2019 Preface

New York Courts addressed several tort-law issues of statewide importance this year. The following is a summary of a few of the most notable recent decisions from the New York State Court of Appeals on questions of defamation, product liability and personal jurisdiction (among others) as well as some of the Appellate Divisions, which weighed in on topics from President Trump's (non-)immunity from state-court suits to how much social media information is discoverable.

Defamation

Absolute Privilege. In *Stega v. New York Downtown Hosp.*, the Court of Appeals considered whether an absolute privilege is available to protect defamation defendants in every kind of quasi-judicial hearing or proceedings. The answer is no. The Court concluded that if the defamatory statements were not made in an adversarial proceeding, the alleged defamer is entitled only to a qualified privilege, meaning that the plaintiff must be able to establish that the statements at issue were made with malice. The Court explained that if there is no adversarial hearing, an absolute privilege could be used to shield statements the defendant might not even know about and would never be able to rebut.

Products Liability

The Scarangella Exception. In 1999 the Court of Appeals carved out a rule to protect a manufacturer from liability when a user sustains an injury that could have been prevented if the manufacturer had included an available safety feature as standard equipment, rather than as a purchasable option. This exception is reserved for situations where the product is purchased by a sophisticated buyer able to balance the benefits and risks of not having the safety device in the specifically contemplated circumstances for which the product will be used.

Two years ago, in *Fasolas v. Bobcat*, the Appellate Division for the Second Department carved out an exception to the *Scarangella* rule, deciding that *Scarangella* did not apply where the manufacturer sells its product to a company that is in the business of renting equipment to others for their personal use. The court reasoned that a rental company would not have control over the renters and would not be in a position to make an accurate risk-utility analysis.

This year the Court of Appeals reversed, rejecting the "rental market distinction." The Court ruled that the purchaser's status as a rental company did not establish, as a matter of law, that it

was not in a position to engage in the balancing analysis contemplated by *Scarangella.* The Court was also unwilling to presume, as a matter of law, that a purchaser who rented equipment to other users would not consider the well-being of its retail customers when making rental decisions.

Privacy

Can a "look-alike" avatar in a video game be defined as a "portrait" within the meaning of the privacy provisions of the Civil Rights Law? The Court of Appeals answered this question in a case brought by actress Lindsay Lohan against a video game company, in which she alleged that the company created an avatar in its video game that misappropriated her portrait and voice. The Court ruled that the avatar did not constitute a "portrait" of the actress where it was merely a generic artistic depiction of a young woman without any particular identifying physical characteristics and the game did not use the plaintiff's name or photograph. The Court noted that there can be no misappropriation under the privacy statute if the plaintiff is not recognizable from the image in question. Furthermore, even if the avatar's voice resembled the plaintiff's voice and accent, the resemblance would not support a privacy claim, because the plaintiff did not dispute that her actual voice was not used in the game. *Lohan v. Take-Two Interactive Software, Inc.*

Governmental Immunity

Presidential Immunity from Actions in State Courts. Famously, President Trump has been sued in state courts many times over the course of his career. But can he be sued in a state court while he is in political office for actions unrelated to his official duties? In *Clinton v. Jones,* the United States Supreme Court ruled that President Clinton was subject to civil liability in *federal courts for conduct that had taken place in his private capacity, but the Court did not address state* court actions.

In *Zervos v. Trump,* in a matter of first impression, the Appellate Division for the First Department ruled that President Trump *is* subject to a state lawsuit while in office, for actions that do not implicate his official duties. Summer Zervos claimed that she had been subjected to unwanted groping and kissing by Mr. Trump when she competed on his television reality show. Mr. Trump responded by calling Ms. Zervos (and several other women) "liars," and suggesting that Ms. Zervos was perpetuating a "hoax." Ms. Zervos brought an action for defamation against the President in New York state court, insisting that the allegations were true, and that the President's comments damaged her reputation. The President argued that the Supremacy Clause of the United States Constitution required a state court to defer litigation against a sitting President until his term ends. In a split decision, the court rejected this argument, noting that the Su-

premacy Clause only provides that federal law supersedes a state law with which it conflicts, and there is no federal law that conflicts with New York's defamation law.

