NEW YORK COURT OF APPEALS ROUNDUP:

HARMLESS DEPRIVATION OF THE RIGHT TO COUNSEL AND SOLE LEGAL CAUSE OF INJURY

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This month we discuss the recent decision of the Court of Appeals holding that, although the defendant was deprived of his right to counsel at a suppression hearing, he was not entitled to a new trial because it was clear beyond a reasonable doubt that representation by counsel at the hearing could not have altered the outcome of the case. We also discuss a decision holding that a defendant need not admit in a sworn statement that he possessed narcotics in order to move to suppress them. Finally, we discuss the decisions in three personal injury actions, two of which involved whether the plaintiff's own conduct was the sole proximate cause of his injuries as a matter of law, relieving the defendants of liability, and one of which defined the limits of liability for owners of domestic animals.

Right to Counsel

Can violation of the Sixth Amendment right to counsel at a pre-trial hearing ever be considered harmless error? Yes and no, according to *People v. Mikel Wardlaw*. When a defendant is wrongfully denied his right to counsel at a proceeding, such as the suppression hearing at issue, courts do not inquire whether the presence of counsel would have changed the result of that proceeding, and in that sense the error is not treated as harmless, the Court explained. However, if it is clear beyond a reasonable doubt that the outcome of the proceeding had no effect on the outcome of the case as a whole, the defendant is not entitled to the relief of a new proceeding or trial, and in that sense the harmless error rule may be applied, the Court held. The caveat: "where a deprivation of the right to counsel was egregious, and where to leave it unremedied might invite future abuse, appellate courts may grant relief even though the defendant was not prejudiced by the error."

The Court divided over *Wardlaw,* with the dissent written by Judge Carmen Beauchamp Ciparick, in which Chief Judge Judith S. Kaye and Judge George Bundy Smith joined, asserting that the Court "never before" had applied the harmless error rule to deprivation of the right to counsel. The majority opinion, written by Judge Robert S. Smith,

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disputed that assertion, arguing that precedent supported the Court's ruling.

The Court was swayed by the overwhelming evidence of guilt, and perhaps also by the nature of the crime and the fact that affording the defendant a new trial would subject the nine-year old rape victim – defendant's niece – to the trauma of testifying again. The Court observed that applying the harmless error rule in this case served the interest of the child, and the interest of society "in punishing heinous crimes like this one with as much efficiency and promptness as possible without unfairness to the defendants."

At a hearing to suppress incriminating statements he had made to the police, the defendant asked to dismiss his counsel and proceed *pro se.* The trial court permitted him to do so without making the "searching inquiry" necessary to ensure that the defendant understood the perils of this course of action. The People conceded this was error, and that defendant thereby had been denied his right to counsel. The motion to suppress was denied.

At trial, the defendant was represented by counsel. In addition to the defendant's statements, the prosecution introduced testimony of the girl that the defendant had attacked her, testimony of her mother and brother that the child had reported the assault immediately, testimony of medical personnel as to the physical condition of the child when they examined her the next day and the presence of semen in her vagina and anus, and testimony of a DNA expert that the semen was defendant's.

The Court stated that, but for the DNA evidence, it might have directed the "normal remedy" of a new suppression hearing at which defendant would be represented by counsel, with a new trial if the statements were ordered suppressed. The DNA evidence, however, proved defendant's guilt "conclusively." Thus, a new hearing would serve no purpose because it was clear beyond reasonable doubt that, even if the defendant's statements had not been introduced into evidence, the outcome of the trial would have been the same.

Suppression Standing

The Court was unanimous in reversing the conviction in *People v. Thomas Burton*. What seems remarkable about the case is that it had to be decided at all, yet the "Catch 22" argument of the prosecution succeeded before the Supreme Court and Appellate Division, First Department, and apparently had been accepted by other trial courts following the First Department's decision in *People v. Brown,* 256 A.D.2d 42 (1st Dep't 1998), *leave denied,* 93 N.Y.2d 871 (1999).

