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TORTS

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Cases this year established a few new claims to relief. There now is a right to recover for injuries caused by hazards in unlighted doorways of apartment buildings, and children are given broader rights to recover from landowners for dangerous conditions of the land even though they trespass. Wives may now sue for loss of consortium of their husbands, and a court has asserted that a civil claim for violation of the constitutional right to privacy is actionable under New York law. Other than that, the cases appear not to alter prior law basically. They demonstrate again the difficulty faced by a plaintiff seeking to recover for police abuse. One case demonstrated the grisly fate that may befall an inmate of a state mental institution. Finally, sweeping language in a Court of Appeals case seemed to suggest that the court may join the courts of several other important states in up-dating archaic tort principles to meet current societal needs.

TORT LIABILITY OF THE STATE

During the past year the actions of police came under broad public scrutiny. While some members of the public were questioning whether the police enjoyed excessive latitude, the courts of New York appeared more sympathetic. In one case, a group of police intervened in a fight and, in the process of removing one of the fighters, knocked down a bystander on crutches. Three levels of New York courts agreed that no claim in negligence could be made out.[1]

Police immunity in the performance of their duty was even more dramatically demonstrated in *Stanton v. State*.[2] After stopping a station wagon heading the wrong way on a public highway, a state trooper delayed completing his business with the motorist while he waved on other traffic. When the motorist decided to make his getaway, there followed the classic movie chase. The culprit went racing off in the wrong direction on the road with the trooper in hot pursuit, sometimes with his lights off, later with his lights back on. Speeds reached up to a hundred miles per hour. The trooper overtook his quarry, only to lose him again. Finally the fleeing car sideswiped an oncoming vehicle and skidded into another, killing its operator. While lamenting the death, the Appellate Division, Third Department, found the officer guiltless of negligence on the basis of Vehicle

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1. McEvoy v. City of New York, 20 N.Y.2d 900, 232 N.E.2d 862, 285 N.Y.S.2d 868 (1967).

2. 29 App. Div. 2d 612, 285 N.Y.S.2d 964 (3d Dep't 1967).

and Traffic Law, Section 1104, which expressly allows the exceeding of maximum speed limits and the disregarding of regulations governing direction for drivers of authorized emergency vehicles. The Court was unimpressed with Subsection (d) of Section 1104, which limits the section by requiring due regard for the safety of all persons. Curiously, the same court within a month decided *Tompkins County v. Day*,[3] in which it held the qualifying provisions of Section 1104(d) determinative in holding liable a police officer, who drove through a stop sign on his way to apprehend a "drunk," for failure to be sufficiently careful about cross traffic. With only Judge Keating dissenting, the Court of Appeals affirmed the decision in *Hacker v. City of New York*,[4] which denied recovery to a wife accidentally shot while her rookie probationary patrolman husband was cleaning his revolver.

The Third Department was quick to deny the Court of Claims' new theory that probable cause in false arrest cases could not be established through evidence which would be constitutionally inadmissible in a criminal proceeding.[5] It reverted to the distinction between criminal and civil proceedings and, additionally, pointed out that the magistrate's arraignment which had followed in the case had itself *prima facie* established probable cause.[6] The result is that one may presumably use statements obtained in constitutionally objectionable ways to defeat a false arrest case; one may use a magistrate's arraignment (as was historically true) as a *prima facie* defense and, even avoiding these defenses, a successful recovery is far from assured. In *Graham v. City of New York*,[7] plaintiff was barely able to escape the review of the First Department, Appellate Division, with considerably less than half the damages the jury had awarded him at trial. By a majority of only one, the Court sustained the jury's finding of lack of probable cause in a case which even the dissent described as "so brutally unfair that it was impossible to listen to the account without a high degree of indignation."[8]

An appellate division also took an opportunity to reverse *Harty v. State*, commented upon in last year's Survey.[9] The result is that, though a court may lose jurisdiction over a defendant by excessive delay, the resulting erroneous sentence is treated as an immune judicial determination.[10] For the same reason, the failure of the clerk of county court to notify a judge that plaintiff's probationary period had ended was sufficiently quasi-judicial in

3. 29 App. Div. 2d 709, 286 N.Y.S.2d 157 (3d Dep't 1968).
4. 20 N.Y.2d 722, 229 N.E.2d 613, 283 N.Y.S.2d 46 (1967).
5. Dixson v. State, 54 Misc. 2d 100, 281 N.Y.S.2d 912 (Ct. of Cl. 1967).
6. Dixson v. State, 30 App. Div. 2d 626, 290 N.Y.S.2d 682 (3d Dep't 1968).
7. 28 App. Div. 2d 245, 284 N.Y.S.2d 518 (1st Dep't 1967).
8. *Id.* at 252, 284 N.Y.S.2d at 525.
9. Alexander, *Torts, 1967 Survey of N.Y. Law*, 19 SYRACUSE L. REV. 457, 466 (1968).
10. Harty v. State, 29 App. Div. 2d 243, 287 N.Y.S.2d 306 (3d Dep't 1968).

nature so that the resulting illegal incarceration for probation violation would not support a claim against the state.[11]

On the other hand, the failure of a court clerk to ask a sentenced defendant to show cause why judgment should not be pronounced against him was treated by the Court of Claims as an act of a different sort[12] on which liability could be predicated. Since primary reliance is placed in that case on *Harty v. State*,[13] its correctness is questionable. As a federal district court found occasion to point out this year, also, failure to perform the duties of a court clerk is not cognizable under the Federal Civil Rights Act.[14]

If, as is alleged in the public press from time to time, the courts have undermined the authority of police or the judicial institution itself, it is not evident in the tort cases.

TORT LAW AND THERAPY

Again this year the tort cases illustrated the plight in the courts of those labeled mentally ill. Consistent with cases cited in the prior section, the state is immune from liability for the initial labeling. Thus, a police justice with no necessary skills in psychiatry may properly, under Section 870 of the Code of Criminal Procedure, order a person appearing before him to psychiatric examination and cannot be sued when it turns out that there is no basis for holding the person in psychiatric confinement.[15] This is true, irrespective of the triviality of the criminal charges pending. Thus, information charging disorderly conduct sufficies.[16] If one is found to be mentally ill, the length of potential criminal sentence is also not determinative.

