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TORTS

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This year, the Court of Appeals had the opportunity to consider a number of basic questions in the field. It announced a strict liability rule for blasting, held that the statute of limitations in malpractice cases resulting from foreign objects being left in the body does not begin to run until the fact was discovered, allowed to plaintiffs both proof of specific acts of negligence and reliance on res ipsa loquitur in the same case, and overruled interfamilial tort immunity for negligent torts. It refused to allow causes of action to bystanders for mental distress, denied liability for a failure of police protection absent the assurance of protection, and for the wrongful death of a fetus. In deciding these important questions, it had occasion to restate its perception of the role of courts in legal innovation several times and at some length.

Other decisions further reduced the impact of the statutory right of privacy provisions on comments concerning public figures. One case held that failure of restraint of confined mental patients could be judged by a jury without the assistance of medical expertise. The usual range of luminaries were in court litigating their right to privacy or their right to publicity: Barry Goldwater, Howard Hughes, Mrs. Ernest Hemingway, Ayn Rand and Patrick Paulsen. The first and last members of the group sued for what they considered improprieties connected with their respective campaigns for the presidency of the United States.

TORT LIABILITY OF THE STATE

Last year's Survey reviewed the difficulty the third department has had in defining the bounds of state responsibility for policemen whose emergency action against supposed law violators injures innocent third parties.[1] This year brought another chase with resultant injury to innocent persons on the highway.[2] Like last year's case, the circumstances were quite bizzare. After attempting to stop the driver of a stolen car several times by other methods, and after a chase on a highway with traffic running in both directions at speeds of up to ninety miles an hour, three chasing patrol cars decided to wedge the offender between their respective cars and accordingly brought their cars into position. The driver of the stolen car swerved to the left, impacted with one of the police cars and the two cars in unison careened into the lane reserved for traffic going in the opposite direction, where they severely injured plaintiffs, who were sitting in their car at a light. In holding the state

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1. Alexander, *Torts*, 1968 *Survey of New York Law*, 20 SYRACUSE L. REV. 424 (1969), *discussing* Stanton v. State, 29 App. Div. 2d 612, 285 N.Y.S.2d 964 (3d Dep't 1967).

2. Jansen v. State, 60 Misc. 2d 36, 301 N.Y.S.2d 811 (Ct. Cl. 1968).

responsible for the injuries the Court of Claims distinguished *Stanton v. State*[3] by asserting that the injury in *Stanton* was caused by the pursued car for which the state is not responsible, while in the instant case "the collision between the fleeing car and the claimant's automobile occurred at least in part as a result of a plan of action deliberately formulated by the two police officers after conferring over their car radios."[4] Having said that, the court concluded that several less risky alternatives were available to the state in order to effect the apprehension, and that the police were demonstrably negligent in having chosen this particular plan.[5] The appellate division affirmed unanimously without opinion.[6]

While it seems commendable for the Court of Claims to have found a way to reimburse an innocent bystander on these facts, the asserted distinction between the instant case and *Stanton* is probably not to be taken too seriously. While the question of less risky alternatives would certainly seem relevant in establishing a case of negligence against the state, it would seem an injury resulting from the chase, whether occasioned by the fleeing vehicle, the pursuing vehicle, or, as in this case, a combination of both, would seem hardly relevant to the question of the state's culpability in rejecting less risky alternatives. Indeed, the notion that emergency vehicles are to be held to reasonable care under the circumstances despite the exemption of Section 1104 of the Vehicle and Traffic Law[7] urged by the appellees in the appellate division[8] appears a far more convincing explanation of the result in *Jansen* than does the court's rationale. Certainly, the statute is capable of either the construction given it in *Jansen* or that in *Stanton*. A judicial choice in favor of compensating innocent persons incidently injured in the process of police administration where the injury was avoidable by the exercise of greater care seems more appropriate a resolution of the conflicting interests of the public's safety and the state in the administration of criminal justice. This seems even clearer in cases such as the instant one where the offender appears to threaten only property interests while bystanders are threatened in life and limb.

The responsibility of the state, acting through its police, for the safety of its citizens was quite forcefully denied in another context by the Court of Appeals in *Riss v. City of New York*.[9] In that case plaintiff had refused to date the person from whom she sought police protection. He in turn had threatened over a period of about ten months that, if she persisted in her refusal, he would retaliate physically. Though she made several complaints to the police at this point, after investigation they refused to intervene. On the

3. 29 App. Div. 2d 612, 285 N.Y.S.2d 964 (3d Dep't 1967).
4. Jansen v. State, *supra* note 2, at 42, 301 N.Y.S.2d at 818.
5. *Id.* at 44, 301 N.Y.S.2d at 820.
6. Jansen v. State, 32 App. Div. 2d 889, 302 N.Y.S.2d 1016 (4th Dep't 1969)
7. N.Y. VEHICLE & T. LAW § 1104 (McKinney 1960).
8. Brief for Appellee at 12-13, Jansen v. State, *supra* note 6.
9. 22 N.Y.2d 579, 240 N.E.2d 860, 293 N.Y.S.2d 897 (1968).

night of a party to celebrate her engagement to another, plaintiff received a threatening telephone call from her tormentor, who informed her that this was her last chance. Presumably this was intended to convey the notion that the caller would now make good on his melodramatic threat, "If I can't have you, no one else will have you, and when I get through with you, no one else will want you."[10] She again called the police, but they refused protection. The next morning lye was thrown in her face, destroying sight in one eye, causing partial loss of vision in the other eye, and leaving her face disfigured. Although not repudiating the holding in *Schuster v. City of New York*,[11] the Court limited the state's responsibility to specific undertakings of responsibility to particular members of the public.

An informer, promised protection, may presumably still be covered for a negligent failure to provide it. Other members of the public have no claim. Judge Keating wrote a strong dissenting opinion.[12] He pointed out, among other things, that private citizens were required to rely on police protection because state law prohibits arming in self-defense.[13] He took the opportunity to review extensively the demise of sovereign immunity and indicated his feeling that the Court should not await legislative action to alter the present rule.[14] The majority and Judge Keating view the Court's role differently. The majority believes "there is no warrant in judicial tradition or in the proper allocation of powers of government for the courts, in the absence of legislation, to carve out an area of tort liability for police protection to members of the public."[15] While Judge Keating finds some cases supporting the Court's concern, he believes that "what is of importance here are cases . . . [which] signify the direction in which the law is proceeding. They indicate how, step by step, New York courts are moving to return—albeit with some notable setbacks--toward the day when the government, in carrying out its various functions, will be held equally responsible for the negligent acts of its employees as would a private employer."[16] He concludes:

> The rule is Judge made [*sic*] and can be judicially modified. By statute, the judicially created doctrine of 'sovereign immunity' was destroyed. It was an unrighteous doctrine, carrying as it did the connotation that the government is above the law. Likewise, the law should be purged of all new evasions, which seek to avoid the full implications of the repeal of sovereign immunity.
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> No doubt in the future we shall have to draw limitations just as we have done in the area of private litigation, and no doubt some of these limitations will be unique to municipal liability because the problems will not have any counterpart in private tort law. But if the lines are to be drawn, let them be delineated on candid considerations of policy

10. *Id.* at 583, 240 N.E.2d at 862, 293 N.Y.S.2d at 899.
11. 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).
12. Riss v. City of N.Y., *supra* note 9, at 583, 240 N.E.2d at 861, 293 N.Y.S.2d at 899.
13. *Id.* at 584, 240 N.E.2d at 862, 293 N.Y.S.2d at 900.
14. *Id.* at 590-92, 240 N.E.2d at 866-67, 293 N.Y.S.2d at 905-06.
15. *Id.* at 583, 240 N.E.2d at 861, 293 N.Y.S.2d at 899.
16. *Id.* at 590, 240 N.E.2d at 866, 293 N.Y.S.2d at 905.

