

## **Firefighter's Rule**

For the first time in several years, the Court of Appeals addressed the application of General Municipal Law sec. 205-a, the so-called “firefighter’s rule” in Giuffrida v. Citibank, N.Y.2d (2003). As such, we take the opportunity to discuss the history and the current state of this area of the law.

Historically, firefighter’s were barred from recovering from injuries sustained in the line of duty. Although several rationales existed for the rule, the most persuasive was that firefighter’s assumed the risk of suffering the types of injuries that go along with the profession. Stated a different way, “firefighters must be precluded from recovering damages for the very situation that creates a need for their services.” Santangelo v. State, 71 N.Y.2d 393, 397 (1988).

In 1935, the Legislature enacted sec. 205-a, which created an exception to the common law rule which precluded an injured fireman from recovering. Essentially, 205-a permits recovery where a firefighter is injured in the course of his or her duty as the result of negligence in failing to comply with “any of the statutes, ordinances, rules”, etc. of the federal, state or local governments. The statute also states that the negligence must “directly or indirectly” cause injury or death to the firefighter.

The plaintiff in Giuffrida was a member of the New York City Fire Department who responded to a fire at a doughnut shop in a building owned by the defendant. While fighting the fire, the alarm on the plaintiff’s air supply equipment sounded, signaling that he only had 6 minutes of oxygen left. The plaintiff advised his lieutenant that he needed to leave the building immediately, however he was ordered to leave with his fellow firefighters, who had been ordered to evacuate. Before the plaintiff was able to leave, his oxygen supply ran out, he was overcome by smoke, suffering severe burns and smoke inhalation.

In his claim brought pursuant to GML section 205-a, the plaintiff alleged that the fire was caused by an accumulation of grease in the ventilation system of the doughnut shop's kitchen, and that the defendant/building owner violated certain regulations requiring it to keep the building in a safe condition and to maintain a proper fire protection system. Ultimately, the defendant moved for summary judgment, arguing that the plaintiff had failed to show that the alleged violations were the proximate cause of his injuries. The Supreme Court granted the motion, and the Appellate Division affirmed.

After discussing the legislative history of GML sec. 205-a, the Court of Appeals stated that in order to make out a valid claim under the section and survive a motion to dismiss, a plaintiff must (1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the firefighter was injured, and (3) set forth those facts from which it may be inferred that the defendant's negligence directly or indirectly caused the harm to the firefighter. There was no dispute over the first two prongs, as such the court focused on the third prong, specifically, on the phrase "directly or indirectly."

The Court of Appeals held that by including the word "indirectly" in the statute is that the Legislature intended to broaden a firefighter's cause of action under section 205-a to encompass situations where the alleged violation was not the "direct" cause of the injuries. More to the point, an "indirect cause" is simply a factor that, though not a primary cause, plays a part in producing the result. (This is a more relaxed standard than the typical proximate cause standard in typical negligence actions.) The injured firefighter need only show a "practical or reasonable connection" between the statutory or regulatory violation and the claimed injury.

In moving for summary judgment, the defendant argued that the proximate cause of the plaintiff's injury was that he ran out of oxygen. In response, the plaintiff argued that the fire

suppression system in the donut shop did not activate properly so as to prevent or extinguish the fire which led to his injuries. Additionally, the plaintiff cited code provisions that required buildings to be kept in a safe condition, that the owner be responsible for the maintenance of the building and its facilities, and that the building's fire extinguishing system be inspected, tested and serviced every six months. Additionally, the plaintiff submitted evidence that the doughnut shop had been cited twice and ordered to comply with code provisions requiring that the system be properly inspected. The plaintiff also submitted an affidavit from a fellow firefighter who stated that he did not observe any evidence that the fire suppression system had activated.