In *Whitree v. State*[17] the plaintiff had been given a suspended sentence. He could at most have been sentenced to a period of three years. He was in fact incarcerated in mental hospitals for 14 1/2 years. At least the latter 12 1/3 years were found by the Court of Claims to have been unnecessary and plaintiff received $300,000. in damages for his wrongful confinement. The facts brought out in his claim for damages provide one of the most dramatic illustrations to date of what it means to be incarcerated in a state mental hospital. The case should be required reading for anyone representing a released patient. A few of its highlights follow.

Whitree spent over four years of his confinement (considerably more

11. Rodriquez v. State, 55 Misc. 2d 669, 285 N.Y.S 2d 896 (Ct. of Cl. 1967).
12. Corcoran v. State, 56 Misc. 2d 293, 288 N.Y S.2d 801 (Ct. of Cl. 1968).
13. Harty v. State, *supra* note 10.
14. Jemzura v. Belden, 281 F. Supp. 200 (N.D.N.Y. 1968).
15. Reynolds v. Hart, 54 Misc. 2d 476, 282 N.Y.S 2d 909 (Sup. Ct., Niagara Co. 1967).
16. *Id.*
17. 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. of Cl. 1968).

than his total criminal sentence could have been) in maximum security, locked in his cell except for exercise and toilet requirements. According to his unrefuted testimony, he was beaten by attendants, stripped and placed in the "Blue Room." The blue room is described as a small dark room without toilet or water facilities, and without a bed or mattress. He remained there for about eight days on bread and water except for one full meal every three days. The testimony of one of the attendants in examination before trial revealed his opinion that the patients were like animals who knew when to be fed, and that they were like dogs wagging their tails.

Whitree's damages are themselves illuminating enough to quote at some length.

> We note that when Whitree was admitted to the State Hospital he was about 48 years of age and in good physical health, although he had sustained a slight knee injury while in the Armed Forces. On April 5, 1955, another patient poured hot coffee over him causing first degree burns to his face and chest. On March 4, 1961, he was kicked in the face by another patient causing a fracture to 2 upper incisors, 4 lower incisors to loosen, a fracture of the nose, and a laceration requiring 4 sutures to close. On several occasions, while Whitree was sleeping, he was struck by other patients and his testicles were squeezed. He was struck, kicked and beaten by attendants. The headaches which Whitree had through the years since November, 1955, and up to the time of trial, were causally related to the injuries reflected by his hospitalization of November 2, 1955. On or about September 5, 1950, Whitree sustained a complete fracture of the second metacarpal bone of the left hand which healed with deformity. He sustained a comminuted fracture of the distal and of the right tibia which healed with deformity. He sustained a fracture of the greater tuberosity of the right shoulder which healed with deformity. He sustained fractures of the eighth and ninth ribs posteriorly on the left side. He sustained an injury in the area of the fifth and sixth cervical vertebrae which resulted in a deformity and compression of the bodies of said vertebrae. That, as a consequence of said injury, he developed an osteoarthritic condition in the area of the cervical spine. As a consequence of the beating administered to Whitree while a patient during the 12-year period aforesaid, he sustained a permanent chronic peritonitis of the right shoulder.[18]

Even more frightening than the injuries sustained is the fact that the system was found by the court to be wholly incapable of assessing ripeness for release, necessitating twelve years of unnecessary incarceration. The court characterizes the hospital records as so inadequate that even a layman could determine their insufficiency. The court also found that Whitree had been examined psychiatrically only seven times in six years, that only three of those examinations were of any depth and that they all occurred in the first four months of the six-year period. It found that the timing of some of the psychiatric examinations coming close on the heels of a serious medical condition made them of questionable value, and noted that the psychiatrist's apparent lack of appreciation of this fact cast grave doubts upon his competency. It found a close temporal correlation between the

18. *Id.* at 710, 290 N.Y.S.2d at 504.

times of examination and applications for writs of habeas corpus or hearings on such writs. Finally, it found that Whitree was never exposed to psychotherapy or psychological testing during his entire time at the hospital. It seems almost an understatement for the court to conclude that the "record is, in fact, redolent with callous contempt for the claimant herein."[19]

In a warning judgment, the court concluded:

> We believe we understand the immense difficulties faced by the State in financing, staffing, and administering as vast a complex as Matteawan State Hospital, as well as the other state hospitals. However, society denominates these institutions as hospitals and they should be so conducted. If they are to be no more than pens into which we are to sweep that which is offensive to 'normal society' let us be honest and denominate them as such. Certainly, as we demean the least of us, so we demean us all.[20]

While the Whitree case is singular in its probing examination of mental incarceration, it is not unique in holding the state liable for malpractice in its state hospitals. Some cases were reviewed in the Survey last year.[21] This year the State was held for the death of a seventeen year old patient who was admitted with a temperature of 101.8, apparently not treated for her medical condition and not transferred to a medical facility until four days later, at which time she had a temperature of 106 degrees.[22] Almost trivial by comparison is the unsuccessful claim of Helen Krieger in which she sought an award for being required, while an inmate in Gowanda State Hospital, to work six days a week at mopping floors, cleaning toilets and similar work. The court held the work not to have been arduous enough to amount to involuntary servitude and refused to compensate.[23]

The Court of Appeals, this year, announced a very interesting and novel theory of physician liability in *Tofh v. Community Hospital at Glen Cove*.[24] Although noting that a physician meets his obligation of reasonable care when his practice accords with practice acceptable in the medical community, he may fail in his obligation to use his own best judgment when he fails to require more careful practice than the community standard would suggest. It was apparently adequate medical procedure to administer oxygen to prematurely born children at the rate of six liters per minute. The attending pediatrician, however, thought the quantity excessive for children of that age and ordered oxygen to be administered at the rate of four liters per minute after the first twelve hours. The nurses at defendant hospital continued to administer six liters with disasterous effect. For his failure to note the deviation from his instructions, the physician, as well as the hospital, was held liable.

