NEW YORK STATE LAW SUMMARY

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A. CAUSES OF ACTION

1. Negligence Standards

To set forth a claim in negligence, a plaintiff must prove a duty on the part of the defendant to protect the plaintiff from injury, a breach of that duty by the defendant, and that the plaintiff's injuries were actually and proximately caused by the defendant's breach of the duty.

2. Negligence Per Se

A violation of a state or federal statute is negligence *per se* if it is proven that a) the defendant's act, or failure to act, proximately caused the injury and b) plaintiff is in a class of individuals that was intended to be protected by the particular statute. However, a violation of a rule of an administrative agency, or an ordinance of a local government, is merely evidence of negligence and not negligence *per se*.

3. Respondent Superior

An employer is vicariously liable for its employee's negligent or intentional acts if those acts are committed within the scope of the employee's employment, and the conduct is generally foreseeable and a natural consequence of the employment. If the negligent act by the employee was outside the scope of his employment so that his acts constitute an abandonment of his service, and there was no expressed or implied consent by the employer for the employee to perform that act, there is no liability for the employer.

An employee making a minor deviation from work-related activities is still acting with the scope of his employment for the purposes of *respondeat superior.*

If an individual is operating a motor vehicle as an independent contractor of the owner of that vehicle, then the owner would not be liable under *respondeat superior* for the negligent acts of the independent contractor.

Under the Transportation Equity Act of 2005, an owner of a motor vehicle cannot be held liable for harm to persons or property that arise from the use, operation or possession of that vehicle if the owner is in the business of renting or leasing motor vehicles and there is no negligence or criminal wrongdoing by the owner. 49 U.S.C. Section 30106. This statute, commonly known as the "Graves Amendment," preempts the New York State Statute which imposes vicarious liability on lessors for the negligent conduct of its lessees. See NYS Vehicle and Traffic Law Section 388.

4. Negligent Hiring, Training And Retention

In addition to an employer's liability under the doctrine of *respondeat superior*, an employer may be negligent if the employer hired or retained an employee with knowledge of the employee's propensity for the sort of behavior which resulted in the injury. The employer's negligence consists of placing the employee in a position to cause foreseeable harm, which most probably would not have occurred had the employer taken reasonable care in the hiring of employees.

In New York, an employer may be liable for an employee's conduct if the employee was not properly trained or supervised. However, it has been held that such a duty to supervise does not extend to common and ordinary activities associated with the performance of the employee's job.

5. Negligent Infliction Of Emotional Distress

A cause of action for negligent infliction of emotional distress is often referred to in New York as a "Zone of Danger" action because the observer-plaintiff must face actual risk of physical harm to recover damages. In addition to being in the zone of danger, plaintiff must have an intimate familial relationship with the party who suffered the physical harm. The New York Court of Appeals has held that, under very limited circumstances, a bystander may recover damages for the emotional distress caused by observing serious physical injury or death to a family member. Notably, in New York, an aunt, uncle and grandmother have been found to be lacking the "intimate familial relationship" required to establish a claim for negligent infliction of emotional distress. Nevertheless, in a case where the plaintiff was the aunt of the decedent and "legal guardian," assuming all the duties and responsibilities of a mother, the Court found that the plaintiff-aunt had an "intimate familial relationship" with the decedent, thereby allowing her to recover damages based upon negligent infliction of emotional distress.

6. Wrongful Death

Wrongful death and survivorship claims may be brought to recover for a person's death. As more fully discussed below, a wrongful death claim compensates a decedent's survivors for economic losses. A cause of action for wrongful death requires the following elements: (1) death; (2) defendant's wrongful conduct which gave rise to a cause of action that could have been brought by the decedent had the death not occurred; (3) distributees who sustained a pecuniary loss and (4) the appointment of a personal representative for the decedent. See Section 5-4.1 of the Estates, Powers and Trusts Law.

In addition, a survivorship claim may be brought by the estate to recover for the decedent's conscious pain and suffering prior to death. Survivorship claims are based upon case law, not statutory law, in New York.

