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New York Practice Guide: Negligence

Publication 521 Release 33 May 2022

HIGHLIGHTS

Recent Developments in New York Negligence Law

- Release 33 updates the text with coverage of recent developments in New York negligence law. The update covers all four volumes of the publication, as well as a complete update of the index.

New Case Coverage

New cases discussed in this release include:

The Court of Appeals, in *Greene v. Esplanade Venture Partnership*, 36 N.Y.3d 513, 168 N.E.3d 827, 2021 N.Y. LEXIS 104, at *17–*18 (Feb. 18, 2021), held that a grandparent may assert a cause of action for emotional distress under the "zone of danger" doctrine when a grandchild suffered fatal injuries after being struck by falling debris from a building façade. The Court acknowledged that prior case law had not set an outer boundary on the definition of "immediate family" for the purposes of the doctrine, and further noted the evolving definition of family when making the decision. *See* § 2.04[2].

A statute of limitations issue was presented in *Engelman v. Rofe*, 194 A.D.3d 26, 144 N.Y.S.3d 20, 24 (1st Dep't 2021), in the context of a civil action brought by eleven women for alleged sexual abuse, against company that provided voice-over coaching. The court noted that there was no prior appellate precedent addressing whether the limitations period in the VGM is pre-empted by the one-year assault statute of limitations in CPLR 215(3). It then held that the VGM statute of limitations applied when the State had not indicated an intent to occupy the entire field through a

pervasive scheme and the local law did not prohibit what would be permissible under, nor impose additional restrictions on rights that would inhibit operation of, the State's general laws. *See* § 6.02[1].

The New York Legislature amended the CPLR to create an action for the recovery of damages for personal injury caused by exposure to toxic burn pits while serving as a member of the armed forces. New section 214-i was added to provide that such an action may be commenced by a member of the armed services, who served in certain listed countries on or after August 2, 1990. A statute of limitations is set for three years from the date of discovery of the injury, or within three years of the date when through the exercise of reasonable diligence, the cause of such injury should have been discovered, whichever is later. 2021 N.Y. Laws 728, § 1. Eff. Dec. 22, 2021. *See* § 6.02[8].

The Court of Appeals, in *Aybar v. Aybar*, 37 N.Y. 3d 274, 177 N.E.3d 1257, 2021 N.Y. LEXIS 2134, at *15–*18 (Oct. 7, 2021), addressed a jurisdiction issue stemming from a products liability case that was generated by a motor vehicle accident. The Court found that, although the Business Corporation Law (BCL) requires foreign corporations to register and designate an in-state agent for service of process in order to do business in New York, certain BCL provisions do not confer general jurisdiction in New York courts over corporations that fulfill these requirements. Therefore, foreign corporations, that were defendants in a products liability case arising from an automobile accident in Virginia and involving a New York resident, did not consent to general jurisdiction under CPLR 301 through their compliance with the BCL requirements. It should be noted that the Court did not address long-arm jurisdiction under CPLR 302, as plaintiffs had not asserted that as basis for jurisdiction. *See* § 7.02[4].

The First Department, in *Gilliam v. Uni Holdings*, 201 A.D.3d 83, 86–87, 159 N.Y.S.3d 401 (1st Dep't 2021), held that the medical condition of a person's body is not the type of evidence that is subject to spoliation analysis. Therefore, plaintiff was not precluded from offering evidence regarding her injury or surgery to her spine, despite having had non-emergency surgery to that area of her body after she had postponed an independent medical examination by defendants. The court held that a person's body is to be distinguished from inanimate objects, for which spoliation sanctions have been levied when they are destroyed by a party to the litigation. *See* § 18.01[4].

Liability for bedbug infestation was addressed by the Appellate Division, Second Department, in *Aponte v. New York City Hous. Auth.*, 197 A.D.3d 1283, 153 N.Y.S.3d 582, 584–585 (2d Dep't 2021). The court reversed judgment as a matter of law on the issue of liability, granted in favor of plaintiffs against a landlord, because the evidence at trial did not

establish that there was no rational process by which the jury could base a finding for the landlord. The case involved conflicting expert testimony on the protocols for treatment of bedbug infestation and there were competing conclusions on whether eradication efforts were appropriate. The court also noted that the violation of a municipal ordinance may constitute some evidence of negligence but is not negligence per se. *See* § 27.01[1].

The application of primary assumption of risk to a slip and fall on accumulated water near a pool was addressed in *O'Brien v. Asphalt Green*, 193 A.D.3d 1061, 1063, 147 N.Y.S.3d 114 (2d Dep't 2021), and held not to apply under the circumstances. Although a wet condition near a pool is generally an assumed risk, this was held not to apply when a fall occurred on a wet condition at an indoor pool. The reason was that the wetness was not due to splashing from the pool but rather from condensation that dripped from overhead pipes or ductwork. This was deemed not to be an inherent risk related to the condition of the playing surface and beyond the risks inherent to the sport of indoor swimming. *See* § 27.01[7].