Prior Written Notice/Functional Equivalency. Does a staircase serve the same function as a sidewalk? On the one hand, both enable pedestrians to get from one place to another. On the other, if stairs and sidewalk are the same, the Legislature would not have needed to include an enumerated list of six covered locations in prior written notice legislation. Yet, in *Hinton v. Village of Pulaski*, the Court of Appeals held that a stairway was the "functional equivalent" of a sidewalk for purposes of the prior written notice rule.

Mr. Hinton fell while descending an exterior stairway connecting a public road to a municipal parking lot. Citing its prior ruling in *Woodson v. City of New York*, the Court determined that the case involved the application of settled precedent. The dissent disagreed with the majority's conclusion, arguing that the Court was expanding "a single fact-specific determination into an erroneous doctrine." In *Woodson*, the stairs were shallow concrete steps that were integrated into a sloped area of a connected standard sidewalk. In contrast, the staircase down which Mr. Hinton fell was not integrated with, or part of any standard sidewalk. Furthermore, the stairway in question was steep, irregularly spaced, and made of railway ties and compacted earth, with potholes, muddy clumps, and a rickety wooden railing. Noting that most stairways are much more hazardous than sidewalks, and a common location for falls, the dissent predicted that, as a result of this ruling, local governments would have less incentive to maintain their potentially dangerous stairways, making everyone less safe.

Proprietary Acts. Hurricane Sandy will never be forgotten by New Yorkers, especially those who lived in the Rockaways. In *Connolly v. Long Island Power Authority*, the issue before the Court of Appeals was whether LIPA was acting in a discretionary or proprietary capacity when its decided to continue providing power at a time when Sandy was bearing down on New York, and the threat of a massive storm surge was imminent. Plaintiffs alleged that their homes and personal property were destroyed by fire as a result of the authority's negligent failure to preemptively de-energize the Rockaway Peninsula prior to the arrival of the storm. LIPA admitted that the provision of electricity traditionally has been a private enterprise, which normally would be regarded as a proprietary function. However, it argued that it was a governmental function under these circumstances because it related more broadly to the protection of the public from a natural disaster. The Court rejected LIPA's claim emphasizing that the characterization of an action as discretionary or proprietary

rests on the character of the specific act or omission in question, which in this case was LIPA'S failure to de-energize the Rockaway Peninsula before the hurricane struck.

Personal Jurisdiction

Consent by Registration. The last few years have produced a flood of litigation in the wake of the United States Supreme Court's recent landmark personal jurisdiction jurisprudence. Following the Supreme Court's decision in *Daimler AG v. Bauman*, which limited general jurisdiction to the place where an entity is "at home" (generally, a state in which it has its place of incorporation or its principal place of business), attorneys wondered whether registration consenting to service on an agent in a state could justify general jurisdiction over a foreign defendant. In 2016 the Second Circuit, in *Brown v. Lockheed Martin Corp.*, ruled that registration to do business in the state pursuant to Connecticut's business registrations statute was not sufficient to confer jurisdiction on the state's courts, but observed that the result might be different in another state with a more carefully drawn statute, which expressly required consent to jurisdiction as a condition of doing business in the state.

Until 2019 no appellate court in New York had ruled on whether registration to do business in-state was a sufficient basis for an assertion of personal jurisdiction, with trial courts split on the issue. However, in 2019 the Appellate Division for the Second Department became the first appellate court in the State to rule on the validity of the consent-by-registration theory. In *Aybar v. Aybar*, the court concluded that, following *Daimler*, defendant's registration to do business in New York was *not* sufficient to obtain general jurisdiction over causes of action that are unrelated to the corporation's affiliations with New York. The court concluded that an exercise of jurisdiction, without the express consent of the foreign corporation to general jurisdiction, would, in the words of the *Daimler* Court, be "unacceptable grasping."

Long-Arm Jurisdiction. It seems like a day rarely passes without another story about a tragic shooting at a school, or other public place. Efforts to keep illegally purchased guns off the streets have been hampered by laws that have been specifically enacted by Congress to protect gun manufacturers from liability. This year the effort was made even more difficult as a result of a Court of Appeals decision interpreting New York's long-arm statute in favor of an Ohio gun seller.

