COURT OF APPEALS
EVIDENCE UPDATE

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I. PROCEDURAL CONCERNS

A. Court Control Over Trial

1. Generally

People v. Nelson
27 N.Y.3d 361, 33 N.Y.S.3d 814 (2016)

In this murder prosecution, the issue before the Court was whether the trial court should have taken action when defense counsel objected to T-shirts worn by certain spectators that bore a photograph of the deceased victim, thereby depriving D of a fair trial. Court held: (1) For purposes of evaluating a claim that spectator conduct violated a D's right to a fair trial, whether the trial court should intervene to resolve spectator conduct, and what intervention is appropriate, must depend upon the facts and circumstances of each case. If the trial court determines, in its discretion, that the spectator conduct was so prejudicial that no other form of curative action can ensure the D's right to a fair trial, then a mistrial will be warranted. In deciding whether to intervene and what intervention is appropriate, the trial court's paramount concerns must be the protection of the D's fundamental right to a fair trial and the court's obligation to preserve order and decorum in the courtroom. One fact that should not be considered is any First Amendment right of the spectators themselves. Appellate courts evaluating a D's contention that the trial court erred in refusing to intervene in spectator conduct, or did not intervene appropriately, should review the trial court's action or inaction for abuse of discretion. (2) As to spectator displays of a deceased victim's portrait or photograph should be prohibited in the courtroom during trial, as such depictions may be viewed by the jury as an appeal to sympathy for the deceased victim and the spectators, and as a request to hold D responsible for their loss. Portraits or photographs of a deceased victim, taken while the victim was alive, are generally inadmissible at trial unless relevant to a material fact to be proved at trial because such photographs may arouse the jury's emotions. A similar risk is presented by images of a deceased victim displayed by spectators in the courtroom, either on their clothing or by some other method. Such displays, however, are not so inherently prejudicial that they require reversal and a new trial in every case. A trial court's error in refusing to intervene upon defense counsel's request is subject to harmless error analysis. (3) Here, as the proof of guilt was overwhelming and the spectator's conduct was not egregious as only a few spectators wore the shirts, the shirts were not particularly inflammatory and the spectators did not call attention to themselves or their shirts, the trial court's failure to take action was harmless error. **COMMENT:** As D did not object during the trial but only during summations, Court held issue was preserved only for that part of his contention.

2. Presentation of Proof

People v. Gary
26 N.Y.3d 1017, 20 N.Y.S.3d 327 (2015)

In this non-jury trial of a criminal prosecution for participating in a scheme to defraud mortgage lenders, Court held trial court did not abuse its discretion in admitting into evidence a document,

which had been deemed admissible pursuant to the parties' pretrial stipulation containing a loan officer's handwritten note that D verbally confirmed certain false information, where defense counsel did not raise a hearsay objection to the receipt of the note and a witness' testimony referencing it until the following day of trial and after receipt of considerable unobjected-to testimony respecting the notation. While the trial court might have exercised its discretion differently, its decision not to revisit the issue of notation's admissibility could not under the circumstances be characterized as an abuse of discretion. Although the stipulation was not irreversibly binding, it was at least presumptively enforceable and D offered no plausible excuse for failing earlier to seek an exception from its coverage. **COMMENT:** Court also observed: "Although courts are ordinarily bound to enforce party stipulations where a party has in the interests of judicial economy stipulated to the admission of voluminous materials and there are among them scattered items, both prejudicial and ordinarily inadmissible that may reasonably have escaped counsel's attention, there is no rule preventing an exercise of judicial discretion to relieve the party, at least in part, from the stipulation, particularly where doing so would not significantly prejudice the other side."

People v. Ortiz
26 N.Y.3d 430, 23 N.Y.S.3d 626 (2015)

In this prosecution for burglary and related offenses, the prosecution alleged that D pushed the complainant into their apartment while holding a razor blade to her neck; and D claimed the complainant pulled him into the apartment and then lunged at him with a kitchen knife. The jury found D guilty of burglary but acquitted him in the second degree of burglary in the second degree and robbery. That conviction was reversed and D proceeded to a second trial on the sole charge of burglary in the second degree. Court held the doctrine of collateral estoppel did not bar the People from introducing, at D's second trial, evidence that D threatened the victim of a burglary with a razor blade even though the jury had acquitted D of charges involving the use or threatened use of a dangerous instrument at the first trial. Court noted the practical difficulties of applying collateral estoppel outweighed the otherwise sound reasons for preventing repetitive litigation, as complaining witnesses, who both testified that D threatened to cut one witness's throat if the other did not give him money or jewelry and that D made a slitting gesture with his hand when he uttered the threat, would have had to materially alter their testimony and mislead the jury in order to omit reference of the razor blade.

B. Spoliation

Pegasus Aviation v. Varig Logistica
26 N.Y.3d 543, 26 N.Y.S.3d 218 (2015)

Court held: "A party that seeks sanctions for spoliation of [electronic] evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." And "Where the evidence is determined to have been intentionally or willfully destroyed, the relevancy of the destroyed documents is presumed. On the other hand, if the evidence is determined to have been

negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed documents were relevant to the party's claim or defense. Majority held spoliation occurred as a result of negligence but Judge Stein in dissent concluded it was the result of gross negligence. Court then remitted for a determination as to the relevance issue. **COMMENT:** (1) Court adopted rule from pre-December 2015 Second Circuit precedent, including *Zubulake v. UBS Warburg, LLC,* 220 F.R.D. 212 [SD N.Y. 2003]). (*See, generally* Schlosser, "New York Should Catch the Federal ESI Wave Before It's Too Late," NYLJ, 12/23/15, p. 3, col. 3); and that precedent was rejected by amendment to FRCP 37(e), effective December 1, 2015. *(See Id.).* (2) Does this standard apply to non-electronic evidence spoliation cases? (3) As Judge Stein's carefully crafted dissent shows, applying this standard will not always be a simple task. (4) Court does not fully discuss what triggered the duty to preserve. (5) For a thoughtful discussion of a non-party's duty to preserve, *see* Gleason, "Implementation of Litigation Holds for Non-Parties," NYLJ, Jan 20, 2017, p. 3, col.3.