19. *Id.* at 708-09, 290 N.Y.S.2d at 502.
20. *Id.* at 711, 290 N.Y.S.2d at 504-05.
21. Alexander, *Torts, supra* note 9 at 467-69.
22. Soto v. State, 55 Misc. 2d 1035, 286 N.Y.S.2d 993 (Ct. of Cl. 1968).
23. Krieger v. State, 54 Misc. 2d 583, 283 N.Y.S.2d 86 (Ct. of Cl. 1966).
24. 22 N.Y.2d 255, 239 N.E.2d 368, 292 N.Y.S.2d 440 (1968).

With one bold stroke, and by a majority of only one vote on the court, Judge Keating has basically altered the low standard of care traditionally applied to the medical profession. While the decision does nothing to alter the fact that the medical profession is essentially allowed to establish its own standard of care by its own definition of what is acceptable, in holding a physician to the exercise of his own higher notion of care, the court has, for good physicians at least, come close to reestablishing the general standard of reasonable care under the circumstances for physicians. It follows, from this decision, that a physician is held to two separate standards of care: that minimal standard set by acceptable medical practice in the community and, additionally, a standard to be judged by the physician's personal knowledge and information.

Compensating those harmed in this case appears to be in line with the general movement away from immunities in tort law. It should also be noted that in the *Toth* case the hospital was held liable for the failure of its nurses to follow instructions. The court reasoned that hospitals could not both immunize themselves by claiming independence from physicians practicing at the hospital (an independence which the Court of Appeals this year held bars liability for the novelty of an unsuccessful operation conducted by a private practitioner in the hospital),[25] and then fail to follow physicians' instructions with impunity. The community hospital was found a proper defendant.

INTENTIONAL TORTS

The problems of accommodating constitutional First Amendment rights and the law of defamation and privacy, more fully surveyed last year,[26] were still actively pursued in New York courts. Linus Pauling[27] was recognized as appropriately within the *New York Times v. Sullivan* rule,[28] and thus defamatory comments about him were deemed protected by a constitutional qualified privilege. Similarly, Thomas R. Gilligan who obtained national fame through his appearance on a CORE poster with the caption "Wanted for Murder" was also held within the ambit of constitutional privilege, although litigation progressed as to whether the privilege had been exceeded.[29]

Warren Spahn was back in the Court of Appeals in his seesaw battle

25. Fiorentino v. Wenger, 19 N.Y.2d 407, 227 N.E.2d 296, 280 N.Y.S.2d 373 (1967).

26. Alexander, *Torts*, *supra* note 9 at 457-63.

27. Pauling v. National Review, Inc., 22 N.Y.2d 818, 239 N.E.2d 654, 292 N.Y.S.2d 913 (1968).

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

29. Gilligan v. Farmer, 30 App. Div. 2d 26, 289 N.Y.S.2d 846 (1st Dep't 1968); Gilligan v. King, 29 App. Div. 2d 935, 290 N.Y.S.2d 1014 (1st Dep't 1968); Gilligan v. Farmer, 29 App. Div. 2d 935, 290 N.Y.S.2d 1014 (1st Dep't 1968).

with the Courts. Again, he won in the New York courts,[30] the Court of Appeals finding that intentional fictualization was sufficiently close to the Supreme Court's mandate of calculated falsehood so as to make it actionable. Judge Bergan, dissenting, commented:

> The direction of movement of the cases interpreting the constitutionally shielded freedom of the press suggests that the protection to defendants should now be more broadly based than either the narrow grounds that would rest on the *Hill* criteria, or those laid down by our prior decisions. It does not seem probable, reading *Hill* and *New York Times* together, that fiction alone concerning a public figure, actionable under the New York statute as construed, is any longer actionable.
>
> Spahn is a public figure by his own choice. He is not a public official coming literally within *New York Times* or *Garrison*, but the right to print and publish material about a public figure rests on similar policy considerations even though they are not chosen at elections after public debate on their merits. A vast area of public discussion would be closed off if the press could speak much less freely of public figures than of public officials.[31]

More pragmatically Judge Bergan noted:

> Had the Supreme Court agreed with our decision . . . upholding the constitutional validity of Sections 50 and 51 of the Civil Rights Law as applied to Spahn's case, it would normally have affirmed in due course. Instead, it remanded the case back here for further consideration. . . .
>
> This seems to imply that on the present record the Court disagrees with our earlier determination to sustain this statute against the argument of defendants that, as invoked by Spahn, it invades the constitutionally protected freedom of press.[32]

If Judge Bergan is correct, and his reasoning is persuasive, the Supreme Court may again deny Spahn recovery.

In another case this year the Appellate Division, First Department, applied free speech concepts to public debate. In the heated debate over a civilian review board in New York City, a number of public statements were issued. One of them drew a response, not on the merits of the civilian review board, but on the legitimacy of the type of ad that had been run. The published response suggested that the advertising firm responsible had used advertising to exploit and incite emotion and had done a disservice to the advertising industry. The rejoinder to the response was a lawsuit in defamation. The court held it to be without merit for several reasons, including freedom of speech.[33] The result of the case is probably to broaden the rule which allows comment with constitutional immunity under the *New York Times* rule to such an extent that one may now comment not only about those engaged in public life, but their press agents as well.

30. Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967).

31. *Id.* at 130-31, 233 N.E.2d at 844, 286 N.Y.S.2d at 837-38.

32. *Id.* at 129, 233 N.E.2d at 843, 286 N.Y.S.2d at 836.