> and fairness and not on the fictions or relics of the doctrine of 'sovereign immunity'. Before reaching such question, however, we must resolve the fundamental issue raised here and recognize that, having undertaken to provide professional police and fire protection, municipalities cannot escape liabilities for damages caused by their failure to do even a minimally adequate job of it.[17]

Even if *Riss* had been decided as Judge Keating wished, *Wasserstein v. State*[18] might well be a case in which liability would be denied. Plaintiff was shot by a sixteen year old parolee and attempted to recover from the state, claiming negligent parole supervision in the failure of the parole officer expeditiously to terminate the parole and place the violator in custody. Unlike the *Riss* case, a new factor was introduced in this case. As the court noted:

> In the present case the propriety of admitting the delinquent to parole was established and to find that liability to the general public would flow from a failure to revoke a parole immediately upon hearing of a technical violation would thwart the purpose of attempting rehabilitation through parole. 'Duty', whether its performance be by an individual or the State, is concerned with a concept of reasonableness. A parole officer acting as a reasonable man is not required to guess or surmise that a 16-year-old boy, declared delinquent because of truancy and absence from home, will shoot a pedestrian walking along a public street.[19]

From the perspective of the state, apparently its liability is even further constricted. In *Foster v. State*,[20] the state argued that it should not be held responsible for the forceable assault and rape of a fourteen year old inmate of a New York training school by a supervisor of that institution. The Court of Claims disagreed. Judge Glavin noted that "were this court to hold otherwise, this decision would be a license to all State employees assigned to custodial positions to pillage and plunder, and engage in licentious conduct with whomsoever they were charged to protect."[21]

The state was also held liable for the failure of New York State Thruway authorities either to provide police escort, to close the Thruway, or to take other dramatic measures when a portion of the Thruway was reduced to zero visibility as a result of smog.[22] A Thruway with zero visibility is extremely hazardous to adult drivers so it should be closed or police protection provided. On the other hand, a park frequented by young children with a slide thoroughly slickened by a 17-hour rainfall and surrounded by a slick cement floor is an insufficient hazard to the youngsters to require either the closing of the slide or its supervision by a park superintendent. Consequently, the appellate division in *Saracino v. City of New York*,[23] held that the trial court did properly dismiss plaintiff's complaint.

17. *Id.* at 592-93, 240 N.E.2d at 867, 293 N.Y.S.2d at 907-08.
18. 32 App. Div. 2d 119, 300 N.Y.S.2d 263 (3d Dep't 1969).
19. *Id.* at 121, 300 N.Y.S.2d at 265.
20. 57 Misc. 2d 281, 292 N.Y.S.2d 269 (Ct. Cl. 1968).
21. *Id.* at 284, 292 N.Y.S.2d at 272.
22. Harvey v. N.Y. State Thruway Authority, 59 Misc. 2d 1079, 301 N.Y.S.2d 909 (Ct. Cl. 1968); Rindfleisch v. State, 59 Misc. 2d 1074, 301 N.Y.S.2d 830 (Ct. Cl. 1968).
23. 30 App. Div. 2d 853, 293 N.Y.S.2d 29 (2d Dep't 1968), *aff'd*, 23 N.Y.2d 938, 246 N.E.2d 364, 298 N.Y.S.2d 516 (1969) (mem.).

TORT LAW AND THERAPY

Cases this year again raise the question of the extent of the state's responsibility for self-injury and injury to others caused by mental patients hospitalized in state facilities. In *Weglarz v. State*,[24] the appellate division affirmed a judgment of the Court of Claims denying state liability for improper supervision, care and surveillance of a decedent who, after some treatment, was placed in an open ward from which he disappeared and was later found dead of asphyxia due to hanging. The court noted:

> There was no showing of prior suicidal tendencies on the part of the decedent and the decision of the supervising psychiatrist 'to give him an honor card was based on the improvement of the patient; the fact that he was well' and was not negligently made. The decision to place the patient in open ward was a medical judgment. Liability on the part of the state does not arise if such judgment was, in fact, erroneous. There was no further evidence that the hospital authorities had any reason to anticipate that the decedent would commit suicide.[25]

In *Timmins v. State*,[26] the Court of Claims dismissed a complaint by the administrator of a deceased three year old girl whose father killed her on a home visit from a mental hospital. In part the decision was grounded on the fact that the patient had been released in the custody of his brother without anticipation that he would visit with his child. More significantly, the court noted: "Home visits and passes were authorized by physicians in both hospitals, and were in accordance with accepted standards of medical practice. The modern concept of handling mental illness is one of treatment, not incarceration. The objective is to return the patient to society which should be done as soon as in the judgment of properly qualified doctors and psychiatrists, it is safe for others and helpful to the patient."[27]

In both cases, the courts, by their decisions, underscored the important policy objective of providing the maximum possible freedom to persons involuntarily hospitalized. While one can sympathize with the loss occasioned, a contrary result would underwrite a public safety policing function that psychiatrists are ill-equipped to perform and which would lead to broad preventive detention responsibilities violative of the civil liberties of mental patients.[28]

On the other hand, the interest of providing maximum possible freedom to mental patients does not justify the state in failing to provide necessary requested service to a patient in convalescent care. Thus, where the failure to provide adequate supply of a necessary psychiatric medication (Prokedazine) resulted in a relapse causing injury to others, the state was held liable in *McCord v. State*.[29]

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24. 31 A.D. 2d 595, 295 N.Y.S.2d 152 (3d Dep't 1968).
25. *Id.* at 596, 295 N.Y.S.2d at 154-55.
26. 58 Misc. 2d 626, 296 N.Y.S.2d 429 (Ct. Cl. 1968).
27. *Id.* at 631, 296 N.Y.S.2d at 434.
28. *See generally* T. SZASZ, PSYCHIATRIC JUSTICE (1965).
29. Case remains unreported. Claim Nos. 43405-07, New York Court of Claims.

In *Wright v. State*,[30] the Appellate Division, Fourth Department, appeared to embark on a new and extremely interesting theory. A claim was brought for the injuries suffered by a mental patient who jumped from the second story window of the Syracuse Psychiatric Hospital during a period of confinement. The Court of Claims dismissed plaintiff's action because he did not demonstrate, by expert medical testimony, that the supervision provided was inadequate. The appellate division unanimously disagreed, stating:

> Expert medical testimony was not required to establish the State's liability in negligence The average trier of the facts should be able to discern the facts as presented and determine whether the foreseeable risks to plaintiff's safety, in light of the history of his suicide attempts and bizzare behavior between February 7 and 13 did not put the hospital staff on notice to take every reasonable caution to prevent him from harming himself.[31]

In short, the court asserted that whether the state had appropriately fulfilled its function was not a question of medical expertise but of ordinary negligence.

The decision seems extremely sound. The court recognized that the function which the state was performing by hospitalization of the patient was essentially custodial. They had incarcerated the patient because of the danger of self-injury and had failed as adequate custodians because they did not provide the restraint which theoretically justified the initial hospitalization.

The distinction is crucial. A number of commentators have noted that questions of involuntary hospitalization ought not to be treated as medical questions.[32] In terms of analyzing the legal relationships of the parties, it has been urged that viewing the problem in nonmedical terms leads to far more appropriate legal results.[33] By refusing to distinguish this case from other cases in which the state undertook to safeguard the safety of a person in its custodial care, the court moved in the direction of destroying the immunity imposed by the euphemistic labeling of the problem as "medical." In fact, the justification for involuntary incarceration is and must be the state's desire to protect either society or the patient. When so viewed, the function is seen as quite similar to the function of the restraints imposed in the criminal process. Unlike voluntary medical treatment, the state cannot be viewed as acting in the patient's stated self-interest. In assuming involuntary hospitalization functions it has established institutions whose legitimacy turns not only on their provision of medical services but also on their application of appropriate restraint. Consequently, they can be judged in one of these activities as can other institutions which involuntarily restrain inmates without an inquiry into medical practice.

A combination of the policy of cases minimizing the state's responsibility

30. 31 App. Div. 2d 421, 300 N.Y.S.2d 153 (4th Dep't 1969).

31. *Id.* at 422, 300 N.Y.S.2d at 154.

32. *See, e.g.*, T. SZASZ, MYTH OF MENTAL ILLNESS (1966).