7. Third-Party Bad Faith Claims

"The notion that an insurer may be held liable for the breach of its duty of 'good faith' in defending and settling claims over which it exercises exclusive control on behalf of its insured is an enduring principle . . ." according to the leading case on this issue, *Pavia v. State Farm Mut. Auto. Ins. Co.*, 82 N.Y.2d 445, 605 N.Y.S.2d 208 (1993). The New York approach to bad faith is understandable and well-balanced. When confronted with a policy limits case and the possibility of a settlement within the policy limits, the insurer must not act in "gross disregard" of the insured's interests, and must not fail to place the insured's interest on an equal footing with that of the insurer. An insurer is not penalized for a "mere mistake in judgment."

Under *Pavia* and earlier cases, bad faith is established only when liability is clear and the potential recovery far exceeds the policy limit. There must be proof of a settlement demand and an actual lost opportunity to settle within the policy limits, after all doubt about liability is removed. An insurer cannot be compelled to concede liability and settle a questionable claim simply because an opportunity to settle is presented.

8. Negligent Entrustment

Negligent entrustment is a cause of action in New York. If an owner of a motor vehicle allows the vehicle to be used by an incompetent or unfit person with the knowledge, or constructive knowledge, that the driver is incompetent or unfit to operate the motor vehicle, the owner may be liable for an injury which is negligently inflicted by the use of the vehicle by that driver. The owner would be liable even if the use of the vehicle at the time of the injury was beyond the scope of the consent which the owner granted to the operator.

If the owner permits an unlicensed person to operate his motor vehicle, this constitutes some evidence of negligence, and the owner may be liable for any injuries which were negligently inflicted as a result of the operation of the vehicle. However, if the owner of the vehicle entrusts the vehicle to an unlicensed person, but the operator was competent to operate the vehicle and not responsible for the accident, the owner may not be liable.

The failure of an employer to investigate whether his employee was licensed to operate a motor vehicle does not necessarily make the employer liable for that

individual's negligence in the operation of that vehicle. If the negligent acts were committed outside the scope of the employment and without authorization of the employer, then the owner is not liable. In addition, an owner may not knowingly permit his motor vehicle to be operated by an individual whose control over the vehicle is limited such that operation of the vehicle would constitute an unreasonable danger.

B. STATUTE OF LIMITATIONS

1. Bodily Injury/Property Damage Claims

The New York statute of limitations for commencement of an action to recover for bodily injury or property damage, arising from negligence, is three (3) years, measured from the date of the accident.

The statute is tolled during periods of incapacity to sue, such as infancy (adulthood is age 18) and insanity, until the incapacity is lifted. Thus, in a negligence action in New York, a minor plaintiff has until his twenty-first (21st) birthday to file suit.

2. Wrongful Death

The statute of limitations for a survivorship cause of action is one (1) year from the date of death or three (3) years from the date of the accident, whichever is longer. See CPLR Section 214(5).

The statute of limitations for the commencement of a wrongful death action in New York State is two years from the date of death. See Section 5-4.2 of the Estates, Powers and Trusts Law. The statute of limitations is tolled, however, if the tortfeasor is the subject of a criminal prosecution arising from the same occurrence. In that situation, the executor or administrator of the decedent's estate may bring the wrongful death action within one year after termination of the prosecution.

3. Breach of Contract/Bad Faith Claims

New York actions based upon express or implied contractual obligations are governed by a six-year statute of limitations. A cause of action for breach of contract accrues upon the breach. It is irrelevant that the plaintiff is unaware of the breach or that damages are merely nominal.

Actions for contribution or indemnification accrue in New York at the time of payment and are governed by the six-year statute, which accrues from the date payment is made by the party seeking indemnification.

An action based upon a sale governed by Article 2 of the Uniform Commercial Code is subject to a four-year limitation, measured from the date of the sale.

C. DAMAGES

1. Damages Recoverable In A Personal Injury Action

A personal injury plaintiff, upon finding of liability, is to be compensated for all his past, present and prospective damages. This includes fair and adequate compensation for past and future medical expenses, and lost earnings, and also for past and future pain and suffering. A spouse may recover for loss of services and consortium of the injured spouse arising out of the injuries.

2. Damages In A Wrongful Death Action

In wrongful death actions, recovery is limited to economic damages which result from the pecuniary loss sustained by the distributees for whom the action is maintained. The measure of the pecuniary loss is the reasonable expectation of future assistance or support to the survivors had the decedent survived. In addition to lost wages, the value of "services" provided by the decedent such as cooking meals and performing household chores are also considered. The survivors may also recover for reasonable expenses of medical aid, nursing and attention incident to the injury causing the death and reasonable funeral expenses incurred by any distributee, or for which any distributee is responsible. There is no recovery for grief, heartache or sorrow, but there is a recognized claim for loss of parental support, including a parent's nurture and the intellectual training received from a parent. Damages for the pecuniary loss to an infant are calculated up until the time the child reaches the age of twenty-one (21). In addition, punitive damages may be recoverable if same would have been recoverable had the decedent survived.

