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Warren's Negligence in the New York Courts

Publication 790 Release 96 May 2011

HIGHLIGHTS

Revised Chapters

- Release 96 features revisions to many chapters in the treatise, affecting all seven volumes of the publication and covering all eight major Part groupings: Essentials of Negligence, Defenses to Action, Parties Negligent, Persons Injured, Places, Instrumentalities, Types ofActions, and Damages.

Revised Index

- The comprehensive Index has been completely revised to reflect the contents of this release. *To ensure that your set contains full coverage of the latest legal developments, be sure to add* ***Release 96****.*

REVISIONS

New developments reflected in this release include a number of recent cases, including the following significant decisions:

VOLUME 1

Chapter 2–Elements of Actionable Negligence.

The Court of Appeals, in *Marco v. Village/Town of Mount Kisco*, 2010 N.Y. LEXIS 3524 (Dec. 16, 2010), addressed municipal liability for an injury caused by a fall on snow that melts and re-freezes. It was noted that a municipality cannot be held liable for a road repair that creates a dangerous condition unless the work immediately created the hazard. However, distinguishing other case law, the Court found that this rule did not apply when snow is plowed in a pile and ice forms in a parking lot from foreseeable melting and refreezing, because this is not the gradual deterioration of a repair that requires written notice. (This case also appears in Volume 2, Chapter 39–Counties.)

The professional judgment rule, providing qualified immunity for the discretionary actions of governmental officials, was applied in *Johnson v. City of New York*, 2010 N.Y. LEXIS 3334 (Nov. 23, 2010), to insulate the City of New York from liability when the police returned gunfire at a

robbery suspect and a bystander was struck by a bullet. The Court of Appeals noted that department guidelines gave officers the discretion to make a judgment call on firing their weapons so long as they did not unnecessarily endanger innocent people, and the police followed that mandate. (This case also appears in Volume 3, Chapter 69–Police Officers and Police Departments.).

Chapter 12–Statute of Limitations.

In *Giordano v. Market America, Inc.*, 2010 N.Y. LEXIS 3284 (Nov. 18, 2010), plaintiff took a product containing ephedra and had a stroke a few hours later. The Court of Appeals held that a period of only a few hours could qualify as a "latent" effect for the purposes the tolling provisions in CPLR 214-c(4). However, the key to when the toll commenced was determined not by when a layman could recognize the connection between the product and the latent effect, but when scientific or medical experts had sufficient knowledge to make a connection between the product and the later injury. Therefore, after determining that the statute applied, the case was remanded to determine when scientific or medical experts could have made a causal connection. (This case also appears in Volume 6, Chapter 232–Products Liability.)

VOLUME 2

Chapter 37–Contractors.

The Court of Appeals addressed the use of the provisions in Part 12 of the Industrial Code as the basis for a Labor Law § 241(6) claim and held that they may not be used by themselves. In *Nostrom v. A.W. Chesterton Company*, 15 N.Y.3d 502, 2010 N.Y. LEXIS 3285 (2010), a worker brought a Labor Law § 241(6) claim based on violations of two sections of Part 12 of the Industrial Code. However, the Court held that Part 12 provisions can only be used in a Labor Law § 241(6) claim if they are incorporated into a narrow subset of work sites governed by Part 23 of the Code. This is because Part 23 contains language indicating it applies to parties obligated to provide safe places to work under the Labor Law, while Part 12 does not.

In *Miranda v. Norstar Bldg. Corp.*, 79 A.D.3d 42, 909 N.Y.S.2d 802 (3d Dep't 2010) plaintiff was injured while working on a roof and was granted partial summary judgment in a subsequent Labor Law 240(1) action. The court found that a safety monitoring system, in which a worker was stationed on the roof to warn other workers when they were too close to the edge, was not the type of proper physical safety device contemplated by statute, even if this method was approved by OSHA.

The Supreme Court, Kings County, in an unpublished opinion, held that a person could not recover for emotional damages under Labor Law 240(1) when he saw his brother fall to his death from a utility pole. In *Fernandez v Abalene Oil Co., Inc.*, 2010 N.Y. Misc. LEXIS 4587, 2010 NY Slip Op 32604U (Sup. Ct. Kings Co. Aug. 23, 2010), a zone of danger theory of recovery was rejected, as part of a Labor Law 240(1) claim, because plaintiff was not injured by the physical effects of gravity on him when he observed his brother's fatal fall.

Chapter 39–Counties.

In a case of first impression, the Supreme Court, Queens County, in *Weissman v. City of New York*, 29 Misc. 3d 1064, 912 N.Y.S.2d 379 (Sup. Ct. Queens Co. 2010), held that the prior written notice requirement of the New York City Administrative Code, for a personal injury claim based on a sidewalk defect, was satisfied by a five-year-old street map filed by the Big Apple Pothole & Sidewalk Protection Corpora-

tion, when it was the most recent map on file.