33. *See, e.g.*, Alexander & Szasz, *Mental Illness as an Excuse for Civil Wrongs*, 43 NOTRE DAME L. 24 (1967).

for the release of patients from involuntary hospital restraint, and this case charging a hospital with the results of the failure of restraint when a patient has not been released, should militate toward a decrease in involuntary psychiatric detention. While *Wright* can hardly be viewed as a bugle blast which will cause the walls of psychiatric detention to crumble, it is certainly a case demonstrating a rare perception of the problem. It will, hopefully, be broadly followed.

Even if there were not other reasons for wishing to see the end of involuntary institutionalization of persons held to be mentally ill, the brutality that appears in a number of reported cases concerning patients would provide strong motivation. The *Whitree* case reported in the 1968 Survey[34] was subsequently reversed by the appellate division.[35] This year a patient brought suit for a fractured jaw received when he was struck in the face by an attendant because of abusive comments made.[36] The patient was at the time in the custody of three attendants in an elevator and his hands were handcuffed behind his back. Despite the evidence establishing these facts, the state attempted to avoid liability by claiming that it was not responsible for the act of its attendants. The Court of Claims, fortunately, disagreed. It said:

> Implementation of the doctrine of reasonable care requires the hospital authorities to select and instruct the staff and to include as part of their training the awareness that the patients are not normal, and that their mental abberations must be coped with in an enlightened and sympathetic manner, so as to avoid cruel and heartless punishment that, through ignorance, prevailed generations ago. This rules out as a disciplinary measure any physical assault by attendants, regardless of the verbal provocation.[37]

Several cases this year sharpened the legal standard for judging informed consent of patients to medical treatment. *Darrah v. Kite*,[38] a malpractice action against a neurosurgeon who performed a ventriculogram on a nine year old boy, was premised in substantial part on the failure to obtain informed consent to the operation. Since general consent to perform an operation was obtained, the trial court viewed the case as one requiring plaintiff to demonstrate malpractice. Specifically, with respect to any facts not disclosed, the trial judge instructed the jury that plaintiff was required to demonstrate that injuries or disabilities that the plaintiff received must be causally linked to the failure of defendant to disclose additional facts.[39] The Appellate Division, Third Department, disagreed, stating:

> It has long been settled in this State that a 'surgeon who performs an operation without

34. *See* Alexander, *Torts*, 1968 *Survey of New York Law*, 20 SYRACUSE L. REV. 424, at 428 (1969); *see also* Alexander, *Torts*, 1967 *Survey of New York Law*, 19 SYRACUSE L. REV. 457, 467-68 (1968).

35. Whitree v. State, 56 Misc. 2d 693, 290 N.Y.S.2d 486 (Ct. Cl. 1968).

36. Bennett v. State, 59 Misc. 2d 306, 299 N.Y.S.2d 288 (Ct. Cl. 1969).

37. *Id.* at 309, 299 N.Y.S.2d at 292.

38. 32 App. Div. 2d 208, 301 N.Y.S.2d 286 (3d Dep't 1969).

39. *Id.* at 210, 301 N.Y.S.2d at 290.

> his patient's consent commits an assault for which he is liable in damages' . . . at least in the absence of an emergency . . . . An uninformed or invalid consent is tantamount to no consent at all . . . . An operation performed without an informed consent has been characterized as an 'unauthorized operation' . . . . As the trespass on the body arises from the unlawful touching itself there need be no showing of negligence or malice and the plaintiff is entitled to any damages which flow from the unauthorized procedure regardless of the fact that the operation was performed with the utmost of care. The damages related to the cause of action for uninformed consent arise not because the procedure was performed unsatisfactorily, but because it was performed at all.[40]

The cause of action for battery was thus reinstated.

INTENTIONAL TORTS

A number of prominent persons were in court this year litigating either a right to suppress publications or a right to be compensated for the publicity. Howard Hughes was still pressing his suit against Random House to prevent the publication of a biography about him.[41] An earlier case on the same issues is commented on in the 1967 Survey article on torts.[42] On learning that a biography was being prepared about him, Mr. Hughes assigned exclusive rights in his biography to the plaintiff corporation, a company organized by close associates of his. While plaintiff claimed that it intended ultimately to publish its own work, the court was pursuaded that its intention was instead to suppress any projected biography. In the instant litigation, plaintiff sought to establish that Random House's publication would violate plaintiff's commercial rights and Mr. Hughes' right of privacy. The court disagreed. It found that in New York a public figure has no right to suppress a biography, and that the publication of such a biography is constitutionally protected. It rejected plaintiff's contention that defendant's biography was materially false in major respects but stated that even had there been demonstrable falsification in the preparation of the book, that would only go to the factual question of whether defendant published the book with knowledge of its falsity or in reckless disregard of its truth.[43] Unless it were thus knowingly or recklessly published it would be protected by the first amendment,[44] nor could a different result be reached, said the court, by characterizing the cause of action as one for the right of publicity rather than the right of privacy.[45] The same limitations which are constitutionally imposed on the right of privacy

40. *Id.* at 210-11, 301 N.Y.S.2d at 290-91.

41. Rosemont Enterprises, Inc. v. Random House, Inc., 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct., N.Y. Co. 1968).

42. Alexander, *Torts*, 1967 *Survey of New York Law*, 19 SYRACUSE L. REV. 457, 463 (1968).

43. Rosemont Enterprises, Inc. v. Random House, Inc., *supra* note 41, at 5, 294 N.Y.S.2d at 127.

44. Time, Inc. v. Hill, 385 U.S. 374 (1967).

45. Rosemont Enterprises, Inc. v. Random House, Inc., *supra* note 41, at 6, 294 N.Y.S.2d at 129.

inhere in the right of publicity. Being a newsworthy figure, Howard Hughes was held to be the appropriate subject of an unauthorized biography.

For similar reasons Ernest Hemingway's widow could not use the right of privacy to bar publication of a book about her late husband despite the fact that her privacy was also involved.[46] Both by being the spouse of so renowned a literary figure and by herself having an established reputation as a writer, her claim in this respect faced the same obstacles which applied to Mr. Hughes. The Hemingway case added a new dimension to the problem, however. A good deal of the book about the late author was taken from private conversations between Hemingway and the book's author. The case thus posed the more difficult question of whether the indisputable right to publish biographies of newsworthy figures irrespective of their consent reaches their private conversations as well as their public statements. The Court would not commit itself.

> Copyright, both common-law and statutory, rests on the assumption that there are forms of expression, limited in kind, to be sure, which should not be divulged to the public without the consent of their author. The purpose, far from being restrictive, is to encourage and protect intellectual labor . . . . The essential thrust of the First Amendment is to prohibit improper restraint on the voluntary public expression of ideas; it shields the man who wants to speak or publish when others wish him to be quiet. There is necessarily, and within suitably defined areas, a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect.
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> The rule of common-law copyright assures this freedom in the case of written material. However, speech is now easily captured by electronic devices and, consequently, we should be wary about excluding all possibility of protecting a speaker's right to decide when his words, uttered in private dialogue, may or may not be published at large. . . . Concerning such problems, we express no opinion; we do no more than raise the questions, leaving them open for future consideration in cases which may present them more sharply than this one does.[47]

The Court then resolved the case by finding that Hemingway had consented during his lifetime to the author's publication of the conversations in question.[48]

Thus, biographies concerning the public aspects of the life of a public figure are not governed by the right of privacy. This is true though they are published for purposes of trade within the meaning of Civil Rights Law Sections 50 and 51.[49] Does a patent advertising use of a person's public expressions share a similar immunity? A case was raised this year in *Rand v. Hersch Corp.*[50] Ayn Rand complained that the use of her name in promoting

46. Hemingway v. Random House, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968); for an earlier discussion of the case *see* Alexander, *Torts*, 1968 *Survey of New York Law*, 20 SYRACUSE L. REV. 424, at 462 (1969).

47. *Id.* at 348, 244 N.E.2d at 255, 296 N.Y.S.2d at 778.

48. *Id.* at 348-49, 244 N.E.2d at 255-56, 296 N.Y.S.2d at 778-79.