33. Cole Fischer Rogow, Inc. v. Carl Ally, Inc., 29 App. Div. 2d 423, 288 N.Y.S.2d 556 (1st Dep't 1968).

Whether the last holding suggests that attorneys can appropriately be drawn into the constitutionally exposed area by operation of their client's public status is not known. This much is clear. Where lawyers are defamed in the course of a lawsuit, in comments appropriate to the proceedings, the defamers are even more immune since the comment is subject to the absolute privilege attending judicial proceedings.[34] Similarly, where complaint is made of lawyers to grievance committees of the bar, even though those groups are not strictly speaking judicial bodies, absolute privilege applies to avoid defamation recovery.[35] The bar and judiciary had protected their own right of internal free expression long before the Supreme Court applied a rule to public discussion generally.

One of the sillier vestiges of the common law in the defamation area is a distinction between the four categories of slander *per se* (actionable without special damage), and the remaining cases of slander, for which special damage must be demonstrated. The existence of these four special categories makes it necessary not only to determine whether words are defamatory, a task difficult enough in itself, but also whether they are defamatory in one of the specified ways. Several cases this year demonstrate to what lengths such inquiry can go. The statement "She receives at least $15,000 per annum in gifts from friends (especially men) and relatives, most or all of which she spends on luxuries, such as her expensive apartment, her clothes, travel, hotels, restaurants and other tokens of affection" was held not within the category of imputing unchastity in a woman.[36] Calling a rabbi a crook was held not within the category of injuring a person in his business or profession.[37] Similarly, accusing a physician of being part of a Communist plot to remove the speaker from office was held not to qualify.[38] The rabbi's case clarified the third of the categories, that of charging a person with crime, by resolving a long-standing dispute as to whether the crime had to be

34. Holzberg v. Rothenberg, 28 App. Div. 2d 875, 281 N.Y.S.2d 931 (2d Dep't 1967); Zimmerman v. Kallimopoulou, 56 Misc. 2d 828, 290 N.Y.S.2d 270 (N.Y. City Ct., N.Y. Co. 1967).

35. Wiener v. Weintraub, 22 N.Y.2d 330, 239 N.E.2d 540, 292 N.Y.S.2d 667 (1968); Sullivan v. Crisona, 54 Misc. 2d 478, 283 N.Y.S.2d 62 (Sup. Ct., N.Y. Co. 1967).

36. Zimmerman v. Kallimopouli, 56 Misc. 2d 828, 831, 290 N.Y.S.2d 270, 273 (N.Y. City Ct., N Y. Co. 1967). *See also* Hewitt v. Wasek, 35 Misc. 2d 946, 947, 231 N.Y.S.2d 884, 885 (Sup. Ct., Chemung Co. 1962) (a married woman was "keeping company with and having an affair with a married man"); Morris v. Stellakis, 27 Misc. 2d 120, 121-22, 212 N.Y.S.2d 488, 490 (Sup. Ct., Queens Co. 1961) ("I could tell you a few things that went on in that apartment with her and her boy friends. . . . That isn't even your own apartment. . . . You had men or a man paying the rent"); Bolton v. Strawbridge, 156 N.Y.S.2d 722, 724 (Sup. Ct., Westchester Co. 1956) ("You'd do anything for five dollars, so I am told in the village"); Taylor v. Wallace, 31 Misc. 393, 64 N.Y.S. 271 (Sup. Ct., Kings Co. 1900) ("She came down here and coaxed my bartender to stay with her all night").

37. Klein v. McGauley, 29 App. Div. 2d 418, 288 N.Y.S.2d 751 (2d Dep't 1968).

38. Nadrowski v. Wazeter, 29 App. Div. 2d 741, 286 N.Y.S.2d 904 (1st Dep't 1968).

one involving moral turpitude or infamous punishment. The Appellate Division, Second Department, having previously ruled in the negative, this year brought itself into line by expressly overruling its prior determination.[39] That leaves only one category of slander per se: charging a person with venereal disease or leprosy. In that category, no cases were found this year.

Of considerably greater import is a lawsuit brought by Ralph Nader against the General Motors Corporation[40] in which he established a hitherto unrecognized claim for recovery in New York: invasion of a constitutional right of privacy. Since an early case in New York,[41] recovery for right of privacy has been limited to the confines of the Civil Rights Law Sections 50 and 51, which deal exclusively with commercial appropriation of a person's name or picture. Nader complained of intrusions into his life through threatening phone calls, tapped telephones and enticing women. A New York County Supreme Court found in constitutional cases[42] the basis for a civil action for invasion of the classic right of privacy: the right to be left alone. Less generously the United States District Court for the Southern District of New York held that New York motorists had no such right. It denied a claim brought by Corliss Lamont against the Commissioner of Motor Vehicles to prevent the sale of motor vehicle registration records to private entrepreneurs who use the list to inundate defenseless motorists with promotional literature.[43] Mr. Nader, having struck a blow for safer cars for motorists, has now established a new right to be left alone. Mr. Lamont, lamentably, has failed to establish the rights of motorists to be left alone.

Concerning the tort of intentional infliction of mental distress, a number of problems remain unresolved in New York, as in other states. One of the most difficult problems is the question of the right to recover for witnessing tortious conduct inflicted on others. The cases were easily resolved before *Battalla v. State*[44] made it possible to bring suit for psychic damage unaccompanied by impact. Even after *Battalla*, the courts seemed inclined to disallow claims of persons who were not the direct objects of the tortious conduct, even if they were as closely related as parents.[45] Then came *Haight*

39. Klein v. McGauley, *supra* note 37.

40. Nader v. General Motors Corp., 57 Misc. 2d 301, 292 N.Y.S.2d 514 (Sup. Ct., N.Y. Co. 1968).

41. Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902).

42. Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1965); Griswold v. State of Connecticut, 381 U.S. 479 (1965); Shelley v. Kraemer, 334 U.S. 1 (1948); Afro-American Publishing Co v. Jaffe, 366 F.2d 649 (D.C. Cir. 1965).

43. Lamont v. Commissioner of Motor Vehicles, 269 F. Supp. 880 (S.D.N.Y.), *aff'd*, 386 F.2d 449 (2d Cir. 1967).

44. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), *overruling* Mitchell v. Rochester Ry., 151 N.Y. 107, 45 N.E. 354 (1897).