In determining an award for conscious pain and suffering, the fact finder may consider the evidence which demonstrates an understanding of impending death, the amount of time that lapsed between injury and death, the extent of consciousness and the severity of pain.

3. Punitive Damages - Standards For Recovery

Punitive damages may be recovered when a wrongful act is done willfully, wantonly, maliciously or under other aggravating circumstances. In general, punitive damages are recoverable for injuries resulting from intentional torts such as assault, battery, defamation, false impoundment and fraud. Punitive damages may also be recovered in a breach of contract case where the conduct constituting, accompanying, or associated with the breach is first actionable as an independent tort for which compensatory damages are ordinarily available, and the conduct is sufficiently egregious to warrant exemplary damages. Punitive damages are not permitted in cases involving ordinary negligence.

The party seeking the punitive damages must demonstrate not only egregious tortuous conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally. Driving while intoxicated may constitute a basis for an award of punitive damages, although, the courts will generally look at this issue on a case by case basis. In order for an award of punitive damages to stand against the employer, however, there must be more than a showing that the employee was acting within the scope of his employment.

4. Insurability Of Punitive Damages

As a matter of public policy, punitive damages are not insurable in New York.

5. Effect Of Settlement With Co-Defendant

A settlement with one tortfeasor buys peace for that settling defendant, from claims of the plaintiff and claims for contribution (but not necessarily indemnity) from the non-settling tortfeasor. The release does not bar plaintiff's claims against the remaining tortfeasor, although it may limit his recovery. In a trial against that non-settling tortfeasor, plaintiff's recovery will be reduced by the amount paid by the settling tortfeasor, or the settling tortfeasor's equitable share of the damages as found by the trier of fact, whichever is greater. See, generally, General Obligations Law §15-108.

D. COMPARATIVE FAULT

1. Type Of Comparative Fault System

New York is a "pure" comparative negligence state, and as such, a plaintiff's comparative negligence acts to reduce his recovery to the extent that he was comparatively negligent. A plaintiff who is sixty (60%) percent at fault in causing his injury may recover forty (40%) percent of his damages from the responsible

tortfeasor. Since the State of New York has adopted comparative negligence, it has abrogated the doctrine of last clear chance which permitted a plaintiff who was contributory negligent to recover in full if the defendant had the last clear chance to avoid the accident.

2. Status Of Joint And Several Liability

Article 1601 of the Civil Practice Law and Rules brought about a significant limitation upon the rule of joint and several liability, holding that a defendant whose responsibility for an accident is less than fifty percent of the total fault, will be responsible only for his percentage share of non-economic damages. Unfortunately, injuries resulting from motor vehicle accidents are expressly excepted from this reform statute. Therefore, if a defendant involved in a motor vehicle accident is found one (1%) percent at fault, that defendant may be held responsible for the entire judgment. Of course, that defendant would have a right to contributions from the other defendants to the extent each was found at fault.

E. DEFENSES

1. Generally

A defendant is required to plead any defense, which if not pleaded, would be likely to take the adverse party by surprise or would raise an issue of fact not appearing on the face of a prior pleadings. Such affirmative defenses include arbitration and award, collateral estoppel, comparative negligence, discharge in bankruptcy, illegality by statute or common law, fraud, infancy or other incapacity, payment, release, *res judicata*, statute of frauds, or statute of limitation. These defenses, as well as affirmative defenses for lack of personal jurisdiction, lack of legal capacity to sue, prior action pending, failure to state a cause of action and failure to name a proper party can be the basis of a motion to dismiss under CPLR§ 3211. A motion to dismiss based on lack of personal jurisdiction must be made within sixty (60) days of service of the answer.

2. "Serious Injury" Threshold

Pursuant to §5104 of New York's Comprehensive Motor Vehicle Insurance Reparations Act, in personal injury actions arising from motor vehicle accidents, a plaintiff may only recover non-economic damages, *i.e.* pain and suffering, if his injuries meet the "serious injury" standard as defined by §5102(d). If the plaintiff cannot establish that his injuries are "serious" as defined by §5102(d), he may only recover economic damages, *i.e.* unreimbursed medical expenses, unreimbursed loss wages, etc. Section 5102(d) defines "serious injury" as follows:

> [A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.