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

50. Rand v. Hearst Corp., 31 App. Div. 2d 406, 298 N.Y.S.2d 405 (1st Dep't 1969).

the sale of defendant's book violated her right of privacy. Taking a portion of a book review of defendant's book, the defendant published an excerpt from the review on the cover of that book. The excerpt read: "Ayn Rand Enjoys . . . The Same Kind of Mystique Analysis As Vale . . . . Their Underlying Drive Is The Same."[51] While admitting that the book review published in a newspaper was privileged commentary on public writing, Ayn Rand complained that the use made of it was patently advertising use in violation of the Civil Rights Law. The court disagreed, saying that the statute must be construed narrowly so as not to curtail

> [f]ree speech, or free press, or to shut off the publication of matters newsworthy or of public interest, or to prevent comment on matters in which the public has an interest or the right to be informed. Its underlying purpose being to protect privacy, in the case of a public figure who by the very nature of being a public figure has no complete privacy no liability exists when his or her name or picture is used without consent, or when the article complained of is of public interest, unless, of course, the publication is knowingly false . . . or may be considered a blatent [*sic*] 'selfish, commercial exploitation' of the individual's personality.[52]

The dissent disagreed, holding the test to be whether the nature of the material is historical (*i.e.*, factual) news, or the like, or not.[53] If the material is neither factual nor historical, privacy pertains.

If the majority's position is upheld, it will have gone a long way toward eliminating from the law the often difficult problem of sorting out the public interest aspects and the commercial interest in a given publication. Quite commonly, they coexist and are hard to separate. The majority would focus on the desirability of the expression concerning prominent figures and their viewpoints without regard to the profit motive of those who would publish the views. Such a test, replacing the more difficult standard of prior New York cases, would seem very much in accord with the developing first amendment principles announced by the Supreme Court.[54]

The exception to right to privacy action for comments on public figures has been so broadened that this year it blocked an action by an entertainer against commercial sale of his picture on a poster.[55] As part of a television show, Mr. Paulsen announced his candidacy for the presidency in 1968 under the banner of the Stag Party. He built on this theme throughout his comedy appearances and became the subject of considerable commentary. The defendants published and sold a "campaign poster" featuring his picture. Despite the fact that the court did not appear seriously to doubt Mr. Paulsen's

51. *Id.* at 407, 298 N.Y.S.2d at 408.

52. *Id.* at 409, 298 N.Y.S.2d at 410.

53. *Id.* at 414, 298 N.Y.S.2d at 414.

54. *See generally* Alexander, *Torts*, 1968 *Survey of New York Law*, 20 SYRACUSE L. REV. 424, at 457-63 (1969).

55. Paulsen v. Personality Posters, Inc., 59 Misc. 2d 444, 299 N.Y.S.2d 501 (Sup. Ct., N.Y. Co. 1968).

assertion that he was only kidding, it was unwilling to classify his "candidacy" as sufficiently different from serious political endeavors. Since he had chosen to enter a traditional area of public interest, albeit satirically, Mr. Paulsen became in the court's view as much subject to public exposure as the others.[56]

If correct, the case would nonetheless appear to be of limited application. Surely most sales of a picture of a public entertainer would entitle the entertainer to compensation. It would, in fact, have been fairly easy for the court to find that, since the candidacy was initiated in jest and the posters were distributed in the probable anticipation that they were to be purchased for their amusement value rather than because of political interest, the case was distingushable from the great bulk of privacy cases where the unauthorized use of the person's picture would lead to liability. The case does provide one significant advantage to future courts if it is followed. Courts will not be required in these hectic political times to decide which candidates should be taken seriously.

Another right of privacy action was brought on behalf of an infant who had been posed with a model wearing a new bathing suit in a picture which ultimately appeared in the Herald Tribune magazine.[57] Although the picture appeared in a feature section and not as an advertisement, its caption did indicate that the type of bathing suit featured was available for $20.00. at Lord and Taylor. Thus, claimed plaintiffs, his picture was used "for advertising purposes." The court disagreed, primarily because it found the feature story far removed from actual advertising copy.[58] Nor was it persuaded that the posing of the scene created the kind of fictionalized account on which liability might be premised, finding, in that respect, falsity or reckless disregard of truth to be necessary criteria because of *Time, Inc. v. Hill*.[59] It was a close decision, with two of the five justices dissenting. In their opinion there was an issue to be litigated as to whether this feature was really an "advertisement in disguise."[60] The majority's refusal to allow that issue to be litigated is yet another example of the broad reading that has been given to the free expression guarantees so recently announced to be applicable to this area by the United States Supreme Court.

Similarly, in the area of libel the constitutional immunity granted by *New York Times v. Sullivan*[61] continued to make inroads into traditional defamation actions. Members of a garbage disposal association accused of having contacts with the Mafia were sufficiently in the public limelight to

56 *Id.* at 449, 299 N.Y.S 2d at 507-08.

57 Pagan v. New York Herald Tribune, Inc., 32 App. Div. 2d 341, 301 N.Y.S.2d 120 (1st Dep't 1969)

58 *Id.* at 343, 301 N.Y.S.2d at 123.

59. *Id.* at 344, 301 N.Y.S.2d at 124.

60. *Id.* at 344, 301 N.Y.S.2d at 124 (dissenting opinion).

61 376 U.S. 254 (1964).

invoke the rule.[62] After carefully reviewing the precedent, the court concluded that a sanitation department which performed the collection functions for several cities and towns was infected with a public interest and that, in consequence, the public's concern about possible connections with organized crime warranted the same type of robust and free public discussion as was supported in the original *Times* case. Thus, a claim against the defendant whose statements were not demonstrably falsely or recklessly made was dismissed.[63] Another cause of action, in the same case, was preserved because of evidence of knowing falsity or reckless disregard of truth.[64]

Senator Barry Goldwater was also confronted with the *New York Times* rule in his libel suit arising out of an article in Fact magazine entitled "The Unconscious of a Conservative: A Special Issue on the Mind of Barry Goldwater."[65] The article had concluded, among other things, that Goldwater suffered from paranoia and had demonstrated "infantile fantasies of revenge and dreams of total annihilation of his adversaries."[66] It also attributed a nervous breakdown to the senator.[67]

The trial court allowed the jury to find actual malice in the publication of the article and the Court of Appeals, Second Circuit, affirmed. On the whole, the statements made in the article were cited from other sources or taken from a poll of psychiatrists which had inquired into Goldwater's mental health. To be sure, there was some biased extrapolation. The court did not rely on actual errors, however, in reaching its conclusion, but found the failure to make a more thorough investigation itself sufficient evidence of malice even with respect to items accurately quoted. It stated:

> There are many parallels between the evidence tending to prove actual malice in this case and the proof in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), which the Supreme Court held was sufficient to establish actual malice. The Goldwater article did not contain 'hot news'; appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques; appellants were not psychiatric experts nor did they have any experts review 'Goldwater: The Man and the Menace' or evaluate its conclusion; they persisted in their polling project despite warnings by reputable professional organizations that their techniques lacked validity; and, obviously there was evidence as to whether there was a possible preconceived plan to attack Senator Goldwater regardless of the facts.[68]

This evidence, together with the other facts brought out at trial, established that the appellants not only knowingly published defamatory statements but

62. Arizona Biochemical Co. v. Hearst Corp., 302 F. Supp. 412 (S.D.N.Y. 1969).
63. *Id.* at 413.
64. *Id.* at 417.
65. Goldwater v. Ginzburg, 414 F.2d 324 (2d Cir. 1969).
66. *Id.* at 331.
67. *Id.*
68. *Id.* at 339-40.

also established with convincing clarity that the appellants were motivated by actual malice when they published these defamatory statements.[69] The court pointed out that defendants did not act in good faith in republishing other accounts of Senator Goldwater's character.[70]

One may wonder whether the Supreme Court intended that, in political debates concerning candidates for public office, defamation could be used to punish statements republished without verification partially because of the intention of the republisher to have them support this predetermined point of view. Certainly his ill will or personal spite would not independently suffice. The quotations were after all from reputable sources: *Pageant, Good Housekeeping*, and *Time* magazines.[71] The letters published from psychiatrists were presumably written by psychiatrists. One may also wonder whether the court was correct in its assertion that the article did not contain "hot news" when it was published in the September-October issue preceding the November election.[72] If the case is correct, it would seem to reimpose some restraint on the more colorful forms of character assassination which so commonly are concomitant with significant elections.