Chapter 42–Employees and Employers.

An actress in a musical sought Workers' Compensation benefits in *Matter of Bigelow v. Wpac Prods., Inc.*, 78 A.D.3d 1448, 911 N.Y.S.2d 507 (3d Dep't 2010), after she was injured while riding a bicycle to warm up physically and vocally for a rehearsal. A determination that she was entitled to benefits was upheld, because riding the bicycle under those circumstances was sufficiently within the scope of her employment to trigger benefits.

Chapter 45–Firefighters and Fire Departments.

In a case of first impression, the District Court, Nassau County, held in *Wenger v. Incorporated Village of Rockville Centre*, 29 Misc. 3d 1086, 909 N.Y.S.2d 333 (Dist. Ct. Nassau Co. 2010), that the "reckless disregard" standard of VTL 1104 did not to apply when damage was caused by a defect in a fire truck's rear compartment door. In this case, a municipality was denied summary judgment when the rear compartment door of a fire truck swung open during an emergency call and damaged another vehicle, because this occurrence was merely ancillary to the operation of the fire truck.

VOLUME 3

Chapter 77–Schools

Chapter 80–Sports Participants

In *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392, 901 N.Y.S.2d 127, 130, 927 N.E.2d 547 (2010), the Court of Appeals held that in most instances, if an infant plaintiff's harm is attributable in some measure to his or her own conduct, and not to negligence on the defendant's part, the infant's negligence should be considered within a comparative fault allocation; it is not a predicate upon which an assumption of risk defense should apply. In *Trupia*, an 11-year-old fell from the railing when sliding down a banister. The Court concluded that assumption of risk principles should be limited to pursuits both unusually risky and beneficial, such as athletic activity. Allowing an assumption of risk defense in this case would have particularly unfortunate consequences, and little would remain of an educational institution's obligation to supervise adequately the children in its charge. (This case is also discussed in Volume 1, Chapter 11–Comparative Negligence and Assumption of Risk; and Volume 4, Chapter 91–Children.)

VOLUME 4

Chapter 92–Firefighters and Police Officers.

In addition to the common law negligence action now permitted by GOL § 11-106, injured firefighters and police officers continue to utilize Gen. Mun. Law § 205-a and § 205-e as remedies for on-the job injuries. These provisions allow firefighters and police officers who are injured in the line of duty to sue persons, *including* fellow employees and employers, whose negligence in failing to comply with the requirements of any ordinance or statute causes their injuries or death. In *Cusumano v. City of New York*, 15 N.Y.3d 319, 323, 910 N.Y.S.2d 410, 937 N.E.2d 74 (2010), a firefighter slipped on debris at the top of stairs, and was unable to grasp a handrail to prevent his fall. Although the alleged violation of the handrail clearance requirements of NYC Administrative Code § 27-375(f) was not applicable because the stairs were not "interior," the case was remanded for retrial to determine whether the defendant had violated NYC Administrative Code §§ 127 and 27-128, which require that owners maintain buildings in safe condition. (This case is also discussed in Vol-

ume 5, Chapter 193–Fire).

Chapter 95–Intoxicated Persons.

Courts are continuing to consider the potential liability of homeowners for injuries occurring after alcoholic beverages are consumed on the property. Two recent cases have held that negligent supervision against the homeowners were viable. In *Martino v. Stolzman*, 74 A.D.3d 1764, 902 N.Y.S.2d 731, 733 (4th Dep't 2010), a 3-2 decision, the court held that social hosts who served alcohol at a party were potentially liable to plaintiffs who were injured when an intoxicated guest backed his automobile out of the hosts' driveway and into the path of an oncoming automobile. The driver of the oncoming automobile and a passenger in the guest's automobile were injured. The court held that the hosts had a common-law duty as social hosts to control and supervise intoxicated guests on their property or in an area under their control. Because the party guest had a blood alcohol content that was nearly twice the legal limit following the accident, there was a question of fact whether the hosts knew or should have known that the guest left the party in a dangerous state of intoxication. (The two dissenting judges argued that requiring social hosts to prevent intoxicated guests from leaving their property would inappropriately expand the concept of duty).

In *Struebel v. Fladd*, 75 A.D.3d 1164, 905 N.Y.S.2d 732 (4th Dep't 2010), the decedent, a teenager, attended a party where beer was consumed. He fell from a second-story porch and died as a result of head injuries. One defendant owned the premises, but was not present during the party. The other defendant, who was the owner's fiancée and the mother of the party host, was present during the house at various times during the evening. The court held that although the owner of the house could not be liable for negligent supervision, there were questions of fact whether the fiancée had the opportunity to control the conduct of third persons on the premises and whether she was reasonably aware of the need for such control.