45. Kalina v. Syracuse Gen. Hosp., 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct., Onondaga Co. 1961), *aff'd*, 18 App. Div. 2d 757, 235 N.Y.S.2d 808 (4th Dep't 1962), *aff'd*, 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963).

v. McEwen[46] which allowed recovery to a mother for witnessing the death of her boy. The case was curious in that it placed reliance primarily on English cases which had been since limited, and a lower court California case which had been reversed. It was completely untroubled by the contrary New York authority though that authority was squarely on point.[47]

This year, a court divorced itself from precedent even more in arriving at the same result. In *Tobin v. Grossman*[48] the supreme court upheld an action by a mother who witnessed her infant son being run down. In concluding that such injury was compensable, *Tobin* not only ignored the cases that had been ignored in *McEwen*, but ignored *McEwen* as well. Instead, the court returned to *Battalla* as providing the basic theory for recovery and finally stated what it considered to be the perimeters of the tort:

> It would seem that recovery must be limited to those persons who can demonstrate that they were in a position physically to have been affected or influenced directly and not vicariously by the tortious acts at the time of their commission and not at any subsequent time.[49]

However, in *Campbell v. Westmoreland Farm, Inc.*,[50] parents claimed negligent infliction of mental distress resulting from a number of drivers leaving the scene of an accident in which their child was killed by one of them. It is not surprising that a federal district court, applying New York law, acknowledged *Battalla* and *Haight* as applicable cases, yet found *Kalina v. General Hospital of the City of Syracuse* determinative and denied recovery. As far as precedent is concerned, the federal court's choice seems correct.

Reviewing the same precedent the Appellate Division, Third Department, then reversed *Tobin v. Grossman*[51] stating: "We note that in nearly all the jurisdictions where the issue has been considered, recovery has been denied."[52] It placed primary reliance on the decision of the California Supreme Court in *Amaya v. Home Ice, Fuel & Supply Co.*,[53] denying recovery. Curiously, California has just reversed its stand in *Dillon v. Legg*,[54] and thus again, reference to the law of California had led a New York court astray.

In light of the prior instability of the law pertaining to bystanders in

46. 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct., Oneida Co. 1964).

47. *See Recent Decision, Mental Fright and Subsequent Injuries Occasioned by Witnessing Negligent Act to Third Party for Cause of Action*, 16 SYRACUSE L. REV. 182 (1964).

48. 55 Misc. 2d 304, 284 N.Y.S.2d 997 (Sup. Ct., Albany Co. 1967), *rev'd*, 30 App. Div. 2d 229, 291 N.Y.S.2d 227 (3d Dep't 1968).

49. *Id.* at 306, 284 N.Y.S.2d at 1000.

50. 270 F. Supp. 188 (E.D.N.Y. 1967).

51. 30 App. Div. 2d 229, 291 N.Y.S.2d 227 (3d Dep't 1968).

52. *Id.* at 232, 291 N.Y.S.2d at 229.

53. 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

54. 68 Cal. 766, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

New York and California, one would expect that the issue is not finally settled in this state. The trend toward greater compensation for psychic injury begun in *Battalla* might still prove as irresistible as it proved to be in California. Certainly, the limitation which precludes all bystanders from obtaining relief cannot be easily logically justified.

In any event, even cases permitting recovery have at best, to date, established that right on the part of a member of the family actually present at the time of the allegedly wrongful act. Similar shock on hearing the news does not suffice.[55] Parents removed from the scene are relegated to more traditional causes of action, or to the cases which proved to be a progenitor of intentional infliction of mental distress: those connected with rights in dead bodies.[56]

Discarded wives had no better luck in pressing intentional infliction of mental distress suits against their former husbands or the women they held out as their current wives irrespective of the legality of the second relationship.[57] The Court of Appeals pointed out that to allow such claims would both violate legislative policy against actions for alienation of affection and criminal conversation, and would intervene inappropriately in domestic affairs.

No more successful was a mother who donated one of her kidneys to prevent the death of her son. She also was denied recovery for the allegedly negligent conduct in removing her son's kidneys. Her theory, ingeniously, was that she was a rescuer and thus entitled to the benefits of the rescue doctrine. The court concluded that a rescuer might recover for unforeseen hazards, but held the rescue doctrine inapplicable to a calculated sacrifice. It determined that plaintiff's theory was really novel and then invoked the chilling language of the *Williams* case,[58] noted last year, in denying recovery.[59]

If a parent cannot recovery for injury to his child, it seems symmetrical not to hold him responsible for injury caused by his child. That, also, is still the law,[60] although exceptions exist.[61]

55. Markowitz v. Fein, 30 App. Div. 2d 515, 290 N.Y.S.2d 128 (1st Dep't 1968).

56. *Id.*

57. Cummings v. Kaminski, 56 Misc. 2d 784, 290 N.Y.S.2d 408 (Sup. Ct., Kings Co 1968); Weicker v. Weicker, 22 N.Y.2d 8, 237 N.E.2d 876, 290 N.Y.S.2d 732 (1968).

58. Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

59. Sirianni v. Anna, 55 Misc. 2d 553, 285 N.Y.S.2d 709 (Sup. Ct., Niagara Co. 1967).

60. Shaw v. Roth, 54 Misc. 2d 418, 282 N.Y.S.2d 844 (Sup. Ct., Monroe Co. 1967).

61. *See, e.g.*, Steinberg v. Cauchois, 249 App. Div. 518, 519, 293 N.Y.S. 147, 149 (2d Dep't 1937), wherein the court said:

> There are situations in which the parent may be held liable: (1) Where the relationship of master and servant exists and the child is acting within the scope of his authority accorded by the parent; (2) where a parent is negligent in intrusting to the child an instrument which, because of its nature, use and purpose, is so dangerous as to

COMMERCIAL TORTS

Court intervention in business practices relating to competition is a delicate thing indeed. On the one hand, courts accept the aggressiveness of competition as a necessary part of the competitive scheme, and to some extent they intervene to make the process more aggressive through the enforcement of the anti-trust laws. On the other hand, traditional tort concerns with ethical practices require courts to prohibit aggressive practices. When one throws into the balance the peculiar interests of society in employee mobility, the complexities rise significantly. This year New York courts had to grapple again with striking the balance in a number of cases, none of which provided dramatic innovation.

