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Michael M. Martin
Fordham University School of Law, dean_michael_m_martin@law.fordham.edu

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TORTS
Michael M. Martin*

I. INTRODUCTION

The principal torts decisions this *Survey* year, especially in the products liability area, seemed to leave as many questions unanswered as they resolved. The Court of Appeals held that a noncontracting user's claim for injuries from a defective product sounded in tort for limitations purposes,1 but the Court did not decide what limitation period would be applicable if a statutory breach of warranty claim were also asserted. The contributory negligence defense to a strict products liability claim was upheld by a reference to the appellate division's opinion in a second-collision case.2 The analytically suspect "sales"—"service" distinction was reaffirmed in an enigmatic opinion by the Court.3 And the "abnormally dangerous activity" formulation of the Restatement (Second) of Torts was cited favorably in an opinion which appeared to give no weight at all to the context in which the activity was being conducted.4 Elsewhere, the appellate divisions gave little encouragement to malpractice "countersuits";5 a well-publicized, but questionable, decision of the Second Circuit further extended first amendment protections to the media by barring pretrial discovery of "New York Times malice";6 and the United States Supreme Court may have opened the floodgates by withdrawing municipalities' immunity from section 1983 suits.7

* Professor of Law, Fordham University School of Law. The author gratefully acknowledges the research and editorial assistance of William Ruane, Fordham Law School Class of 1980.


5. See pp. 583-84 & notes 174-82 infra.


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II. STRICT LIABILITY

A. Defective Products

1. Theories of Recovery

The problem of the applicable theory or theories under which persons suffering injuries from defective products can recover has perennially bedevilled New York courts and lawyers. The early cases that allowed recovery without proof of negligence were premised on breach of warranty theories, which, as befits "contractual" liability, required privity between the injured plaintiff and the defendant. The expanded availability of strict liability in product cases was based upon relaxation of the privity concept in favor of noncontracting users and against noncontracting manufacturers.

Although similar developments in other states led to an explicit recognition that tort remedies were being provided, the New York courts continued to characterize the products claim made without allegations of negligence as a contractual cause of action for breach of warranty. It was only in Colding v. Paglia, when an action was brought by a complete stranger to the product's chain of privity, that the "warranty" characterization became too far removed from reality and the Court of Appeals recognized a claim for "strict products liability."

Martin v. Julius Dierck Equipment Co. is the latest case decided by the Court of Appeals in which the plaintiff attempted to exploit a difference between strict products liability and breach of warranty theories. A majority of the divided Court held that the plaintiff, who was not in privity with the defendants manufacturer and distributor, could not rely on New York's four-year statute of

14. Id. at 342, 298 N.E.2d at 628, 345 N.Y.S.2d at 469-70.
limitations for breach of warranty.14

The plaintiff in Martin, a resident of the District of Columbia, had been injured in Virginia on June 7, 1968, when a forklift truck he was operating malfunctioned and threw him to the ground. The truck had been sold on June 26, 1967, by the defendant manufacturer to the plaintiff's employer through the defendant distributor, whose principal place of business was in New York.17

The plaintiff commenced his actions against the two defendants on May 21 and June 25, 1971, alleging negligence and breach of warranty. The defendants moved for summary judgment, contending that under the New York "borrowing statute," CPLR 202,18 the New York courts must apply the two-year Virginia statute of limitations19 and that, because the action accrued in Virginia on May 6, 1969, the action was barred.20

The trial court held that the negligence cause of action accrued in Virginia and was therefore barred, but also concluded that the breach of warranty action accrued in New York, thus making the breach of warranty claim timely under New York's four-year statute of limitations for breach of warranty actions.21 The appellate division reversed and granted the defendants' motion for summary judgment, holding that the breach of warranty claim, as well as the negligence claim, accrued in Virginia, the forum with the greatest interest in the litigation.22

16. Id. at 588, 374 N.E.2d at 99, 403 N.Y.S.2d at 187.
17. Id. at 587, 374 N.E.2d at 98, 403 N.Y.S.2d at 186.
18. N.Y. CPLR 202 (McKinney 1972) provides:
   An action based upon a cause of action accruing without the state cannot be comm-
   enced after the expiration of the time limited by the laws of either the state or the
   place without the state where the cause of action accrued, except that where the
   cause of action accrued in favor of a resident of the state the time limited by the laws
   of the state shall apply.
   ever the theory of recovery, . . . shall be brought within two years next after the cause
   of action shall have accrued."
20. 43 N.Y.2d at 587, 374 N.E.2d at 98, 403 N.Y.S.2d at 186.
21. Id. at 587, 374 N.E.2d at 98-99, 403 N.Y.S.2d at 187; see N.Y. U.C.C. § 2-725
   (McKinney 1964). The trial court denied the defendants' motion for summary judgment
   in its entirety, on the ground that factual issues existed as to whether Virginia's statute of
   limitations was tolled by the plaintiff's unsuccessful efforts to obtain jurisdiction over the
   defendants in Virginia. 43 N.Y.2d at 587-88, 374 N.E.2d at 99, 403 N.Y.S.2d at 187. The
   appellate division found no question of fact on the jurisdictional issue, 52 A.D.2d 463, 468-
   69, 384 N.Y.S.2d 479, 483-84 (2d Dep't 1976), and the Court of Appeals affirmed, 43 N.Y.2d
   at 592, 374 N.E.2d at 101-02, 403 N.Y.S.2d at 190.
   (2d Dep't 1976), aff'd, 43 N.Y.2d 583, 374 N.E.2d 97, 403 N.Y.S.2d 185 (1978).
Judge Jasen, writing for the Court of Appeals, said at the outset that before CPLR 202 could be applied, it was necessary to characterize the plaintiff's cause of action to determine where it had accrued.23 While the plaintiff's second cause of action was denominated as a breach of warranty claim, the Court said that it was in reality a strict products liability action.24 Breach of warranty is a contractual remedy which seeks to provide the parties with the benefit of their bargain;25 strict products liability, on the other hand, seeks to make whole a party who has been injured by another person's violation of a duty imposed by law.26 An injured person not in privity with the seller, therefore, does not possess a breach of warranty action, but an action in negligence or strict products liability.27 As a result, the plaintiff's claim accrued in Virginia, where the injury occurred, and was barred by the Virginia statute of limitations.

The decision in Martin denying the breach of warranty theory is an appropriate culmination to the evolutionary process by which strict products liability has replaced breach of implied warranty in non-privity situations.28 In the development of products liability law it was at one time advantageous to speak in terms of breach of warranty because that theory allowed recovery without proof of fault, while the then-existing tort doctrine did not. However, breach of warranty, with its basis in contract,29 was stretched to the break-

23. 43 N.Y.2d at 589, 374 N.E.2d at 99, 403 N.Y.S.2d at 187.
27. 43 N.Y.2d at 589, 374 N.E.2d at 100, 403 N.Y.S.2d at 188.
ing point in cases such as Codling where claims were made by bystanders completely outside the chain of privity. Therefore, the Court not only adopted new terminology—strict products liability—but also gave explicit recognition to the development in tort doctrine which had been going on under the breach of warranty label.30 Bluntly stated, after Codling the breach of warranty theory had outlived its usefulness in claims for personal injuries for defective products; in Martin, the Court appropriately returned the theory to its place in contract law.

Despite statements in recent cases that either the breach of warranty or the strict products liability theory may be available, depending on the factual context,31 it is clear that for noncontracting users or bystanders the theories are identical in all respects save the statute of limitations. As defined by the courts, the breach of warranty theory affords the plaintiff no advantage—in the elements of the cause of action,32 the possible defendants,33 or the applicable defenses34—which he could not obtain by suing for strict products liability. The identity of the causes of action, and the unreasonableness of maintaining two separate statutes of limitations therefor, was recognized by Judge Scileppi in Mendel v. Pittsburgh Plate Glass Co.:35

We would merely add that both parties appear to agree, and we believe correctly, that strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action. If we were to adopt a three-year limitations period from the time of the injury, then we would create a situation where at least those plaintiffs not in privity covered by section 2-318 of the Uniform Commercial Code, would be entitled to pick and choose between the code’s four-year-from-the-time-of-the-sale, and our three-year-from-the-time-of-the-injury, limitations period, depending upon which, under the facts of a given case, would grant them the longest period of time to sue. Although it is true that a plaintiff may have two different theories of recovery involving the same wrong with different limitation periods (e.g., negligence and breach of warranty), it would be absurd to have two different periods of limitation applicable to the same cause of action, with the same elements of proof, complaining of the very same wrong.36

Unfortunately, the absurdity of which Judge Scileppi spoke may be an unavoidable consequence of the Legislature’s 1975 amendment of UCC section 2-318, which expanded the third-party beneficiaries of sales contract warranties from the buyer, his family, members of his household, and his guests to “any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty.”37 Since the injuries to the plaintiff in Martin occurred in 1969, the majority and the dissent agreed that he could not claim the benefit of a breach of warranty action based on the statute.38 However, the dissent believed that the Legislature, by its amendment of section 2-318, had ratified the trend in the cases toward

36. 25 N.Y.2d at 345, 253 N.E.2d at 210, 305 N.Y.S.2d at 494-95. It should be noted that Judge Scileppi was not speaking of a situation in which distinguishable theories of recovery are available for a single injury. In such a situation, the Court of Appeals has said, “the Legislature may, if it chooses, impose one period of limitation for a cause of action to recover damages for a personal injury arising from negligence and different periods of limitation for a cause of action for the same injury where liability may arise on other grounds . . . .” Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 299, 200 N.E. 824, 826 (1936). However, the decision this Survey year in Sears, Roebuck & Co. v. Enco Associates, 43 N.Y.2d 389, 394-95, 372 N.E.2d 555, 557, 401 N.Y.S.2d 767, 770 (1977), suggests that the nature of the remedy, not the theory of liability, will now determine the statute of limitations. See McLaughlin, New York Trial Practice, 179 N.Y.L.J., Mar. 10, 1978, at 1, col. 1.


38. See 43 N.Y.2d at 591, 374 N.E.2d at 101, 403 N.Y.S.2d at 189; id. at 595, 374 N.E.2d at 103, 403 N.Y.S.2d at 191 (Gabrielli, J., dissenting).
eliminating any privity requirement; therefore, "[i]t would seem rather incongruous at this late date for this court to act to reconstruct those very barriers which we have previously dismantled . . . and at a time when the Legislature has enunciated public policy and has so plainly indicated its approval of the direction of our earlier decisions." The majority, on the other hand, chose to postpone considering the effect of the amended statute, "except to note the likelihood of disagreement as to its effect should a case arise in which its applicability may properly be considered." The majority has few options in trying to limit the application of the statutory breach of warranty cause of action and thus avoid two statutes of limitations for essentially identical claims. The amendment to section 2-318 clearly makes unavailable, to causes of action accruing on or after September 1, 1975, the argument from Martin that breach of warranty requires privity of contract. Nor can the Court use the argument suggested by the decision this Survey year in Sears, Roebuck & Co. v. Enco Associates, that damages for personal injury do not constitute a contract remedy, and thus the tort statute of limitations must apply. UCC section 2-715(2)(b) explicitly states that "[c]onsequential damages resulting from a seller's breach include . . . injury to person or property proximately resulting from any breach of warranty."
The best approach to the dual-limitations problem, though one far from unassailable, seems to be that suggested by Judge Fuchsberg in his concurring opinion in Victorson v. Bock Laundry Machine Co.:\(^{46}\) the statute of limitations prescribed in UCC section 2-725\(^{47}\) is intended only to govern commercial transactions.\(^{48}\) As he noted:

[A] careful reading of section 2-725 of the code (or the comments to it), where the four-year-from-time-of-delivery limitation is set out, points up the complete absence of references to personal injury and third-party beneficiary actions. The inference is that the intent was to deal exclusively with commercial transactions. Expressed in the drafter's own statement of statutory purpose, the aim was: "To introduce a uniform statute of limitations for sales contracts, thus eliminating the jurisdictional variations and providing needed relief for concerns doing business on a nationwide scale whose contracts have heretofore been governed by several different periods of limitation depending upon the state in which the transaction occurred. This Article takes sales contracts out of the general laws limiting the time for commencing contractual actions and selects a four year period as the most appropriate to modern business practice. This is within the normal commercial record keeping period."\(^{49}\)

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47. N.Y. U.C.C. § 2-725 (McKinney 1964).
48. 37 N.Y.2d at 407-08, 335 N.E.2d at 281-82, 373 N.Y.S.2d at 47-48 (Fuchsberg, J., concurring). Judge Fuchsberg, who dissented in Martin, would probably contend that he was speaking in Victorson in the context of unamended U.C.C. section 2-318 and a plaintiff who would benefit by application of the tort limitation period. However, his Victorson opinion defined the problem he was addressing and explicitly stated the conclusion argued for here, in the following terms:

But a future choice between the Statute of Limitations provisions of the code and that of tort law will be unavoidable in cases of consumer plaintiffs who come within the compass of the code, though I take leave to venture the opinion that the choice of the tort rule for all persons injured in such cases would both appear to partake of the virtues of simplicity and equality of application, and to be the logical end-product of the legal evolution hereinafter discussed.

Id. at 405, 335 N.E.2d at 280, 373 N.Y.S.2d at 45. During this Survey year the Second Department rejected an argument that U.C.C. section 2-725 did not apply to a breach of warranty action for personal injuries from a defective drug on the ground, inter alia, that the other members of the Court in Victorson did not join in Judge Fuchsberg's concurring opinion. McCarthy v. Bristol Laboratories, 61 A.D.2d 196, 200-01, 401 N.Y.S.2d 509, 512-13 (2d Dep't 1978). Of course, the majority in Victorson could quite reasonably have decided not to join in an opinion which was concedesly addressing an issue not then before the Court.
49. 37 N.Y.2d at 407-08, 335 N.E.2d at 281-82, 373 N.Y.S.2d at 47-48 (Fuchsberg, J., concurring) (quoting N.Y. U.C.C. § 2-725, Official Comment (McKinney 1964)) (emphasis supplied).
Such an approach would permit a single statute of limitations in non-privity cases. In *Victorson* the Court justified its choice of the tort limitations period for strict products liability:

On principle, there having been no prior relationship between the parties in strict products liability cases, the cause of action if any there be, should accrue at the time the injury is sustained. To hold that it somehow came into being prior thereto would defy both logic and experience. . . .

