

## **Contractual Indemnification**

The First Department decision in Dutton v. Pankow Builders, Ltd., 745 N.Y.S.2d 520 (1<sup>st</sup> Dep't 2002) may open up a new area of exposure to insurance carriers writing general liability policies for companies involved in the construction business.. In order to fully understand the significance of the decision, some background is needed.

Prior to the enactment of the Omnibus Workers' Compensation Reform Act of 1996, owners and general contractors in construction cases had two bases to implead the plaintiff's employer, contractual or common law indemnification. Typically, the contractual claim would be covered by the employer's general liability policy, while the common law claim would be covered under section 1b of the workers' compensation policy. The Act abolished all claims for common law unless the plaintiff sustained a "grave injury" as defined by the Act. Thus, in the vast majority of cases, the 1b policy would not be involved.

Additionally, General Obligations Law section 5-322.1 limits claims for contractual indemnity. Essentially, the section voids any contract which seeks to indemnify an owner or general contractor. Thus, if an owner or general contractor were found to be at least 1% responsible for an accident, the contractual indemnification claim would be extinguished. While a common law claim permitted contribution based on the parties respective negligence, the GOL seems to permit owners or general contractor to recover either 100% of their claim or nothing.

Dutton appears to ignore the GOL and open up general liability insurers to contribution (as opposed to indemnification) claims that previously did not exist. In Dutton, the general contractor entered into a contract with a subcontractor who employed the plaintiff. The contract required the subcontractor to indemnify the general contractor "regardless of whether

Owner, Contractor or their respective directors, officers, employees or agents are partially negligent.” The contract did not require indemnification only if the owner and/or general contractor were found 100% responsible.

There was no dispute that the plaintiff did not sustain a “grave injury” and as such the only basis for the action against the subcontractor was the contract. Following a trial, the jury found the general contractor 20% responsible and the subcontractor 80% responsible. The subcontractor made a post-trial motion to dismiss the general contractor’s contractual indemnification claim arguing that the contract violated the GOL as it purported to indemnify the general contractor for its own negligence.

While the contract does appear to violate the GOL, the First Department held that the contract called for “partial, not full indemnification of the general contractor.” This was done despite the fact that both First Department and Court of Appeals precedent rejected contractual language similar to that in Dutton.

While the court calls it partial indemnification, it is really permitting a claim for contribution in a contractual setting. Here, the decision requires the subcontractor’s general liability carrier to pay 80% of a verdict that was over \$4 million. While it may seem more equitable to have each party pay for its proportionate share of liability, the decision appears to ignore the GOL and create a right to contribution which was abolished by the 1996 amendment to the Workers Compensation Law, much to the detriment of general liability carriers.

## **Labor Law Update**

While courts continue to struggle with the application of Labor Law 240(1), it is generally accepted that the section applies to elevation related risks at a construction site.

Generally, the cases involve either a worker falling from a height or having something fall on him from a height. Thus, when a worker on a ladder is injured, but not by a fall or a falling object, one would think a 240 claim does not exist. In fact, that is the holding in some cases, such as Kelleher v. Power Authority, 621 N.Y.S.2d 156 (3d Dep't), which held that "in the absence of a fall there has been no elevation related risk of the type intended to be covered by Labor Law section 240(1)." A recent First Department case however appears to say that a fall is not a prerequisite for a 240 claim.

Pesca v. City of New York, 2002 N.Y. App. Div. LEXIS 10202 involves a work related accident which, unfortunately, the court does not describe in much detail. The plaintiff was standing on a ramp of some type which apparently shook, as the plaintiff injured himself while preventing himself from falling. In a very brief opinion the court held that "although the worker did not fall from the ramp, his injuries in preventing himself from falling could be compensable under section 240(1) if they resulted from a failure to provide a proper safety device."

While the court did not give much reasoning for its decision it is already being followed by the lower courts. In Rodriguez v. OD & P Construction, Inc., New York Law Journal, December 2, 2002, Justice Victor of the Supreme Court, Bronx County was faced with a situation where a worker on a ladder was injured but did not fall. The court followed Pesca and discussed the reasoning for the holding in more detail than the First Department.

The plaintiff in Rodriguez was working on a ladder when the latter shook causing the plaintiff to severely cut his arm on a support bracket. Following the completion of depositions, the plaintiff moved for summary judgment on the 240(1) claim. All of the defendants opposed the motion, arguing that the Labor Law does not cover any and all perils that may be connected tangentially to the effects of gravity, but rather were limited to specific gravity related accidents,

which result in someone falling from a height or being struck by a falling object. After noting that prior First Department caselaw appeared to agree with the defendant's argument, the court pointed out that Pesca did not cite any of the relevant precedents, thereby appearing to signal that it was abandoning a requirement that a worker must fall. Based on Pesca the court held that the fact that the plaintiff did not fall does not bar a 240 claim.

In support of the holding, the court offers a hypothetical of a worker who injures himself while hanging from the ceiling after his ladder collapsed. While it does seem absurd to require the plaintiff in that situation to drop from the ceiling to recover, it is hard to reconcile these cases with the large body of 240(1) caselaw. Given the apparent split in the departments, we look for a Court of Appeals decision in this area.