In *Safer Beef Co. v. Northern Boneless Beef, Inc.*,[62] the court refused to intervene in a suit challenging the establishment of a competitive enterprise to which a number of plaintiff's key personnel transferred. The court found that the skills and business accumen taken by the former employees to the new company were not of a specialized type and that no trade secrets were involved. The customer lists to be used by the new competitor were lists which were found to be readily available from telephone directories and trade manuals, and the continued patronage of the former customers was found primarily to turn on the good will that had been built up by the transferring employees. On the other hand, plaintiff's former general manager and its buyer and production supervisor were held potentially liable to plaintiff for accepting a stock interest in the new competitive corporation while still employed by plaintiff. Thus was a balance struck between the needs of employee mobility and those of employee loyalty in this case.

On the other hand, where a wholly independent concern was able to obtain business by fraudulently obtaining confidential price proposals of a competitor, it was held liable for the damages occasioned by its obtaining a public contract for the manufacture and installation of toll-collection equipment on the Connecticut Turnpike by under-bidding.[63] Linking a proper competitive act to an act violating elementary business morality, in the eyes of the court, sufficed to destroy the right to compete. Even so, a majority of

constitute, in the hands of the child, an unreasonable risk to others; (3) where a parent is negligent in intrusting to the child an instrumentality which, though not necessarily a dangerous thing of itself, is likely to be put to a dangerous use because of the known propensities of the child; (4) where the parent's negligence consists entirely of his failure reasonably to restrain the child from vicious conduct imperilling others, when the parent has knowledge of the child's propensity toward such conduct; and (5) where the parent participates in the child's tortious act by consenting to it or by ratifying it later and accepting the fruits.

62. 20 N.Y.2d 910, 233 N.E.2d 125, 286 N.Y.S.2d 30 (1967).

63. American Electronics, Inc. v. Neptune Meter Co., 30 App. Div. 2d 117, 290 N.Y.S.2d 333 (1st Dep't 1968).

the court felt that punitive damages could not appropriately be applied to such a case and reversed as to them. Since courts do seek to obtain the competition provided by the defendant and would, absent fraudulent conduct, applaud its obtaining a public contract by bidding a lower price, limiting the recovery to compensating plaintiff for actual loss, without giving it a further competitive edge through punitive damages, seems a desirable balance. The Appellate Division, First Department, held that a manufacturer of machines could not set up a patent-like restriction on the use of his machines to prevent copying by competitors.[64] The plaintiff had attempted to prevent the machines from falling into a copier's hands by limiting its use in the hands of purchasers and expressly prohibiting third party use of the purchased machine. The court's conclusion that such an attempted insulation from competitive copying is improper seems unimpeachable in light of the strong public policy prohibiting interference with product simulation.[65] In another case the Court of Appeals held that an arbitration provision in the contract did not require the arbitration of an antitrust claim.[66] In so holding, the court asserted that the public interest in antitrust litigation required access to courts. It is, of course, true that there is a strong public interest in the enforcement of antitrust provisions. One might still be sanguine about the opposite result in this case, recognizing that the primary authority for enforcing the antitrust laws lies in the federal and state governments. Nonetheless, private enforcement of the antitrust laws makes a genuine contribution and presumably, the Court of Appeals feels this contribution needs judicial support despite the strong public policy generally favoring arbitration.

As a person cannot restrict the use of a machine he has designed and put into public use, so a person is prohibited from preventing the attribution to him of authorship or performance of a work, all rights to which have been sold. Thus, irrespective of his desire to restrict identification, an artist may not prohibit the use of his name on a record that is legally produced of his work. This does not mean, however, that there may not be valid objection to a misdescription of an artist's contribution which would mislead the public into believing it was obtaining more by purchase than in fact it would and which would deprive the artist of the additional revenue which he would get through sale of a broader performance. Thus, invoking Section 43(a) of the Lanham Act, an artist was able this year to obtain a preliminary injunction against the use of his name on the jacket of a record in which he did

64. Merchant Suppliers Paper Co., Inc. v. Photo-Marker Corp., 29 App. Div. 2d 94, 285 N.Y.S.2d 932 (1st Dep't 1967).

65. Sears Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); Compco Corp. v. Day Brite Lighting, Inc., 376 U.S. 234 (1964).

66. Aimcee Wholesale Corp. v. Tomar Products, Inc., 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

perform, but in which his performance was trivial.[67] The artist had since developed a reputation as a lead guitarist and singer in a three man group. On the record he provided conventional guitar accompaniment. Under these circumstances the court felt that the likelihood of consumer confusion was sufficient under the broad provisions of the Lanham Act to provide relief.

NONINTENTIONAL TORTS

No one any longer doubts that the citadel has fallen. The question is what survives.[68] Just as in the period in which warranty was in the ascendancy, a number of courts had to concern themselves with the question of whether actions sounded in tort or contract, now that strict liability in tort appears to be superceding warranty, the same questions recur. Several answers were provided this year. For purposes of the statute of limitations, injury resulting from a hay elevator collapse was chargeable to the manufacturer despite the fact that the statute of limitations in warranty had run.[69] The court opined that strict liability in tort was now an appropriate theory in New York and that consequently the tort statute of limitations was applicable. The Court of Appeals, in a memorandum decision, approved a similar conclusion with respect to N.Y. CPLR Section 5001(a) thus refusing to allow interest on a judgment obtained for personal injuries resulting from an exploding bottle.[70] Although the claim was denominated a claim in warranty, the court held it instead to be a claim sounding essentially in tort. The CPLR interest provision allows interest only for breach of contract.