In reversing the lower court, the Court of Appeals held that the plaintiff's submissions were sufficient to raise a triable issue of fact. Both the code violations and the evidence that the fire suppression system did not work raised a factual question as to whether the defendant's negligence directly or indirectly caused the plaintiff's injuries. The Court went on to state that the defendant's argument that the plaintiff was injured because he ran out of oxygen missed the point. The plaintiff was injured because he had to remain in the building to help his fellow firefighters. The depletion of his air supply was not a superceding cause. The Court also noted that the plaintiff cannot be found partially responsible for his injuries, because comparative negligence is not a defense to a section 205-a claim.

The defendant argued that by accepting the plaintiff's argument, the only thing a plaintiff would have to do to succeed is to allege a statutory violation and injuries sustained in a fire. While that may not be the result of this case, it is clear that the Court is signaling that an expansive reading should be given to the causation requirement.

### **Expert Testimony**

There has been much discussion over the last several years about the appropriateness of

expert testimony in different areas. In States v. Lourdes Hospital, 2003 N.Y. LEXIS 954, the Court of Appeals dealt with the admission of expert testimony in cases based on *res ipsa loquitur*. For the first time, the Court held that in certain cases, expert testimony may be permitted in a *res ipsa* case.

In States, the plaintiff underwent surgery in the defendant hospital to remove an ovarian cyst. The cyst was successfully removed, however, the plaintiff alleges that during the operation, the anesthesiologist and his practice group injured her right arm. Prior to the surgery, when the defendant inserted an IV tube into the right hand, the plaintiff complained of pain and a burning sensation. Nevertheless, surgery proceeded, and there is no record of any problems with the right arm. When the plaintiff awoke, she complained of increasing pain in her right arm and shoulder. The plaintiff was ultimately diagnosed with right thoracic outlet syndrome and reflex sympathetic dystrophy. The plaintiff alleged negligence in the positioning of her arm during the surgery. Specifically, she believes her arm was negligently hyperabducted beyond a 90 degree angle for an extended period of time.

The defendant moved for summary judgment, arguing that there was no direct evidence that the plaintiff's arm was hyperabducted during surgery and no evidence of any other negligence. In opposition, the plaintiff submitted expert medical opinion that the injury would not have occurred in the absence of negligence, arguing that that testimony could support a *res ipsa* theory. The Supreme Court granted the motion and the Appellate Division reversed.

In order to invoke *res ipsa* a plaintiff must establish the following: (1) the event does not ordinarily occur in the absence of negligence; (2) the injury was caused by an agent or instrumentality in the exclusive control of the defendant and (3) no act of negligence on the plaintiff's part contributed to the accident. The issue in this case involves the first requirement.

The defendant argued that in order to prove that the occurrence would not have taken place in the absence of negligence, the plaintiff must rely on an expert medical opinion, which, the defendant contended, is impermissible, as *res ipsa* must involve everyday experiences. If expert testimony is necessary to establish that something must have occurred through negligence, the matter is outside the everyday knowledge of the lay person, and therefore, *res ipsa* is inapplicable.

The Court of Appeals disagreed with the defendant and held that expert testimony may be used to help the jury “bridge the gap” between its own common knowledge, which does not include the specialized knowledge necessary to know if this is the type of incident that only occurs through negligence, and the common knowledge of physicians, which does.

The Court based its holding on the realities of the modern world. The majority noted that in our sophisticated and specialized society, there are many matters which are foreign to the general population, but are commonplace within a particular profession. The fact that knowledge is specialized does not alter the fact that it is pervasive among those with proper training.

The Court goes on to caution however, that the admissibility of expert testimony does not negate the jury’s role as factfinder. The expert testimony is permitted in order to educate the jury. The jury must determine whether the information provided by the expert supports the conclusion it is asked to accept. The Court also noted that a defendant is free to offer its own expert testimony that the injury complained of is an inherent risk in the procedure and not totally preventable with the exercise of reasonable care.

The States decision put New York in with the majority of jurisdictions, which allow expert testimony in such cases.

