ADM LAW AHMUTY, DEMERS & MCMANUS NEWSLETTER

"THANK YOU FOR READING AND THANK YOU FOR YOUR BUSINESS"

IN THIS EDITION:

A Note from Founding Partner Philip J. McManus

Welcome to the Summer 2016 edition of the Ahmuty, Demers & McManus Newsletter.

In this edition, Andria Simone Kelly, our partner who oversees our automobile litigation including motions relating to "serious injury," offers an update on the law, tips for defending a threshold case and some practical tips for motion practice.

Nick Cardascia, who leads our Appellate Department, discusses two Appellate decisions regarding damages, and a third decision regarding spoliation of evidence.

In "Firm Results" we highlight a case tried by John Gillespie and Deborah DelSordo, partners in our New York City office, in which they successfully insulated their client from a $12,059,661.00 verdict awarded by the jury in a case that combined principles of automobile negligence with New York Labor Law. We also had two excellent verdicts in "damages only" trials where causation was at issue; and a successful verdict in a premises liability case.

And in news "Of Interest" we highlight Lisa Pigeon for her outstanding work with YAI; Bob Shaw's continued good works with Bronx Advocates for Justice, and Brian Donnelly's presentation at the CLM biannual conference in Orlando.

Relationships and trust have been the bedrock of the firm's culture and success since opening our doors in 1983. This Newsletter provides us with another way to connect and have a productive dialogue on issues currently affecting our business. I encourage you to contact us and discuss the topics we write about or suggest a subject you would like to see us cover in the future. We value your feedback, positive or negative, as it helps us to better deliver the highest level of legal service to our valued clients.

On behalf of our 95 attorneys, we sincerely thank you for your continued support.

NEW YORK AUTOMOBILE LITIGATION: UPDATE 2016

By: Andria Simone Kelly, Esq., Partner, Albertson Office

The last trilogy of Court of Appeals cases that analyzed the Comprehensive Motor Vehicle Insurance Reparations Act (a/k/a the No Fault Law) was *Perl v. Meher*, 18 N.Y.3d 208 in 2011. Since that time there have been only a few Court of Appeals cases interpreting the No Fault Law. These cases have not tipped the scales at all and both plaintiffs and defendants still struggle to interpret this law to their advantage. This article will provide a refresher course in automobile litigation, tips on how to successfully defend a serious injury claim as well as a look at current trends.

Article 51 –Comprehensive Motor Vehicle Insurance Reparations Act a/k/a the No Fault Law was enacted to reduce personal injury lawsuits arising out of automobile accidents. Its purpose was to remove claims arising from automobile accidents from the sphere of common law tort litigation and to establish a quick, short and efficient system for obtaining compensation for economic loss suffered as a result of such accidents. *See Walton v. Lumberman's Mutual Casualty Company*, 88 N.Y.2d 211, 644 N.Y.S.2d 133 (1996). The No-Fault Law allows injured parties to automatically recover benefits for "basic economic loss," i.e., medical costs, percentage of lost wages, compensation for substituted services and all of the reasonable and necessary expenses incurred as a result of personal injuries sustained in an automobile accident, up to $50,000.

Section 5104 limits tort actions for personal injuries arising out of an automobile accident. Thus, an individual injured in an automobile accident has no right of recovery for basic economic loss or for non-economic loss unless a "serious injury" has been sustained.

Section 5102(d) sets forth what constitutes a "serious injury" within the meaning of the statute. Death and dismemberment are considered serious injuries so long as causally related to the accident. A significant disfigurement such as a scar, limp or blemish may also be deemed a serious injury if "a reasonable person viewing plaintiff's body in its altered state would regard the condition as unattractive, objectionable or as the subject of pity or scorn." NY PJI 2:88B.

A fracture or break of any bone or part of a bone in the body constitutes a serious injury so long as it is causally related to the automobile accident. A possibility of a fracture is sufficient to create an issue of fact as to whether the injury is serious.

Loss of fetus is also considered a serious injury, but again the loss must be causally related to the automobile accident.

A permanent loss of use of a body organ, member, function or system constitutes a serious injury so long as the loss of use is "total."

The aforementioned categories of injuries are fairly straightforward and largely depend on causation. The next two categories, however, remain the most ambiguous and therefore are the most litigated.