3. Seatbelt Law

Under New York law, the failure to use a seat belt cannot be introduced into evidence in regard to the issue of liability but rather as an element in mitigating damages. In the typical personal injury case in New York, the accepted rule has been that the injured party cannot recover damages for personal injuries he would not have sustained had he used an available seat belt. The failure to use a seat belt is an affirmative defense that must be properly pleaded and proved by the defendant. If sufficient expert testimony is presented by the defense, the jury must determine whether failure to use a seat belt resulted in greater injury, and thus warrants a reduction of the damages awarded based on a failure to mitigate.

F. EVIDENCE/DISCOVERY

1. Are Rules Of Evidence Similar To The Federal Rules Of Evidence?

New York has not adopted the Federal Rules of Evidence or any modification of those rules, but rather relies upon its own court-made-body of evidence rules.

2. Admissibility Of Traffic Citations/Criminal Charges Against The Driver

Evidence of a plea of guilty to a traffic offense arising out of the incident surrounding defendant’s alleged negligence is admissible at trial, as some evidence of negligence. Nevertheless, because pleas of guilty to traffic charges are frequently prompted by considerations of expediency, the fact that a guilty plea was entered goes to the weight, and a defendant is entitled to explain the guilty plea. On the other hand, if found guilty after a trial on the issues, the finding of guilt would not be admissible.

3. Admissibility of Medical Bills

At trial, medical bills are admissible for the purpose of demonstrating the extent of plaintiff's pain and suffering. If the medical expenses were paid by no-fault insurance benefits, the judge may instruct the jury that they cannot take the amount of the medical bills into consideration when rendering the jury verdict. However, if plaintiff's medical expenses were not paid by insurance, they may be recovered at trial.

4. Discovery Of Statements/Claims Files

A party has a right to obtain, from any other party, a copy of any statement made by him regarding the incident being litigated. Claims files themselves, as a whole, are not discoverable as they are created in preparation of litigation. However, certain items within a claims file may be discoverable by a plaintiff, such as adverse party statements, names and addresses of witnesses, accident reports made in the regular course of business, prior pleadings and expert witness information.

5 Discovery Of Insurance Information

In New York a party may obtain discovery of the existence and contents of any insurance agreement under which any entity carrying on an insurance business may be liable to contribute, indemnify or reimburse any part or all of a judgment entered in the action.

6. Venue

Venue is based upon the county in which one of the parties resided at the time that the lawsuit was commenced. In the event that venue is improper, the defendant must serve a written demand with the answer, or before the answer is served, "that the action be tried in a county he specifies as proper." Thereafter, defendant may move to change venue within fifteen (15) days after service of the demand, unless within five (5) days after such service, plaintiff serves a written consent to change the place of trial to the place defendant specified. Alternatively, even if plaintiff selects a venue where one of the parties reside, a motion to change venue based upon *forum non conveniens* may be filed where the defendant contends that the venue selected by plaintiff is inconvenient and that there are no significant contacts with plaintiff's selected venue to warrant the case being heard there.

7. Any Unique Discovery Rules

New York continues to limit discovery. A defendant may obtain a Verified Bill of Particulars from a plaintiff, and may also obtain certain limited discovery, including the identification of witnesses, the production of photographs, and the production of treating physician reports and medical authorizations. In a personal injury action interrogatories may be used only under penalty of waiver of a deposition. If there is a product liability issue involved, interrogatories may be served in connection with those issues only.

Expert discovery is also limited. A plaintiff is required to identify his liability and damage experts and to provide limited information concerning the expert's background and credentials and the general opinion, and basis for that opinion. There is no provision in New York law for the deposition of an expert, either on liability or damages. Thus, in a trucking accident it is unheard of for the parties to conduct discovery depositions of the respective accident reconstruction experts and/or proposed medical experts and/or treating physicians.

G. PLACARD LIABILITY

Federal regulations, including 49 C.F.R. § 376.11(c) mandate identification of the leased vehicle in the carrier's service by displaying the name of the carrier and the DOT permit number on the vehicle. Accordingly, 49 C.F.R. § 376.12 (c) creates a carrier's liability for a leased truck's negligence as a matter of law.