In *Williams v. Beemiller, Inc.,* the Court ruled that New York lacked jurisdiction over an Ohio gun licensee who sold numerous guns in Ohio to an individual who brought the guns to New York, where he sold the guns illegally. The Ohio dealer had reason to know that the guns might be brought to New York, because the purchaser said that he aspired to own a gun shop in Buffalo. One

of the guns the Ohio dealer sold was, in turn, sold in New York to a Buffalo gang member, who used it to shoot the plaintiff in this case. Although the Court conceded that the Ohio dealer's contacts with the State were sufficient to satisfy New York's long-arm statute, it ruled that such an exercise of jurisdiction would violate the dealer's due process rights. The Court noted that due process requirements must be based on a defendant's own affiliation with the State, and not on any random, fortuitous or attenuated contacts the defendant makes by interacting with other people who are affiliated with the State.

Motor Vehicle Accidents

No Fault/Statute of Limitations. Most vehicle owners in New York obtain no-fault insurance coverage through private insurers. Some, however, opt to be self-insured. Both satisfy the owner's obligations under the No-Fault Law. One would therefore expect that when a medical provider brings an action to recover first-party no-fault benefits, all vehicle owners would be treated equally by the courts, regardless of the method by which they fulfilled their no-fault obligations. No-fault claims against insurance companies liable for no-fault benefits based on an insurance policy are subject to the six-year statute of limitations in CPLR 213(2) for claims arising out of contractual obligations and liabilities. What about for the self-insured owner for whom no contractual obligation exists because there is no policy? In *Contact Chiropractic, P.C. v. New York City Transit Auth.*, the Court of Appeals in a split decision ruled that the three-year statute of limitations in CPLR 214(2), which governs disputes with respect to penalties created by statute, should control when a defendant is self-insured. As a result, plaintiffs making claims against insurance companies have six-years in which to bring a claim, but similarly situated plaintiff's making claims against a self-insured defendant have only three years.

Duty Not to Disturb a Driver. Worried parents are constantly warning their children not to text while driving. Unfortunately, these warnings prove unavailing in far too many cases. In an Appellate Division, Fourth Department case, a young driver allegedly received a text from his girlfriend, who was at another location, and the distraction caused the driver to cross the center line of a highway and crash head-on with another vehicle. The motorist in the other car brought action against the driver's girlfriend, arguing that she knew or should have known that her boyfriend was driving at the time the text was sent. The court held that a person at another location, who texts the driver of a vehicle, allegedly causing that driver to become involved in an accident, owes no duty to a person injured as a result of an ensuing accident to refrain from texting the driver, even if she knew or should have known that the driver was operating a motor vehicle

at the time the text was sent. The responsibility of avoiding distractions caused by electronic devices rests with the driver, who has complete control over whether to allow the conduct of the remote sender to create a distraction; the driver can simply choose to ignore the text while driving. *Vega v. Crane.*

Discovery

Plaintiff's Social Media. Much of a person's life can be gleaned from his or her social media accounts, where every-day activities are laid out in minute detail. Now, much of that information--even if the poster tried to keep it private--is discoverable.

The Appellate Division for the First Department has ruled that private social media information can be discoverable if it contradicts or conflicts with a plaintiff's alleged restrictions and disabilities. This holding allows a defendant's data mining expert to search plaintiff's electronic devices, email, and social media accounts, including materials that have been deleted, for evidence of post-accident physical activity that is inconsistent with the plaintiff's claims regarding post-accident limitations. If the information has been posted after the accident, the material is admissible, even if someone other than the plaintiff posted the material, and the plaintiff claims that the pictures were taken prior to the accident. It is up to the jury to determine if the photos were taken before or after the accident. *Brito v. Gomez.*

Collateral Source Rule

Police Benefits. ADR benefits are paid to a police officer who retires as a result of an on-the-job injury that leaves the officer disabled. In *Andino v. Mills*, the Court of Appeals had to determine whether these benefits should be considered a collateral source that reduces a jury's award for both future lost earnings and pension. Officers who retire after an on-the-job injury are not eligible for benefits under the Workers' Compensation Law. Plaintiffs argued that ADR benefits should be regarded as a reward for past services, and that they should not be subject to a collateral source deduction. Rejecting that argument, the Court ruled that ADR benefits "fall squarely within the intended categories of collateral sources" for which a deduction is required. The Court concluded that ADR benefits paid before the officer would have become eligible for retirement replace future lost earnings. However, once the recipient would have become eligible for a regular service pension, the ADR benefits begin to function as a pension for services rendered and are not subject to a collateral source deduction.