The permanent consequential limitation of use of a body organ or member and the significant limitation of use of a body function or system may constitute a serious injury, even though the loss of use is somewhat less than total. Both require an injury resulting in a "limitation" that is more than minor, mild or slight. *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992). The consequential limitation of use category requires that the limitation be permanent whereas the significant limitation of use does not require permanency. Limitations must be demonstrated by objective medical evidence. Subjective complaints and medical opinions based on subjective complaints alone are insufficient to constitute a "serious injury." *Toure v. Avis*, 98 N.Y. 2d 345, 746 N.Y.S. 2d 865 (2002).

The last category, which is the most common, is the 90 out of 180 day rule. The plaintiff must establish that her inability to perform her usual and customary daily activities existed for not less than 90 days during the first 180 days following the accident. Proof must be submitted detailing what the usual activities were and which activities were curtailed. The plaintiff must submit competent medical evidence that an injury or impairment, not necessarily permanent, was sustained and that the injury was the cause of the claimed disability or impairment over the applicable period.

As indicated above, the most recent Court of Appeals trilogy is *Perl v. Meher*, 18 N.Y.3d 208, decided in November 2011. This decision involved three cases in which the Appellate Division denied allegations of serious injury. In two of the cases, *Perl* and *Adler*, the Court of Appeals rejected the notion that contemporaneous quantitative measurements must be a prerequisite for recovery. In both cases, the plaintiffs' treating doctors recorded their respective symptoms in qualitative terms shortly after the accident and several years later took quantitative measurements in preparation for litigation.

In the third case, *Travis*, the Court of Appeals affirmed the dismissal. The Court found the plaintiff's doctor's failure to describe the plaintiff's disability and failure to discuss what activities the plaintiff could or could not do was fatal to the plaintiff's case.

In the prior trilogy of cases, *Pommels v. Perez*, 4 N.Y.3d 566, 797 N.Y.S.2d 380 (2005), the Court held that even with objective medical evidence, when an additional contributory factor interrupts the chain of causation - such as a gap in treatment, intervening medical problem or pre-existing condition - summary judgment dismissal may be appropriate.

The *Pommels* trilogy was affirmed in *Baez v. Rahamatali*, 24 A.D.3d 256, 808 N.Y.S.2d 171 (1st Dept. 2005), *aff'd*, 6 N.Y.3d 868, where an unexplained 20-month gap in treatment was fatal to the plaintiff's case.

In *Toure*, *supra*, the Court reemphasized that the limitations must be demonstrated by objective medical evidence and that subjective complaints and medical opinions based on those complaints alone are insufficient to constitute a "serious injury."

While the former cases remain good law, the Court of Appeals in *Ramkumar v. Grand Style Transportation*, 22 N.Y.3d 905, 976 N.Y.S.2d 1 (2013) has since reinterpreted the "some reasonable explanation" standard articulated in *Pommels, supra*.

In *Ramkumar*, the plaintiff testified at his deposition that he stopped treating because No Fault cut him off and he had no medical insurance. The Court found this minimum explanation for cessation of treatment without supporting documentation was sufficient to raise a triable issue of fact as to whether the plaintiff sustained a serious injury within the meaning of the No Fault law.

In the case of *Windham v. New York City Transit Authority*, the First Department followed the reasoning in *Ramkumar* and determined that the plaintiff did not raise a triable issue of fact with regard to her claims of "permanent consequential" or "significant limitations of use" where she had an unexplained gap in treatment and continued to be covered by her employer's health insurance. *Windham*, 115 A.D.3d 597, 983 N.Y.S.2d 4 (1st Dep't 2014).

In the recent case of *Alvarez v. NYLL Mgmt. Ltd.*, the Court of Appeals reaffirmed the principle that a plaintiff's medical expert must adequately address degenerative, pre-existing conditions in opposing a defendant's motion for summary judgment under the serious injury threshold. *Alvarez*, 120 A.D.3d 1043, 993 N.Y.S.2d 1 (1st Dep't 2014), *aff'd*, 24 N.Y.3d 1191 (2015).