Also this year the Court of Appeals, over the dissents of Judges Fuld and Bergan, upheld the judgment for libel arising out of the mass publication of a legal complaint, holding that such publication was not governed by the exception to libel for fair and true reports of judicial proceedings.[73]

One of the problems in bringing suits for fraud has been the defense of mistatement of law. Although mistatements of facts are held actionable, historically mistatements of law were not. This year, the Court of Appeals took an opportunity to update New York law in this respect. In *National Conversion Corp. v. Cedar Building Corp.*,[74] plaintiffs complained of a claimed false representation that the demised premises were situated in an unrestricted area. Defendants asserted that such representations were representations of law and not actionable, but the Court disagreed.

> [T]he law has outgrown the over-simple dichotomy between law and fact and the resolution of issues in deceit. It has been said that 'a statement as to the law, like a statement as to anything else, may be intended and understood either as one of fact or one of opinion only, according to the circumstances of the case.' The statement in this case, both before the execution of the lease, and in the body of the lease, exemplify ideally an instance in which the statements are not intended or understood merely as an expression of opinion. Landlords said they knew the premises were in an unrestricted

69. *Id.*
70. *Id.* at 337.
71. *Id.* at 329-30.
72. *Id.* at 339.
73. Williams v. Williams, 23 N.Y.2d 592, 246 N.E.2d 333, 298 N.Y.S.2d 473 (1969). For a discussion of the case in the appellate division *see* Alexander, *Torts*, 1968 *Survey of New York Law*, 20 SYRACUSE L. REV. 424, at 470 (1969).
74. 23 N.Y.2d 621, 246 N.E.2d 351, 298 N.Y.S.2d 499 (1969).

> district. This meant that they knew as a fact that the zoning resolution did not restrict the use of the particular premises, and tenant so understood it.[75]

So holding, the Court affirmed the appellate division judgment for plaintiffs.[76]

COMMERCIAL TORTS

When a person's employment contract is breached, he has a cause of action against his employer. If others have induced the breach knowingly, he may also have a cause of action against them for the tort of interference with his contractual relations. This year the Court of Appeals considered the rarely litigated question of privilege to interfere with contracts and held in *Felsen v. Sol Cafe Mfg. Corp.*[77] that a person with a financial interest in the operation of the business had a privilege to induce termination of a contract absent express malice. Thus, while affirming a recovery for a discharged employee on a contractual basis, it reversed a jury determination of inducement to breach by the sole stockholder in a parent corporation, finding that as a matter of law he had the requisite financial interest in the operation of the employer's business which would justify his intervention.

Breach of contract was also an issue in *North Shore Bottling Co. v. C. Schmidt & Sons, Inc.*[78] Plaintiff had obtained an exclusive wholesale distributorship for as long as defendant sold his beer in the New York metropolitan area. Despite this contractual provision, the defendant later designated an alternative distributor in place of plaintiff and plaintiff brought a cause of action for breach of contract and conspiracy between the defendant and others to defraud plaintiff. Affirming the appellate division's view,[79] the Court of Appeals held the charge of conspiracy to breach the agreement to be inapplicable as to the defendant on the basis that interference with contract is not an available remedy between contracting parties.[80] It, nonetheless, upheld plaintiff's leave to serve an amended complaint based on the same facts.[81] Since plaintiff had claimed that defendants had entered the contract intending to reassign the distributorship, once plaintiff established the business, an action for fraud might well lie.

The United States Supreme Court broadened the prospects for private antitrust suits in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[82] by

75. *Id.* at 627-28, 246 N.E.2d at 355, 298 N.Y.S.2d at 504.

76. Nat'l Conversion Corp. v. Cedar Building Corp., 29 App. Div. 2d 983, 290 N.Y.S.2d 1019 (2d Dep't 1968).

77. 24 N.Y.2d 682, 249 N.E.2d 459, 301 N.Y.S.2d 610 (1969).

78. 22 N.Y.2d 171, 239 N.E.2d 189, 292 N.Y.S.2d 86 (1968).

79. North Shore Bottling Co. v. C. Schmidt and Sons, Inc., 28 App. Div. 2d 569, 280 N.Y.S.2d 427 (2d Dep't 1967).

80. North Shore Bottling Co. v. C. Schmidt and Sons, Inc., *supra* note 78, at 179, 239 N.E.2d at 193, 292 N.Y.S.2d at 92.

81. *Id.*

82. 392 U.S. 134 (1968).

holding that the *in pari delicto* defense had no application to antitrust suits and that those involved in illegal schemes could, in the interest of vindicating broader antitrust objectives, bring suits. At the same time the issue of whether antitrust violation may be used itself as a defense to other forms of litigation was raised by several New York cases. In *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*,[83] defendant attempted to defend a trademark infringement action by demonstrating that the trademarked product had been used in various ways to violate the antitrust laws of the United States. The court, analyzing Section 33(b)(7) of the Lanham Act,[84] which denies conclusive evidentiary force to the registration of a trademark that has been or is being used to violate the antitrust laws, held that the provision was intended only to deny the statutory benefit to antitrust violators and not to deny the validity of the trademark. It then turned to the question of whether, in the exercise of its equity jurisdiction, the court should consider the antitrust violation as a reason to deny enforcement of the trademark rights, a practice common in patent cases.[85] In concluding that it should not, the court reasoned that the product's reputation might well have been essential to the antitrust violation but that the trademark itself was not. It feared that failing to distinguish between a product's reputation and the trademarks used would make trademark forfeiture an automatic concomitant to any antitrust violation and thus frustrate the aspects of trademark protection designed to serve consumers through product identification.[86]

In *T.N.T. Communications, Inc. v. Management Television Systems, Inc.*,[87] an antitrust defense was set up by former employees being sued by their former employer to restrain their disclosure of trade secrets. Their counterclaim asserted that plaintiff was attempting to obtain a prominent position in his business in violation of state and federal antitrust laws. The court noted that the relationship between the asserted monopolistic position of the plaintiff and the possible misuse of his trade secrets was quite remote and, on that basis, refused to consider the antitrust defense.

Both cases seem to support the United States Supreme Court's direction in this area. While encouraging antitrust litigation by those who have an interest in bringing suits,[88] the Court has also indicated that it considers it inappropriate to use antitrust issues, tangential to other transactions, as a bar to litigating those transactions.[89]

83. 298 F. Supp. 1309 (S.D.N.Y. 1969).
84. 15 U.S.C. §§ 1115(6), (7) (1964).
85. *See, e.g.*, Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942).
86. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, *supra* note 83, at 1315-16.
87. 32 App. Div. 2d 55, 299 N.Y.S.2d 692 (1st Dep't 1969).
88. *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., *supra* note 82.
89. Kelly v. Kosuga, 358 U.S. 516 (1959).

UNINTENTIONAL TORTS

This year the Court of Appeals grappled with some fairly fundamental questions in the law of negligence. In *Gelbman v. Gelbman*,[90] the Court reviewed the historic position of the state on intrafamilial tort suits. Since the immunity from suit in intrafamilial torts is thought to have a serious effect on family relations, the Court of Appeals in *Badigian v. Badigian*[91] previously declined to change the common-law rule without legislative guidance. This year it noted that seven years had passed since that decision and legislative guidance had not been forthcoming.[92] It noted that intrafamilial immunity was a court-created rule and that courts could revoke it. After reviewing the stated rationale for immunity, maintaining family harmony, the Court rejected it fairly forcefully.[93] Not only does intrafamilial tort immunity no longer apply for nonwillful torts, but the rule is expressly made retrospective to matters which have not gone to final judgment.[94] The decision was unanimous.

In *Endresz v. Friedberg*,[95] the Court considered whether a wrongful death action would lie for the negligent killing of a fetus, and held it would not. After weighing the policy considerations for and against such recovery, the Court decided that the most practical solution was to continue to allow parents to recover for damages directly inflicted on them. The Court was careful to point out that it arrived at this conclusion not by giving mindless deference to precedent, but by careful consideration of the necessity for additional actions in such cases. It believed that the parent's recovery sufficed. Judges Burke and Keating dissented.