Then over how long a period thereafter should the injured party be allowed to assert his claim? As in other instances in which periods of limitation must be fixed, the answer depends on a nice balancing of policy considerations. . . . We identify no material factors which suggest that the period of limitation should be different where it is sought to impose liability on the manufacturer on the theory of strict products liability rather than on the theory of negligence. Substantially similar considerations are equally cogent and persuasive.50

The only question remaining is what the Legislature was trying to do when it amended UCC section 2-318. If it was attempting to codify *Codling*,51 the result was not just unnecessary; it also missed the point of the Court's shift from "breach of warranty" to "strict products liability" terminology and, in so doing, suggested a distinction that the Court has not been willing to recognize. If it was attempting to give plaintiffs alternative statutes of limitations for products injuries, the intention was opaque and the result extremely difficult to justify. Unless the Legislature had some other, indiscernable purpose in mind, the better course would be to repeal the now-redundant Code provisions which give noncontracting consumers warranty remedies for personal injuries.

2. *Contributory Negligence Defense*

When the Court of Appeals recognized the cause of action for strict products liability in *Codling v. Paglia*,52 it also ruled that fault by the plaintiff—by virtue of his use of the product, in failing to discover the defect and perceive its danger, or in contributing to his injuries independently of the defect—was a defense to the cause of

50. *Id.* at 403-04, 335 N.E.2d at 278-79, 373 N.Y.S.2d at 43-44.

51. This is the most likely possibility ineratable from the bill jacket materials accompanying the amending statute, 1975 N.Y. Sess. Laws ch. 774. There was no Governor's memorandum or other legislative document accompanying the Act.

action.\textsuperscript{53} That position is more stringent than that which is taken elsewhere. For example, under the Restatement (Second) of Torts, a plaintiff's claim is not barred for failure to discover a defect or to guard against its existence, but only for voluntarily and unreasonably acting in the face of a known dangerous defect.\textsuperscript{54} Nevertheless, New York's strict position has been reaffirmed several times by the Court of Appeals.\textsuperscript{55} The most recent occasion on which the Court upheld the contributory negligence defense to strict products liability was during this Survey year in the interesting case of Cousins v. Instrument Flyers, Inc.\textsuperscript{56}

In Cousins the plaintiff was flying a rented airplane from New York to Ohio when it ran out of fuel and was forced to land in a field near Erie, Pennsylvania. During the landing, the plaintiff suffered injuries which were allegedly made serious because the plane lacked shoulder harnesses and was otherwise not "crashworthy."\textsuperscript{57} In an action brought against the lessor and the manufacturer of the plane, the defendants argued that the plaintiff's contributory negligence in allowing the plane to run out of fuel barred his strict products liability claim. A judgment for the defendants was affirmed by the appellate division on the grounds that New York law rather than Pennsylvania law applied and that, under New York law, a plaintiff's negligent failure to avert his injuries constitutes a defense to a strict products liability action.\textsuperscript{58} The Court of Appeals affirmed the judgment in a per curiam decision which discussed the conflicts issue and referred to the lower court's opinion regarding contributory negligence.\textsuperscript{59}

\textsuperscript{53} Id. at 342, 343-44, 298 N.E.2d at 628-29, 629, 345 N.Y.S.2d at 470, 470-71.
\textsuperscript{54} Restatement (Second) of Torts § 402A, Comment n (1965).
\textsuperscript{56} 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978) (per curiam), aff'd 58 A.D.2d 336, 396 N.Y.S.2d 655 (1st Dep't 1977).
\textsuperscript{57} 58 A.D.2d 336, 338-39, 396 N.Y.S.2d 655, 656 (1st Dep't 1977). The plaintiff had also alleged that the plane was defective because the instruction manuals did not accurately describe the plane's fuelUSAGE characteristics, as a result of which the plane ran out of fuel and was forced to crash land. See id. at 343, 396 N.Y.S.2d at 659-60 (Capozzoli, J., dissenting).
\textsuperscript{59} 44 N.Y.2d 698, 376 N.E.2d 914, 405 N.Y.S.2d 441 (1978) (per curiam).
What makes Cousins interesting was the attempted use of the distinction taken in many products liability cases between defects initially contributing to an accident and those tending only to aggravate injuries once an accident takes place. The plaintiff essentially argued that liability should be determined independently for the two stages of the accident. The argument was based in part on the decision in Spier v. Barker, in which the Court of Appeals held that a plaintiff who unreasonably failed to use a seat belt was not barred from recovery for injuries suffered in an accident caused by the defendant's negligence, but the plaintiff's damages would be reduced by the amount that the negligent failure to use the seat belt made her injuries more serious than they foreseeably would have been if she had exercised reasonable care by using the belt. The plaintiff in Cousins suggested that the Spier reasoning could be used when the parties were reversed. That is, the plaintiff should be responsible for the injuries attributable to him alone (i.e., the threshold injuries), but the defendant should be responsible for the injuries which would not have occurred but for the "crash-

60. If I were wearing my Conflicts hat I would say that Cousins is also interesting for its choice-of-law analyses. The appellate division essentially went through a "contacts-counting" exercise. See 58 A.D.2d at 337-38, 396 N.Y.S.2d at 656. Justice Capozzoli, by contrast, considered the significance of the various contacts with respect to the issue involved. See 58 A.D.2d at 341-43, 396 N.Y.S.2d at 659 (Capozzoli, J., dissenting). The Court of Appeals affirmed on some notion of estoppel:

Plaintiff chose to sue in New York, and the parties and the court proceeded, reasonably, in view of the many relevant factors, assuming that New York law would apply on the now disputed issue. Only after all the proof had been received and just before the jury was to be charged did plaintiff's highly experienced counsel suggest application of Pennsylvania law. Plaintiff had already chosen his strategy, based on New York law, and it was late to change it after the unfavorable testimony had unfolded. Hence, it was not error for the Trial Justice to apply New York law, not only the law of the forum, but the law applicable to significant events in this multi-State trip by air, in the absence of compelling reason to apply belatedly another law, whether on the doctrine of lex loci delicti or otherwise.

44 N.Y.2d at 700, 376 N.E.2d at 915, 405 N.Y.S.2d at 443. The Court gave no indication how anyone was prejudiced by this change of positions (which was, incidentally, accompanied by the defendants' shift from Pennsylvania to New York law as the law to be applied, 58 A.D.2d at 342, 396 N.Y.S.2d at 659 (Capozzoli, J., dissenting)). Moreover, as Justice Capozzoli noted, "[n]one of this, however, would excuse the court from the duty of applying the correct law since the request came prior to the charge to the jury." 58 A.D.2d at 342, 396 N.Y.S.2d at 659 (Capozzoli, J., dissenting).


63. Id. at 449-52, 323 N.E.2d at 167-69, 363 N.Y.S.2d at 920-22.

64. See 58 A.D.2d at 338-39, 396 N.Y.S.2d at 656-57.
worthiness' defect (i.e., the aggravated injuries). The argument thus implies a proximate cause analysis: the plaintiff is negligent because he has created an unreasonable risk of threshold injuries, not because he has created an unreasonable risk of aggravated injuries, since aggravated injuries resulting from defective design or manufacture are not reasonably foreseeable by him. Therefore, even if the plaintiff's negligent conduct gives rise to the circumstances in which the 'second collision' occurs (i.e., he is a 'but-for' cause of the aggravation injuries), he is cut off from responsibility (i.e., not a proximate cause) because of the unforeseeable intervention by the defendant manufacturer.\textsuperscript{65}

The appellate division rejected the plaintiff's argument on the ground that the \textit{Spier} reasoning applied only to the question of mitigation of damages, not to the question of liability.\textsuperscript{66} The court found that \textit{Spier} bore "no discernible relation" to any theory which would make inapplicable the condition for a strict products liability claim set out in \textit{Codling}, "that by the exercise of reasonable care the person injured or damaged would not otherwise have averted his injury or damages."\textsuperscript{67}

In \textit{Codling} the Court of Appeals adopted the contributory negligence defense to strict liability claims as if the justification were self-evident.\textsuperscript{68} However, further analysis suggests that, at least in some circumstances, such as in \textit{Cousins}, the defense is inconsistent with the rationales announced for the strict products liability theory\textsuperscript{69} and serves no purpose except to limit the manufacturer's liability.

The heart of the policy argument for the plaintiff in \textit{Cousins} is that there is no reason to relieve the defendant manufacturer of liability in this one situation, since the manufacturer would have been strictly liable for the plaintiff's aggravated injuries if the acci-

\textsuperscript{65} See Furukawa v. Yoshi Ogawa, 236 F.2d 272 (9th Cir. 1956); Twerski, \textit{The Use and Abuse of Comparative Negligence in Products Liability}, 10 \textit{Ind. L. Rev.} 797, 810 (1977).


\textsuperscript{67} 58 A.D.2d at 339, 396 N.Y.S.2d at 657 (quoting Codling v. Paglia, 32 N.Y.2d 330, 342, 298 N.E.2d 622, 628-29, 345 N.Y.S.2d 461, 470 (1973)).


\textsuperscript{69} The rationales suggested in \textit{Codling} include: induced consumer reliance by attractive packaging and mass advertising; impracticability of consumers discovering defects; spreading of costs through mass production and marketing systems; and pressures imposed on manufacturers to improve safety. \textit{Id.} at 340-41, 298 N.E.2d at 627-28, 345 N.Y.S.2d at 468-69.
dent had resulted from the non-faulty conduct of the plaintiff, faulty or non-faulty conduct by anyone else, or an Act of God.\textsuperscript{70} Permitting the use of the defense in these circumstances has no deterrent effect. The plaintiff is already deterred, to the extent he can be, from getting into the accident by the contributory negligence defense applicable to his threshold injuries.\textsuperscript{71} Application of the defense cannot further induce him either to use the product only for its intended purposes,\textsuperscript{72} which he was already doing, or to discover the defect,\textsuperscript{73} which is by definition undiscoverable in the exercise of reasonable care. Furthermore, it is not efficient to put the cost burden of the aggravated injuries on the plaintiff. The defendant cannot reasonably foresee the defects for which he is suing, but the defendant can reasonably foresee that the defects will cause aggravated injuries in accidents resulting from both negligent and non-negligent conduct. Since the manufacturer is thus in a superior position to avoid the risk, he should bear the costs of the harm.\textsuperscript{74}

In a sense, as Professor Twerski has argued,\textsuperscript{75} cases such as Cousins involve a "last clear chance" situation. After the moment of the initial collision the plaintiff is helpless, unable to protect himself against the crashworthiness defect in the product that will aggravate his injuries. The defendant manufacturer, on the other hand, knows or has reason to know of the plaintiff's peril, in the sense that the crashworthiness defect is one which a reasonable person in the position of the manufacturer would know creates an unreasonable risk of injury to a person involved in an accident (however caused) and unable to help himself. Thus, since the manufacturer has the last clear chance to avoid the peril of aggravated second-collision injuries, the plaintiff's contributory negligence in getting himself into this helpless position should not bar his recovery.

The New York comparative negligence statute\textsuperscript{76} was not applic-

\textsuperscript{70} See Bolm v. Triumph Corp., 33 N.Y.2d 151, 159, 305 N.E.2d 769, 773, 350 N.Y.S.2d 644, 650-51 (1973); Twerski, supra note 65, at 809.

\textsuperscript{71} See Twerski, supra note 65, at 810.


\textsuperscript{73} See id.

\textsuperscript{74} See Twerski, supra note 65, at 800-02.

\textsuperscript{75} Id. at 809 & n.38.

\textsuperscript{76} N.Y. CPLR 1411-1413 (McKinney 1976). N.Y. CPLR 1411 provides:

In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent,
able in *Cousins*, since the accident occurred before September 1, 1975. Even if the cause of action had accrued after that date, however, the analysis suggested here would lead to the conclusion that the plaintiff's alleged negligence in running out of fuel should not have diminished his recovery for the aggravated injuries caused by the crashworthiness defect. Under the statute, "culpable conduct" goes to diminish the recovery when it "cause[s] the damages"; here, the plaintiff's conduct is not a proximate cause of the aggravated injuries. Moreover, the policy of encouraging care on the part of the manufacturer by holding him liable for crashworthiness defects will be impaired if his liability is diminished by the foreseeable negligence of the plaintiff, but reduced recovery will induce no increased care on the plaintiff's part. Thus, the effect of the comparative negligence statute in a case like *Cousins* should only be that the plaintiff will bear the cost of the threshold injuries attributable to his negligence in causing the occurrence, while the manufacturer will bear the cost of the aggravated injuries attributable to the crashworthiness defect.

3. Retail Vendors as Defendants

Three cases decided during this Survey year involved claims against retail vendors of allegedly defective products. The different results appear to reflect differences in both the nature of the prod-

including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.


81. N.Y. CPLR 1411 (McKinney 1976) calls for determining "the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages." That suggests that relative amounts of fault are to be compared; the analysis in the text suggests a weighing of relative causal contributions. In the situation discussed, it seems questionable whether there would be any practical difference, especially when the jury is told to "determine the percentage of the total negligence which can be attributed to the negligence" of the claimant. See 1 Pattern Jury Instructions, *supra* note 78, at 28. See generally Twerski, *supra* note 65, at 819-29.
ucts and the functions performed by the respective retailers.

In *Mead v. Warner Pruyn Division, Finch Pruyn Sales, Inc.*, the plaintiff's decedents had died in a fire that was allegedly caused by defects in a refrigerator sold to the previous owners of their residence by the defendant retailer. The retailer's motion to dismiss the claims based on strict products liability and warranty was denied, and that decision was affirmed by the Third Department.

