, with some reservation about defendant's pleading as negligent the very thing he told decedent to do, held the effective causes of the accident were the position of defendant's car, its lack of lights, and the second driver's failure to see it. Decedent's presence at the spot where he had been told to stand played no part in causing the accident, nor could his standing there be deemed contributory negligence as a matter of law since he was trying, in an emergency situation, to prevent injury to others using the road. Thus, the question of contributory negligence was one of fact for the jury.

117. *Id.* at 306, 270 N.E.2d at 316, 321 N.Y.S.2d at 593.

118. *Id.* at 308, 270 N.E.2d at 317, 321 N.Y.S.2d at 595.

play. Such a result is inconsistent with the Court of Appeals avowed aim to treat "amnesiac plaintiffs on a par with the representatives of decedents in death actions."[119] A better result in *Wartels* would have entitled plaintiff to a factual inference of reasonable care and reinstatement of the jury's verdict.

Two decisions reported in last year's Survey concerning the effect of releases were affirmed by the Court of Appeals. In *Plath v. Justus*,[120] the Court agreed with the third department that plaintiff's settlement with the driver of a motor vehicle did not constitute a release of the owner, even though the owner's liability was derivative and statutory. In reaching this conclusion it noted that where, as here, the release contained a reservation of rights against other joint tort-feasors, it should be construed as a covenant not to sue rather than as a general release.[121] It stated, further, that:

> Where a release has been given but the releasor reserves the right to proceed against other wrongdoers, we believe effect should be given to the intention of the parties as expressed by these reservations and allow the suit against any defendant not a party to the release.[122]

The Court also affirmed that the first department's opinion in *Malvica v. Blumenfeld*,[123] where it was held that plaintiff's general release of defendants, at a time when the fact of aggravation of his injury by malpractice was fully known, operated to discharge the liability of a negligent doctor. It agreed that the distinction between *Derby v. Prewitt*,[124] a case in which plaintiff was unaware of malpractice when she executed a release, and *Milks v. McIver*,[125] a case with facts similar to *Malvica*, was controlling.

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119. Schechter v. Klanfer, *supra* note 106, at 233, 269 N.E.2d at 815, 321 N.Y.S.2d at 103-04 (1971).

120. 28 N.Y.2d 16, 268 N.E.2d 117, 319 N.Y.S.2d 433 (1971). The lower court's opinion was reported in O'Hara & Wolff, *Torts, 1970 Survey of New York Law*, 22 SYRACUSE L. REV. 423, 446-47 (1971).

121. *Id.* at 19, 268 N.E.2d at 118, 319 N.Y.S.2d at 435. *See* Gilbert v. Finch, 173 N.Y. 455, 66 N.E. 133 (1903).

122. *Id.* at 22, 268 N.E.2d at 120, 319 N.Y.S.2d at 437.

123. 34 App. Div. 2d 741, 310 N.Y.S.2d 329 (1st Dep't 1970), *aff'd mem.*, 28 N.Y.2d 851, 271 N.E.2d 227, 322 N.Y.S.2d 249 (1971). The lower court's opinion was reported in O'Hara & Wolff, *Torts, 1970 Survey of New York Law*, 22 SYRACUSE L. REV. 431-32 (1971).

124. 12 N.Y.2d 100, 187 N.E.2d 556, 236 N.Y.S.2d 953 (1962). In *Derby*, the Court of Appeals held that the jury should decide whether settlement was intended as full satisfaction for all damages.

125. 264 N.Y. 267, 190 N.E. 487 (1934). *See* Derby v. Prewitt, *supra* note 124, at 107, 187 N.E.2d at 560, 236 N.Y.S.2d at 959.

What is the effect of plaintiff's release of one joint tort-feasor, after payment, where the release contains no reservation of rights? The third department held that such a case called for the jury to determine whether the payment was in full satisfaction for the results of the negligence.[126] If it was not, the general release presumably was not intended to absolve the other joint tort-feasor's responsibility, although he would be entitled to credit for the amount paid plaintiff. For support the court relied on the General Obligations Law[127] and pointed to the demonstrated willingness to liberalize the strict common law rule in the *Derby* case. A concurring justice urged

> that the antiquated rule that a general release to one tort-feasor without reservation creates a bar to an action for damages against another tort-feasor, arising from the same injury, be abolished in this State.[128]