Post-*Pegasus* Appellate Division Decisions:

Arbor Realty Funding v. Herrick, Feinstein LLP
140 A.D.3d 607, 36 N.Y.S.3d 12 (1st Dep't 2016)

In this legal malpractice action, arising out of D's representation of P in negotiating a construction loan, a dispute arose concerning P's alleged spoliation of evidence. It is undisputed that P's obligation to preserve evidence arose at least as early as June 2008, when P retained counsel in connection with its claims against D. However, P did not issue a formal litigation hold until May 2010. As a consequence, P's internal electronic record destruction polices, including recycling of backup tapes, deletion of employees' emails stored in their inboxes or sent items folders for 189 days, and erasure of employee hard drives and email accounts upon the employee's departure from the firm, were not suspended until May 2010. In addition, P's CEO deleted his emails on a regular basis between June 2007 and June 2010, with the result that only one of his emails from the relevant period was produced. P produced no emails from the relevant period from its Executive Vice President of Structured finance, who was involved in the transaction. Supreme Court dismissed the complaint as a spoliation sanction. Court reversed. Citing *Pegasus,* Court held that where, as here, the spoliation is the result of P's intentional destruction or gross negligence, the relevance of the evidence lost or destroyed is presumed. P failed to rebut this presumption and motion court properly determined an appropriate sanction should be imposed on P. However, the sanction must reflect "an appropriate balancing under the circumstances," and generally, dismissal of the complaint is warranted only where the spoliated evidence prevents the party from presenting its case or defense. Here, the record does not support such a finding, given the massive document production and the key witnesses that are available to testify, including the eight additional persons identified in the minutes, on whom D had not yet served interrogatories or deposition notices at the time it filed its renewal motion. Accordingly, an adverse inference charge is an appropriate sanction under the circumstances, since it will permit the jury to: (1) find that the missing emails and other electronic records would not have supports P's position, and would not have contradicted evidence offered by D, and (2) draw the strongest inference against P on the issues of whether P would have made the loans regardless of any potential zoning issues, and the measure or P's damages taking into account its assignment of the loans and/or failure to mitigate its damages.

Rookwood v. Busy B's Child Care
147 A.D.3d 561, 48 N.Y.S.3d 48 (1st Dep't 2017)

In this personal injury action arising out of an allegedly defective staircase at premises owned by individual Ds and leased to D daycare, Court granted Ps' motion for sanctions against Ds for spoliation of the staircase and struck their answer. Court stated: "The intentional destruction of the staircase, key physical evidence, severely prejudiced P's ability to prove their case, and warrants the extreme sanction of striking D's answers. The record contains no evidence that photographs depicting the staircase exist. Nor is this a case where plaintiffs sat on their rights. The mere fact that the daycare did not own the premises does not warrant the denial of the motion to strike defendants' answers or the imposition of a lesser penalty, given that plaintiffs served the daycare with a preservation letter and that the daycare's chief executive officer was one of the owners of the premises."

Golan v. North Shore-Long Island Hosp.
147 A.D.3d 1031, 48 N.Y.S.3d 216 (1st Dep't 2017)

In this medical malpractice action, Supreme Court granted P's motion to impose sanctions against Ds for the willful spoliation and destruction of evidence to the extent of precluding the defendants from contesting that a suture failed for any reason other than the actions of the surgeon and/or asserting a defense at trial that the suture was defective or unsafe. Citing *Pegasus* Court reversed, stating Supreme Court improvidently exercised its discretion in granting the plaintiff's motion to impose sanctions against the defendants for the willful spoliation and destruction of evidence, as the plaintiff failed to demonstrate that the defendants were obligated to preserve the broken suture at the time of its destruction, that the suture was destroyed with a "culpable state of mind," and/or that the destroyed suture was relevant to the plaintiff's claim. In any event, the plaintiff failed to establish that the defendants were on notice that the suture might be needed for future litigation.

UMS Solutions, Inc. v. Biosound Esaote
145 A.D.3d 831, 44 N.Y.S.3d 93 (2d Dept. 2016)

In this breach of contract action, it was established that P's president intentionally destroyed evidence, *e.g.*, emails in anticipation of litigation, and took an external hard drive from an employee's apartment and destroyed it before it could be examined. This finding established common law spoliation - when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading. It then held, citing *Pegasus* that where, as here, the spoliation is the result of intentional or willful conduct, the relevance of the destroyed evidence is presumed, Thus, the striking of the pleadings was warranted.

Rokach v. Taback
148 A.D.3d 1195, 50 N.Y.S.3d 499 (2d Dep't 2017)

In this P/I action, P moved for sanctions based on D's destruction of surveillance tape, Court held trial court improvidently exercised its discretion in failing to impose any sanction. P

sustained her burden of establishing that spoliation occurred, given that D failed to preserve the surveillance video despite their knowledge of a reasonable likelihood of litigation regarding the incident, and the highly relevant nature of the video evidence to that litigation. However, since the destruction of the evidence did not deprive P of her ability to prove her claim so as to warrant the drastic sanction of striking Ds' answer, the appropriate sanction is to preclude Ds from offering any evidence in this action regarding the alleged contents of the erased surveillance video.