The new ease of reaching a manufacturer in tort or contract does not, of course, guarantee that someone injured by a manufacturer's product will obtain recovery. At a minimum he must still demonstrate a defect in the product and a causal connection between that defect and his injury. Thus, for example, a manufacturer of automobiles was held not responsible for the failure of brakes after brake fluid leaked out of the system.[71] Plaintiff theorized that the manufacturer should have installed a warning device to note loss of hydraulic fluid, but the court held the automobile not to have been defectively constructed for failure of such a device. Similarly, in

67. Yameta Co. v. Capitol Records, Inc., 279 F. Supp. 582 (S.D.N.Y. 1968).

68. Donnelly, *After the Fall of the Citadel: Exploitation of the Victory or Consideration of Ill Interests?*, 19 SYRACUSE L. REV. 1 (1967).

69. Wilsey v. Sam Mulkey Co., 56 Misc. 2d 480, 289 N.Y.S.2d 307 (Sup. Ct., Broome Co. 1968); *but see* Mendel v. Pittsburgh Plate Glass Co., 57 Misc. 2d 45, 291 N.Y.S.2d 94 (Sup. Ct., Monroe Co. 1967) (applying contracts limitations). For a discussion of these cases *see* Donnelly, *Commercial Law Sales, 1968 Survey of N.Y. Law*, 20 SYRACUSE L. REV. 324, 327-30 (1969).

70. Gillespie v. Great Atlantic & Pacific Tea Co., 21 N.Y.2d 823, 235 N.E.2d 911, 288 N.Y.S.2d 907 (1968) (mem.).

71. McNally v. Chrysler Motors Corp., 55 Misc. 2d 128, 284 N.Y.S.2d 761 (Sup. Ct., Kings Co. 1967).

Schwartz v. Macrose Lumber and Trim Co.[72] plaintiff failed to make out his case when he demonstrated that a nail shattered and that something flew into his eye causing damage. The court held it equally possible that he could have been injured from a wood splinter or from some other cause.

New York once held out against an attractive nuisance doctrine for injuries to children but that era has apparently ended. In *Patterson v. Proctor Paint & Varnish Co.*,[73] the Court of Appeals allowed a negligence action to be maintained by a twelve year old trespassing boy who carried a pail of inflammable liquid from defendant's property, and was subsequently injured when he played fireman and poured the water-like substance on a fire, causing personal injury. The court carefully reviewed prior cases and then concluded that:

> The main body of decisions in this court instructs us that the rule today is that if the owner of land leaves it open and accessible to children; if he knows that children use it for play; and if he leaves accessible to them highly volatile substances, a case prima facie is made out if a child is thus injured.[74]

The court also noted that there had been an abandonment of the trespass defense to personal injury actions for children in other cases in which there was a dangerous condition on land. While, in this case, it was possible for the court to limit its holding to dangerous volatile substances, presumably it was serving notice as well that attractive nuisance would apply to other forms of danger in the future. Where no trespass is involved, a landowner has traditionally had an obligation to keep his premises in a condition which does not present undue hazards for children playing thereon, when he has notice that they customarily use them for play.[75]

When a state statute prescribes conduct designed to insure safety to others, a violation of that statute may either constitute negligence or it may give rise to absolute liability. The test is whether the statute is primarily designed for the protection of a group in which plaintiff is included. The Court of Appeals this year enlarged the latter category of statute violation significantly by holding that a statute requiring school bus drivers to instruct pupils to cross in front of the bus and that he await their crossing before leaving was of the category for which violation created absolute liability.[76] This appears to be the first case in which absolute liability has been imposed on a regulation governing motor vehicle or pedestrian safety. As the dissent pointed out:

72. 29 App. Div. 2d 781, 287 N.Y.S.2d 706 (2d Dep't 1968) (mem.).

73. 21 N.Y.2d 447, 235 N.E.2d 765, 288 N.Y.S.2d 622 (1968).

74. *Id.* at 453, 235 N.E.2d at 768, 288 N.Y.S.2d at 627.

75. Cuevas v. 73rd & Central Park West Corp., 21 N.Y.2d 745, 234 N.E.2d 843, 287 N.Y.S.2d 889 (1968) (mem.).

76. Van Gaasbeck v. Webatuck Cent. School Dist. No. 1, 21 N.Y.2d 239, 234 N.E.2d 243, 287 N.Y.S.2d 77 (1967).

> It would be easy to say that any statute prescribing standards of reasonable care is enacted for the benefit of a special class of persons as, for example, the protection of motorists in particular traffic situations, school children or other pedestrians crossing the streets, and many other specified uses of the streets and highways.[77]

The distinction is a significant one because where the statute is interpreted as merely establishing a standard of care, contributory negligence applies while, in cases such as the one under discussion, it does not. Since the child was found to be contributorily negligent, the wrongful death part of the claim against the bus driver, based on negligence, was dismissed. Had the statute been otherwise interpreted, the entire claim would have been lost.

One can only speculate, at this point, how far the court will in the future apply motor vehicular regulation in this manner. It seems unlikely, the dissent's comments notwithstanding, that the court will similarly interpret all the statutory requirements of motor vehicles. When the time comes to distinguish one type of motor vehicle regulation from another, it will probably prove a fairly simple matter to distinguish the legislature's special concern for the safety of school children on school busses from its general concern for the safety of pedestrians and motorists.

Even the application of statutory violation as negligence *per se*, of course, provides a great deal of help to plaintiffs. In *Rees v. Grandelli*,[78] defendant stopped his car on a highway after having been hit by another motorist. He got out to exchange information with the other driver and, during this time an interval of five minutes or so—his car was hit in the rear by plaintiff. While the jury might, under these circumstances, have found negligence in leaving the car on the highway, it surely could also have found that the conduct was reasonable under the circumstances. That question was removed from it by the court which charged that leaving a parked car on the highway was a violation of Section 1200 of the Vehicle and Traffic Law and was consequently negligence as a matter of law. The Appellate Division, Second Department, affirmed without opinion over a vigorous dissent which suggested that the violation in this case might have been a reasonable and, consequently, permissible violation of the statute.