Chapter 112–Bars and Nightclubs.

Perhaps the most common situation, aside from a drunk driving accident, in which a bar or nightclub faces liability under the Dram Shop Act (GOL § 11-101) is when a visibly intoxicated adult is served alcohol and then assaults another person. Two recent appellate division cases considered whether an assault was proximately caused by a bar's violation of GOL § 11-101.

In *Cohen v. Bread & Butter Entertainment LLC*, 73 A.D.3d 600, 905 N.Y.S.2d 4 (1st Dep't 2010), a dram shop patron assaulted the plaintiff. Neither the assailant's view of his own state of intoxication, nor the manager's affidavit that the patron was not intoxicated when served his *first* drink, met the dram shop's burden of proof for summary judgment that the patron was not visibly intoxicated at time the dram shop served the patron his *second* drink.

In *Dugan v. Olson*, 74 A.D.3d 1131, 906 N.Y.S.2d 277, 278 (2d Dep't 2010), a patron at defendant's bar stabbed plaintiff. The testimony of the assailant's sister and his friend, both of whom were with the assailant, that the assailant was not intoxicated when he left the defendant's bar established, prima facie, that there was no causal connection between the defendant's service of alcohol to the assailant and the assailant's infliction of injury upon the plaintiff.

(These two cases are also discussed in Volume 4, Chapter 95–Intoxicated Persons).

VOLUME 5

Chapter 172–Boilers.

In *Simmons v. Sacchetti*, 15 N.Y.3d 797, 934 N.E.2d 877, 908 N.Y.S.2d 144 (2010), a 17-month-year-old infant fell into a bathtub containing scalding hot water.

The Court held that triable issues existed whether the owners and managers of the apartment building negligently failed to maintain apartment building's boiler and domestic hot water system in a reasonably safe condition. There were also triable issues whether the negligence of these defendants proximately caused the infant plaintiff's injuries and whether the conduct of the infant's mother and older brother constituted superseding causes of the plaintiff's injuries. (This case is also discussed in Volume 5, Chapter 219–Temperature Conditions).

VOLUME 6

Chapter 230–Labor Law Liability.

The Court of Appeals has again applied the rule that liability pursuant to Lab. Law § 240 should be applied only when a worker is injured by an ''elevation related" hazard. In *Gasques v. State of New York,* 15 N.Y.3d 869, 910 N.Y.S.2d 415, 937 N.E.2d 79 (2010) a worker's hand was caught between a scaffold and the leg of bridge while a scaffold was ascending. The Court of Appeals concluded that Lab. Law § 240(1) was not applicable because the worker's injury was not the "direct consequence of the application of the force of gravity to an object or person."

In *Gasques*, the Court of Appeals also rejected the worker's Lab. Law § 241(6) claim. The Court held that 12 NYCRR 23.1.5(c)(1), which requires that machinery or equipment be "in good repair and in safe working condition," did not set forth a specific standard of conduct and could not serve as a predicate for Lab. Law § 241(6) claim. (This case is also discussed in Volume 5, Chapter 210–Scaffolds.)

Chapter 232–Products Liability.

Products liability claims were considered by the Court of Appeals in *Adams v. Genie Industries, Inc.*, 14 N.Y.3d 535, 903 N.Y.S.2d 318, 929 N.E.2d 380 (2010), and a jury finding was upheld that a lift was not reasonably safe because there was a feasible safer design that would make it impossible to operate the device without removable outriggers in place. Additionally, the Court held that a seller who discovers a post-sale risk is only under a duty to warn, and is not obligated to recall or retrofit the product. However, an erroneous jury instruction on this issue was harmless under the circumstances.

Chapter 240–Personal Injuries.

The Court of Appeals recently considered what evidence was required at trial to establish a plaintiff's loss of future earnings. In *Shubbuck v. Conners*, (2010), 15 N.Y.3d 871, 939 N.E.2d 137, 913 N.Y.S.2d 120, the plaintiff sought damages, including damages for loss of future earnings, for injuries he sustained in a motor vehicle accident. The Court held that the plaintiff's W-2 forms and tax returns were not probative of a reduction in his future wages as result of the accident, because they did not compare his pre- and post-accident income nor compare his post-accident income with the income of similarly situated employees in the plaintiff's company. Accordingly, there was no valid line of reasoning and permissible inferences, which could lead rational people to the conclusion reached by the jury, on the basis of the evidence presented at trial.

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Publication 790 Release 96 May 2011

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