The defendant in *Mead* had argued that the cause of action for strict products liability that was recognized in *Codling v. Paglia* applied only against the manufacturer of a defective product, not against the retailer who has no control over hidden or latent defects. In rejecting that argument, the appellate division focused on the retailer's position as an "'integral part of the overall producing and marketing enterprise . . . .'" The retailer is able to exert pressure on the manufacturer to improve product safety; he has induced reliance in the quality of the goods he sells; and he serves as an accessible defendant ensuring that the costs of defective goods will not be left on injured consumers but will be imposed on the enterprise distributing goods to the public. These considerations are equally applicable whether the theory of the claim is breach of warranty, for which the Court of Appeals in *Greenberg v. Lorenz* has already allowed recovery against a retailer, or strict products liability, since "'[t]he conclusion is inescapable that 'strict products liability and liability to a remote user based on implied warranty are one and the same cause of action.'"

Implicit in the court's reasoning was the assumption that losses imposed on the retailer can be further shifted to the manufacturer or other party in the distribution chain responsible for the defect. The court noted that a retailer can pass on the costs under the

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82. 57 A.D.2d 340, 394 N.Y.S.2d 483 (3d Dep't 1977).
84. 57 A.D.2d 340, 394 N.Y.S.2d 483 (3d Dep't 1977).
86. 87 Misc. 2d at 784, 386 N.Y.S.2d at 343.
87. 57 A.D.2d at 341, 394 N.Y.S.2d at 484 (quoting Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262, 391 P.2d 168, 171, 37 Cal. Rptr. 896, 899 (1964)).
88. *Id.* at 341-42, 394 N.Y.S.2d at 484; *see* Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 262-63, 391 P.2d 168, 171-72, 37 Cal. Rptr. 896, 899 (1964); *Restatement (Second) of Torts § 402A, Comment c* (1965).
90. 57 A.D.2d at 343-44, 394 N.Y.S.2d at 485 (quoting Dickey v. Lockport Prestress, Inc., 52 A.D.2d 1075, 1076, 384 N.Y.S.2d 609, 610 (4th Dep't 1976)).
theories of contribution between joint tortfeasors, contractual indemnity, and indemnity based on strict products liability.\(^\text{91}\) The court might also have mentioned that a commercial relation such as that between retailer and distributor or manufacturer may give rise to express or implied warranties on which rights over could be based.\(^\text{92}\)

The Third Department, in *Osborn v. Kelley*,\(^\text{93}\) subsequently distinguished *Mead* in an action in which the allegedly defective product was a drug and the defendants were doctors who prescribed it. The plaintiffs' breach of warranty claims were dismissed on the authority of *Perlmutter v. Beth David Hospital*,\(^\text{94}\) which held that no express or implied warranties arise when the product is furnished as an incidental part of services rendered by the defendant,\(^\text{95}\) since there is no "sale" within the meaning of the Uniform Commercial Code.\(^\text{96}\) The plaintiffs' attempt to assert a strict products liability claim fared no better. The court acknowledged that in *Mead* it had recently imposed liability on retailers under this theory, but reasoned in *Osborn* that physicians "are in a unique position."\(^\text{97}\)

Relying again on *Perlmutter*, the court noted:

"The art of healing frequently calls for a balancing of risks and dangers to a patient. Consequently, if injury results from the course adopted, where no negligence or fault is present, liability should not


\(^{93}\) 61 A.D.2d 367, 402 N.Y.S.2d 463 (3d Dep't 1978).

\(^{94}\) 308 N.Y. 100, 123 N.E.2d 792 (1954).

\(^{95}\) Id. at 104-07, 123 N.E.2d at 793-96.

\(^{96}\) 61 A.D.2d at 369, 402 N.Y.S.2d at 464; see N.Y. U.C.C. §§ 2-313, 2-314 (McKinney 1964).

\(^{97}\) 61 A.D.2d at 369, 402 N.Y.S.2d at 464.
be imposed upon the institution or agency actually seeking to save
or otherwise assist the patient."\textsuperscript{98}

The same result was reached by the First Department in
\textit{Bichler v. Willing},\textsuperscript{99} an action against a pharmacist who had dis-
persed diethylstilbestrol (DES) to the plaintiff’s mother. Although
the druggist was the retail vendor of the allegedly defective product,
the court dismissed claims based on breach of implied warranty and
strict products liability. The former theory was rejected because the
buyer had not relied on the skill and judgment of the seller-druggist
to provide a product inherently fit for its intended purpose, but
rather had placed that confidence in the doctor who prescribed the
drug.\textsuperscript{100}

In dismissing the claim based on a strict products liability
theory, the court apparently read Comment \textit{k} to section 402A of the
Restatement (Second) of Torts as imposing strict liability for drugs
only when they are improperly prepared or insufficient warning is
given of recognized risks.\textsuperscript{101} Since the retail druggist had no practical

\textsuperscript{98} Id. (quoting Perlmutter v. Beth David Hosp., 308 N.Y. 100, 107, 123 N.E.2d 792, 795
(1954)).

\textsuperscript{99} 58 A.D.2d 331, 397 N.Y.S.2d 57 (1st Dep't 1977).

\textsuperscript{100} Id. at 333-34, 397 N.Y.S.2d at 58-59; see N.Y. U.C.C. § 2-315 (McKinney 1964). In
McCarthy v. Bristol Laboratories, 61 A.D.2d 196, 401 N.Y.S.2d 509 (2d Dep't 1978), the court
held that the four-year U.C.C. limitations period applied to a breach of warranty claim for
personal injuries allegedly caused by a defective drug given to the plaintiff in a hospital. Id.
at 199-200, 401 N.Y.S.2d at 511-12; see N.Y. U.C.C. § 2-725 (McKinney 1964). Since the
appeal arose on the denial of the defendants' summary judgment motion, the court did not
reach the question "whether medication given to a patient in a hospital (for which the patient
pays) is 'sold' to the patient or is an aspect of the 'service' rendered to the patient." 61 A.D.2d
at 200, 401 N.Y.S.2d at 512. \textit{See also} pp. 573-76 & notes 108-28 infra.

\textsuperscript{101} See 58 A.D.2d at 334-35, 397 N.Y.S.2d at 59. \textit{Restatement (Second) of Torts} §
402A, Comment k (1965) provides:

There are some products which, in the present state of human knowledge, are quite
incapable of being made safe for their intended and ordinary use. These are especially
common in the field of drugs. An outstanding example is the vaccine for the Pasteur
treatment of rabies . . . . Such a product, properly prepared, and accompanied by
proper directions and warning, is not defective, nor is it \textit{unreasonably} dangerous. The
same is true of many other drugs, vaccines, and the like, many of which for this very
reason cannot legally be sold except to physicians, or under the prescription of a
physician. It is also true in particular of many new or experimental drugs as to which,
because of lack of time and opportunity for sufficient medical experience, there can
be no assurance of safety, or perhaps even of purity of ingredients, but such experi-
ence as there is justifies the marketing and use of the drug notwithstanding a medi-
cally recognizable risk. The seller of such products, again with the qualification that
they are properly prepared and marketed, and proper warning is given, where the
situation calls for it, is not to be held to strict liability for unfortunate consequences
attending their use, merely because he has undertaken to supply the public with an
opportunity independently to test the drugs, the court imposed no duty on him to do so.\textsuperscript{102} The court dismissed the strict products liability claim because the record in the case was "unclear whether or not at the time of the sale there was any recognized risk which called for a warning."\textsuperscript{103}

The decision in \textit{Bichler} can be questioned on three counts. First, as the dissenting justice noted, a motion for summary judgment is not usually an appropriate time to determine whether the defendant knew or should have known of the risks of the drug which would have given rise to a duty to warn of them.\textsuperscript{104} Second, the court's reliance on Comment \textit{k} may have been misplaced, since that provision deals with "unavoidably unsafe products," which are "apparently useful and desirable . . . , attended with a known but apparently reasonable risk."\textsuperscript{105} It is true that many drugs have those characteristics, but in \textit{Bichler} there was no showing that DES fit within this category. Finally, the court assumed, without deciding, that a retailer cannot be held liable for selling an insufficiently labeled product unless he has or should have knowledge of the insufficiency of the warning.\textsuperscript{106} The court recognized that "many of the

\textsuperscript{102} 58 A.D.2d at 335, 397 N.Y.S.2d at 59-60.

\textsuperscript{103} \textit{Id.}

\textsuperscript{104} \textit{Id.} at 335, 397 N.Y.S.2d at 60 (Yesawich, J., dissenting in part).

\textsuperscript{105} The Comment includes within the definition of "unavoidably unsafe products" many new or experimental drugs as to which, because of lack of time and opportunity for sufficient medical experience, there can be no assurance of safety, or perhaps even of purity of ingredients, but such experience as there is justifies the marketing and use of the drug notwithstanding a medically recognizable risk.

\textsuperscript{106} See 58 A.D.2d at 335, 397 N.Y.S.2d at 59. The court relied on \textit{Restatement (Second) of Torts} § 402A, Comment \textit{k} (1965). If the "medically recognizable risk" of such new drugs includes the risk of unforeseen side effects, then a drug dispensed without warning of that possibility would seem not to qualify for the immunity from strict liability which is provided by the Comment.

\textsuperscript{107} \textit{Id.} The court also quoted from \textit{Codling} v. \textit{Paglia}, 32 N.Y.2d 330, 340-41, 298 N.E.2d 622, 627, 345 N.Y.S.2d 461, 468 (1973), where the Court of Appeals had emphasized that nowadays it is the manufacturer alone who has a practical opportunity to discover or avoid defects. In \textit{Codling}, however, that observation was used to justify extending strict liability without privity to manufacturers, not to suggest that retail vendors should not be held strictly liable for the products they sold. \textit{See id.}
very same social and economic reasons which prompted applying [the strict products liability] doctrine to manufacturers and suppliers militate, with equal force, in favor of applying it to retailers.”\textsuperscript{107} It would have been helpful, therefore, if the court had explained what distinguished the pharmacist at the end of the drug-distribution chain in \textit{Bichler} from the appliance dealer at the end of the refrigerator-distribution chain in \textit{Mead}.

4. \textit{Services Distinguished from Products}

Several attempts to use products liability theories in order to recover, without showing fault, against persons providing services were held unsuccessful during this \textit{Survey} year.\textsuperscript{108} In \textit{Milau Associates v. North Avenue Development Corp.},\textsuperscript{109} commercial tenants of a warehouse suffered substantial water damage when an underground section of the building's sprinkler system burst. They sued the general contractor that built the warehouse and the subcontractor that designed and installed the sprinkler system on theories of negligence and breach of implied warranty of fitness for a particular purpose. Evidence was presented that the subcontractor’s tools weakened the pipe, which had been supplied according to the contract specifications and which had been installed by the subcontractor.\textsuperscript{110} The trial judge denied the plaintiffs’ request to charge that this weakening constituted a breach of the warranty that the pipe was fit for its intended purpose.\textsuperscript{111} The jury found for the defendants on the question of negligence.\textsuperscript{112} The appellate division affirmed, finding no evidence in the record of a breach of warranty.\textsuperscript{113}

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\textsuperscript{107} 58 A.D.2d at 334, 397 N.Y.S.2d at 59.
\textsuperscript{108} In addition to \textit{Milau Associates v. North Avenue Development Corp.}, 42 N.Y.2d 482, 388 N.E.2d 1247, 398 N.Y.S.2d 882 (1977), there were two other cases worthy of note in which architects were the defendants. Sears, Roebuck & Co. v. Enco Associates, 43 N.Y.2d 389, 372 N.E.2d 555, 401 N.Y.S.2d 767 (1977), involved, \textit{inter alia}, a claim for breach of implied warranty of fitness after an improperly designed snow-melting system caused cracks in a concrete parking ramp. The Court noted its agreement with the determinations below “that no action lies for breach of implied warranty, or what is now known as strict product liability, on behalf of an owner against the architect with whom he has his contract.” \textit{Id.} at 398, 372 N.E.2d at 559, 401 N.Y.S.2d at 772. Likewise, in Queensbury Union Free School District v. Jim Walter Corp., 91 Misc. 2d 804, 398 N.Y.S.2d 832 (Sup. Ct., Warren Co. 1977), the court dismissed strict product liability and breach of warranty claims against the architect of a leaking roof.
\textsuperscript{110} \textit{Id.} at 484, 388 N.E.2d at 1248-49, 398 N.Y.S.2d at 883.
\textsuperscript{111} \textit{Id.} at 485, 388 N.E.2d at 1249, 398 N.Y.S.2d at 883.
\textsuperscript{112} \textit{Id.} at 484-85, 388 N.E.2d at 1248-49, 398 N.Y.S.2d at 883.
\textsuperscript{113} \textit{Milau Assocs. v. North Ave. Dev. Corp.}, 56 A.D.2d 587, 588, 391 N.Y.S.2d 628, 629-
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The Court of Appeals affirmed, but took care to disassociate itself from the appellate division's suggestion that "in a proper case, the implied warranty provisions of the Uniform Commercial Code might apply to the "sale of goods" aspect of a hybrid sales-service contract ...." The Court reaffirmed its holding in *Perlmutter v. Beth David Hospital* that when the service aspect of a contract predominates, liability without fault will not be imported from the law of sales. As a matter of policy, it is unreasonable to expect experts, hired to render services utilizing their special skills, to produce infallible results. Therefore, "unless the parties have contractually bound themselves to a higher standard of performance" or to the accomplishment of a particular result, "reasonable care and competence owed generally by practitioners in the particular trade or profession defines the limits of an injured party's justifiable demands ...."

The Court's reasoning is unassailable, in that one cannot reasonably expect infallible performance of services. However, that does not satisfactorily explain why one cannot reasonably expect nondefective products to be provided incidentally to those services, if such an expectation would be reasonable were the same goods purchased alone. Regardless of whether the defendant is characterized as a vendor of goods or a provider of services, when goods are furnished, he is the final step in a manufacturing and marketing chain which nowadays induces consumers' reliance and is able to spread the costs of the defective products it produces.