The Court also affirmed the result in *Tobin v. Grossman*,[96] commented on in last year's Survey.[97] It thus prohibited recovery for infliction of mental distress arising out of direct harm to others irrespective of relationship to the harmed person and the witnessing of the event. The Court took the opportunity of this decision to articulate again what it feels its role is in the development of tort law.

> In recent years this court has expanded many tort concepts, but they have been only expansions rather than significant creation of entirely new causes of action. Thus, in the *Battalla* and *Ferrara* cases (*supra*), the reality of psychological causation with consequent mental and physical harms was recognized in an area where previously even the slightest physical impact would have been sufficient to establish a cause of action. Although in *Millington v. Southeastern Elevator Co.* (22 N.Y.2d 498) it was necessary to strike down

90. 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969).
91. 9 N.Y.2d 472, 174 N.E.2d 718, 215 N.Y.S.2d 35 (1961).
92. Gelbman v. Gelbman, *supra* note 90, at 437, 245 N.E.2d at 193, 297 N.Y.S.2d at 530.
93. *Id.* at 437-38, 245 N.E.2d at 193, 297 N.Y.S.2d at 530-31.
94. *Id.* at 439, 245 N.E.2d at 194, 297 N.Y.S.2d at 532.
95. 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969).
96. 24 N.Y.2d 609, 249 N.E.2d 419, 301 N.Y.S.2d 554 (1969).
97. Alexander, *Torts*, 1968 *Survey of New York Law*, 20 SYRACUSE L. REV. 424, at 433 (1969).

a bar to a wife's recovery for loss of consortium, the fact of such harm was always evident and recovery had always been allowed to the husband in the converse situation. Although in *Gelbman v. Gelbman* (23 N.Y.2d 434) the immunity from suit between parent and child for nonintentional tort was abandoned, there was no such intrafamilial immunity for intentional tort, and precisely the same conduct between others would give rise to a cause of action. . . .

Similarly, *Woods v. Lancet* (302 N.Y. 349) involved well-understood harms but for which recovery had theretofore been barred only because of difficulties in recognizing the personality as entitled to sue. In that case plaintiff was permitted to recover for injuries sustained while a fetus *in utero* resulting from impact on the mother. Plaintiff, who had been the direct object of the harm inflicted, would have had a cause of action, except for the conceptual difficulty of not having been the legal person with capacity to sue at the time the wrong was committed.

On the other hand, the Court was unanimous in denying the cause of action for an alleged wrong which the law has never before recognized as a wrong at all (*Williams v. State of New York*, 18 N.Y.2d 481, 483). The *Williams* case involved an action by an illegitimate child conceived in a State mental hospital of a mentally deficient mother who was not protected from sexual attack. Damages were sought for a 'wrongful life.' The Court, in discussing its recent expansion of tort concepts observed: 'In none of these were we asked to, nor did we, go so far as to invent a brand new ground for suit' (p. 483).

Of course, the common law is not circumscribed by syllogisms, however constructed out of precedence, and this case presents an acute issue that will not pass merely by the incantation of a logical formula.

If that were not so, the developments in the field of products liability would never have taken place. True, the landmark cases in that area did not acknowledge creation of new causes of action or describe new harms as compensable, but they certainly broadened the range of duty and, therefore, of liability. . . . Thus, for all practical purposes, in a limited sense, new causes of action were created when liability was imposed on others than the mere purveyors of goods and services.[98]

To take a thought from the Court, for all practical purposes, in a limited sense, the Court appeared in its review of cases to be indicating that the categorical denial of the creation of new torts in *Williams v. State*[99] was no longer to be taken seriously. In a number of cases cited its results had made that clear. It is good to have this later more careful statement to substitute for the *Williams* language, even though it comes in a case in which new liability is categorically rejected.

In another case,[100] dealing with the effect of a release, the Court of Appeals upheld an appellate division ruling which determined that a jury should consider the validity of a release signed within fifteen days of the time the injuries were received. The release was knowingly and intentionally executed while the person was hospitalized, so the burden of proof rested with the defendant. Despite the fact that obtaining such a release under such circumstances was a violation of Section 270-b of the then extant Penal

98. Tobin v. Grossman, *supra* note 96, at 613-14, 249 N.E.2d at 421-22, 301 N.Y.S.2d at 556-58.

99. 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966).

100. Fleming v. Ponziani, 24 N.Y.2d 105, 247 N.E.2d 114, 299 N.Y.S.2d 134 (1969).

Law,[101] the Court ruled that the jury could be properly given the question for decision.

The Court also put to death this year the fairly anomalous prior cases which had barred reliance on res ipsa loquitur when plaintiff introduced specific evidence of negligence. During street rioting in Rochester, New York, a civil defense official chartered a helicopter to observe trouble spots. The helicopter crashed and the pilot's widow sued for wrongful death.[102]

At trial, the defendants asserted immunity either as a participant in civil defense under the New York State Defense Emergency Act,[103] or in catastrophe control provided for by the General Municipal Law.[104] The Court disagreed, viewing the charter as wholly commercial and as involving no added risk as a result of the riots, and noted in passing that it was the policy of the state to decrease obstacles to the recovery of damages for negligence.[105] It then turned to defendant's argument that specific acts of negligence had been proved, thus making reliance on res ipsa loquitur improper. It noted that prior New York cases had previously been interpreted by many as establishing the rule that res ipsa loquitur cannot be invoked under such circumstances. The Court of Appeals rejected that interpretation as irrational. Henceforth one may proceed on the theory of negligence based on specific facts and on res ipsa loquitur.[106]

The rescue doctrine was applied in several significant cases this year. The Court of Appeals reversed the appellate division's failure to allow the doctrine in *Provenzo v. Sam*.[107] Plaintiff had gone to the aid of a driver whom he assumed to be suffering from a heart attack. The "victim's" car had veered apparently out of control before it finally hit a parked car across the street, struck a house, and stopped. In his attempt to reach the driver, plaintiff was injured when struck by another car. He sued both the driver of the car who struck him and the driver he sought to aid. It turned out that the other driver had not been ill as he had surmised but was intoxicated. The Court of Appeals held that the rescue doctrine applied. While noting that the normal application of the rescue doctrine requires three people, the one culpably negligent, the one injured by that negligence and the rescuer, it is now acceptably applied as well to two-party situations where the rescued party himself, by his own negligence, has created the situation which invites the rescue.[108] Thus victims of their own negligence may appropriately be sued by those injured in seeking to aid them.

101. N.Y. PENAL LAW § 270-b (Penal Law of 1909) (McKinney 1967).

102. Abbott v. Page Airways, Inc., 23 N.Y.2d 502, 245 N.E. 2d 388, 297 N.Y.S.2d 713 (1969).

103. N.Y. UNCONSOLIDATED LAWS § 9101 *et. seq.* (McKinney 1961).

104. N.Y. GEN. MUN. LAW § 209-n(a) (McKinney 1965).

105. Abbott v. Page Airways, Inc., *supra* note 102, at 507, 245 N.E.2d at 390, 297 N.Y.S.2d at 716.

106. *Id.* at 512-14, 245 N.E.2d at 394-95, 297 N.Y.S.2d at 720-22.

107. 23 N.Y.2d 256, 244 N.E.2d 26, 296 N.Y.S.2d 322 (1968), *discussed in* Alexander, *Torts*, 1968 *Survey of New York Law*, 20 SYRACUSE L. REV. 424, at 475 (1969).

108. *Id.* at 260, 244 N.E.2d at 28, 296 N.Y.S.2d at 325.

In line with the Court of Appeals ruling in *Rooney v. S.A. Healy Co.*,[109] which held the manufacturer of a gas mask responsible for the death of a person wearing the mask, the Appellate Division, Second Department, which had originally refused recovery in that case, held the defendants liable as well to those injured or killed in their attempt to rescue the decedent.[110] In *Knudsen v. New Dorp Coal Corp.*,[111] the Court of Appeals upheld an appellate division judgment which approved another application of the rescue theory. Plaintiff's car had been backed into by defendant's truck, and the police were investigating at the scene of the accident. Antifreeze had leaked from plaintiff's radiator because of the impact. Suddenly a child dashed from the sidewalk into the street. Plaintiff, attempting to reach the child, slipped on the antifreeze. According to both appellate courts the rescue doctrine applied and plaintiff could include, as part of a negligence claim, this injury as well.