Defendant moved to suppress the crack cocaine that he was charged with possessing. The People opposed the motion on the basis that the defendant had not specifically admitted he possessed the drugs and therefore lacked standing. Under CPL 710.60[1], a pretrial suppression motion must state the grounds therefore and "contain sworn allegations of fact, *whether of the defendant or of another person or persons,* supporting such grounds." (Empahsis added.) Here, the motion was supported by an affidavit of counsel that the defendant had been walking along the street when he was stopped and searched for no apparent reason and that the

police officer claimed he had found the cocaine in defendant's pants pocket, which affidavit was supplemented by the police officer's statement that he had recovered the cocaine from defendant's person.

Judge Victoria A. Graffeo's opinion for the Court reiterated that, as provided in the statute, it is not necessary that the sworn allegations supporting a suppression motion come from the defendant himself. They may have another source, including statements by law enforcement officers in an accusatory instrument.

A suppression motion must be made upon factual allegations that support the contention a search was unjustified, not merely that a search occurred. Thus, in the "buy-and-bust" scenario, police statements that the defendant engaged in a narcotics transaction provide a justification for the search, and must be countered either with a denial that the defendant engaged in the transaction or a sworn assertion of facts that provide some other ground on which to suppress the evidence. Where, as in this case, the search was premised upon defendant's alleged "furtive behavior," however, the suppression motion may be based upon the assertion that the defendant was doing nothing wrong, which raises the factual issue whether the search was justified.

"Sole" Legal Cause of Injury

The Court recently examined two cases that raised the issue of whether the conduct of the plaintiff was the sole legal cause of his personal injury, thus defeating his claim as a matter of law. In *Soto v. New York City Transit Authority,* a negligence action, the Court, in an opinion by Judge Carmen Beauchamp Ciparik for a four-judge majority, concluded that Soto's clearly reckless conduct did not bar his recovery. However, in *Robinson v. East Medical Center, LP,* an action arising under the strict liability provisions of the scaffold law, a unanimous Court, in an opinion by Judge Susan Phillips Read, held that plaintiff could not recover.

The facts in *Soto* were not unlike those of other cases involving subway or railroad accidents where the conduct of the injured plaintiff put his well-being in clear jeopardy. Indeed, Soto's conduct may be seen as extreme.

On a Friday night in late January 1997, Soto went from his home in Queens to Manhattan with three friends. Their destination was a bar. After a night of bar-hopping and drinking, at around 4:00 a.m. Soto and his friends headed home. Reaching the Queensboro Plaza elevated subway station and believing there was no train running to their destination, they left the station platform, entered onto a 3-foot wide wooden catwalk adjacent to the tracks, and walked single-file to the next station. When no train appeared at that station, they re-entered the catwalk and proceeded toward the next station. It was dark, it had been raining, and the only illumination along the catwalk was provided by lighting from the street below. Halfway to the next station, Soto heard a subway train coming from behind him. He and his companions began to run along the catwalk in an effort to catch the train at the next station. Soto was struck by the train and suffered the loss of both legs below the knee.

The claim of negligence against the New York City Transit Authority was based on the motorman's failure to bring the train to a stop before it struck Soto. The proof supporting this claim rested largely upon Soto's testimony that he was running at 7-8 mph as he heard the train approaching, a speed he gauged based upon observing the running speed he regularly reached on a treadmill at his health club. Plaintiff's expert witness then used Soto's estimate of his running speed to opine that, had the motorman been operating the train properly, he could have brought the train to a stop before the impact with Soto.

As reflected by the persuasive dissent by Judge Robert S. Smith, the 4-3 decision of the Court finding Soto's recklessness was not a superceding cause of the accident to absolve the Transit Authority of liability as a matter of law, and the 3-2 decision in the Appellate Division, Second Department, affirming the judgment entered in the trial court, show a sharp division over the ultimate result. While this division can be accounted for in large part by Soto's conduct, the acceptance by the trial court of Soto's opinion of his running speed on an elevated, dark, wet catwalk, after a night of drinking – hardly comparable to circumstances on a treadmill at a health club – contributed to the narrowness of the margin upholding the verdict in favor of plaintiff. If there is an outer limit for liability in cases of this kind, *Soto* takes us there.

Robinson, on the other hand, left no room for a conclusion other than that plaintiff was the sole proximate cause of his injuries.