H. LIABILITY FOR UNAUTHORIZED PASSENGERS

New York recognized the unauthorized passenger defense which provides a defense to an owner/employer for a claim made by a passenger who rides in the employer's vehicle without permission from the owner/employer, provided that the owner/employer explicitly forbids the carrying of unauthorized passengers.

I. LIENS

As a general rule, the potential proceeds of a lawsuit are an asset against which a lien may be effectuated. Statutory provisions exist under both the workers' compensation law and the social services law that allow parties to put a lien on the proceeds of a lawsuit. An injured employee's workers' compensation carrier can recover all amounts that it has paid to an injured employee out of the proceeds of the employee's recovery from a third-person, regardless of whether it has been obtained by judgment or settlement.

If the plaintiff's injuries were sustained through the use of an automobile, the first fifty thousand dollars of recovery is treated as having been paid in lieu of no-fault benefits. The effect of this is that the worker's compensation carrier is entitled to recover the first

fifty thousand dollars paid, from the automobile insurance carrier, rather than the plaintiff himself. Any dispute as to this sum is to be settled between the worker's compensation carrier and the automobile liability insurer through arbitration.

J. OFFERS OF JUDGMENT

An Offer of Judgment is known as an Offer to Compromise under New York's civil practice rules. It may be made any time, but not later than ten days to serve written notice of acceptance upon the defendant. If the plaintiff declines the offer, and later recovers less than the offer made, he may not recover any costs from the defendant and is liable to the defendant for costs accrued from the time the offer was made until the culmination of the action. **See CPLR §3221.**

K. AVAILABILITY OF UNINSURED/UNDERINSURED MOTORIST COVERAGE TO EMPLOYEE DRIVERS

1. Is It Available, Can It Be Limited?

Uninsured motorist coverage in New York is mandatory and based upon a standard endorsement that establishes certain minimum requirements permitting an insured to recover from his, or her employer's own insurance carrier in the event of an accident with either a motor vehicle, or another motor vehicle that qualifies as "uninsured" within the statutory or endorsement definition.

Underinsured motorist coverage, or supplementary uninsured motorist coverage, is optional in New York State. This coverage is designed to afford protection to an insured in the event a tortfeasor has liability limits that are too low to compensate adequately for an injury. Essentially, the purpose of this type of coverage is to provide injured individuals with compensation for their injuries equal to the protection they themselves purchased to protect others from injuries they might have caused.

2. Effects Of Workers' Compensation Benefits On Availability Coverage

It is not uncommon for a claimant to receive both no-fault and Workers' Compensation benefits for lost earnings. When determining what benefits are to be paid, the no-fault carrier may deny only those amounts that would be covered under Workers' Compensation. Therefore, Workers' Compensation benefits are akin to first-party benefits and can be used to offset against basic economic loss. However, such benefits may not be used to lower the amount recoverable under non-economic loss.

L. TORT REFORM

1. Generally

New York has enacted some limited tort reform in recent years, in the areas of joint and several liability, structuring of personal injury judgments, restricting employer liability for third party suits, and capping medical malpractice damage awards.

Article 50-B of the Civil Practice law and Rules has placed a requirement for the structuring of payments on judgments for future non-economic loss in excess of $250,000. The statute provides an express formula for calculating into the future, for both economic and non-economic loss. Thus, defense counsel often object to economic testimony in the damage phase of personal injury lawsuit.

Pain and suffering damage awards in medical malpractice actions are now subject to a cap. Unfortunately, this statute does not apply outside the realm of medical malpractice.

Since 1972, employers whose employees were injured on the job have been subject to third party complaints for contribution and indemnification, notwithstanding the clear language of the workers' compensation act, and whether or not the action is based upon a contractual indemnity. This law changed, effective in 1996, such that an employer may not be impleaded by a tort defendant unless he is being impleaded on a contractual indemnification claim or the plaintiff has suffered a "grave injury." Only the most severe of injuries (not even a herniated disc will fall into the definition) will support a third party complaint against the employer. The statutory change has been held not to be retroactive.

The last-mentioned reform will have importance to trucking companies whose employee-drivers are injured during the course of loading or unloading, through the negligence of the shipper, consignee, or other terminal or warehouse personnel. Typically, the driver sues the terminal for his injuries, and the terminal in turn impleads the trucking company, alleging that the trucker was itself negligent in failing to train the driver adequately in loading and unloading procedure and safety. The reforms, contained in amendments to Workers' Compensation Law § 11, should significantly reduce the likelihood of a third party complaint against a trucking company in the case of an injured driver, except in those cases involving "grave injury".