A number of cases dealt with collisions caused when cars unexpectedly either crossed from a lane going in the other direction or swerved in front of other cars, and the courts absolved the drivers who, under those circumstances, crashed into the cars ahead of them.[112] The Court of Appeals stopped short, however, of upholding a contributory negligence finding against two employees working on and near a truck parked at right angles to, and projecting three feet over the paved portion of, a two-lane highway. One employee was behind the truck with a flashlight waving on traffic and the other was unloading dirt from the truck. A red flasher light was on the hood of the truck. Although this vehicle was also in a place sufficiently obstructive of traffic to allow holding in negligence the person who parked the truck, neither of the employees was found to bear legal responsibility for that act. Thus, it was appropriate for the jury to find that the employees were acting with due care in warning oncoming traffic and in working on the truck. The Appellate Division, Fourth Department, reversed a trial judgment for the employees against the owner of the truck.[113] The Court of Appeals held this to be error and ordered a new trial.[114]

In another case arising out of an automobile accident, the duty of the

109. 20 N.Y.2d 42, 228 N.E.2d 383, 281 N.Y.S.2d 321 (1967).

110. Guarino v. Mine Safety Appliances Co., 31 App. Div. 2d 255, 297 N.Y.S.2d 639 (2d Dep't 1969). As this article went to press, *Guarino* was affirmed by the Court of Appeals. ___ N.Y. 2d ___, ___ N.E.2d ___, ___ N.Y.S. 2d ___ (1970).

111. 23 N.Y.2d 892, 245 N.E.2d 817, 298 N.Y.S.2d 90 (1969).

112. Palmer v. Palmer, 31 App. Div. 2d 876, 297 N.Y.S.2d 428 (3d Dep't 1969) (reversing finding for plaintiff); Whitely v. Lobue, 24 N.Y.2d 896, 249 N.E.2d 476, 301 N.Y.S.2d 635 (1969) (reinstating summary judgment for plaintiff); Joyce v. Stockwell, 32 App. Div. 2d 698, 299 N.Y.S.2d 1011 (3d Dep't 1969) (reversing judgment against driver); Nieves v. Manhattan & Bronx Surface Transit Operating Authority, 31 App. Div. 2d 359, 297 N.Y.S.2d 743 (1st Dep't 1969) (reversing judgment against bus company and bus driver).

113. Orwat v. Smetansky, 27 App. Div. 2d 640, 275 N.Y.S.2d 493 (4th Dep't 1966).

114. Orwat v. Smetansky, 22 N.Y.2d 869, 239 N.E.2d 749, 293 N.Y.S.2d 126 (1968).

state to assure highway safety was raised in an interesting fashion.[115] The driver of a car negligently drove into guardrails adjacent to a highway. The state sued to recover for the damage to the guardrails. Defendant defended on the basis that the state was required to provide the guardrails as part of its obligation for highway safety, and that defendant, as a traveler on the highway, was part of a class for whose special use and benefit the guardrails had been erected. Since, it was reasoned, the guardrails were there for his protection and had served their function in preventing further injury, that should end the matter. The court disagreed, denying that there was an absolute duty to provide guardrails and thus avoiding the main thrust of defendant's argument. However, it would seem equally sound merely to have concluded that the existence of a duty to prevent injury to others does not absolve the person benefited of paying the costs that such duty imposes.[116]

Labor Law Section 240[117] and subsequent sections provide specific safety requirements for certain types of work. This year, a number of plaintiffs sued for alleged violation of the law. The cases demonstrated that the application of the labor law standards to tort litigation is still shrouded in some confusion. In *Sarnoff v. Charles Schad, Inc.*,[118] plaintiff, a painter engaged to paint a church, fell from a scaffold more than twenty feet above the ground. The scaffold did not have the safety rail required by the statute. Plaintiff sued the general contractor and the subcontractor who had furnished the scaffolding. The trial court, after jury verdicts holding both defendants responsible, held the general contractor and released the company furnishing the scaffolding, and the Court of Appeals agreed. While, the Court of Appeals stated, it generally would be the subcontractor, for whom the employee worked, rather than the general contractor, who would bear the statutory responsibility, where, as here, the general contractor had undertaken to furnish the necessary scaffolding the responsibility was his.[119] On the other hand, nothing in the statute appeared to apply to the furnisher of the scaffolding itself since a person who neither employs nor directs another in the performance of his labor is apparently beyond its sanctions.[120]

Furthermore, one can fail to qualify for the protection of the Labor Law because he does not perform precisely the kind of work specified by statute. Thus, where plaintiff sued for failure to provide safety equipment that led allegedly to his falling from a window while removing a broken pane preparatory to replacing it, he was denied a cause of action under Section 202 of the Labor Law,[121] which is addressed to persons engaged in window

115. State v. Hart, 57 Misc. 2d 296, 292 N.Y.S.2d 320 (Sup. Ct., Albany Co. 1968).
116. *See* Vincent v. Lake Erie Transportation Co., 109 Minn. 456, 124 N.W. 221 (1910).
117. N.Y. LABOR LAW § 240 (McKinney 1965).
118. 22 N.Y.2d 180, 239 N.E.2d 194, 292 N.Y.S.2d 93 (1968).
119. *Id.* at 185, 239 N.E.2d at 196, 292 N.Y.S.2d at 97.
120. Boraski v. Backer, 32 App. Div. 2d 577, 299 N.Y.S.2d 335 (3d Dep't 1969).
121. N.Y. LABOR LAW § 202 (McKinney 1965).

cleaning. Also, though fitting appropriately the type of work statutorily addressed, plaintiff fails if his employer is a private home owner merely making home repairs. In *Rivers v. Sauter*,[122] the court concluded that such a result did not

> erode the policy expressed in the Labor Law. The virtual abolition in cases based on the Labor Law of the conception of liability based on fault is justified where the consequential cost of an accident is made a burden of a business. It is hardly to be conceived that the Legislature without express statement intended to extend the same liability to homeowners not similarly engaged. As to the latter, their liability would remain what it was at common law.[123]

If one hurdles these threshold problems, he is then confronted with interpreting the specifics of the statute. Here, too, he may not be successful Section 241-a of the Labor Law[124] requires that an employer cover an elevator shaft not more than one story below men working on it. The decedent was working three feet above the thirtieth floor and planking was placed across the shaft at the thirtieth floor. There was, however, no planking beneath the thirtieth floor. Nonetheless, the appellate division found that the statute was adequately complied with by the one floor of planking, and the Court of Appeals affirmed.[125] Furthermore, while there may be an obligation to avoid common hazards, details of work performed under the immediate supervision of contractors are not governed. Thus, where an I beam tipped as it was being placed, hurling an employee to his death, the appellate division reversed a recovery and the Court of Appeals affirmed.[126] Also, Section 241 of the Labor Law, which provides in general terms for the reasonable and adequate protection and safety of persons employed or frequenting building or construction work sites,[127] unlike specific provisions of the Labor Law requiring indicated safety features, does not preclude the defense of contributory negligence.[128] In cases where specific acts are required, contributory negligence is not available.[129]

Aside from the statutory duties imposed by the Labor Law, a number of other duties were litigated. In *Roark v. Hunting*,[130] the Court of Appeals had before it the question of the duty of a tenant for injury caused by ice on the sidewalk abutting his building. It was alleged that the ice had been formed

122. 32 App. Div. 2d 59, 299 N.Y.S.2d 934 (1st Dep't 1969).

123. *Id.* at 61, 299 N.Y.S.2d at 936.

124. N Y LABOR LAW § 241-a (McKinney 1965).

125. German v. Grand Central Building, Inc., 22 N.Y.2d 821, 239 N.E.2d 655, 292 N.Y.S.2d 916 (1968).

126. Curtis v. State, 23 N.Y.2d 976, 246 N.E.2d 751, 298 N.Y.S.2d 991 (1969).

127. N Y. LABOR LAW § 241 (McKinney 1965).

128. Corbett v. Brown, 32 App. Div. 2d 27, 299 N.Y.S.2d 219 (3d Dep't 1969); Long v. Gartner, 32 App. Div. 2d 25, 299 N.Y.S.2d 226 (3d Dep't 1969).