Nevertheless, the results in both *Perlmutter* and *Milau* may have been justifiable on their particular facts. *Perlmutter* was a suit against a charitable hospital for providing hepatitis-contaminated blood. The Court may well have been reluctant to impose strict liability principles, which had developed in the commercial context,

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114. 42 N.Y.2d at 485, 368 N.E.2d at 1249, 398 N.Y.S.2d at 884 (quoting 56 A.D.2d at 587-88, 391 N.Y.S.2d at 629 (citations omitted)).
115. 308 N.Y. 100, 104, 123 N.E.2d 792, 794 (1954).
116. 42 N.Y.2d at 485-86, 368 N.E.2d at 1249, 398 N.Y.S.2d at 884.
117. *Id.* at 486, 368 N.E.2d at 1250, 398 N.Y.S.2d at 885 (citation omitted).
118. *See id.* at 486, 368 N.E.2d at 1250, 398 N.Y.S.2d at 884.
against a noncommercial entity which, at that time, enjoyed some charitable immunity from even negligence liability.\footnote{121} Furthermore, in the “marketing” of human blood there is no advertising that induces consumer reliance; by contrast, manufacturers of products such as drugs and surgical supplies conduct substantial public relations campaigns extolling their virtues. Finally, human blood may be distinguishable from other products in that the defect (hepatitis) is neither man-made nor reasonably discoverable, so that there is not the inequality between supplier and consumer regarding access to knowledge of the defect that has been a major factor in imposing strict liability.\footnote{122}

In Milau the operative factors were somewhat different, but they too suggest that imposition of strict liability would have been inappropriate. First, the defect was not associated with the marketing chain for the pipe, but rather was alleged by the plaintiffs to have been caused by the defendants’ installation of the system.\footnote{123} Thus, the case seems much closer to the traditional negligence paradigm of a close relationship between producer and consumer, with equivalent opportunities to discover defects, than to the modern strict liability paradigm of mass production and distribution, where advertising induces reliance and defects are difficult to discover because of the complexity and packaging of the products.\footnote{124} Second, and of greater importance to the Court, there were contracts which spelled out the defendants’ obligations.\footnote{125} In such a situation, involving an arm’s-length commercial relationship, there is little need to provide the warranties implied in law to protect consumers;\footnote{126} nor

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\footnote{123} See 42 N.Y.2d at 484, 368 N.E.2d at 1248-49, 398 N.Y.S.2d at 883.


\footnote{125} See 42 N.Y.2d at 487-88, 368 N.E.2d at 1250, 398 N.Y.S.2d at 885. The Milau opinion is not entirely clear whether any contractual relation existed between the plaintiffs and the defendants. Explicit mention is made of the subcontract between the defendants and the agreement between the contractor and the owner, but the only suggestion of the plaintiffs’ participation in those agreements is a reference to “a subcontract in which [subcontractor] Higgins undertook to design and put together a sprinkler system tailored to the needs of the commercial tenants . . . .” Id. at 487, 368 N.E.2d at 1250, 398 N.Y.S.2d at 885.

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were the plaintiffs able to establish that the contracts implied in fact a warranty that defect-free products would be provided.\textsuperscript{127} Thus, the Court's decision properly turned on how the parties had allocated the risks.

Even if the results in \textit{Perlmutter} and \textit{Milau} are justifiable, the opinions pose a problem in their emphasis on the "sales"—"service" distinction. Lower courts may be led thereby to focus on characterizing the transactions before them. Instead, these courts should be analyzing—in light of factors such as induced consumer reliance, relative access to knowledge of defects, and contractual allocation of risks—whether the costs of defective products should be placed on the consumer or the supplier.\textsuperscript{128}

\textbf{B. Abnormally Dangerous Activities}

In a case reminiscent of the classic \textit{Rylands v. Fletcher},\textsuperscript{129} the Court of Appeals was faced with the question whether strict liability

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\textsuperscript{127} 42 N.Y.2d at 487-88, 368 N.E.2d at 1250, 398 N.Y.S.2d at 885-86.
\textsuperscript{128} See Franklin, supra note 121, at 460-61. See generally Farnsworth, \textit{Implied Warranties of Quality in Non-Sales Cases}, 57 COLUM. L. REV. 653 (1957); \textit{Continuing the Common Law Response}, supra note 126, at 401. The Court's discussion in \textit{Milau} of "strict tort liability" is enigmatic. First, the Court suggested that the plaintiffs might not be parties to, or third-party beneficiaries of, the installation contracts (which the Court had earlier said defined the defendants' duty of care): "To be sure, particularly in cases involving personal injury, the absence of an enforceable contractual relationship for the technical sale of goods will not necessarily result in the foreclosure of all remedies . . . ." 42 N.Y.2d at 488, 368 N.E.2d at 1251, 398 N.Y.S.2d at 886. Then, the Court rejected the application of the tort theory in the case, but it is not at all clear whether the Court did so because the policies favoring the imposition of this theory were not present, see id. at 488-89, 368 N.E.2d at 1251-52, 398 N.Y.S.2d at 886-87; because "the language and policies of the tort-based cases 'should not be understood as in any way referring to the liability of a manufacturer [or tradesman] under familiar but different doctrines of the law of contracts . . . .'" id. at 489, 368 N.E.2d at 1251, 398 N.Y.S.2d at 886 (quoting Victorson v. Bock Laundry Mach. Co., 37 N.Y.2d 395, 400, 335 N.E.2d 275, 277, 373 N.Y.S.2d 39, 41 (1975)); or because the plaintiffs "had at no time in the course of litigation sought to invoke these [tort] doctrines to redress their no less real but somehow less impelling economic loss." \textit{Id.} at 489, 368 N.E.2d at 1251, 398 N.Y.S.2d at 886. Disposition on the last-stated ground would cause one to wonder (1) why water damage to stored merchandise was called "economic loss" (which usually refers either to lost profits or the cost of repairing the defective product) rather than "property damage," and (2) just what the difference is between strict tort liability and breach of implied warranty that makes it so important for a plaintiff not in privity to attach the right label to his claim.

\textsuperscript{129} L.R. 3 E. & I. App. 330 (1868), \textit{aff'd} L.R. 1 Ex. 285 (1866). The \textit{Rylands} doctrine was expressly rejected by the New York Commission of Appeals in a case involving an explosion of a steam boiler. Losee v. Buchanan, 51 N.Y. 476, 485-87 (1873). However, as Dean Prosser noted, "the law of . . . [Rylands] was misstated, and as misstated rejected, on facts to which it had no proper application in the first place." \textit{W. Prosser}, supra note 29, § 78, at 508-09.
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was appropriately imposed when waters percolating from a hydraulic landfill operation undermined bulkheads supporting the property of neighboring landowners. The Court adopted the "abnormally dangerous activity" standard of the Restatement (Second) of Torts, but remanded the case for a factual determination whether the criteria established by section 520 of the Restatement for the imposition of strict liability had been satisfied.

_Doundoulakis v. Town of Hempstead_ had its genesis in a project to develop a public park on the defendant town's property. In order to construct the park it was necessary to fill in marshland, which was done by pumping a mixture of sand and water two miles through a pipe and depositing it on the park site. A dike-and-weir system had been constructed to channel and regulate the outflow of water as the sand settled, but seepage from the site passed onto plaintiffs' lands and caused their eventual subsidence.

Since the plaintiffs sued the town, its contractor, and the design engineer of the project on a theory of negligence, most of the trial court evidence pertained to issues of due care and causation. However, the trial court dismissed the negligence claims and instead submitted the case to the jury on the theory that the defendants' activity was of such a nature that they would be "'responsible for any damage proximately caused by this landfill operation, with or without negligence or fault on their part.'" The jury returned verdicts in favor of all three plaintiffs against all the defendants, but the trial court set aside the verdicts against the engineer and the contractor on the ground that absolute liability applied only against the offending landowner. The appellate division modified the judgment by reinstating all the plaintiffs' verdicts.

The Court of Appeals held that a new trial was necessary on the ground that the record was insufficient to establish that the defendants' activities were abnormally dangerous, since the trial proceed-

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131. _Restatement (Second) of Torts_ §§ 519-520 (1977).
134. _Id._ at 307-08, 381 N.Y.S.2d at 290. In addition, the trial court set aside all verdicts in favor of one plaintiff for failure to notify the town of his claim for damages within the prescribed statutory period. _Id._; see _N.Y. GEN. MUN. LAW_ § 50-e (McKinney 1977).
135. 51 A.D.2d at 320, 381 N.Y.S.2d at 295-96.
ings were directed almost exclusively to the negligence charge. The Court said that the plaintiffs were entitled to have their negligence claims submitted to a jury, and that they were also entitled to introduce, if they could, sufficient evidence to make a case for strict liability. Factors to be weighed in determining if an activity is abnormally dangerous include those set out in section 520 of the Restatement (Second) of Torts: a high degree of risk with the potential for serious damage; an inability to eliminate the risk through the use of reasonable care; and the extent to which the activity is not one of common usage or appropriate to the place where it is being carried on. There was nothing in the record to substantiate such factors, the Court said, although strict liability might be appropriate under the facts of this case. The Court also noted that if strict liability were appropriate, it could be imposed against the contractor and the engineer, as well as against the adjacent landowner (the town). The defendants would be able to cross claim against each other.

The decision in Doundoulakis hardly breaks new ground, since numerous New York decisions dating back to 1866 have imposed liability without fault when defendants’ activities have caused damage to neighboring landowners by subterranean water flows. Strict

137. Id. at 450-51, 368 N.E.2d at 28-29, 398 N.Y.S.2d at 405-06.
138. Id. at 448, 368 N.E.2d at 27, 398 N.Y.S.2d at 404. RESTATEMENT (SECOND) OF TORTS § 520 (1977) provides:
In determining whether an activity is abnormally dangerous, the following factors are to be considered:
(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.
139. 42 N.Y.2d at 448-51, 368 N.E.2d at 27-29, 398 N.Y.S.2d at 404-06.
140. Id. at 451, 368 N.E.2d at 29, 398 N.Y.S.2d at 406. The Court dismissed the complaint of the third owner against the town for failure to give notice within the statutory 90-day period. In the Court's view, a letter to the town two years before the cause of action accrued, threatening to hold the town liable for any future damage, could not suffice for the required notice. Id. at 452, 368 N.E.2d at 29-30, 398 N.Y.S.2d at 406-07.
liability in those cases was imposed on a theory of trespass\textsuperscript{143} or as an outgrowth of the principle \textit{sic utere tuo ut alienum non laedas}.\textsuperscript{144} The significance of the present decision lies in the Court's apparent adoption of the Restatement's "abnormally dangerous activity" formulation of strict liability. The real question is how easy it will be for the courts to weigh the factors listed in section 520.

The opinion of the Court of Appeals specified that the six criteria listed in section 520 of the Restatement are "[p]articularly useful."\textsuperscript{145} It then went on to point out the deficiencies in the record below:

There is little if any information, for example, of the degree to which hydraulic landfilling poses a risk of damage to neighboring properties. Nor is there data on the gravity of any such danger, or the extent to which the danger can be eliminated by reasonable care. Basic to the inquiry, but not to be found in the record, are the availability and relative cost, economic and otherwise, of alternative methods of landfilling. There are other Restatement factors, and perhaps still others, which the parties may develop as relevant, about which there is little or nothing in the record.\textsuperscript{146}

Noting that "the case strongly suggests that strict liability treatment may be appropriate,"\textsuperscript{147} the Court quoted from the opinion of the appellate division:

"From . . . review of the authorities there emerges a dominant theme, viz., that strict liability will be imposed upon those who engage in an activity which poses a great danger of invasion of the land of others. . . . Often underlying these invasion-causing activities is a deliberate interference, distortion, wrenching or manipula-


\textsuperscript{144} \textit{E.g.}, Odell v. Nyack Waterworks Co., 98 N.Y. Sup. Ct. 283, 286, 36 N.Y.S. 206, 207 (2d Dep't 1895) ("the principle of law which require[s] persons so to use their property as not necessarily to injure their neighbor"); see Pixley v. Clark, 35 N.Y. 520, 521 (1866).

\textsuperscript{145} 42 N.Y.2d at 448, 368 N.E.2d at 27, 398 N.Y.S.2d at 404.

\textsuperscript{146} \textit{Id.} at 448-49, 368 N.E.2d at 27, 398 N.Y.S.2d at 404.

\textsuperscript{147} \textit{Id.} at 449, 368 N.E.2d at 27, 398 N.Y.S.2d at 404.
tion of natural forces, resources or equilibrium, frequently on a mas-

sive scale."\textsuperscript{148}

In neither of the quoted excerpts, nor in the rest of the opinion, is there any specific mention of the three Restatement criteria which the drafters considered essential to the imposition of strict liability for "abnormally dangerous activities":

(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is car-
ried on; and
(f) extent to which its value to the community is outweighed by its dangerous attributes.\textsuperscript{149}

As Comment \( h \) to section 520 notes:

A combination of the factors stated in Clauses (a), (b), and (c), or sometimes any one of them alone, is commonly expressed by saying that the activity is "ultrahazardous," or "extra-hazardous." Liability for abnormally dangerous activities is not, however, a mat-
ter of these three factors alone, and those stated in Clauses (d), (e), and (f) must still be taken into account.\textsuperscript{150}

It is unfortunate that the Court's opinion conveys the possibly mis-
leading impression that strict liability may be imposed on an activ-
ity without considering the context in which it is being conducted.