Atiles v. Golub Corp.
141 A.D.3d 1055, 36 N.Y.S.3d 533(3d Dep't 2016)

In this slip and fall action, D provided video surveillance that included footage prior to, during, and after P's accident, but which did not contain footage covering the full 24-hour period after the accident, as P had requested. P moved to compel production of the surveillance of the two hours after the accident or for an adverse inference charge. It was not disputed that D did not have it. Citing *Pegasus*, Court noted that P failed to show why the video was not preserved, and then held P failed to establish that D intentionally or willfully destroyed the video while under an obligation to preserve it; P thus must establish the relevancy of the portion of the video they did not receive; P failed to establish relevancy; and thus, an adverse inference charge was not appropriate.

Burke v. Queen of Heaven Roman Catholic Elementary School
151 A.D.3d 1608, 58 N.Y.S.3d 757 (4th Dep't 2017)

In this slip and fall action, P moved to strike D's answer on the ground that Ds had destroyed and replaced the stairs P slipped on after P had notified Ds of their intent to have their expert inspect the stairs. Citing *Pegasus*, Court noted the original condition of the stairs was relevant and that Ds destroyed the stairs with a culpable state of mind, thus, warranting sanctions against D. However, striking the answer was not warranted as the record did not demonstrate that P has been left "prejudicially bereft" of the means of prosecuting her action, given that P has in her possession, among other evidence of the condition of the stairs, photographs of the stairs taken after the commencement of this action. Thus, an appropriate sanction is that an adverse inference charge be given at trial with respect to any now unavailable evidence of the condition of the stairs.

C. Objections

People v. Jackson
29 N.Y.3d 18, 52 N.Y.S.3d 63 (2017)

In this sexual assault prosecution, D argued the trial court's *Sandoval* ruling on his JD adjudication was erroneous. Court held the argument was not preserved. It noted that as with other questions of law concerning a ruling or instruction, a challenge based on a *Sandoval* error must be preserved for appellate review by a specific, timely objection. To preserve an issue for review, counsel must register an objection and apprise the court of grounds upon which the

objection is based at the time of the allegedly erroneous ruling or at any subsequent time when the court had an opportunity to effectively changing the same. Under the unique factual circumstances of this case and based on the trial court's colloquy with counsel, Court concluded that D's challenge to the *Sandoval* ruling is unpreserved. D did not make the argument he now asserts at the time of the alleged erroneous ruling, or at any time at all. Instead, he argued, against the People's initial proffer, that the court should deny the request because D's actions should not be judged based on a young offender's undeveloped mind and sense of values.

II. BURDENS OF PROOF AND ALTERNATIVES TO PROOF

A. Circumstantial Evidence

People v. Whitehead
29 N.Y.3d 956, 51 N.Y.S.3d 486 (2017)

In this drug prosecution, Court held evidence was legally sufficient to support D's conviction. Although the People did not recover or introduce any of the cocaine that D was charged with possessing, "direct evidence in the form of contraband or other physical evidence is not the only adequate proof." Here, the People presented sufficient evidence in the form of, among other things, D's intercepted phone calls replete with drug-related conversations, visual surveillance, and the testimony of cooperating witnesses.

B. *Res Ipsa Loquitur*

Morejohn v. Rais Constr. Co.
7 N.Y.3d 203, 818 N.Y.S.2d 792 (2016)

Court stated: "We reaffirm that only in the rarest of *res ipsa* cases may a P win S/J or a DV."

Barney-Yeboah v. Metro-North
25 N.Y.3d 945, 6 N.Y.S.3d 549 (2015),
***revg.*, 120 A.D.3d 1023, 992 N.Y.S.2d 215 (1st Dep't 2014)**

P, a passenger on D's train, was allegedly injured when a ceiling panel in the train car swung open and struck her in the head. P testified that she was seated on the train when she heard a loud sound, and the next thing she knew, she was on her knees with people around her yelling. After the commotion, she looked up and saw a hanging panel – a cabinet utility door that had hit her in the head. First Department granted her S/J based on *res ipsa*. Court of Appeals reversed, stating: "This is not the type of rare case in which the circumstantial proof presented by P is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable.

Post-*Morejon* Decisions:

Sterbinsky v. 780 Riverside Drive
139 A.D.3d 458, 29 N.Y.S.3d 792 (1st Dep't 2016)

Court held trial court properly awarded partial S/J to P on liability based on the doctrine. P, a cable TV technician, was injured while walking on a metal grate on D's property when the grate collapsed causing him to fall down an air shaft. Court found that D failed to rebut the "presumption of negligence" arising from the collapse of the grate due to the corroded condition of the metal frame supporting it. D's claim that the condition was a latent defect was belied by testimony of D's own employee. **COMMENT:** Yes, Court said presumption. Upon what basis?

Legakis v. New York Westchester Square Med. Ctr.
144 A.D.3d 549, 42 N.Y.S.3d 17 (1st Dep't 2016)

In this M/M action, Court affirmed grant of partial S/J on liability to P. This case was one of those "rare" cases where the doctrine could be used to establish liability as a matter of law since inference of negligence is "inescapable" from facts and "unrebutted." D MD admitted that he should not have placed an "exceedingly hot" mallet into P during surgery.

Bonacci v. Brewster Service Station
54 Misc.3d 437, 44 N.Y.S.3d 845 (Sup. Ct. Westchester Co. 2016) (Ecker, J.)

P was injured when his car fell off lift at D's service station's garage while he and mechanic were standing in bay of garage. Court granted P's motion for partial S/J on liability, concluding this case is one of those "rare" cases where the doctrine can be used to establish liability as a matter of law.