In *Alvarez*, the plaintiff was involved in an automobile accident and alleged serious injuries to her right shoulder, right knee and neck. The defendants moved for summary judgment, arguing that the plaintiff did not sustain a causally related qualifying serious injury. The defendants submitted expert reports from an orthopedic surgeon and a radiologist. The defendant's orthopedic surgeon found full range of motion in the plaintiff's right shoulder, right knee and neck. Both the orthopedic expert and radiologist concluded the plaintiff's conditions were degenerative in nature.

The defendants also submitted medical records of the plaintiff's treating doctors that included findings of full range of motion of the right knee, the same range of motion in both shoulders (despite the alleged injury to the right shoulder), and her emergency room records which noted a history of arthritis.

In opposition the plaintiff relied on her orthopedist's opinion, which failed to address or contest the detailed findings of pre-existing, degenerative conditions by the defendant's experts. His findings were considered conclusory and insufficient to raise a triable issue of fact.

The *Alvarez* decision shows the importance of evidence of degenerative and pre-existing conditions in serious injury threshold cases. If a plaintiff's medical records and imaging studies reveal degenerative changes, defendants may successfully argue that the plaintiff did not sustain a qualifying serious injury that was causally related to the subject automobile accident because the injuries pre-existed the accident.

Given the foregoing statute interpretation and case law, the following are some tips for successfully defending a case based on the serious injury threshold.

Featured Article – Continued

Upon receipt of a claim, immediately run an ISO, litigation search and social network search on the plaintiff. This may reveal prior accidents, incidents, claims, injuries or conditions that may be relevant in defeating the injury claims at issue.

Independently collect and review all medical records. Do not rely solely on records provided by plaintiff's counsel. The most important medical records are the Ambulance Call Report and the Emergency Room Records as the information contained therein is obtained when the claimant is being most truthful. Thus, these records are critical in either substantiating or disputing causation. All of the plaintiff's medical records should be reviewed regarding prior and subsequent injuries, conditions and accidents.

Conduct a thorough deposition of the plaintiff inquiring as to prior and subsequent accidents, incidents, injuries or conditions. The plaintiff should be questioned regarding the elements of each category of the No Fault law that is being alleged.

Obtain a good, reputable, credentialed IME doctor who conducts objective tests and quantifies ranges of motion. And, of course, make sure the expert's report is affirmed. The last thing a defendant wants is for a summary judgment motion to be denied because the expert failed to affirm the report or failed to quantify ranges of motion.

The only way to defeat a serious injury claim is by knowing the elements of the claim, keeping up with recent case law, and conducting thorough investigation/discovery regarding the plaintiff's medical history. Good deposition testimony and favorable IME reports are also critical to successfully defending these cases and will make it that much more difficult for the plaintiff to prove that her injuries are serious within the meaning of the No Fault law.

CARDASCIA'S CORNER

Damages – Fractured ankle with two surgeries – In *Blechman v. New York City Tr. Auth.*, 134 A.D.3d 487 (1st Dep't 2015), the First Department affirmed a New York County jury verdict in the amount of approximately $360,000.00 where the plaintiff sustained a broken ankle, and underwent two surgeries, an open reduction with internal fixation to repair the comminuted ankle fracture, and later, the removal of the hardware.

Damages – Spinal surgery – In *Kusulas v. Saco*, 134 A.D.3d 772 (2d Dep't 2015), the Second Department affirmed a Kings County jury verdict for pain and suffering in the total amount of $2,000,000.00 ($1,000,000.00 for past pain and suffering and $1,000,000.00 for future pain and suffering) to a plaintiff injured in a rear-end collision. The plaintiff sustained herniated discs at C4–5 and C5–6, requiring spinal fusion surgery. The plaintiff underwent a second surgery after the bone graft between C5–6 failed to properly fuse, causing the adjacent disc at C6–7 to herniate. The plaintiff testified that she suffers from chronic and severe neck pain, despite physical therapy, epidural injections, and pain medications, and that she is unable to engage in many athletic activities that she previously enjoyed. According to the plaintiff's treating physician and expert, the plaintiff will require future surgery and medical treatment, including physical therapy and pain management, for the rest of her life.