2. No-Fault – First Party Benefits And Subrogation

New York law requires automobile liability insurance policies to provide at least $50,000 per person in first party benefits to cover basic economic loss, including, but not limited to, medical expenses and lost earnings. See New York Consolidated Laws - §§ 5102 & 5103.

Any insurer liable for the payment of first party benefits on behalf of an injured party has a right to recover the amount paid from the insurer (or self-insurer) of any other person to the extent that such other person would be liable to pay damages in a legal action due to a related motor vehicle accident, if at least one of the motor vehicles involved weighed more than six thousand five hundred (6,500) pounds unloaded or is a motor vehicle used principally for the transportation of persons or property for hire. See New York Consolidated Laws - § 5105(a).

In the case of bus occupants, other than the operators, owners and employees of the bus company, an insurer liable for the payment of first party benefits on behalf of any such bus occupants shall have no right to recover the amount of such benefits from the insurer of the bus. Id.

The sole remedy of an insurer to recover for the payment of first party benefits as outlined above is submission of the controversy to mandatory arbitration. See New York Consolidated Laws - § 5105(b). Furthermore, New York law specifically directs submission of such subrogation claims between insurers to Arbitration Forums, Inc. 11 NYCRR § 65.10(b). This process of resolving disputes over the reimbursement of no-fault benefits is referred to as "loss transfer."

M. MISCELLANEOUS

1. New York Statute Mandates Vicarious Liability For Chassis Lessors; Primary Coverage From Bobtail Insurer

A quirk of statutory law leads to unexpected results in areas common to trucking (and especially intermodal) accidents. Vehicle & Traffic Law § 388 provides vicarious liability to owners (even if not otherwise liable through actual operation, by *respondeat superior*, or by federal leasehold regulations) of tractors and trailers, for the negligence of their own operators and that of the other. A trailer owner is thus liable for the negligence of the driver of a non-owned tractor hauling the trailer, quite apart from federal regulatory leasehold requirements. The statute also requires that the tractor and trailer both have mandatory automobile insurance coverage.

2. A Potential Remedy For Excessive Verdicts

In New York, CPLR § 5501 (c) permits a trial or appellate court to enter a different award if the award materially deviates from reasonable compensation. In addition, to ensure that state and federal courts do not have "substantial variations" in monetary judgments, the U.S. Supreme Court ruled that federal courts, when interpreting New York law, must follow the "material deviation" standard and can reduce or increase an award if the verdict is inadequate or excessive.

3. Settlements Must Be Written

In New York, an agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in writing and signed by the party or his attorney or reduced to the form of an order and entered on the record. Thereafter, the stipulation must be filed with the county clerk.

4. New York State Department of Motor Vehicles MV-104 Forms

When an accident occurs in New York which involves a fatality, personal injury or property damage over $1,000, the accident must be reported within ten days to the New York State Department of Motor Vehicles using the MV-104 form. Failure to report the accident is a misdemeanor, punishable by up to one year imprisonment. If the driver of the vehicle is physically unable to prepare the report, the owner of the vehicle is required to report within ten days after learning the facts of the accident.

5. Workers' Compensation: Not A Total Bar

Ordinarily, an employer's liability for an on-the-job injury is limited to Workers' Compensation benefits. However, in New York, a defendant named in a lawsuit filed on behalf of the employee, can recover against the employer for common law indemnification and contribution if the employee sustained a "grave injury." A "grave injury" is defined by the New York State Workers' Compensation Law, § 11 as:

> death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury

to the brain caused by an external physical force resulting in permanent total disability

6. CPLR Section 3420: The End of The "No Prejudice" Rule

Under § 3420 of the CPLR, all policies of insurance issued in New York provide that failure to give any notice required under the policy shall not invalidate a claim by any insured, the injured person, or any other claimant, unless the failure to provide timely notice caused prejudice to the insurer. Under § 3420 (c), the burden of proof is on the insurer to demonstrate prejudice if notice was provided within two years of the time required in the policy. If notice was given after the two years required in the policy, the burden will be on the injured person or claimant to demonstrate that the insurer was not prejudiced by the late notice.