Although the court's ruling may do just that, it is doubtful whether such a result is consistent with *Plath* and *Malvica*, especially where there was neither a reservation of rights nor a demonstration that some elements of damage were unknown at the time of release.[129]

Finally, the Court of Appeals reaffirmed the imputed negligence doctrine of *Gochee v. Wagner*[130] in an extreme case. The owner of an automobile was injured when the auto, driven by his wife, skidded on a state highway. The wife's claim against the state was dismissed because of her contributory negligence, although the state was also found to have been negligent. In his separate action the husband contended that his wife's negligence should not be imputed to him because, although he was indeed the owner of the car and present in it at the time of the accident, he had never driven an automobile, did not have a driver's license, and thus had no right to control its operation. The court was not persuaded, and held that his claim should have been dismissed.[131]

D. Miscellaneous

Jose Garcia lived under an oral lease in an East Harlem tenement

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126. Berlow v. New York State Thruway Auth., 35 App. Div. 2d 356, 316 N.Y.S.2d 238 (3d Dep't 1970).

127. N.Y. GEN. OBLIG. LAW §§ 15-101 to 15-105 (McKinney 1964). *But see* note 129, *infra*.

128. Berlow v. N.Y. State Thruway Auth., *supra* note 126, at 359, 316 N.Y.S.2d at 242 (Greenblott, J., concurring).

129. Moreover, the Court of Appeals' memorandum opinion in *Malvern* implicitly rejects the notion that the General Obligations Law is applicable to *Berlow*. *See* Malvica v. Blumenfeld, *supra* note 123, at 852, 271 N.E.2d at 228, 322 N.Y.S.2d at 250.

130. 257 N.Y. 344, 178 N.E. 553 (1931).

131. Lindner v. State, 27 N.Y.2d 703, 262 N.E.2d 221, 314 N.Y.S.2d 16 (1971).

house with his two young children. The plaster and paint in the rooms of his apartment were flaking off the walls and his children were eating plaster and paint flakes. He complained to his landlord, Freeland Realty, Inc., about the condition, and when nothing was done he purchased plaster and paint and fixed the walls himself. He then went into small claims court to recover the costs of materials and labor from his landlord. Was he entitled to such recovery even though the lessor's statutory duty to repair and paint[132] is not enforceable by a lessee?[133]

The court took judicial notice of the fact that the eating of plaster and paint flakes by children resulted in lead poisoning with consequent mental retardation and death. Thus, plaintiff's action was not for the sake of comfort or enjoyment of the premises; rather, it concerned "a situation of emergency and menace to the health and life of children."[134] The court then constructed a novel cause of action which made plaintiff's reimbursement possible.

Noting that a landlord is liable for injuries suffered by the tenant or members of his famly as a result of the landlord's failure to make repairs,[135] the court reasoned that

> Just as in the case of a falling ceiling or a defective step, so the defendant could foreseeably have been exposed to a tort action for damage had the plaintiff's children suffered the result of continuing ingestions of plaster and paint because of the defendant's failure to act after notice and demand for action.
>
> The plaintiff, therefore, by his act, prevented the commission of an actionable tort that might have resulted from inaction.
>
> If damage based upon the commission of a tort is an appropriate award, then . . . it is proper and desirable to reimburse a plaintiff for the reasonable cost of preventing or averting the commission of a tort after a defendant has had a reasonable opportunity to act and failed to do so in circumstances calling for action on his part.[136]

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132. N.Y. MULT. DWELLING LAW §§ 78, 80 (McKinney 1946).

133. Davar Holdings, Inc. v. Cohen, 255 App. Div. 445, 7 N.Y.S.2d 911 (1st Dep't 1938), *aff'd mem.*, 280 N.Y. 828, 21 N.E.2d 882 (1939).

134. Garcia v. Freeland Realty, Inc., 63 Misc. 2d 937, 314 N.Y.S.2d 215 (N.Y.C. Civ. Ct. 1970).

135. Weiner v. Leroco Realty Corp., 279 N.Y. 127, 17 N.E.2d 796; Altz v. Leiberson, 233 N.Y. 16, 134 N.E. 703 (1922).

136. Garcia v. Freeland Realty, Inc., *supra* note 134, at 942-43. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 23 (3d ed. 1964):

> The 'prophylactic' factor of preventing future harm has been quite important in the field of torts. . . . While the idea of prevention is seldom controlling, it very often has weight as a reason for holding the defendant responsible.