C. Presumptions: V&T §388

State Farm v. Sajewski
150 A.D.3d 1297, 56 N.Y.S.3d 204 (2d Dep't 2017)

D1 drove a car owned by his father, D2, into residence of X. P, after paying X's claim, commenced this subrogation action against Ds. D2 claimed he was not liable as D1 was operating his car without his permission; D1 averred that he did not have permission. Court denied D2's motion to dismiss. Citing *Country-Wide v. National RR Passenger* (6 N.Y.3d 172 [2003]), Court noted that "uncontroverted" testimony that the owner did not give consent is insufficient to overcome the presumption. Indeed, even if the owner and driver both disavowed that permission was given, the Court may still require additional support before granting S/J. Here, evidence established that the keys were kept in a central location, available to D1, and that D1 had driven other cars owned by D2. Thus, the Court found a question of fact.

III. RELEVANCY

A. Generally

People v. Harris
26 N.Y.3d 1, 18 N.Y.S.3d 583 (2015)

In this bribery prosecution arising out of D's payment to three teenage girls after they recanted their prior identifications of D's brother as the shooter in a murder investigation, Court held the trial court's decision to admit evidence of the murder of a fourth eyewitness, with which defendant was not involved but which caused the girls to reveal D's actions to police, was not an abuse of discretion. It noted the evidence of the second murder showed the state of mind of the girls and provided an explanation as to why they abandoned their recantations and told police about their deal with D. It also explained why the girls were placed in protective custody prior to the trial, and allowed the jury to have all of the relevant facts before it to decide whether to credit defense counsel's arguments or the girls' testimony concerning the charges against D. While possible prejudice could arise from the testimony in that the jury might link D to the second murder, that prejudice was minimized by the court's limiting instruction, which made clear that D had not been charged with causing the death of the fourth eyewitness and the prosecutor stated there was no evidence showing D was involved.

B. *Molineux/Bad Acts*

People v. Frankline
27 N.Y.3d 1113, 36 N.Y.S.3d 834 (2016)

In this assault prosecution arising out of D's assault of his former intimate partner, Court held prior acts of violence against the partner was admissible as non-propensity background evidence of their relationship, and motive and intent for the subsequent acts of violence towards the partner.

People v. Frumusa
29 N.Y.3d 364, 27 N.Y.S.3d 103 (2017)

In this larceny prosecution of defendant for transferring some of the proceeds of a hotel he co-owned into accounts defendant held for his other separate businesses, Court held a contempt order issued in a civil action involving the same funds defendant was criminally charged with stealing did not constitute *Molineux* evidence. The Court noted the People were not seeking to introduce evidence that defendant had previously embezzled money from a separate business several years before. Rather, the contempt order stated that defendant's businesses had failed to return to the hotel the very same funds that defendant was on trial for stealing from the hotel. It therefore would be impossible for the jury to conclude from the contempt order that defendant had a "propensity" to steal or otherwise commit crime.

Mazella v. Beals
27 N.Y.3d 694, 37 N.Y.S.3d 46 (2016)

In this medical malpractice and wrongful death action, the trial court admitted a consent order between the D doctor and OMPC. The consent order alleged that D deviated from medical standards in prescribing medication to 13 persons, including the decedent, without adequately monitoring or evaluating them; and in the consent order, D agreed that he would not contest the negligence charges involving 12 out of the 13 patients, excluding the decedent. Court held it was error to admit the consent order. In so ruling, the Court noted that no *Molineux* exception was applicable; it was not relevant to the issue of D's negligence or proximate cause, especially as D conceded he deviated from the standard of care; and any possible relevance was outweighed by the "obvious undue prejudice of his repeated violations of accepted medical standards."
COMMENT: Admissible as habit?

IV. IMPEACHMENT

A. Prior Bad Acts

People v. Smith
27 N.Y.3d 652, 36 N.Y.S.3d 861 (2016)

In this decision resolving 3 appeals, Court set forth basic considerations for determining whether a criminal D may examine arresting police officers about their misconduct in making other arrests that give rise to civil actions against the officers. They are: (1) presence of good faith basis for the examination; (2) misconduct is relevant to officer's credibility in that it shows an untruthful bent or self-interest, as well as it is an act that is "criminal, vicious, or immoral;" (3) absence of unfair prejudice to the parties and jury confusion. In the separate appeals, Court held trial court properly disallowed questions about whether the charges from the arrest were dismissed and that a lawsuit was settled for a large amount; disallowed question whether officer was "sued" but should have allowed inquiry about the underlying acts of misconduct; and should have allowed inquiry as to whether officer had been involved in making a specified false arrest.
COMMENT: Decision is applicable to all "bad acts" impeachment efforts.

B. Contradiction

Mazella v. Beals
27 N.Y 694, 37 N.Y.S.3d 46 (2016)

In this medical malpractice action, D physician was asked over objection whether his failure to properly monitor P while he was on medication constituted medical malpractice. While he admitted he was negligent, he answered "No." To impeach D, trial court then permitted P to admit a consent agreement between D and OMPC which contained evidence of D's negligent treatment of 12 other patients. Court held admission of the consent order was error as it was "unquestionably collateral, without probative value, and regardless, improperly prejudicial."