Robinson, a plumber who had been installing pipe hanger systems for several weeks using a six-foot step ladder, saw that he was reaching a point in his work that required an eight-foot ladder. He mentioned to the foreman that he would be needing an eight-foot ladder, to which the foreman responded, "I'll see if I can get you one." This was the first time that Robinson had ever asked the foreman for any tool or equipment because, as he explained in his testimony, Robinson's practice was to help himself to ladders and other equipment. An hour or more later, Robinson finished the piping that required only a six-foot ladder, but the foreman had not yet given him a taller ladder. Rather than look for an eight-foot ladder himself in the shed where ladders were stored or elsewhere on the site, and despite having other work to do, Robinson proceeded to use the six-foot step ladder to hang pipe in the area where a taller ladder was called for. While standing on the top cap of that ladder, he lost his balance and was injured.

Robinson sued the owner of the premises and the general contractor under the New York State Labor Law (§§ 240(1), 200(1) and 241(6)), and moved for partial summary judgment. Robinson's employer, who was impleaded into the action, moved to dismiss on the ground that Robinson's own actions were the sole proximate cause of the accident.

The Court held that Robinson was the sole cause of his injuries and was entitled to no recovery, affirming the decision of the Appellate Division, Fourth Department.

While the *Soto* verdict can be understood as a jury reaction to a powerfully sympathetic case, it also may be explained as the result of the operation of New York's doctrine of comparative fault, which resulted in Soto being held to be 75% at fault and the defendants

25% at fault. Unfortunately, it appears that the jury was not given an instruction that it could consider Soto's conduct to be the sole proximate cause of his injuries, which alternative the jury may have chosen, given the facts. *Robinson*, on the other hand, never got to the jury, although even there the motion court had granted partial summary judgment to plaintiff on his § 240(1) claim and two justices in the Appellate Division dissented from the order dismissing the case.

Liability for Domestic Animal

The Court split again over another tort action, *Bard v. Jahnke.* The case involved a farm animal, but is likely to be invoked more frequently in dog-bite cases.

The action arose out of an attack by a dairy bull upon a carpenter working on defendants' farm. The bull ("Fred") was hornless, and the evidence was that he never before had injured or threatened any other person or animal, but nonetheless Fred inflicted serious injury upon the carpenter. Plaintiff asserted that the bull should have been restrained, or at least that plaintiff should have been warned that the pen in which he would be working held a breeding bull, as well as cows. His claim was supported by the expert affidavit of an animal scientist that breeding bulls are "generally dangerous and vicious animals."

Judge Susan Phillips Read, who had been among the majority in *Soto* upholding the plaintiff's verdict there, wrote the majority opinion in *Bard* ruling that defendants were entitled to summary judgment.

The owner of a domestic animal is strictly liable for the harm it causes if he "either knows or should have known of *that* animal's vicious propensities." *Quoting Collier v. Zambito*, 1 N.Y.3d 444, 446 (2004) (emphasis added). This sometimes is referred to as the "one-bite rule," but the Court noted that is a misnomer because, while a prior similar attack by the animal certainly satisfies the "knew or should have known" element required for strict liability, the element also may be satisfied with lesser behavior by the animal suggesting vicious proclivities, for example by a dog growling and baring its teeth. But Fred had never before harmed anyone and his owners had never felt the need to restrain him while people were in the cow pen. The Court had never held that particular kinds of domestic animals or breeds are dangerous, and was unwilling to establish such a precedent in *Bard.*

The more difficult issue was whether plaintiff could assert a claim for negligence. To allow the case to proceed on the theory that, due to the dangerous nature of bulls in general, the defendants should have restrained Fred or warned plaintiff, would "dilute our traditional rule under the guise of a companion common-law cause of action for negligence." The Court ruled that the liability of a domestic animal's owner must be determined under the *Collier* "knew or should have known" test applied to the particular animal.

The dissent, written by Judge Robert S. Smith, in which Judges George Bundy Smith and Albert M. Rosenblatt concurred, argued in favor of the approach taken by the majority of jurisdictions that an animal owner should be held responsible if he acts negligently to the harm of another, even if the specific animal is not more dangerous than others of its class.

The expert evidence that breeding bulls have a "high libido" and will "attack . . . unknown individuals" should have been sufficient to support a jury finding that the defendants were negligent. In apparent reference to *Soto*, in which Judge Robert S. Smith and Judge Rosenblatt dissented, the *Bard* dissent asked, "Why should a person hit by a subway train be able to recover and one hit by a breeding bull be left without a remedy?"