## **Leases Vehicles and VTL 388**

In the April, 2003 edition, we mentioned that among the current tort reform proposals pending in Albany is one which would eliminate vicarious liability under Vehicle and Traffic Law section 388 for car manufacturers that lease their vehicles. Under the proposal, the lessee would be considered the “owner” for purposes of section 388. We have noted from recent advertising that some car manufacturers are attempting to reach the same result through the use of a balloon payment at the end of the lease.

Our research has revealed that the use of a lease-end balloon payment has convinced at least one court that the car manufacturer, while still the title owner, should not be considered an owner under the VTL. Travelers Property and Casualty Company v. General Electric Capital Auto Lease, Inc., et.al, 2001 N.Y. LEXIS 1250 (Supreme Court, Suffolk County 2001) is a declaratory judgment action which arose out of an automobile accident which occurred on August 7, 1996 involving Joel Bernstein and Dawn Reiter. Ultimately, Ms. Reiter brought a personal injury action against Mr. Bernstein.

At the time of the accident, Mr. Bernstein was driving a 1993 Volvo leased from Volvo Car Finance Company (hereinafter VCF), a subsidiary of Volvo Finance North America, Inc. and General Electric Capital Auto Lease, Inc. In accordance with the lease provisions, Mr. Bernstein purchased liability insurance with Travelers. Travelers, being the primary carrier for the Bernstein vehicle, provided Mr. Bernstein with a defense in the personal injury action. Travelers then brought a declaratory judgment action against the vehicle lessor seeking to share the cost of defending Bernstein.

The main issue in the case was whether VCF was considered an “owner” within the meaning of the VTL. VTL sec. 388(1) provides:

Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with permission, expressed or implied, of such owner...

Under that section, a lessor can be found vicariously liable for the lessee's negligent acts.

Morris v. Snappy Car Rental, Inc., 614 N.Y.S.2d 362. The Travelers court also admitted that VCF had de jure legal title to the subject vehicle. Nevertheless, the court went on to find that VCF was not an "owner" within the meaning of the VTL. The court looked to VTL sec 128 which defined an "owner" as being :

A person, other than a lien holder, having the property in or title to a vehicle or vessel. The term includes a person entitled to use and possession of a vehicle or vessel subject to a security interest in another person and also includes any lessee or bailee of a motor vehicle or vessel having the exclusive use thereof, under the lease or otherwise, for a period of thirty days.

Bernstein, who signed a four year lease, is clearly an owner, so the issue became whether VCF, as the title owner, was an additional "owner" under the VTL. While a lessor may be considered an "owner" under the VTL, where the party has a security interest in any vehicle outside its possession, it is not deemed an owner pursuant to VTL section 388(3). The VTL defines a "security interest" as "an interest in a vehicle reserved or created by agreement and which secures payment or performance of an obligation."

In determining when a lease agreement is really a security interest, the court emphasized a number of factors, including balloon payments, acceleration clauses and options to buy. Ultimately, the court held that as a secured party, VCF was not an "owner" and should be exempt from any type of vicarious liability.

The Travelers decision, while of limited precedential value, is interesting because it

shows a court attempting to do what both car makers and the legislature have so far failed to do, eliminate vicarious liability for the owners of leased vehicles.

### **Tort Reform**

While on the subject of tort reform, we must note a significant development in this area. On June 27, 2003, the New York City Council passed legislation shifting legal responsibility for sidewalk accidents from the city to landowners. The law, which goes into effect 60 days after Mayor Bloomberg signs it, would only apply to buildings with four or more units. It would also still obligate the City to cover unreimbursed medical expenses of up to \$50,000 where the owners are so financially strapped that they could not pay a judgment.

The law will only apply to claims made after it becomes effective, so its full effect will not be felt for several years, however, it will ultimately mean a much greater exposure of insurance carriers who write general liability policies.

While the City Council successfully passed this measure, the New York State Legislature did not pass any of the tort reform proposals pending before adjourning.