Pleadings – Answer stricken because of spoliation of evidence – The First Department modified an order of the Supreme Court and struck the defendant's answer in a defamation action where the defendant failed to preserve emails in *Chan v. Cheung*, 138 A.D.3d 484 (1st Dep't 2016). The First Department noted that "[u]pon receipt of correspondence, dated July 13, 2009, threatening litigation, and certainly upon service of the complaint herein, defendant should have placed a litigation hold on relevant electronic data in order to preserve it." The court cited to its earlier decision in *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.,* 93 A.D.3d 33 (1st Dep't 2012). The court went on to determine that the spoliation of the evidence was highly prejudicial to plaintiffs and that the destruction was willful. As a result, it issued an order striking defendant's answer.

Firm Results – Recent Trial Verdicts and Summary Judgment Wins Obtained By ADM Attorneys

Sometimes it takes a team of ADM lawyers to achieve a successful result at trial. Such was the case when **John Gillespie** and **Deborah DelSordo**, partners in our New York office, successfully insulated their client from a $12,059,661.00 verdict in a matter tried over nine weeks in the Supreme Court, New York County. The case combined elements of automobile liability and Labor Law and is very significant since it is one of the few cases of record involving the responsibility of a consulting engineer in connection with roadwork construction.

The plaintiff, a foreman for a road construction company hired by the State of New York, was struck by a motor vehicle while standing on a sidewalk performing an inspection of the construction work zone. He had been called to the area by the engineer consultant to discuss the next day's work. The motor vehicle, driven by a woman transporting medical files, entered the sidewalk from a handicap ramp 150 feet away and traveled 40mph on the sidewalk until she struck the plaintiff. John and Debbie represented the consultant inspector/engineer hired by the New York State Department of Transportation to ensure the contractors performed their work pursuant to plans and specifications.

Plaintiff alleged causes of action sounding in negligence, Labor Law 200 and 241(6) against the consultant/engineer. Prior to trial Plaintiff obtained summary judgment against the driver of the motor vehicle, her employer, and the owner of the car. ADM commenced a third-party action against the plaintiff's employer for contractual indemnification based upon the indemnity clause in the employer's contract with the State of New York.

Prior to the accident, earlier in the day, the lane adjacent to the work zone had been closed while the sidewalk was being excavated. It was required to be closed since equipment and men were physically in the lane of traffic during the excavation. At the time of the onsite meeting, no equipment or men were in the adjacent lane of traffic. Plaintiff alleged that our client directed and controlled the work and further that the traffic lane adjacent to the sidewalk should have been kept closed while the inspection and on site meeting took place. After the examination of 30 witnesses, defendants argued at closing that the Federal and State guidelines did not require closing the adjacent traffic lane for a sidewalk meeting and inspection. Defendants also argued that the sole proximate cause of the accident was driver error and that closing the adjacent traffic lane would not have prevented bizarre driver error or the accident.

Following the accident the plaintiff, a union road construction worker, was taken via helicopter to Stony Brook Hospital. He sustained 16 fractures, including a comminuted fracture to his tibia/fibula which required the insertion of a rod, ankle fracture, multiple facial fractures, fractures to several ribs and a hand injury. He underwent six surgeries over the course of five years. A seventh ankle surgery was postponed due to the trial. It is anticipated that he will need another two, possibly three additional surgeries. He never returned to work after the accident.

Although the jury found that our client was negligent and violated Labor Law Section 200, it found that neither was a substantial cause of the accident. The jury dismissed the Labor Law 241(6) claim. Total damages were awarded in the amount of $12,059,661.00. Some defendants filed a motion to reduce the verdict. ADM filed an application seeking defense costs from the plaintiff's employer.

Tom Colameo, a partner in our New York office, obtained a wonderful result in a damages only case tried in Supreme Court, Kings County, before the Honorable Laura Bailey-Schiffman.

The plaintiff, a 25-year old male, alleged a myriad of back injuries as a result of a motor vehicle accident. The course of treatment included a laminectomy, diskectomy, fecetotomy and a percutaneous cervical diskectomy. Plaintiff's surgeon testified that the plaintiff needed a lumbar fusion. Plaintiff, self-employed, never returned to work, however, he could not sustain his claim for lost earnings as he never documented them. Notwithstanding a lack of any evidence of prior neck or back issues, a causation defense was postured based upon degenerative changes shown on the plaintiff's lumbar MRIs and testimony of the defendant's biomechanical expert.