In *Blajszczak v. McGhee-Reynolds*, 191 A.D.3d 1339, 141 N.Y.S.3d 210, 212 (4th Dep't 2021), liability in a rear-end collision was addressed after a motorcycle rear-ended a vehicle driven by defendant. Although the trailing vehicle is generally at fault in a rear-end collision, denial of summary judgment to defendant was upheld. The court cited VTL 1163(c), which imposes a duty on a driver who stops suddenly to do so with reasonable care and to give an appropriate signal. Here, defendant allegedly stopped abruptly because a dog ran into the road, but the court noted that the accident occurred on a residential street with a 45-mph speed limit and a motorist, such as the motorcyclist, could reasonably expect traffic to continue unimpeded. Additionally, an experienced driving instructor submitted an affidavit indicating that the best practice, when a small animal is in the road, is to avoid stopping suddenly. *See* § 31.02[4] and § 31.02[8].

Government function immunity was addressed by the Second Department, in *Santaiti v. Town of Ramapo*, 197 A.D.3d 1191, 153 N.Y.S.3d 553, 557 (2d Dep't 2021), and it was held not to apply when a gun was taken from a retired police officer during a domestic altercation with his wife, but later returned to him. The doctrine did not apply to shield the municipality from liability when the gun was later used by the retired officer to kill his wife and himself, in a situation where the officer had no license to possess a gun in the State and had not produced proper identification under the Law Enforcement Officers Safety Act. Under these facts, return of the confiscated firearm was a ministerial act requiring strict adherence to governing rules and standards and this clearly required the municipality not to give the weapon back. *See* § 33.03[3].

Proof of the applicable standard of care, in a motion for summary judgment related to a medical malpractice action stemming from the sexual assault of a patient by a psychiatrist, was at issue in *Kennedy v. Hubsher*, 193 A.D.3d 705, 707, 146 N.Y.S.3d 288 (2d Dep't 2021). In this case, a psychiatrist was convicted of third-degree rape after he engaged in sexual acts with plaintiff during a treatment session. In a subsequent medical malpractice action, the failure by plaintiff to submit an expert affidavit showing a departure from the applicable standard of care was not fatal to a motion for summary judgment, because nature of defendant's criminal acts alone sufficiently attested to medical malpractice. *See* § 35.01[3].

The applicability of Labor Law Section 240(1) was addressed in *Kelley v. Episcopal Church Home & Affiliates, Inc.*, 198 A.D.3d 1448, 2021 N.Y. App. Div. LEXIS 6550, at *3 (4th Dep't Nov. 19, 2021), when a worker's back gave out as he was moving appliances up a flight of stairs and the appliances fell on a coworker. The Appellate Division, Fourth Department, held that the statute applied because adequate protection against a risk arising from a significant elevation differential was not provided, rejecting defendant's expert's opinion that no additional safety devices were needed when this opinion was merely based on what is typical or common practice in delivery and installation of appliances. *See* § 37.03[2].

In *Hovorka v. Applied Prods. Co. Inc.*, 199 A.D.3d 520, 154 N.Y.S.3d 435, 435 (1st Dep't 2021), Labor Law 240(1) was held to apply when a worker fell off a retaining wall that had ice on it, with the court finding that the statute contemplates recovery when a slippery surface is combined with an elevation hazard. *See* § 37.03[2].

In *Marney v. Cornell Kent II Holdings*, 194 A.D.3d 917, 2021 N.Y. App. Div. LEXIS 3290, at *4, 194 A.D.3d 917 (2d Dep't 2021), the Appellate Division, Second Department, examined whether a particular activity was encompassed under Labor Law 241(6). The court held that defendants were entitled to summary judgment when plaintiff was injured due to an alleged drill malfunction while he was drilling for soil samples, because the work was part of a geotechnical investigation to determine if the soil was suitable for excavating and constructing a structure, and this was not covered by the statute. *See* § 37.04[2].

In *Wallace v. Tri-State Assembly, LLC*, 201 A.D.3d 65, 2021 N.Y. App. Div. LEXIS 6692, at *2–*5 (1st Dep't Nov. 30, 2021), the Appellate Division, First Department, analyzed whether Amazon could be sued in a products liability action, arising from an injury allegedly caused by a product purchased on that website. Plaintiff was injured when the handlebars loosened on an electric bicycle that had been purchased on Amazon, and was held that Amazon was not liable under either breach of warranty or

strict products liability, because it had not sold, manufactured, distributed, or assembled the product and it was never in its possession or control. Amazon was simply a provider of services that furnished a website from which the item was purchased. In making the decision, the First Department cited two federal district court cases that applied New York case law to deny expansion of the chain of liability to Amazon when a defective product was sold by a third-party vendor on its website. *See* § 29.03[4] and § 29.03[5].

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