129. Koenig v. Patrick Const. Co., 298 N.Y. 313, 83 N.E.2d 133 (1948); Utica Mutual Ins. Co. v. Mancini & Sons, 9 App. Div. 2d 116, 192 N.Y.S.2d 87 (4th Dep't 1959).

130. 24 N.Y.2d 470, 248 N.E.2d 896, 301 N.Y.S.2d 59 (1969).

by water dripping from a sign in front of his premises. The Court reviewed with approval an appellate division formulation of general liability for removal of snow and ice.

> As a general rule it is only the municipality which may be held liable for the negligent failure to remove snow and ice from a public sidewalk or to have defects and dangerous conditions in the sidewalk repaired . . . unless a charter, statute or ordinance clearly imposes liability upon the owner in favor of the injured pedestrian. . . . An abutting owner is not liable even though he failed to comply with the provision of a charter, statute or ordinance charging him with removal of snow and ice, nor is he liable for the removal thereof in an incomplete manner. . . . It is also a general rule that an abutting owner is liable if, by artificial means, snow and ice are transferred from the abutting premises to the sidewalk; or if, by such artificial means, water from the property is permitted to flow into the public sidewalks where it freezes. The basic distinction between liability and nonliability rests upon whether the water, snow or ice was conducted from private premises to the public sidewalk by artificial or natural means. The abutting owner may be held liable in the former case—where the unsafe condition was created by his own wrongful act . . . [but] he is not liable in the latter case where he committed no wrongful act. . . .[131]

Here, since there was no indication that the defendant controlled or maintained the sign, the Court of Appeals reversed both the trial court and the appellate division which had previously allowed recovery.

Another court was invited this year to reject limitations on the duty of utilities to furnish service. In *Shubitz v. Consolidated Edison Company of New York*,[132] a tenant sued an electric company for injuries caused by a blackout, relying on the company's contract to furnish electricity to his landlord. Citing the oft-quoted language of *Palsgraf v. Long Island R.R.*,[133] which requires a finding of a duty to the specific individual complaining, and *Moch v. Rensselaer Water Co.*,[134] in which plaintiff was denied recovery against a water company which had failed to supply water required by its contract with the city but not with the plaintiff, the court found precedent to be against the plaintiff. Addressing itself to the importance of stare decisis in such cases, the court said:

> The court recognizes that the absence of a remedy by the tenant in an action for damages leaves her without recourse and is also aware of the flexibility and creative power of the law to meet the progressive developments of the age. . . . However, it cannot reject principles established by sound reason or doctrines established by long experience.[135]

In *Neumann v. Shlansky*,[136] the court held an eleven year old golfer to an adult standard, relying on Section 283-a of the Second Restatement of

131. *Id.* at 475, 248 N.E.2d at 898-99, 301 N.Y.S.2d at 62-63, *citing* Cannon v. Pfeider, 19 App. Div. 2d 625, 626, 241 N.Y.S.2d 85, 97 (2d Dep't 1963).

132. 59 Misc. 2d 732, 301 N.Y.S.2d 926 (Sup. Ct., Kings Co. 1969).

133. 248 N.Y. 339, 162 N.E. 99 (1928).

134. 247 N.Y. 160, 159 N.E. 896 (1928).

135. Shubitz v. Consolidated Edison Co., *supra* note 132, at 735-36, 301 N.Y.S.2d at 930.

136. 58 Misc. 2d 128, 294 N.Y.S.2d 628 (Westchester Co. Ct. 1968).

Torts.[137] If, it reasoned, a child is to be held to an adult standard when he drives a motor boat or airplane, his minority cannot be considered when he sets into motion a dangerous white missile which may also cause substantial injury.

With the abandonment of strict liability for trespass,[138] the Court of Appeals initiated a line of cases designed to bring New York back into the mainstream of tort law.[139] Abandoning liability for trespass required confronting anew the question of strict liability. Especially awkward were the cases which distinguished between vibration damage and missiles, both resulting from blasting.[140] The Court hinted broadly in *Schalnsky v. Augustus V. Riegel, Inc.*[141] that the time had come to repudiate such doctrines. Not willing to take the hint, the Appellate Division, Third Department, in *Horn v. State*,[142] denied recovery in the absence of a demonstration of negligence for vibration damage, stating that if precedent was to be overruled the overruling should be done by an authoritative source and not by mere interpretation or prediction of an intermediate appellate court.[143] Three months later, without citing the appellate division decision, the Court of Appeals provided the guidance the appellate division had wanted in *Spano v. Perini Corp.*,[144] unequivocally repudiating prior law and holding that "since blasting involves a substantial risk of harm no matter the degree of care exercised, we perceive no reason for ever permitting a person who engages in such an activity to impose this risk upon nearby persons or property without assuming responsibility therefor."[145]

MISCELLANEA

There has been a long-standing debate concerning the statute of limitations in medical malpractice cases. When does the statute begin to run? Is it when the negligent act is committed or when it is discovered? In *Schwartz v. Heyden Newport Chemical Co.*,[146] the Court of Appeals held that with respect to medical treatment the relevant time was the time of administration of the treatment. This year it was asked to decide whether that ruling applied as well to cases in which foreign objects were left in the patient's body. It said it did not. Where a foreign object is left in a patient's body, the statute of

137. RESTATEMENT OF TORTS (SECOND) § 283A(c) (1959).

138. Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954).

139. *See* Alexander, *Torts*, 1968 *Survey of New York Law*, 20 SYRACUSE L. REV. 424, at 474 (1969).

140. *Id.*

141. 9 N.Y.2d 493, 174 N.E.2d 730, 215 N.Y.S.2d 52 (1961).

142. 31 App. Div. 2d 364, 297 N.Y.S.2d 795 (3d Dep't 1969).

143. *Id* at 365, 297 N.Y.S.2d at 797.

144. 25 N.Y.2d 11, 250 N.E.2d 31, 302 N.Y.S.2d 527 (1969).

145. *Id.* at 18, 250 N.E.2d at 35, 302 N.Y.S.2d at 532.

146. 12 N.Y.2d 212, 188 N.E.2d 142, 237 N.Y.S.2d 714 (1963).

limitations will not begin to run until the patient could reasonably have discovered the malpractice.[147] Thus, the Court consciously adopted the position held by a minority of jurisdictions, being persuaded that the basic logic of the other jurisdictions having adopted a similar rule was more persuasive than the number of jurisdictions in opposition. The Court was also unpersuaded by the failure of the Legislature to pass a series of remedial bills that had been introduced to it to accomplish the same result. It refused to read legislative inaction as tantamount to negative action. It stated that the Court would be remiss in its duties if it surrendered its own right to act merely because a period of time had elapsed in which the Legislature had not acted.[148]

Commenting on the peculiar court-legislature interaction, the majority noted:

> Courts and legislatures need not be viewed as antagonists in the area of tort law. Developing the law is the province of both, and the peculiar attributes of these institutions are complementary in getting the task performed. Judicial action is often necessary to bring to the attention of the Legislature a particular problem in order for it to accomplish the necessary form which only legislative action can fashion. . . .
>
> Where a court makes what appears to be a needed adjustment in an area in which the Legislature had failed to act, the Legislature is not thereby foreclosed from action. . . . The Legislature, because of its flexibility, may wish, after consideration, to place an outside limit on bringing a cause of action in foreign object cases and may also wish to review the applicable time for the running of the Statute of Limitations for medical malpractice medication and treatment cases. Such action will, of course, be entirely appropriate as is ours, in the absence of legislative mandate.[149]

Again, the Court clearly indicated that it was considering carefully its role as an initiator of new legal principles.

147. Flanagan v. Mt. Eden Gen. Hosp., 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969).

148. *Id.* at 432-34, 248 N.E.2d at 874-75, 301 N.Y.S.2d at 28-29.

149. *Id.* at 435, 248 N.E.2d at 876, 301 N.Y.S.2d at 30.