C. Silence

People v. Chery
28 N.Y.3d 139, 42 N.Y.S.3d 655 (2016)

In this robbery prosecution, Court held the trial court did not err in allowing the People to use D's selective silence, while making a spontaneous post-detention statement to police, to impeach his trial testimony that complainant had hit him on the head with a piece of wood. The Court reasoned D's conspicuous omission of such exculpatory facts tended to show that his trial testimony was a recent fabrication. While evidence of a D's pretrial silence is generally inadmissible, when given circumstances make it most unnatural to omit certain information from a statement, the fact of the omission is itself admissible for the purposes of impeachment. In support, Court noted D's statement was not the product of interrogation, but was made spontaneously at the scene, prior to the issuance of *Miranda* warnings; the substance of D's spontaneous statement was not inculpatory, but a description of the complainant's conduct and was made to inform the police when the information was timely to their decision as to whether to arrest defendant or complainant; and D admitted in his direct testimony that he was not silent and that he had given the police his version of complainant's misconduct at the scene. Consequently, the credibility of his initial spontaneous statement was legitimately called into question by his trial testimony. D elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial

D. Rehabilitation: Prior Consistent Statement

People v. Ludwig
24 N.Y.3d 221, 997 N.Y.S.2d 351 (2014)

In this prosecution for sexual assault against a child arising after D's sexual abuse complaint, his daughter, when she was in the third and fourth grades. Court held trial court did not abuse its discretion when it permitted the People to elicit testimony from complainant's half brother and mother about her prior consistent statements disclosing the abuse to them. In its view, the challenged testimony was admissible for the legitimate, non-hearsay purpose of explaining to the jury how and when the sexual abuse came to light, which resulted in an investigation and D's eventual arrest. In that regard, nonspecific testimony about a child victim's reports of sexual abuse does not constitute improper bolstering when offered for the relevant, non-hearsay purpose of explaining the investigative process and completing the narrative of events leading to the D's arrest. In the challenged testimony here, complainant's half brother and mother did not recite any details of the sexual abuse to which complainant testified in court. They merely stated that complainant claimed that she had been made to engage in oral sex with D, and theydesribed complainant's appearance during her disclosure and explained what actions her disclosure prompted them to take. Because D claimed at trial that complainant had made up disclosure were relevant to her credibility and the jury's assessment of her alleged motive to lie, and the challenged testimony was necessary to depict for the jury the circumstances attendant to the disclosure that triggered the investigation. **COMMENT:** As noted by Professors Barker and Alexander, the court created a "new class" of admissible prior consistent statements, namely, a

child witness' prior consistent statement about sexual abuse to explain the investigative process that led to D's arrest when relevant to the jury's assessment of the witness' alleged motive to lie. *See*, Barker & Alexander, Evidence in NY State and Federal Courts (2d ed) §6:41 (2015-2016 Supp.). Court emphasized the statements were admitted for a non-hearsay purpose.

People v. Gross
26 N.Y.3d 689, 27 N.Y.S, 3d 459 (2016)

In affirming D's child sexual misconduct conviction, Court held D was not deprived of the effective assistance of counsel in his sexual abuse prosecution by his trial counsel's failure to oppose as improper bolstering the admission of the victim's statements of prior disclosures of the abuse to various individuals. Such testimony was properly admitted into evidence as background information to complete the narrative of how defendant came to be investigated. The testimony of the victim's mother, sister and principal and two police officers included nonspecific statements that the victim had made a disclosure and described what steps they took after hearing the disclosure. Court noted the nonspecific testimony about a child-victim's reports of sexual abuse does not constitute improper bolstering when offered for the relevant, non-hearsay purpose of explaining the investigative process which led to the defendant's arrest. The testimony of the witness fulfilled these legitimate non-hearsay purposes. **COMMENT:** Court continued its legitimization of the admissibility of prior consistent statements even in the absence of claims of recent fabrication with respect to the witness's present trial testimony.

V. HEARSAY

A. Hearsay?

People v. Lin
26 N.Y.3d 701, 27 N.Y.S.3d 439 (2016)

In this murder prosecution, Court held: (1)trial court's refusal to admit into evidence a videotape of the failed attempt by the ADA to interview D following his confession to police was not an abuse of discretion. Court noted it was undisputed that the videotape was hearsay and this inadmissible unless it came within one of the hearsay exceptions. Though defense counsel represented to the court that he intended to introduce the videotape for the non-hearsay purpose of establishing D's appearance after the interrogation in response to the People's admission of his booking photograph, defense counsel declined the court's offer to admit a still photograph from the videotape, which would have served defendant's purpose of presenting the jury with evidence of his physical appearance and also avoided any potential confusion or misdirection created by the jury's consideration of defendant's linguistic skills based on the audio component of the video;(2) Trial Court's refusal to admit excess excerpts from handwritten notes prepared by D during police questioning was not an abuse of discretion. Court noted that to the extent the excerpts where D claimed he was "imprisoned for the whole day" and that is how "American police do" were offered for their truth- to establish his confinement- the statements were inadmissible hearsay, and they did not contain complaints to anyone within the meaning of the prompt complaint exception. Even as evidence of D's state of mind, the statements were of limited probative value because they were written based on defendant's experience the first day

of the interrogation, when he was not a suspect and before he was permitted to go home, see his family and rest. The statements did not shed light on how D was treated when he returned to the precinct the next day or provide information about his state of mind at the time of his confession and other inculpatory statements.

People v. Patterson
28 N.Y.3d 544, 46 N.Y.S.3d 511 (2016)

In this robbery and burglary prosecution arising out of an incident at the complainant's apartment at the time an alleged accomplice to the crimes was there, the accomplice received several cell phone calls from a cell phone number. The records for that number showed for the person who activated the phone provided subscriber information that included a name, birth date and address associated with defendant. At the trial, this information was admitted through the admission of the records under the business records exception. Court held that the subscriber information, while contained in a business record and not verified by the cell phone company, was properly admitted at trial for a non-hearsay purpose other than simply completing the narrative. Here, the subscriber information was not hearsay because it was not admitted to prove the truth of the matters asserted therein, *i.e*., that an individual named "Darnell Patterson" was the subscriber of the cell phone account used at the time of the robbery, or that "Darnell" had a particular date of birth that matched that of defendant or lived at a particular address that was associated with defendant. Rather, the information was admitted for the limited purpose of showing that the individual who activated the cell phone number identified himself as Darnell Patterson and gave certain pedigree information that was otherwise associated with defendant. The evidence was ultimately relevant to help the jury assess the reliability of the victim's identification of defendant as the perpetrator, and for consideration as a piece of the puzzle, which, considered along with other relevant evidence, gave rise to an inference that defendant was the user of the phone.
COMMENT: For further discussion of Patterson, *see* Shechtman, "Patterson Raises Complex Questions About Hearsay," NYLJ, Feb. 10, 2017, P. 3, col. 3; Hutter, "Admissibility of Business Records Containing Out-of-Court Statements," NYLJ, Feb. 2, 2017.