III. INTENTIONAL TORTS AND THE MALPRACTICE COUNTERSUIT

Among the techniques which have been suggested to forestall the increase in medical malpractice litigation is the threat of coun-
tersuits charging patients and their lawyers with tortiously bringing or conducting unjustified litigation.\textsuperscript{151} Several cases decided during this \textit{Survey} year bear on the "countersuit" technique;\textsuperscript{152} they sug-

\textsuperscript{148} \textit{Id.} at 449, 368 N.E.2d at 27-28, 398 N.Y.S.2d at 405 (quoting 51 A.D.2d at 312, 381 N.Y.S.2d at 293).

\textsuperscript{149} \textit{Restatement (Second) of Torts} §§ 520(d)-(f) (1977).

\textsuperscript{150} \textit{Id.} § 520, Comment \( h \) (emphasis supplied); see W. Prosser, \textit{supra} note 29 § 78, at 512.


\textsuperscript{152} Theories on which countersuits could be based include malicious prosecution, abuse of process, and prima facie tort. \textit{Id.} at 1004. In addition to the cases discussed in the text, other decisions, in cases not involving countersuits, are also worthy of note. In Nardelli v. Stamberg, 44 N.Y.2d 500, 377 N.E.2d 975, 406 N.Y.S.2d 443 (1978), the Court of Appeals held that the "actual malice" required in an action for malicious prosecution was sufficient to support the award of exemplary damages in such a case. \textit{Id.} at 563, 377 N.E.2d at 976-77, 406 N.Y.S.2d at 445; see \textit{Restatement (Second) of Torts} § 908, Comment c (Tent. Draft
gest that it is likely to be applicable in very few situations.

The only countersuit case in which the plaintiff enjoyed a measure of success, Drago v. Buonagurio, 153 arose out of a wrongful death claim which had alleged that defendant Buonagurio's decedent died because of malpractice by the plaintiff physician. The plaintiff alleged in his countersuit that he had never treated the decedent as a patient; that the wrongful death action had been commenced at the direction of defendant Brownstein as a discovery device in order to ascertain where responsibility could be placed; that Brownstein's actions were malicious, unethical, and grossly negligent; and that the plaintiff had suffered much mental anguish and defamation of character and was otherwise damaged. 154 Special term dismissed the complaint for failure to state facts sufficient to constitute a cause of action. 155 The Appellate Division, Third Department, reversed, finding that the complaint alleged "a cause of action which should be cognizable at law," 156 although the court remarked that "[i]t is immaterial and unimportant whether we label the instant cause of action one of prima facie tort or something else." 157

The court first considered the complaint in light of traditional theories, but it noted that missing elements precluded recovery under those theories. A claim of malicious prosecution would fail

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In AT&T, Inc. v. Ruder & Finn, Inc., 42 N.Y.2d 454, 368 N.E.2d 1230, 398 N.Y.S.2d 864 (1977), the Court held that a cause of action for prima facie tort is precluded when the defendant's conduct is justified by a value to the public which outweighs the alleged harm to the private plaintiff. Id. at 459-60, 368 N.E.2d at 1233, 398 N.Y.S.2d at 867; see Brandt v. Winchell, 3 N.Y.2d 628, 334-35, 148 N.E.2d 160, 163-64, 170 N.Y.S.2d 828, 833-34 (1958) (no prima facie tort liability for instigating action by public officials).

Finally, the Court held in Fischer v. Maloney, 43 N.Y.2d 553, 373 N.E.2d 1215, 402 N.Y.S.2d 991 (1978), that liability could be imposed for intentional infliction of severe emotional distress only if the defendant's conduct had been extreme and outrageous. Id. at 557, 373 N.E.2d at 1217, 402 N.Y.S.2d at 992-93; see Long v. Beneficial Fin. Co., 39 A.D.2d 11, 13-15, 330 N.Y.S.2d 664, 667-68 (4th Dep't 1972); Halio v. Lurie, 15 A.D.2d 62, 65-66, 222 N.Y.S.2d 759, 762-64 (2d Dep't 1961); W. Prosser, supra note 29, § 12, at 56; Restatement (Second) of Torts § 46 & Comment d (1965). The Court in Fischer also questioned whether the intentional infliction doctrine should be applicable when the conduct falls well within the ambit of other traditional categories of tort liability (in that case, malicious prosecution or abuse of process). 43 N.Y.2d at 558, 373 N.E.2d at 1217, 402 N.Y.S.2d at 993.

154. Id. at 284, 402 N.Y.S.2d at 251.
156. 61 A.D.2d at 286, 402 N.Y.S.2d at 252.
157. Id. at 286, 402 N.Y.S.2d at 252-53.
because there was no allegation of an interference with the plaintiff's person or property,\textsuperscript{158} nor was it alleged that the wrongful death action had terminated in the plaintiff doctor's favor.\textsuperscript{158} Likewise, an abuse of process claim would fail because an allegation of improper use of the court's process was lacking.\textsuperscript{160} Finally, New York law recognizes neither liability to third parties for negligence by an attorney\textsuperscript{161} nor a cause of action for barratry.\textsuperscript{162}

On the premise that "the law should never suffer an injury and a damage without a remedy,"\textsuperscript{163} the court then turned its attention to "the more innovative theory designated prima facie tort."\textsuperscript{164} That theory imposes liability for "the intentional infliction of harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful . . . and which acts do not fall within the categories of traditional tort . . . ."\textsuperscript{165} Since the plaintiff could not, on the alleged facts, have been guilty of malpractice, the obvious purpose of the wrongful death action was to benefit the attorney and his client, and because the apparent consequence was foreseeable harm to the physician, the court concluded that the complaint should be deemed sufficient.\textsuperscript{166} As the court stated: "[T]he act was not only intentional and wrongful, but under the unusual circumstances alleged, irresponsible and without justification."\textsuperscript{167}

It is interesting that the court did not say explicitly that the

\textsuperscript{158} Id. at 285, 402 N.Y.S.2d at 251 (citing Williams v. Williams, 23 N.Y.2d 592, 596 n.2, 246 N.E.2d 333, 335 n.2, 298 N.Y.S.2d 473, 477 n.2 (1969)).

\textsuperscript{159} Id. (citing Lewis v. Village of Deposit, 40 A.D.2d 730, 336 N.Y.S.2d 672 (3d Dep't 1972), aff'd mem., 33 N.Y.2d 532, 301 N.E.2d 422, 347 N.Y.S.2d 434 (1973)).


\textsuperscript{163} 61 A.D.2d at 285, 402 N.Y.S.2d at 252.

\textsuperscript{164} Id.

\textsuperscript{165} Id. (citations omitted); see Board of Educ. v. Farmingdale Classroom Teachers Ass'n, 38 N.Y.2d 397, 405-06, 343 N.E.2d 278, 284, 380 N.Y.S.2d 635, 643 (1975).

\textsuperscript{166} 61 A.D.2d at 286, 402 N.Y.S.2d at 252.

\textsuperscript{167} Id.
plaintiff had alleged a claim fitting within the "non-category" of prima facie tort. That theory has traditionally required pecuniary injury, so the plaintiff's complaint would probably have been insufficient to constitute a prima facie tort. Only by the liberal view which the court acknowledged it took of the facts and which it in truth took of the law, could a countersuit against intentional, baseless, and damaging charges be upheld. With its emphasis on the unique facts of the case (i.e., that the plaintiff had never treated the decedent) and its caution that the opinion should not be read "as creating or recognizing a distinctly new cause of action whenever a physician escapes malpractice liability and claims he was wrongfully charged in the first place," the opinion in Drago gives little encouragement to those who would use the prima facie tort theory for a countersuit to a malpractice action.

Two other appellate division decisions dismissed claims which had been commenced by doctors against whom malpractice suits had previously been brought and then discontinued. In Belsky v. Lowenthal, the doctor countersued the former patient and her husband who brought the suit. Claims based on a malicious prosecution theory were dismissed for failure to allege an interference with the plaintiff doctor's person or property. A claim based on a theory which the plaintiff originally denominated (but later abandoned) as abuse of process was denied cognizance as prima facie tort because, the court said,

[i]t would be unwise, we think, to allow every unrealized cause of action to be tortured into a prima facie tort action, by the liberal

170. 61 A.D.2d at 286, 402 N.Y.S.2d at 252.
171. Id. at 284, 286, 402 N.Y.S.2d at 251, 252.
172. Id. at 286-87, 402 N.Y.S.2d at 253.
application of "malicious" to the motives of the disappointed plaintiff, thus affording a forum for a never-ending source of new litigation. Every failed suit for medical malpractice could conceivably then be made the basis of a prima facie tort.\textsuperscript{177}

Furthermore, the strong public policy of allowing all parties to have access to the courts means that fear of reprisal beyond the imposition of court costs should not be allowed to act as a deterrent.\textsuperscript{178}

In \textit{Aquilina v. O'Connor}\textsuperscript{179} the doctor who had been sued for malpractice followed a different course in attempting to vindicate his conduct, but he was likewise unsuccessful. After his malpractice insurer and its counsel obtained, over the doctor's objection, a discontinuance with prejudice of the action against him, he sued not only the former plaintiff and her attorneys (on theories of malicious prosecution and abuse of process), but also the insurer and its counsel for breaching the insurance contract by settling without his consent. Special term dismissed the contract claim and the Third Department affirmed. As the court noted, even if the plaintiff doctor incurred expenses and suffered damages to his professional reputation, he had "no abstract 'right' to have a judicial determination on the facts of any lawsuit."\textsuperscript{180} Once the malpractice plaintiff discontinued her suit without payment of any consideration from the doctor, that case was terminated and the doctor had no interest that would allow him to insist on further litigation. With regard to the contract, which provided that "'no claim or suit shall be settled or compromised by the company except with the written consent of the insured,' " the court held that the discontinuance without payment or concession was not a "'compromise or settlement.'"\textsuperscript{181} However, the court said that the discontinuance would constitute a "'favorable termination' " sufficient to support the doctor's claim for malicious prosecution.\textsuperscript{182}

\textsuperscript{177} 62 A.D.2d at 322, 405 N.Y.S.2d at 65.
\textsuperscript{178} \textit{Id.} at 322-23, 405 N.Y.S.2d at 65; see Chappelle v. Gross, 26 A.D.2d 340, 345, 274 N.Y.S.2d 555, 561 (1st Dep't 1966) (Steuer, J., dissenting).
\textsuperscript{179} 59 A.D.2d 454, 399 N.Y.S.2d 919 (3d Dep't 1977).
\textsuperscript{180} \textit{Id.} at 456, 399 N.Y.S.2d at 920.
IV. NEGLIGENCE AND MALPRACTICE

A. Negligent Misrepresentation

In *White v. Guarente*, decided during this survey year by the Court of Appeals, an accounting firm was sued for professional malpractice for preparing and distributing inaccurate and misleading financial reports of a limited partnership. The centerpiece of the Court's ruling was its holding that an accounting firm owes a duty of due care to a definable group of limited partners, although not to the investing public at large.

The action was brought by one of the partnership's limited

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183. There were other noteworthy negligence and malpractice decisions in addition to the cases discussed in the text. The Court of Claims, *per* Justice Mangum, rejected the "locality rule" as the standard of due care in a medical malpractice case. Instead, the physician will be held to "that degree of care and skill expected of the average practitioner in the class to which he belongs, having regard for the circumstances under which he must act, the advances of his profession and the medical resources reasonably available." *Hirschberg v. State*, 91 Misc. 2d 590, 597, 398 N.Y.S.2d 470, 475 (Ct. Cl. 1977). The decision, if followed, will bring New York into line with other jurisdictions which have recognized that modern transportation, communication, and medical education have made the locality rule outdated. *See, e.g.*, Brune v. Belinkoff, 354 Mass. 102, 105, 235 N.E.2d 793, 798 (1968); Carbone v. Warburton, 11 N.J. 418, 424, 94 A.2d 680, 683 (1953) (Brennan, J.); Pederson v. Dumouchel, 72 Wash. 2d 73, 79, 431 P.2d 973, 978 (1967). In any event, as the court in *Hirschberg* observed, the locality rule is especially inappropriate when applied to doctors in the state hospital system, where state-wide standards are established by statute and regulation. 91 Misc. 2d at 598, 398 N.Y.S.2d at 475.

The Third Department held that in a legal malpractice action for failing to prosecute two negligence claims, the damages need not be reduced by any contingency fee the defendant would have earned if he had performed the promised services. Andrews v. Cain, 62 A.D.2d 612, 406 N.Y.S.2d 168 (3d Dep't 1978). Rejecting the rule set out in *Childs v. Comstock*, 69 A.D. 160, 169, 74 N.Y.S.2d 643, 649 (1st Dep't 1950), the court concluded that deducting the unearned contingent fee would unfairly force the plaintiff to pay twice for the same service—once to the defendant and the other time to counsel in the malpractice action. 62 A.D.2d at 613, 406 N.Y.S.2d at 169; accord, Duncan v. Lord, 409 F. Supp. 687, 691-92 (E.D. Pa. 1976).

The Second Department held, in a three-to-two decision, that a plaintiff in a medical malpractice action was permitted to examine the physician member of a medical malpractice mediation panel as to the basis of the panel's unanimous recommendation of liability, notwithstanding N.Y. *Jud. Law* § 148-a(8) (McKinney Supp. 1978), which provides that the panel member may be examined "with reference to the recommendation of the panel only." *Curtis v. Brookdale Hosp.*, 62 A.D.2d 749, 406 N.Y.S.2d 494 (2d Dep't 1978). The court found that both the statutory language and the legislative intention clearly pointed toward permitting testimony as to the basis for the recommendation; an examination limited to the recommendation itself and the witness's qualifications would be cumulative and unnecessary. *Id.* at 753-55, 406 N.Y.S.2d at 496. The dissenters feared that under the majority's view, the professional members of the panel would be serving in an expert-witness role rather than in the intended quasi-judicial capacity. *Id.* at 756, 406 N.Y.S.2d at 498 (Titone, J., dissenting).