In another case demonstrating some liberality toward plaintiff, the Court of Appeals approved, without opinion, a death recovery for one of two occupants of a two-seater plane, which either of them might have been flying at the time it rolled over twice and fell to the ground killing both of them.[79] The court found it permissible for the jury to determine whether the defendant's testate was piloting the plane, though there was no evidence on that point and the controls permitted either passenger to fly. Having determined the question of who was flying, the jury was instructed that it

77. *Id.* at 247-48, 234 N.E.2d at 248, 287 N.Y.S.2d at 84 (dissenting opinion).
78. 28 App. Div. 2d 565, 282 N.Y.S.2d 662 (2d Dep't 1967) (mem.).
79. Suiter v. Collamer, 21 N.Y.2d 844, 235 N.E.2d 924, 288 N.Y.S.2d 924 (1968) (mem.).

could apply the doctrine of *res ipsa loquitur* to hold the flier, even though there was no direct evidence from which to determine whether pilot error or a defect in the plane caused the crash. Thus, the court approved a recovery in a case in which both the elements of control of the instrumentality and probability of negligent conduct were quite loosely demonstrated.

Approving another trial recovery, the Court of Appeals overruled the common law rule denying a duty upon owners of public buildings to light building exteriors.[80] That rule, according to the court, was a product of a time during which an obligation to provide exterior light was far more arduous than it presently is. After the *Williams* case of last year, the court's language is heartening indeed.

> It is saying the obvious but it bears repetition that whether a society will tolerate a particular course of conduct is, to a large measure, dependent upon the development of society at the particular moment when the courts are called upon to enunciate a proper standard of care. We can conceive of no reason why at the present time the owner of a public building should not be required to light the exterior of his building at those times when it is open to the public. The traditional rule no longer expresses a standard of care which accords with the mores of our society. The public is entitled to a safe and reasonable means to enter and exit from an open public building. . . .
>
> The legislative process has pointed the way. We choose to follow because we recognize that the common law of this State is not an anachronism, but is a living law which responds to the surging reality of changed conditions. We, therefore, do not hesitate to purify our law of what has, with the passage of time, become a most anomalous exception to the general common law rule of due care.[82]

In the same liberal spirit, the Appellate Division, Second Department, held that a lessor of realty, leasing it in an "as is" condition, is nevertheless responsible in implied warranty for defective conditions of personal property that cause damage.[83] Thus product liability principles seem to have jumped the hurdle that has traditionally kept cases connected with the sale and rental of realty behind their other commercial counterparts.

A common law anachronism that remains is a distinction between classes of persons on land. Business invitees can recover in cases where social guests and other licensees cannot; consequently, courts are constantly forced to distinguish between the various kinds of visitors. This year the process went on. One case held the vendee of a one-family dwelling to be a mere licensee when, after the contract for the purchase of the property had been signed, plaintiff returned to measure the premises for drapes. He did not

80. Gallagher v. St. Raymond's Roman Catholic Church, 21 N.Y.2d 554, 236 N.E.2d 632, 289 N.Y.S.2d 401 (1968).

81. Williams v. State, *supra* note 55. *See also* Alexander, *Torts, 1967 Survey of N.Y. Law*, 19 SYRACUSE L. REV. 457, 471-72 (1968).

82. Gallagher v. St. Raymond's Roman Catholic Church, *supra* note 77, at 558, 236 N.E.2d at 634, 289 N.Y.S.2d at 403-04.

83. Inverso v. Whitestone Transit Mix Corp., 30 App. Div. 2d 565, 290 N.Y.S.2d 953 (2d Dep't 1968).

recover.[84] On the other hand, plaintiff who drove a friend to a hospital to visit his wife, and who was injured on the hospital parking lot, was a business visitor who had a right to hold the defendant in negligence.[85]

A number of other defenses to tort actions were litigated during the year. It was contended, for example, that Vehicle and Traffic Law Section 83 providing for the equipment of automobiles with seat belts created contributory negligence as a matter of law when the belts were not fastened. A court, surveying authorities from other states, felt that the statute imposed no such standard of self care.[86] The Court of Appeals approved a judgment for plaintiff who, when his car was trapped by the closing of a railroad gate on top of it, was still attempting to extricate it when a train collided, killing him.[87] It did so over the argument that he had a paramount duty to go to a place of safety, as had the other passengers, and could not properly risk his safety to save his property. Another court refused to read a disclaimer by a patron of a beauty school releasing the school of claims of liability for "all work performed on these premises . . . now and forever, for any claim of any nature," so as to bar claim for injury when a student pushed a dryer into the plaintiff's nose.[88] The case is consistent with long standing policy to interpret strictly releases of liability.

Consistent with the present concern for female equality under the law, New York followed a long line of other state decisions, by allowing a wife to sue for the loss of consortium of her husband.[89] It is curious that New York and the other courts should have followed this route. Suit for loss of consortium originated at a time when husbands were deemed to have legal control over their wives of a sort long since gone. The termination of the rationale for male loss of consortium suits should have ended that form of suit entirely. Instead, it seems to have generated a comparable claim for wives which does not even have the excuse of historical foundation.[90]

84. Ruskowski v. Schenectady Trust Fund Co., 28 App. Div. 2d 1021, 283 N.Y.S.2d 758 (3d Dep't 1967) (mem.).

85. Lesyk v. Park Ave. Hosp., Inc., 29 App. Div. 2d 1043, 289 N.Y.S.2d 873 (4th Dep't 1968) (mem.).

86. Dillon v. Humphreys, 56 Misc. 2d 211, 288 N.Y.S.2d 14 (Sup. Ct., Suffolk Co. 1968).

87. Greck v. New York Central R.R. Co., 21 N.Y.2d 913, 237 N.E.2d 72, 289 N.Y.S.2d 751 (1968) (mem.).

88. Wolinsky v. Queens Beauty Institute, Inc., 56 Misc. 2d 596, 289 N.Y.S.2d 647, 648 (N.Y. City Ct., Queens Co. 1968).

89. Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968).

90. For a history of the tort *see* W. PROSSER, LAW OF TORTS 895-904 (3d ed. 1964).