People v. Huertas
75 N.Y.2d 487, 554 N.Y.S.2d 444 (1990)

In this rape prosecution, where the complaining witness made an in-court identification of the defendant, Court held the admission in evidence on the People's direct case of the complaining witness's account of a description of her assailant given to the police shortly after she was raped was not barred as inadmissible hearsay. It noted the probative force of the complainant's description evidence is not based on an assumption that the prior description is or is not true, nor does the comparison of the verbal description with the actual features of the person later corporeally identified conclusively establish the identification as accurate or inaccurate. It is, however, evidence that assists the jury in evaluating the witness's opportunity to observe at the time of the crime, and the reliability of her memory at the time of the corporeal identification--both important aspects of the critical issue of identification. Thus, the description testimony was properly admitted for this nonhearsay purpose.

People v. Stone
29 N.Y.3d 166, 55 N.Y.S. 3d 730 (2017)

In this assault prosecution, arising out of D's assault of his estranged wife's intimate partner, a detective testified at trial in response to the question about what he did after speaking to the wife, he stated, "I did several computer checks on the person that had been indicated as a suspect, John Stone." Court held a potential inference from this testimony is that the wife identified D as a suspect and, under this theory, D was deprived of his wright to confront this witness. However, any prejudice to D was eliminated by curative instructions and the striking of the testimony. **COMMENT:** Without expressing saying so, Court recognized "indirect hearsay." *See, People v. Bent* (160 A.D.2d 1176, 555 N.Y.S.2d 454 [3d Dep't 1990] [effect of testimony that victim said something after having a conversation with a witness, the contents of which were not expressly disclosed, "indirectly placed before the jury the victim's out-of-court statements."

People v. Jones
28 N.Y.3d 1037, 42 N.Y.S.3d 669 (2016)

In this burglary prosecution, stemming from a police officer's observations of D as he unlawfully entered a delivery truck and a building under construction while carrying a tile cutter and a duffle bag, at issue was whether statement of an unidentified woman who was standing nearby when the officer reached the back of the vehicle – "did you see he was trying to get into the back of the truck? Are you going to get him?" – was properly admitted as present sense impression. Court held it was properly admitted. It noted under the present sense impression exception to the hearsay rule, spontaneous descriptions of events made substantially contemporaneously with the observations may be admitted if the descriptions are sufficiently corroborated by other evidence. Here, the woman's statement was made to the officer immediately after the event she described and before she had an opportunity for studied reflection, and the officer's own observations sufficiently corroborated her description. **COMMENT:** Court assumed the questions uttered by the woman were statements for purpose of the hearsay rule. Corroboration of the contemporaneity element necessary as well?

B. Exception: Adoptive Admission

People v. Vining
28 N.Y.3d 686, 49 N.Y.S.3d 72 (2017)

In a prosecution arising out of a series of domestic violence incidents, Court held the trial court did not err in admitting into evidence the recording of a telephone call between defendant and his ex-girlfriend, which was initiated by the D when incarcerated and knowing that the call was being monitored as an adoptive admission. Appling the rule that another person's statement made to a party can be adopted by the party, and thus admissible as a party admission, by the D's silence, Court viewed D's non-responsive and evasive answers to the ex-girlfriend's repeated accusations that he broke her ribs, could be viewed as silence, and thus potentially adoptable. Court then further held that the trial court properly concluded that the content of the conversation, itself, demonstrated that defendant both heard and understood what the ex-girlfriend was saying, but chose to give evasive and manipulative responses, and that view was

supported by the context of the call, where defendant voluntarily contacted his accuser in violation of an order of protection in an attempt to influence her to drop the charges against him. Once the People satisfied those threshold evidentiary requirements for admissibility, the call was properly placed before the jurors, who were fully equipped to assess its significance and dynamics**. COMMENT**: For further discussion, *se*e Hutter, "People v. Vining and Adoptive Admissions, NYLJ, April 6, 2017, p. 3, col. 3.

C. Exception: Prior Inconsistent Statement

Kaufman v. Quickway
14 N.Y.3d 907, 905 N.Y.S.2d 532 (2010), *affg. on other grounds* 64 A.D.3d 978, 882 N.Y.S.2d 554 (3d Dep't 2009)

In this Dram Shop Act action, convenience store clerk stated in supporting deposition prepared by police officer and purportedly signed by her "under penalty of perjury" that she sold a 12-pack of beer to Mr. Beers (driver who caused fatal accident) and that at the time she detected beer on his breath and that she had a difficult time understanding him. However, at a subsequent deposition clerk averred that Beers showed no signs of intoxication and denied making the statements contained in the supporting deposition. Third Department held the supporting deposition statements were not admissible for its truth as a prior inconsistent written statement under the hearsay exception recognized in *Lefendre v. Hartford Acc*. (21 N.Y.2d 518, 289 N.Y.S.2d 183 [1968]) and *Nucci v. Proper* (95 N.Y.2d 597, 721 N.Y.S.2d 593 [2001]) since she has seriously disputed their utterance and content, expressly asserting that her words were "incorrectly reported." In so holding, the Court noted there were more factors here supporting the reliability of the statements than in *Nucci*. The Court of Appeals disagreed. In its view: "The supporting deposition prepared by the Trooper and signed by the witness under penalty of perjury contained numerous *indicia* of reliability justifying its admissibility under *Letendre.* And, as in *Letendre*, the store clerk was available for cross-examination." Nonetheless, the Court affirmed the dismissal of the action on the ground that there was no "practical connection between the allegedly illegal sale of the alcohol and the accident. **NOTE:** *See* Diamond, "New York Needs A Residual Exception To The Hearsay Rule," NYLJ, 12/24/09, p.4; *see generally*, Hutter, "The *Letendre* Exception," NYLJ, 8/4/11, p. 3, col. 1. **COMMENT:** Still no reported case citing to *Quickway*.