185. *Id.* at 353, 372 N.E.2d at 320, 401 N.Y.S.2d at 479.
partners against the two general partners and the accounting firm which prepared the partnership’s yearly financial report and tax audit. The claim against the accounting firm was based on its alleged failure to comment in the report on the withdrawal by the general partners of approximately eighty percent of the capital investment. The withdrawals, which the partnership agreement permitted only at the end of the fiscal year, were allegedly back-dated to avoid detection, and were lumped in with the withdrawals of the limited partners so as to cover the fact that the general partners had withdrawn the bulk of their investment. Special term dismissed the complaint against the accounting firm for failure to state a cause of action and the appellate division affirmed.

In the Court of Appeals the accountants argued that the plaintiff could not sue because he was not in privity with their firm. The Court dismissed this contention and held that the defendant’s assumption of the task of auditing for the limited partnership was the assumption of a duty to act for the benefit of the “fixed, definable and contemplated group” of limited partners. The Court thus distinguished the classic Ultramares Corp. v. Touche, which ruled that accountants could not be held responsible, when preparing their reports, to “the indeterminate class of persons who, presently or in the future, might deal with the . . . company in reliance on the audit.’ ”

Having assumed the task of preparing a tax audit for the partnership, the Court said, the accountants “must have been aware” that the limited partners would rely on those reports in preparing their own tax returns. There was, therefore, a duty imposed by law to audit carefully, and the defendants’ negligence in preparing the report and distributing it to the partners, who they knew were likely to act on it, was actionable.

186. Id. at 360, 372 N.E.2d at 317-18, 401 N.Y.S.2d at 476-77.
187. Id.
188. 54 A.D.2d 878, 388 N.Y.S.2d 1007 (1st Dep’t 1976).
189. 43 N.Y.2d at 360-61, 372 N.E.2d at 318, 401 N.Y.S.2d at 477.
190. Id. at 362, 372 N.E.2d at 319, 401 N.Y.S.2d at 478.
192. 43 N.Y.2d at 361, 372 N.E.2d at 318, 401 N.Y.S.2d at 477 (quoting Ultramares Corp. v. Touche, 255 N.Y. 170, 183, 174 N.E. 441, 446 (1931)).
193. Id. at 361, 372 N.E.2d at 318-19, 401 N.Y.S.2d at 477-78.
B. "Wrongful Life"

At the end of the last Survey year, the Court of Appeals decided in Howard v. Lecher\(^1\) that parents could not recover for the emotional distress they suffered from watching their child die of a genetic disease that had not been diagnosed in time for an abortion to be performed. That decision, however, hardly resolved all the questions posed by the "wrongful life" cases; this Survey year the Second Department twice\(^2\) upheld claims for medical expenses, loss of the mother's services, and the child's pain and suffering.

Park v. Chessin\(^3\) involved a mother who had given birth in 1969 to a child who lived for five hours before dying of polycystic kidney disease. Immediately after the infant's death, the parents asked the defendant obstetricians about the risk involved if they had a second child. They were told that the chances of a second child being afflicted with polycystic kidney disease were "practically nil."\(^4\) That advice was incorrect; the mother gave birth to a second child in 1970, and that child lived for two-and-one-half years before succumbing to polycystic kidney disease.

Plaintiff parents then brought suit against the defendants in the name of the second child for her "wrongful life," and in their own behalf for medical expenses, emotional distress, and loss of services, relying on theories of both fraud and malpractice.\(^5\) Special term dismissed the claims for emotional distress and those based on fraud, but sustained the cause of action for "wrongful life" and the malpractice actions of the parents for medical expenses and loss of services.\(^6\)

The appellate division affirmed,\(^7\) distinguishing its earlier de-

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\(^2\) Becker v. Schwartz, 60 A.D.2d 587, 400 N.Y.S.2d 119 (2d Dep't 1977) (recovery for medical expenses and loss of services to the extent that these elements were not based on psychiatric injuries or emotional distress); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (2d Dep't 1977), discussed in pp. 587-90 & notes 197-222 infra.

\(^3\) 60 A.D.2d 80, 400 N.Y.S.2d 110 (2d Dep't 1977).

\(^4\) Id. at 83, 400 N.Y.S.2d at 111.

\(^5\) Id.

\(^6\) 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct., Queens Co. 1976).

\(^7\) The court modified the order below to dismiss those portions of the complaint seeking to recover damages for the "mental anguish" or emotional distress of the plaintiff wife and for the loss of her services, insofar as the claim for loss of services was based on her mental anguish or emotional distress. 60 A.D.2d at 88, 400 N.Y.S.2d at 114.
cision in Howard v. Lecher\textsuperscript{202} on the theory that in Howard the plaintiffs were attempting to hold the defendant doctor liable for failing to volunteer information about genetics to prospective parents.\textsuperscript{203} There, the court in Park stated, it would have been too great an extension of liability to force physicians to become "virtual insurer[s] of the genetic health of newborns . . . ."\textsuperscript{204} In the present case, by contrast, the plaintiffs had gone to the defendants seeking specific advice. The defendants were aware of the death of the first child and knew that the plaintiffs would act on their advice. By giving inaccurate advice, the defendants failed to live up to the stricter standard of care imposed on doctors in such situations and, therefore, were liable for their malpractice.\textsuperscript{205}

Because the duty owed in this case flowed from the doctors to the plaintiffs seeking their advice, the doctors could be held liable for the subsequent medical expenses of the parents and the resultant loss of the mother's services.\textsuperscript{206} However, damages for emotional distress on the part of the mother were barred because of the inability to calculate the damages and the absence of any duty.\textsuperscript{207}

With respect to the child's "wrongful life" claim, the court acknowledged that such an action had not yet been recognized in

\textsuperscript{203} See 60 A.D.2d at 84-85, 400 N.Y.S.2d at 112.
\textsuperscript{204} Id. at 84, 400 N.Y.S.2d at 112 (construing Howard v. Lecher, 53 A.D.2d 420, 424, 386 N.Y.S.2d 460, 462 (2d Dep't 1976), aff'd, 42 N.Y.2d 109, 366 N.E.2d 64, 397 N.Y.S.2d 363 (1977)). The emphasis of the Howard majority opinions in both the Court of Appeals and the appellate division was on the difficulties with emotional injuries, not on the burden of genetic counseling for physicians. See Howard v. Lecher, 42 N.Y.2d 109, 112, 366 N.E.2d 64, 65-66, 397 N.Y.S.2d 363, 365 (1977); 53 A.D.2d at 424, 386 N.Y.S.2d at 462. See generally Note, Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling, 87 Yale L.J. 1488, 1490-96, 1504-08 (1978) [hereinafter cited as Father and Mother Know Best].
\textsuperscript{205} 60 A.D.2d at 85-86, 400 N.Y.S.2d at 112-13.
\textsuperscript{206} Id. at 86-87, 400 N.Y.S.2d at 113. The plaintiffs apparently did not assert claims for expenses (other than medical expenses) incurred in supporting the child. Such claims have been recognized, e.g., Becker v. Schwartz, 60 A.D.2d 587, 588, 400 N.Y.S.2d 119, 120 (2d Dep't 1977) (Titone, J., concurring); Karlsons v. Guerinot, 57 A.D.2d 73, 75-76, 394 N.Y.S.2d 933, 934-35 (4th Dep't 1977); Ziemba v. Sternberg, 45 A.D.2d 230, 231, 357 N.Y.S.2d 265, 267 (4th Dep't 1974) (negligent failure to diagnose pregnancy resulting in birth of healthy child). Expenses of supporting a "wrongfully born" child should be offset by the benefits (tangible or intangible) the child might bring. Father and Mother Know Best, supra note 204, at 1512; see Ziemba v. Sternberg, 45 A.D.2d 230, 234-35, 357 N.Y.S.2d 265, 270-71 (4th Dep't 1974) (Cardamone, J., dissenting).
New York or other jurisdictions. However, in view of "expanding technological, economic and social change," the court held that a "wrongful life" cause of action could exist. A couple has a legally recognized right not to have a child, and this right extends to circumstances in which it could be determined with reasonable certainty that the child might be born deformed. Damages would not be speculative because the action would be for the injuries to, and the conscious pain and suffering of, the infant during her short life.

A strong dissent was filed in Park by Justice Titone, who argued that the majority opinion had no legal basis, and had in fact flown in the face of recent precedent, when it recognized these causes of action on behalf of the child. Furthermore, he argued that since "wrongful death" actions were not judicially recognized until passed by a legislature, neither should a "wrongful life" action be recognized until it has been so passed. The dissenting justice would also have dismissed the parents' claims for medical expenses and loss of services on the ground that these claims were based on a theory that the infant should never have been born, a theory which he claimed has not met with the favor of any court faced with the problem.

The court's decision in Park to allow the parents' claims for medical expenses and loss of services is certainly not inconsistent with the Howard decision. The Howard Court had been concerned with the difficulty in circumscribing the duty to avoid emotional injuries; the items claimed in Park posed no similar limitation problems. However, the claim on behalf of the infant, whether generally labeled "wrongful life" or made specifically for her disability and conscious pain and suffering, raises complex issues with

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208. 60 A.D.2d at 87, 400 N.Y.S.2d at 114; see Karlsons v. Guerinot, 57 A.D.2d 73, 79-81, 394 N.Y.S.2d 933, 937 (4th Dep't 1977).

209. 60 A.D.2d at 88, 400 N.Y.S.2d at 114.

210. Id.; see Roe v. Wade, 410 U.S. 113 (1973); N.Y. PENAL LAW § 125.05 (McKinney 1975).

211. See 60 A.D.2d at 88, 400 N.Y.S.2d at 114.

212. Id. at 89, 400 N.Y.S.2d at 115 (Titone, J., dissenting).

213. Id. at 91, 400 N.Y.S.2d at 116-17 (Titone, J., dissenting).


216. It is unclear whether the plaintiffs had labeled the claim "wrongful life" or whether they had claimed for the infant's pain and suffering and it was so denominated by the judges. See 88 Misc. 2d at 225-26, 387 N.Y.S.2d at 207; 60 A.D.2d at 88, 400 N.Y.S.2d at 115 (Cohalan, J., concurring and dissenting).
which the court in *Park* dealt only summarily. It was rightly noted that the argument sometimes used to deny the cause of action, that no legal abortion would have been available, 217 was no longer applicable. 218 It is too much, though, to say, as the court did, that the breach of the parents’ right not to have a child (inferable from the abolition of the statutory ban on abortion) is also “tortious to the fundamental right of a child to be born as a whole, functional human being.” 219 Further, the court never explained what “technological, economic [or] social change” now makes it possible to determine both that the infant is worse off as a result of the negligence causing the wrongful life than if she had never been born, and the amount of the resulting damages.

The *Park* decision in effect allows the parents to obtain indirectly, through the child’s “wrongful life” claim, the damages for emotional distress that they cannot obtain directly. Certainly the damages for “conscious pain and suffering” will not compensate the deceased child for *her* injuries; this compensation goes only to the parents, whose real emotional distress is denied direct relief by the excessively cautious attitude of the Court of Appeals. 220 Even for the “wrongfully born” child who survives, recognition of the child’s cause of action poses the imponderable question whether her pain and suffering may be regarded as an injury, given the alternative of not being born at all. 221 It would be better to grant relief to the parents, who are the persons quite foreseeably suffering emotional injuries when the doctor breaches the duty that he owes to them, as patients, to provide reasonably careful genetic counseling. 222

C. Wrongful Death Damages

The New York wrongful death statute 223 provides that the desig-
nated beneficiaries may recover “fair and just compensation for the pecuniary injuries resulting from the decedent’s death.” Two decisions during this Survey year reached opposite results on the question whether the wrongful death statute encompassed a widow’s claim for loss of consortium.

The Third Department held, in Osborn v. Kelley, that loss of consortium could be recovered only for the period prior to the decedent’s death. The court denied any cause of action for post-death loss of consortium on the ground that the consortium claim was “derivative.” Since the decedent has no cause of action for his death, the court reasoned that the surviving spouse has no cause of action after the death from which to derive the claim for loss of consortium.

The court appears to have misconceived the premise from which it argued that a loss of consortium action is derivative and a wrongful death action is not. It is true that the loss of consortium claim is derivative, in the sense that it will be barred if the claim from which it is derived is barred by the statute of limitations, a settlement or judgment, contributory negligence, or otherwise. However, a wrongful death cause of action is derivative in that sense also. In a second sense, though, neither action is derivative. The

224. N.Y. EPTL 5-4.3 (McKinney 1967) provides, in pertinent part:

The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent’s death to the persons for whose benefit the action is brought.


227. Id. at 370, 402 N.Y.S.2d at 465.

228. Id.

229. Id. at 370, 402 N.Y.S.2d at 464-65; see N.Y. EPTL 11-3.3 (McKinney 1967) (“[w]here an injury causes the death of a person the damages recoverable for such injury are limited to those accruing before death and shall not include damages for or by reason of death”).

230. See Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 507-08, 239 N.E.2d 897, 902-03, 293 N.Y.S.2d 305, 312 (1968) (wife’s claim should be joined with husband’s claim, but it is barred if his “has been terminated either by judgment, settlement or otherwise”).

plaintiff in each case has been permitted to sue for an injury done personally to her; the wife in the consortium action sues for the loss of society and services to her;\textsuperscript{232} the widow in the wrongful death action sues for the benefits she will not receive.\textsuperscript{233} It is not as if the plaintiff were suing in representative capacities, e.g., as an administratrix in a survival action.\textsuperscript{234} The opinion in Osborn, however, clearly treats the cause of action for consortium as "derivative" in the first sense, and the wrongful death cause of action as "not derivative" in the second sense.\textsuperscript{235} The distinction thus taken avoids the true issue in the case, which is whether loss of consortium is a "pecuniary injury," i.e., whether that element of damage is properly recoverable within the limitations of the cause of action recognized by the law.