Plaintiff's last demand was $1,800,000.00 against a $100,000.00 offer. Plaintiffs' counsel asked the jury for $925,000.00 in past pain and suffering and $1,200,000.00 future pain and suffering. The jury deliberated over two days and returned a verdict of $300,000.00 past pain and suffering with no award for future pain and suffering. Plaintiff's application to set aside the verdict was denied.

In another damages only case, **Thomas Montiglio**, a partner in our Albertson office, represented a client in a case tried in Supreme Court, Nassau County.

The plaintiff was a 57-year old female who was a front seat passenger in a vehicle that was rear-ended by Tom's client on I 95. Liability was conceded, and only the issue of damages was tried.

Plaintiff alleged that she had to undergo a total left knee replacement. She was taken by ambulance from the accident scene to a hospital where she made complaints of bilateral knee pain. She attended physical therapy for a few months. There was an unexplained 14 month gap in treatment with her orthopedist. Although the plaintiff resumed treatment, she did not have knee replacement surgery for another 22 months because she had gastric bypass surgery to lose weight before having the knee replaced. The need to lose weight prior to her knee replacement was not documented in her medical records. X-rays, MRIs and the operative report noted degeneration.

Tom successfully convinced the jury that plaintiff's knee surgery was a result of a progressive deterioration as a result of her excessive weight and 25 years as a postal worker. The jury found that the knee surgery was not causally related to the accident.

Michael Salvo, managing partner in our New Jersey office, obtained a defense verdict for his client in a premises liability matter. The incident occurred within a health center building, which is part a large hospital complex located in Washington Township, New Jersey. The plaintiff, the corporate director of the health center, claimed that a dangerous condition existed due to water that accumulated in the reception area of the facility caused in part, by people tracking water and/or slush into the facility on their feet. Michael represented a management company which provided housekeeping services for the hospital facility. Plaintiff alleged that our client was on notice of the condition, failed to clean it, post wet floor signs and/or maintain the floor in a safe condition. After only 10 minutes of deliberation, the jury returned with a unanimous defense verdict for our client.

In a premises liability action, **Vincent Ambrosino,** a partner our New York office, and **Sean Hutchinson** of our Albertson, office successfully moved to dismiss plaintiff's complaint against a building owner and managing agent. Plaintiff alleges she fell while ascending an interior staircase in the building in which she resides. The electrical power was out, and therefore, there was no electric light in the stairwell as a result of a blackout which occurred in the aftermath of Super Storm Sandy.

Because the electronic access card readers at the building entrances did not work without power, the managing agent hired a security company to provide guards to check tenant's access cards at building entrances and to ensure that only tenants and their guests entered the building. In her decision, Judge Cynthia Kern found there was no statutory or common law requirement that the owner and managing agent maintain lighting in the stairway during a blackout. Further, the Court noted that there was no liability on the part of an owner of a premises for failing to provide sufficient illumination in a dark stairway during a blackout. The Court also noted that to the extent the plaintiff contended that the owner and managing agent were negligent in failing to circulate warnings regarding Super Storm Sandy or provide instructions to tenants regarding what they should do in case of a blackout, the Court found such contention unavailing as there is no duty to warn tenants of a forecasted natural disaster or to tell tenants what to do in case of a blackout. On the contrary, the Court noted that an owner has no duty even to warn of the danger inherent in using a dark stairway, because such stairway's condition is "open and obvious."

Lisa Pigeon, a partner in our Albertson office, prevailed at a Traverse Hearing obtaining a dismissal for a client in a potentially significant Labor Law case. The case involved a worksite accident wherein the plaintiff was struck by plywood and was unable to work as a result of the accident. **James Edwards** and **Steven Zecca** of our New York City office filed a Motion to Dismiss the complaint on the grounds of lack of personal jurisdiction and defective service. Lisa and **Brendan Bertoli** prepared the reply papers.

Judge Molia of the Suffolk County Supreme Court scheduled a Traverse Hearing wherein Ms. Pigeon presented testimony from her client's corporate officer confirming that the nominated defendant on the complaint did not exist and was only a trade name; as well as testimony from our client's receptionist who testified she was not authorized to accept service of process. Judge Molia's written decision to dismiss the plaintiff's complaint is with prejudice and the plaintiff is time barred from asserting any further claims.