D. Exception: Excited Utterance / Present Sense Impression/ Prompt Outcry

People v. Brewer
28 N.Y.3d 271, 44 N.Y.S.3d 339 (2016)

In this sexual assault against a child prosecution, Court held the trial court properly allowed the victims' mother to testify about one of the girls disclosing the abuse to her immediately after it occurred. While the prompt outcry exception to the hearsay rule is limited to testimony that a timely complaint was made, and does not allow further testimony concerning details, here the brief account of what the victim told her mother could be viewed as both a prompt outcry and an excited utterance.

E. Exception: Business Record

1. Generally

People v. John
27 N.Y.3d 294, 33 N.Y.S.3d 88 (2016)

In this prosecution for criminal possession of a gun, at issue was the admissibility of a report prepared by several technicians which created D's DNA profile, and was created from swabs taken from a gun that the prosecution sought to link with D. Only witness who testified about it was an analyst who reviewed the report and agreed with the conclusions. Court held D's confrontation rights were violated. It noted there was a criminal action pending against D, and the gun was evidence seized by police for that prosecution; swabs from the gun were then tested with the primary purpose of proving that D possessed the gun and committed the crime for which he was charged; the testing analyst purposefully recorded the DNA profile test results, thereby providing the basis for the scientific conclusions rendered thereon. Therefore, the fact that D's DNA profile was found on the gun was established by the testimonial hearsay in the laboratory report, which could not be admitted as a business record without honoring the right of confrontation.

2. Information Recorded (*Johnson v. Lutz*)

People v. Patterson
28 N.Y.3d 544, 46 N.Y.S.3d 511 (2016)

For the facts, *see Patterson discussion supra*. A. Court, in addressing the admissibility of information in an otherwise admissible business record which information came from a person other than the maker of the record, stated that "More than 85 years ago, in *Johnson v Lutz* (253 NY 124 [1930]), this Court imposed an additional requirement for admissibility that is not set forth in the statute—specifically, that "[u]nless some other hearsay exception is available . . . , admission may only be granted where it is demonstrated that the informant has personal knowledge of the act, event or condition and he [or she] is under a business duty to report it to the entrant". Pursuant to this rule, "[i]f the informant was not under a business duty to impart the information, but the entrant was under a business duty to obtain and record the statement, the entry is admissible to establish merely that the statement was made . . . [but] another hearsay exception is necessary in order to receive the statement *for its truth*". Court then recognized that a non-hearsay purpose could also be used to obtain the admissibility of the information.
COMMENT: For further discussion *see* Hutter, "Admissibility of Business Records Containing Out-of-Court Statements," NYLJ, Feb. 2, 2017.

F. Exception: Hospital and Medical Records

1. Generally

People v. Ortega
15 N.Y.3d 610, 917 N.Y.S.2d 1 (2010)

In this consolidated appeal, Court restated familiar law that hospital records fall within the business records exception to the hearsay rule when they reflect acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects of the particular patient's hospitalization; however, where details of how a particular injury occurred are not useful for purposes of medical diagnosis or treatment, they are not considered to have been recorded in the regular course of the hospital's business. In *Benston*, it then held that records' identification of victim's assailant as "an old boyfriend" and description of case as involving "domestic violence" and reference to "safety plan" for victim were relevant to diagnosis and treatment of victim, and thus admissible in an assault prosecution as domestic violence was part of attending physician's diagnosis, domestic assault differed materially from other types of assault in its effect on victim and in resulting treatment, and developing safety plan for victim, including referral to shelter or dispensing information about domestic violence and necessary social services, was important part of victim's treatment. In companion case *Ortega*, Court held statement in record that victim was "forced to" smoke white, powdery substance, was relevant to victim's diagnosis and treatment, and thus admissible to in criminal possession of stolen property prosecution, since victim, under such scenario, would not have been in control over either the amount or the nature of the substance he ingested, and treatment of a patient who is the victim of coercion may differ from a patient who has intentionally taken drugs. **NOTE:** *See* discussion of *Ortega* in Hutter, "Admissibility of Patient's Statement In Medical Record - Redux," NYLJ, 2/3/11, p. 3, col. 1.

Benavides v. City of New York
115 A.D.3d 518, 982 N.Y.S.2d 85 (1st Dept. 2014)

In this personal injury action, plaintiff testified at trial that police officers pushed him off fence. In his medical records, it stated he jumped off the fence. At issue was the admissibility of that entry. Court held: "There was simply no evidence supporting defendants' position that the medical doctors needed to know whether plaintiff jumped or was pushed from the fence in order for doctors to determine what medical testing he needed upon admission to the hospital. No medical expert provided such testimony. Defendants' only expert, a biomechanical engineer and accident reconstruction expert, opined that plaintiff's injuries were consistent with a jump from a height and not a push to a fall. He did not give any opinion on issues relating to treatment or diagnosis. This is not a case where the conclusion is so obvious that no medical testimony is needed to lay the appropriate evidentiary foundation."