That issue was addressed by Justice Nussbaum in Lehman v. Columbia Presbyterian Medical Center,\textsuperscript{236} where the court concluded that loss of consortium is a pecuniary injury. The court noted that the Court of Appeals has not insisted upon a strict interpretation of the term "pecuniary injuries," but has, for example, permitted children to recover for "the loss of bodily care, or intellectual culture, or moral training, which the mother had before supplied . . . ."\textsuperscript{237} By extension, then, "[t]o recognize that children suffer from the loss of society of their parents and allow recovery to them in wrongful death actions, but to reject this concept as between married persons draws a distinction without a difference."\textsuperscript{238}

The court, by characterizing the claims of both child and spouse as being for "loss of society," glossed over a potentially troublesome distinction. The damages recoverable by a child for the wrongful death of a parent include loss of "parental guidance, advice and care,"\textsuperscript{239} but not "emotional deprivation."\textsuperscript{240} The permitted

\textsuperscript{233} See N.Y. EPTL 5-4.2 (McKinney Supp. 1978) (contributory negligence of decedent constitutes defense to wrongful death claims accruing before Sept. 1, 1975).
\textsuperscript{234} Id. at 541-42, 402 N.Y.S.2d at 953 (quoting Tilley v. Hudson River R.R., 29 N.Y. 252, 256-57 (1864)).
\textsuperscript{235} Id. at 542, 402 N.Y.S.2d at 953.
\textsuperscript{236} 232. See N.Y. EPTL 5-4.3, 5-4.4 (McKinney 1967).
\textsuperscript{237} 234. Id. 11-3.2(b) (McKinney 1967).
\textsuperscript{238} 235. See 61 A.D.2d at 370, 402 N.Y.S.2d at 464-65.
\textsuperscript{239} 236. 99 Misc. 2d 539, 402 N.Y.S.2d 951 (Sup. Ct., N.Y. Co. 1978).
elements can all be provided by persons other than the parents, persons whose services may be employed in a market attaching a pecuniary value to those services. Consortium, on the other hand, "embraces such elements as love, companionship, affection, society, sexual relations, solace and more."241 As the Court of Appeals noted when it recognized the wife's cause of action for loss of consortium in Millington v. Southeastern Elevator Co.,242 those elements reflect injury to "essentially emotional interests."243 Money which may be awarded for such interests in a consortium action does not reflect the price of obtaining other persons to provide the benefits lost, since many of the benefits involve a unique relationship and, therefore, are essentially irreplaceable. Nevertheless, money "is the only known means to compensate for the loss suffered and to symbolize society's recognition that a culpable wrong—even if unintentional—has been done."244 Viewed in that light, damages for loss of consortium may be recoverable in the common-law cause of action while the physically injured spouse lives, but not in the statutory action for wrongful death which is expressly limited to "pecuniary injuries."

The reference in Lehman to loss of the husband's "services,"245 like the reference to loss of "society," equally glosses over the significant distinction. Replaceable services which have market values, such as chauffering, should be recoverable in the wrongful death cause of action whether or not denominated as "loss of consortium"; the preceding discussion, however, suggests why emotional services and those uniquely provided by the decedent (e.g., companionship, sexual relations, and solace) should not.

V. Defamation and Freedom of the Press

A. Pretrial Discovery of "New York Times Malice"

In order to promote the vigor and variety of public debate, the United States Supreme Court held in New York Times Co. v.

243. Id. at 507, 239 N.E.2d at 902, 293 N.Y.S.2d at 311.
244. Id. at 507, 239 N.E.2d at 902, 293 N.Y.S.2d at 312.
245. It is not clear whether the plaintiff claimed for "loss of services and society" of her husband, or whether the court was just so characterizing the action. See 93 Misc. 2d at 540, 402 N.Y.S.2d at 852.
Sullivan246 that a public official could recover for libel only if he proved that the defamatory statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”247 Later decisions by the Court established that this “New York Times malice” standard required a subjective inquiry into the defendant’s state of mind.248 It was therefore noteworthy when the Second Circuit held during this Survey year that the plaintiff in a public-figure defamation action cannot obtain direct evidence through pretrial discovery of the defendant’s state of mind.249

Herbert v. Lando250 had its genesis in 1971 when plaintiff Herbert publicly charged his superior army officers with covering up war crimes in Vietnam. The intense debate over the war and Herbert’s being a much-decorated soldier contributed to the affair becoming a cause célèbre. However, the superior officers were ultimately cleared after a military investigation, and Herbert was removed from his command on the basis of a “poor efficiency report.”251

In 1972 defendant Lando began investigating the Herbert case for the CBS documentary program “60 Minutes,” of which he was associate producer. Lando interviewed the soldiers who were in a position to corroborate Herbert’s charges, as well as the superior officers charged and Herbert himself. Lando’s investigation uncovered discrepancies between Herbert’s version of events and the versions of others who were present when the events took place. These discrepancies were subsequently reported in a broadcast on “60 Minutes” and an article in the Atlantic Monthly, both of which clearly cast doubt on all of Herbert’s allegations.252 As a result, Herbert sued Lando, CBS, and the Atlantic Monthly for defamation.253

Lando cooperated in the extensive pretrial discovery in the suit, except as to “a small number of questions relating to his beliefs,

251. Id. at 980.
252. Id. at 982.
253. Id.
opinions, intent and conclusions in preparing the program."\textsuperscript{254} The inquiries to which Lando objected included: his conclusions regarding leads to be pursued or not to be pursued; his beliefs in the veracity of persons interviewed; the bases for conclusions he reached concerning the veracity of persons; conversations with Mike Wallace, a correspondent on "60 Minutes," about matter to be included in or excluded from the broadcast; and his intentions as manifested by his decision to include or exclude material.\textsuperscript{255} Lando's objection, that any response to these questions would be inconsistent with the protections afforded the editorial process by the first amendment, was overruled by the trial court, which granted the plaintiff's motion to compel discovery.\textsuperscript{256}

In reversing and remanding the decision below, Chief Judge Kaufman focused on the constitutional protection afforded the press's functioning and the essential role of the editorial process in that work. The free flow of information, which is the objective of first amendment protection,\textsuperscript{257} requires not only freedom in acquiring information,\textsuperscript{258} but also protection of the editorial process by which "information" is transformed into "news."\textsuperscript{259} That process was unanimously given protection by the United States Supreme Court in \textit{Miami Herald Publishing Co. v. Tornillo},\textsuperscript{260} when it held that a "right-of-reply" statute would unconstitutionally burden an editor's exercise of judgment in choosing whether to print newsworthy material.\textsuperscript{261} Similarly, according to the Chief Judge, discovery of Lando's thoughts, opinions, and conclusions would tend to stifle the free flow of ideas that is the objective of the first amendment:

The answers . . . [Herbert] seeks strike to the heart of the vital human component of the editorial process. Faced with the possibility of such an inquisition, reporters and journalists would be reluctant to express their doubts. Indeed, they would be chilled in the

\textsuperscript{254} Id. at 982-83 (footnote omitted).
\textsuperscript{255} Id. at 983; see Herbert v. Lando, 73 F.R.D. 387, 392 (S.D.N.Y. 1977).
\textsuperscript{256} 73 F.R.D. 387 (S.D.N.Y. 1977). The question, however, was certified for an interlocutory appeal. 568 F.2d at 983.
\textsuperscript{258} See, e.g., \textit{Branzburg v. Hayes}, 408 U.S. 665, 681 (1972) ("without some protection for seeking out the news, freedom of the press could be eviscerated").
\textsuperscript{259} 568 F.2d at 976-79.
\textsuperscript{260} 418 U.S. 241 (1974).
\textsuperscript{261} See id. at 257-58.
very process of thought. As we expressed above, the tendency would be to follow the safe course of avoiding contention and controversy—the antithesis of the values fostered by the First Amendment.262

Judge Oakes, concurring, relied not only on the constitutional protection afforded the editorial process, but also on what he saw as the Supreme Court's evolving recognition of the press as an institution entitled to special protection. Relying in part on a speech by Mr. Justice Stewart at the Yale Law School,263 he noted that the Supreme Court has treated the constitutional provision for freedom of the press, unlike freedom of speech, as creating "'a fourth institution outside the Government as an additional check on the three official branches.'"264 Viewing the institutional press as integral to our governmental structure, Judge Oakes argued: "[T]o the extent that the independent exercise of editorial functions is threatened by governmental action, the very foundations of the architectural masterpiece that is our form of government are shaken, the supporting columns weakened."265 In his mind, the question then becomes what level of protection is necessary to ensure an independent, institutional freedom of the press.266 He concluded that only protecting the editors' thought-processes entirely from discovery—not just application of the "New York Times malice" test, nor even application of a rule permitting discovery only when the evidence sought is "direct evidence of a highly relevant matter which cannot otherwise be obtained"267—is sufficient to satisfy the mandates of Tornillo.268

262. 568 F.2d at 984.
263. Id. at 986 (Oakes, J., concurring); see Stewart, "Or of the Press," 26 HASTINGS L.J. 631 (1975).
264. 568 F.2d at 988 (Oakes, J., concurring) (quoting Stewart, supra note 263, at 634).
265. Id. (Oakes, J., concurring).
266. Id. at 991 (Oakes, J., concurring).
267. Id. at 992 (Oakes, J., concurring); see Baker v. F & F Inv., 470 F.2d 778, 783-84 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); Garland v. Torre, 259 F.2d 545 (2d Cir.) (Stewart, J.), cert. denied, 358 U.S. 910 (1958).
268. 568 F.2d at 992-95 (Oakes, J., concurring). The "New York Times malice" test was rejected because: (a) the case was speaking only to the substantive standard, not to the method of proving it; (b) permitting discovery not only has a chilling effect on the end product, as was contemplated by New York Times, but also chills the relationship among the editors; and (c) the test gives no consideration to the ramifications of Tornillo for the special status accorded the editorial process. Id. at 992-94. The "compromise" position takes account of the mandates of Tornillo, but falls short of the level of protection required by New York Times and Tornillo. Furthermore, the position was developed in a case where the information sought was on the periphery, rather than at the center, of the editorial process. Id. at 994-95; see Baker v. F & F Inv., 470 F.2d 778, 780-81 (2d Cir. 1972), cert. denied, 411
Thus, Judge Oakes agreed with Chief Judge Kaufman that plaintiff Herbert would have to prove the knowing or reckless falsity of the statements by circumstantial evidence.

Purloining Judge Oakes's architectural metaphor, it might be said that the *Herbert* majority has constructed a substantial edifice on rather weak foundation. On the one hand, the Supreme Court has not given such unquestioned protection to the news-gathering and editorial processes as might be supposed from reading the prevailing judges' opinions. The Court's comment that "without some protection for seeking out the news, freedom of the press could be eviscerated" was made in a case denying reporters a privilege from disclosing confidential sources; there is at present no such constitutional privilege. The Supreme Court cases relied on as affording protection to the editorial process both had substantial overtones of governmental intrusion into news dissemination; they certainly did not hold unequivocally that "the First Amendment will not tolerate intrusion into the decision-making function of editors." More generally, the Supreme Court has been less than receptive to special protection for the press as an institution. This point was reinforced late in the Court's 1977 Term in *Houchins v. KQED, Inc.*, when the majority, concurring (per Mr. Justice Stewart), and dissenting opinions all reaffirmed that the institutional press was entitled to no preferred first amendment position, at least regarding access to information unavailable to the general public.


270. See *Branzburg v. Hayes*, 408 U.S. 665 (1972) (reporters required to testify before grand juries regarding crime of which they have knowledge).


272. In both Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), and Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), the question was whether the government could require certain matter (replies to published criticisms in the former case and paid political announcements in the latter) to be given expression. The concern in both cases was that the possibility of a required response would deter controversial expression, not that the editorial process itself had intrinsic value. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. at 256-57; Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. at 120-21.

273. Herbert v. Lando, 568 F.2d 974, 987 (2d Cir. 1977) (Oakes, J., concurring); *see id.* at 997 (Meskill, J., dissenting).


275. *Id.* at 9-12 (Burger, C.J.); *id.* at 16-17 (Stewart, J., concurring); *id.* at 25-30
Whether pretrial discovery will have an impermissibly chilling effect on "the editorial process" in fact involves two issues: first, whether it will discourage the ultimate publication of "news," and second, whether it will discourage communications within the newsroom. With respect to the first question, the "New York Times malice" test seems, as Judge Meskill noted in his Herbert dissent, to provide an adequate standard. That test was adopted with the implicit recognition that not all expression is protected by the first amendment, but also with the knowledge that there must be some "breathing space" in which liability cannot be imposed, so that no protected expression will be deterred. In the present context, the question becomes whether pretrial discovery will encroach on that breathing space, i.e., whether an editor will be deterred from publication significantly more by a fear that he will be asked if he knew or cared that the statement was false than he will be by the fear that he will be held liable if he knew or did not care that it was false. It seems highly unlikely that an editor's decision whether to publish will turn on his knowledge that the prospective plaintiff will not be permitted to prove New York Times malice by direct evidence. Thus, the Herbert ban on pretrial discovery of the editor's motivations is an unnecessary extension of the New York Times protections for free expression.

On the other hand, pretrial discovery of matters other than the subjective mental states of editors has a potential for deterring the "creative verbal testing, probing, and discussion of hypotheses and alternatives" which goes on in a newsroom. This chilling effect goes beyond that contemplated by the New York Times decision, in which the Court implicitly permitted some judicial inquiry through libel actions into the editorial process. However, to avoid this chilling effect would require a privilege covering all confidential communications, oral or written, made by newspeople in the newsroom or

(Stevens, J., dissenting).

276. See 568 F.2d at 995-96, 997-98 (Meskill, J., dissenting).

277. See New York Times Co. v. Sullivan, 376 U.S. 254, 268-69 (1964); id. at 295 (Black, J., concurring); id. at 299-300 (Goldberg, J., concurring).

278. See id. at 270-72, 278-79.

279. Compare the Tornillo and Democratic National Committee situations, discussed supra note 272, where the proposed intrusion into the editorial process may well have effects on what the editor ultimately chooses to publish.