### **Contractual Liability to Third Parties**

In our September issue, we discussed the Court of Appeals decision in Espinal v. Melville Snow Contractors, 98 N.Y.2d 136 (2002) which analyzed the duty a contracting party owes to a non-contracting party. Briefly, the court held that in general, a party to a contract does not owe a duty to a non-contracting party except in 3 limited circumstances. The Court revisited this issue in Church v. Callanan, 2002 N.Y. LEXIS 3467 and in what seems like a very harsh result for the plaintiff, affirmed its prior ruling.

The plaintiff in Church was a nine year old boy who sustained catastrophic spinal injuries when the driver of a vehicle he was a passenger in fell asleep at the wheel, causing the vehicle to veer off the highway and careen down an embankment. The car left the highway because a restraining barrier had not been completed along the side of the highway. Suit was brought on behalf of the plaintiff against the contractor, the subcontractor and inspector for alleged negligent failure to complete the full 312.5 feet of new guardrail called for in the contractor's general

contract.

The evidence showed that the area where the accident occurred was part of a 22 mile safety-improving project which was completed in 1986 pursuant to a contract between the Thruway Authority and Callanan Industries Inc., a general contractor. Callanan then entered into a subcontract San Juan Construction and Sales Company for installation of the guardrail. For some reason, San Juan installed only 212 of the 312.5 feet required by the contract.

After discovery, Callanan and San Juan moved for summary judgment based on the contention that as purely contracting parties with the installation of the guardrailing, they owed no duty to the plaintiff. The plaintiff countered that both defendants undertook a duty to perform safety improvements and were liable for their negligent performance of the improvements which directly caused the plaintiff's injuries. The plaintiff claimed the defendants owed a duty because "it is well established law that where one undertakes work on a public highway which if not done carefully will create dangerous conditions to the general public, he is under a duty to use requisite care." The plaintiff also submitted expert evidence that if the guardrail had been completed in accordance with the contracts, the car would not have left the roadway and plunged down the embankment. The Supreme Court denied the defendants' motion and on appeal, the Appellate Division reversed.

The Court begins by noting that the defendants had no preexisting duty to install the guardrail, as any duty they had arose exclusively out of the contract. The court then noted the general rule that breach of a contractual obligation will not ordinarily be sufficient in and of itself to impose tort liability upon the contracting parties in favor of non-contracting parties.

The Court then gets to the heart of the matter and discusses the three exceptions to the general rule. The exceptions are discussed in detail in [Espinal](#) (and in our prior newsletter). The

first exception involves a promisor who, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk. The second exception is where a plaintiff suffers an injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation. The final exception applies when the contracting party entirely displaces another party's duty to maintain premises safely.

After listing the exceptions, the Court continues by applying the facts of the case. The first exception was not applicable because there was no evidence that the defendants' failure to fulfill their contractual obligations created or increased the the risk of the vehicle's divergence from the roadway beyond the risk that existed before the contract existed. To put it another way, the defendants' did nothing more than neglect to make the highway safer, as opposed to making it less safe.

The second exception is clearly inapplicable, as the plaintiff did not detrimentally rely on the defendants' performance of their contractual obligations. Additionally, although the defendants, in contracting to put up the guardrail did assume some safety related obligations, they did not comprehensively contract to assume all of the Thruway Authority's safety related obligations. To emphasize that point, the Court noted that the Thruway retained a separate project engineer to provide inspection and supervision of all aspects of the project, including contract compliance. As none of the exceptions were applicable, the Court affirmed the Appellate Division holding that the defendants owed no duty to the plaintiff.

Given the catastrophic damages suffered by the plaintiff and the obvious breach of the contract by the defendants, the result does seem harsh. Nevertheless, the Court of Appeals is sending a very clear signal that tort liability in favor of a third party should be given sparingly. As we previously advised, this situation arises fairly often, given the number of cases where a

snow removal contractor or a provider of security services are defendants. Such cases should be evaluated as soon as possible for a potential summary judgment motion.

### **Tort Reform**

While most tort reform proposals seek to limit the ability of a potential plaintiff to bring suit or to cap the amount of damage recoverable, a recent proposal by the New York City Corporation Council would limit neither, but instead would shift liability from the City to private property owners and thereby to liability insurance carriers.

It is well known that New York City is liable for accidents occurring on city sidewalks except in limited cases where the abutting landowner makes a special use of the sidewalk, which usually means having a driveway that crosses the sidewalk. Recently, Corporation Counsel Michael Cardozo proposed that liability for sidewalk accidents be transferred to the abutting landowner. Owners of homes of three or fewer families would be exempt, meaning the proposed change would effect essentially commercial landowners. In support of the proposed change, the City points out that it annually pays out about \$60 million on sidewalk claims, \$40 million of which involve accidents that occurred in front of larger properties. The City also argues that this would have the added benefit of encouraging larger landowners to repair sidewalk defects as well as freeing up money for the City to make sidewalk repairs in front of smaller properties.

Given the heavily Democratic City Council, it is questionable whether that proposal would ever be adopted. It should also be noted that the Corporation Counsel also wishes to bar the Big Apple Pothole Corporation from submitting maps to the City in order to establish the required prior written notice for sidewalk claims. Mr. Cardozo prefers that individual notices of each defect be filed with the City to allow the City to prioritize which defects should be repaired. That proposal would likely limit potential claims and as such has little chance of being enacted.