Firm Results - Continued

In another matter, **Vincent Ambrosino** successfully prosecuted a motion on behalf of a property owner which sought conditional summary judgment on its contractual indemnification claim from a tenant who used a paved entryway (driveway) for its parking lot business. In granting conditional summary judgment, the Court found that there was no evidence of negligence presented on the part of the building owner and as such, it is entitled to indemnity from the parking lot which had a contractual responsibility under lease, to inspect and maintain the premises. The plaintiff alleges that she tripped and fell on a sidewalk due to a "hazard on a defective sidewalk or driveway." The conditional indemnification order insulates the client for any judgment against it and permits recovery of attorney's fees.

Andrew Mantione from our Albertson office successfully prosecuted a summary judgment motion on behalf of a supermarket chain successfully arguing that the store was not liable for an independent contractor's negligent actions.

Plaintiff claimed to have been injured at our client's supermarket when a vendor allegedly struck her with a hand truck/cart near the store's rear swinging doors connecting the sales floor and stock room. Andrew argued that the store did not owe a duty to the plaintiff for the actions of the vendor and that the vendor's negligent acts were the sole proximate cause of this accident. The Court agreed, finding that the plaintiff had failed to provide any admissible evidence other than mere conclusions that our client was negligent and thus our motion was granted.

Of Interest

Claims Education Programs

Brian Donnelly, a partner in our New York City office, recently spoke at the Claims and Litigation Management Alliance held in Florida on April 6th-8th. Brian spoke about "Claims Management-Building Your Own A Team!"

CLM promotes and furthers the highest standards of claims and litigation management and brings together the thought leaders in both industries. CLM's members and fellows include risk and litigation managers, insurance and claims professionals, corporate counsel, outside counsel and third-party vendors. The CLM sponsors educational programs, provides resources and fosters communication among all in the industry.

ADM Supports Soccer's Rising Stars

Robert Shaw, a partner in our New York City office, and Co-President of Bronx Advocates for Justice, demonstrates his youth mentoring skills at the annual Soccer Clinic for Special Needs children. Bob is back row, last on the right.

ADM Gives Back to a Diverse Community

On May 18, 2016 Ahmuty, Demers & McManus sponsored the YAI ARTS event at the M1-5 Lounge in Tribeca, where various YAI artists showcased their artwork for sale. YAI organizers and **Lisa Pigeon,** a partner with the firm, spoke. The firm was honored for its dedication to YAI, an organization that helps people of all ages with disabilities.

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Ahmuty, Demers & McManus traces its origins to 1946. The Firm as it now exists was formed in 1983 and quickly evolved to its present size of more than ninety attorneys serving the legal needs of clients throughout New York and New Jersey. As experienced litigators with decades of proven results, our attorneys demonstrate daily the tenacity, creativity, energy and commitment required to defend the wide spectrum of complex legal issues that confront our clients.

Perhaps the best indication of the Firm's abilities and dedication to service is manifested by the fact that we have continued to represent many of the same clients over the years, despite management changes within those companies and corporations. As the Firm and its clientele continue to grow proportionately, the Firm remains committed to the core value of taking a personalized approach to the needs of our clients.

Clients of the Firm recognize the commitment of all Ahmuty, Demers & McManus attorneys to handle legal matters efficiently and expeditiously, while at the same time providing the highest quality legal representation at a reasonable cost. The Firm works closely with its clients, utilizing a team approach in the defense of legal matters. The Firm prides itself on understanding the needs and philosophy of our clients and is highly experienced in resolving cases through trial, early resolution, ADR or motion practice. Since no single approach is best suited for all clients or cases, this versatility is a benchmark of the Firm. The legal staff includes some of the finest trial and appellate lawyers in New York, thereby allowing Ahmuty, Demers & McManus to handle any case regardless of complexity.

With over ninety attorneys, Ahmuty, Demers & McManus is uniquely qualified to provide superior and cost effective legal services to all of our clients. Perhaps the best indication of the Firm's abilities and reputation is demonstrated through the long term relationships the Firm maintains, even when many of our clients have experienced management changes. Ahmuty, Demers & McManus is committed to diversity in all hiring practices.