280. Herbert v. Lando, 568 F.2d 974, 980 (2d Cir. 1977); see id. at 990 (Oakes, J., concurring); id. at 997 (Meskill, J., dissenting).

281. Id. at 997 (Meskill, J., dissenting).
elsewhere. As Judge Meskill observed, such a privilege goes beyond any extended heretofore and seems unlikely to gain recognition from a Supreme Court not notably receptive to new constitutional privileges. 282

B. Trespass by Reporters

CBS was less successful with a first amendment defense it raised in another case decided during this Survey year. Le Mistral, Inc. v. Columbia Broadcasting System 283 grew out of an unannounced visit by a WCBS-TV reporter and camera crew to a well-known restaurant which had been cited for health code violations. After entering the restaurant with bright lights on and cameras rolling, the reporter and camera crew were commanded to leave by the restaurant’s president. In a subsequent action for trespass, the plaintiff was awarded compensatory and punitive damages by a jury. 284 The trial judge upheld the jury’s finding of trespass but set aside the damage awards. 285

In reinstating the compensatory damage awards, the First Department rejected CBS’s claim that it was insulated from liability by virtue of the first amendment: “Clearly, the First Amendment is not a shibboleth before which all other rights must succumb.” 286 Quoting the Court of Appeals for the Second Circuit in Galella v. Onassis, 287 the court noted: “‘Crimes and torts committed in news gathering are not protected. . . . There is no threat to a free press in requiring its agents to act within the law.’” 288

The punitive damages question was remanded to allow CBS to demonstrate and explain its motivation. 289 Justice Murphy dissented from the remand on the ground that the evidence indicated merely that the defendant was “pursuing a newsworthy item in the overly aggressive but good faith manner that characterizes the operation of the news media today.” 290

282. Id. at 998.
283. 61 A.D.2d 491, 402 N.Y.S.2d 815 (1st Dep’t 1978).
284. Id. at 493, 402 N.Y.S.2d at 816.
285. Id.
286. Id. at 494, 402 N.Y.S.2d at 817.
287. 487 F.2d 996 (2d Cir. 1973).
289. 61 A.D.2d at 495, 402 N.Y.S.2d at 818.
290. Id. at 496, 402 N.Y.S.2d at 818 (Murphy, J., dissenting in part).
C. Qualified Privileges

The principal decision in defamation and privacy law by the New York Court of Appeals during this Survey year was Toker v. Pollak.\(^{291}\) The defendant in that case had allegedly defamed the plaintiff, a prospective judicial appointee, in statements made to the District Attorney, the New York City Department of Investigation, and the Mayor’s Committee on the Judiciary. The defendant argued that all the statements were absolutely privileged,\(^{292}\) but the Court held that each was entitled only to a qualified privilege.\(^{293}\)

The basis of the Court’s holding was that the absolute immunity for judicial proceedings “‘applies only to a proceeding in court or one before an officer having attributes similar to a court.’”\(^{294}\) Testimony before a grand jury has traditionally been given absolute immunity from defamation liability.\(^{295}\) However, complaints to a district attorney have not been accorded absolute immunity because they do not constitute or institute a judicial proceeding.\(^{296}\) In Toker the Court held that the statements made in an affidavit for the district attorney, even though they were in lieu of grand jury testimony, were entitled only to a qualified privilege,\(^{297}\) since that “is sufficient to foster the public purpose of encouraging citizens to come forth with information concerning criminal activity.”\(^{298}\) The statements to the Department of Investigation were also given only a qualified privilege, since proceedings before the department lack all the safeguards (i.e., the opportunity for the person accused to challenge the allegations) traditionally associated with a judicial or quasi-judicial proceeding.\(^{299}\) For the same reason, the communica-

\(^{292}\) Id. at 218, 376 N.E.2d at 166, 405 N.Y.S.2d at 4.
\(^{293}\) Id.
\(^{294}\) Id. at 219, 376 N.E.2d at 167, 405 N.Y.S.2d at 5 (quoting Pecue v. West, 233 N.Y. 316, 321, 135 N.E. 515, 516 (1922)).
\(^{295}\) Hastings v. Lusk, 22 Wend. 410, 417 (N.Y. 1839); RESTATEMENT (SECOND) OF TORTS § 589, Comment f (1977).
\(^{296}\) Pecue v. West, 233 N.Y. 316, 322, 135 N.E. 515, 517 (1922).
\(^{297}\) 44 N.Y.2d at 220-21, 376 N.E.2d at 167-68, 405 N.Y.S.2d at 6. The Court distinguished grand jury testimony from communications to a prosecutor on the ground that the grand jury proceedings are made secret by statute, N.Y. CRIM. PROC. LAW § 190.25(4) (McKinney 1971). 44 N.Y.2d at 220-21, 376 N.E.2d at 167-68, 405 N.Y.S.2d at 6. As Judge Wachtler noted in dissent, however, grand jury testimony is not absolutely privileged because the proceedings are secret; rather, both the privilege and the secrecy are based on the policy of encouraging truth and candor in a proceeding that plays a critical role in the administration of justice. Id. at 224, 376 N.E.2d at 169-70, 405 N.Y.S.2d at 8 (Wachtler, J., dissenting).
\(^{298}\) 44 N.Y.2d at 221, 376 N.E.2d at 168-69, 405 N.Y.S.2d at 6.
\(^{299}\) Id. at 221-23, 376 N.E.2d at 168-69, 405 N.Y.S.2d at 6-7.
tions to the Mayor's Committee had only a qualified, not an absolute, privilege.\textsuperscript{300}

Judge Wachtler dissented on the ground that all the statements were entitled to an absolute privilege. In his view, "selection of honest Judges is a matter of paramount public interest. . . . Thus persons having information concerning the character of potential judicial candidates should be encouraged to make full and candid disclosure to those charged with the responsibility of determining fitness for judicial office."\textsuperscript{301} In addition, he would agree with Dean Prosser that "'the better rule seems to be that an informal complaint to a prosecuting attorney or a magistrate is to be regarded as an initial step in a judicial proceeding, and so entitled to an absolute, rather than a qualified immunity.'"\textsuperscript{302} In a case such as this, where the statements alleged a bribe that "'did not only involve a possible criminal act, but corruption by a public employee, seeking a higher office, . . . the public need to prosecute or bar from a position of public trust far outweighs the possibility of harassment of the innocent.'"\textsuperscript{303}

VI. MUNICIPAL TORT LIABILITY: CIVIL RIGHTS SUITS

In a decision\textsuperscript{304} which could have the most wide-ranging effect of any rendered during this Survey year,\textsuperscript{305} the United States Su-
preme Court held that municipalities were "persons" subject to liability under 42 U.S.C. § 1983.306 The Court's decision, overruling a seventeen-year-old precedent, poses a serious threat that the current torrent of section 1983 suits307 will become a flood devastating municipal treasuries.

Monell v. Department of Social Services308 was an action brought by female employees of the Department of Social Services and the Board of Education to challenge policies of those bodies that compelled pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons. The plaintiffs sought injunctive relief and back pay from the city, the department, and the board, as well as from the mayor, the Commissioner of the Department of Social Services and the Chancellor of the Board of Education in their official capacities.309

The district court denied injunctive relief on the ground that a change in maternity leave policies after institution of the action made such claims moot.310 With regard to the back pay claims, the court determined that the challenged policies were unconstitutional.311 However, it denied relief on the ground that, since any damages would ultimately be paid by the city, no recovery could be given in light of the immunity conferred on municipalities by Monroe v. Pape.312 The Second Circuit Court of Appeals affirmed.313

The Supreme Court reversed, holding that municipalities had no absolute immunity from claims made under section 1983 for

Id. at 424, 377 N.E.2d at 464, 406 N.Y.S.2d at 20. Thus, in the absence of any proof of actual negligence by the city, there was no basis for holding it liable.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In another case decided during this Survey year, the Court held that the damages recoverable under section 1983 (aside from a nominal award) depend upon proof of an actual injury incurred as a result of the deprivation of constitutional rights. Carey v. Piphus, 435 U.S. 237 (1978).


309. Id. at 661.
311. Id. at 855.
313. 532 F.2d 259 (2d Cir. 1976).
deprivation of constitutional rights. 314 The Court overruled *Monroe v. Pape*, insofar as that case held that local governments were absolutely immune from suits under section 1983, on the basis of "[a] fresh analysis of debate on the Civil Rights Act of 1871, and particularly of the case law which each side mustered in its support . . . ." 315 Essentially, that analysis showed that Congress had rejected the "Sherman amendment" 316 to the Act because the amendment would have made municipalities liable for the riotous acts of *private* persons; the Court had erred in *Monroe* by inferring from this rejection an intention that municipalities be immune as well from liability for conduct pursuant to *official* policy. 317 The amendment was rejected because it imposed an obligation to keep the peace on municipalities, which in many cases had no such obligation under state law. 318 On the other hand, numerous cases prior to 1871 had upheld the power of federal courts to enforce the Constitution against municipalities that violated it, 319 so no new obligation was being imposed by the section of the Civil Rights Act which became section 1983. Given the broadly remedial purposes of the statute 320 and the usual inclusion of "bodies politic and corporate" within the meaning of the word "person" under contemporary case law and statutes, 321 the *Monell* Court found that section 1983 was intended to cover municipalities. 322

314. 436 U.S. at 700-01.
315. Id. at 665.
317. See 436 U.S. at 664-83.
318. See id. at 668.
319. Id. at 672-83.
320. Id. at 683-86.
322. 436 U.S. at 688-89. Mr. Justice Powell concurred, adding, *inter alia*, the observation that the Court's decision obviated the necessity to decide whether a cause of action against municipalities might be inferred directly from the fourteenth amendment. Id. at 713-14 (Powell, J., concurring). It was ironic that on the day before *Monell* was announced, the Second Circuit held, in a five-to-four decision, that a municipality could be sued for damages directly under the fourteenth amendment for employee actions that had been "authorized, sanctioned, or ratified" at a "policy-making level." *Turpin v. Mailet*, 579 F.2d 152 (2d Cir. 1978).
Mr. Justice Rehnquist and the Chief Justice dissented from the Court’s decision on the ground that the Monroe holding had been reaffirmed by a long and consistent line of precedents and had given rise to legitimate expectations by municipalities.323 In their view, only Congress, and not the Court, is equipped to foresee the practical consequences of a change such as that made by the majority’s decision.324 However, the majority disputed both the length and the consistency of the precedents, noting that Monroe had been a departure from prior practice,325 and that numerous post-Monroe cases had made school boards liable under section 1983.326 Moreover, the majority rejected the argument that reliance based on Monroe was justifiable:

As Mr. Justice Frankfurter said in Monroe, “[t]his is not an area of commercial law in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision.”327 . . . Indeed, municipalities simply cannot “arrange their affairs” on an assumption that they can violate constitutional rights indefinitely since injunctive suits against local officials under § 1983 would prohibit any such arrangement. And it scarcely need be mentioned that nothing in Monroe encourages municipalities to violate constitutional rights or even suggests that such violations are anything other than completely wrong.328

Although Monell has the potential for making municipal treasuries into a “pot of gold” in the already staggering number of civil rights suits,329 the practical effect of the decision is difficult to foretell. For one thing, municipalities have already been paying some section 1983 judgments indirectly under indemnification provisions afforded their employees.330 Another factor that perhaps mitigates Monell’s effect is its ruling that a municipality cannot be held liable

323. 436 U.S. at 714-16, 724 (Rehnquist, J., dissenting).
324. Id. at 724 (Rehnquist, J., dissenting).
325. Id. at 695; see, e.g., Holmes v. City of Atlanta, 350 U.S. 879 (1955), vacating per curiam 223 F.2d 93 (5th Cir. 1955); Douglas v. City of Jeannette, 319 U.S. 157, 161 (1943).
326. 436 U.S. at 663 & n.5, 696.
328. 436 U.S. at 699-700.
solely on a respondeat superior theory. The Court held that a municipality did not "subject, or cause to be subjected" any person to the deprivation of his constitutional rights unless the deprivation represented official policy. Finally, the Court suggested the possibility that some limited official immunity might be available to municipalities.

However, the net effect of the Monell decision is likely to be increased pressure on municipal budgets. Juries, no longer inhibited by the prospect of financially ruining individual officials, will provide vindication for the deprivation of constitutional rights at consequently higher levels out of the "deep pocket" now made available. Taken together with expanding definitions of the constitutional rights protected by section 1983 and the incentives to litigation provided by the 1976 amendment that allows attorney's fees as costs in civil rights litigation, this decision poses a real problem for local governments already squeezed between declining revenues and increased expenses.

331. 436 U.S. at 691-95. Mr. Justice Stevens, who concurred in the result, did not join in this part of the Court's opinion. Id. at 714 (Stevens, J., concurring). The Court had not reached the vicarious liability question in Monroe. 365 U.S. 167, 191 (1961). But see Monell v. Department of Social Servs., 436 U.S. at 663-64.


333. Id. at 694-95. Mr. Justice Stevens, who concurred in the result, did not join in this part of the opinion. Id. at 714 (Stevens, J., concurring).

In another decision this year, the Supreme Court held that prison officials would be liable for civil rights violations only if "they knew or reasonably should have known," or acted with the "malicious intention" that their actions would cause a deprivation of rights. Procunier v. Navarette, 434 U.S. 555, 561-66 (1978); see Wood v. Strickland, 420 U.S. 308, 322 (1978). Giving qualified immunity to these officials, after previously extending it to, inter alia, a state governor, local school board members, and prosecutors (e.g., Imbler v. Pachtman, 424 U.S. 409, 418-19 (1976) (prosecutors); Wood v. Strickland, 420 U.S. 308, 322 (1976) (school board members); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (state governor, president of state university, officers and members of state national guard); see O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (superintendent of state hospital)), "strongly implies" to the dissenting Justice Stevens "that every defendant in a § 1983 action is entitled to assert a qualified immunity from damage liability." Procunier v. Navarette, 434 U.S. at 588 (Stevens, J., dissenting).