2. Admissions

Coleman v. New York City Trans. Auth.
134 A.D.3d 427, 21 N.Y.S.3d 46 (1st Dep't 2015)

In this MV action arising out of a bus collision, trial court redacted from P Lemon's hospital record a social worker's statement, which included the information that the vehicle driver "made an illegal left turn…P was a passenger in vehicle operated by Dunnigan. Court held redaction was proper as: "First, it is not clear whether the statement was made by Lemon. Even assuming it was, the statement was not made for purposes of diagnosis and treatment. Additionally, the

statement is not admissible against Lemon as a party's admission against interest, as the statement itself was not against Lemon's interest, but at best, against Dunnigan's interest, the driver at the time of the accident. Moreover, the statement itself does not relate to a matter of fact, because the word "illegal" is a conclusion of law." **COMMENT:** Of note, Court cited *Williams v. Alexander* (309 NY 283 [1955]) with approval.

***Robles v. Polytemp, Inc*.**
127 A.D.3d 1052, 7 N.Y.S.3d 441 (2d Dep't 2015)

In this automobile accident action, P argued the trial court erred in denying his request, made at the outset of the trial on the issue of damages, to redact entries in his hospital records which indicated that he was not wearing a seat belt at the time of the accident. Court noted that if the entry is consistent with a position taken by a party at trial, it is admissible as an admission by that party, even if it is not germane to diagnosis or treatment, as long as there is "evidence connecting the party to the entry." At trial, P testified that he was using a seat belt at the time of the accident, and the hospital records containing the challenged entries clearly indicated that the plaintiff was the source of the information contained therein. Thus, entries were admissible.
COMMENT: Holdings of the Second Department are questionable as they are inconsistent with Williams *v. Alexander* (309 N.Y. 283 [1955]) which imposes the germane requirement upon "admissions." *See*, Hutter, "Admissibility of Patient's Statement In Medical Record," NYLJ, Dec. 2, 2010, p.3, col. 3; Alexander, Practice Commentaries to CPLR 4518, C4518.3 92015-2016 Pocket Part). Also, Second Department rejected this rule in *Merriman v. Integrated Building Controls* (84 A.D.3d 897, 922 N.Y.S.2d 562 [2nd Dept. 2012]), and *Sermos v. Grupposo*, 95 A.D.3d 985, 944 N.Y.S.2d 245 [2d Dept. 2012]).

Berkovits v. Chaaya
138 A.D.3d 1050, 31 N.Y.S.3d 531 (2d Dep't 2016)

In this P/I action, P testified that as she walked behind D's vehicle, the vehicle moved, struck her and knocked her to the ground. D sought to introduce an entry in P's hospital record stating, "Patient/Significant other states that the current problem/reason for admission is 'I fell in the street look at me.'" Outside the jury's presence, the nurse who prepared that document testified that the quotation marks indicated that the patient had made that statement. Supreme Court precluded the admission into evidence of the entry in the hospital record, and precluded the nurse from testifying. Court held error was present as the nurse should have been permitted to testify to establish a foundation for the entry, which was admissible as an admission even if not germane to treatment. **COMMENT:** (1) Court cited *Robles* (2) Why isn't the entry germane to treatment?

G. Exception: Statements of Physical Condition and Cause Thereof

People v. Duhs
16 N.Y.3d 405, 922 N.Y.S.2d 843 (2011)

In this child abuse prosecution arising out of D's alleged conduct in placing a three-year-old's feet and lower legs into a tub filled with scalding hot water, Court held testimony of pediatrician

who treated the infant for his burns that child told her D "wouldn't let me out" in response to pediatrician's question as to how he was injured was admissible as mechanism of treatment was germane to pediatrician's treatment of child. Of note, the physician testified such information was germane to her treatment. **COMMENT:** (1) Court has certainly overruled in part *Davidson v. Cornell* (132 N.Y. 228 [1892]) which, as prior cases and commentary have stated, holds to the contrary, although Court does not state it is doing so and cites *Davidson* for support of its ruling. As a result of *Ortega,* and *Duhs*, New York's medical statement hearsay exception now provides that statements made to a physician relating to present and past pain and physical condition, and the cause thereof are admissible if germane to the person's diagnosis and treatment, bringing New York in line with the modern evidence rule. For further discussion of the implications of these decisions, *see, Hutter, "*Medical Statement Exception," NYLJ, 6/02/11, p.3; (2) The Second Circuit reversed the grant of habeas corpus to D, finding that the Court of Appeals' ruling was not contrary to or an unreasonable interpretation of established Supreme Court law. *See, Duhs v. Capra*, __ F.3d __ (2d Cir. 2016).

H. Exception: Declaration Against Interest

People v. Soto
26 N.Y.3d 455, 23 N.Y.S.3d 632 (2015)

In this criminal prosecution arising out of a MV accident in which D was charged with a DWI count, Court held an unavailable witness's statement to a defense investigator- that she, not D, was the driver at the time of the accident and that she fled the scene- should have been admitted as a declaration against interest. Because the witness was aware at the time she made the statement that it was against her interest, Court concluded the four prongs of the test described in *People v. Settles* (46 N.Y.2d 154 [1978]) were met and the statement should have been admitted as a declaration against interest. It noted the trial court failed to apply the proper standard when it ruled that the statement was not sufficiently against Hunt's penal interest, stating "We have never held, as the trial court concluded, that the declaration-against-interest exception is limited to serious penal consequences. Although leaving the scene of an accident that caused property damage constitutes a mere traffic violation, there is no requirement that a statement against penal interest involve a particularly serious crime."

I. Exception: Co-Conspirator

People v. Flanagan
28 N.Y.3d 644, 49 N.Y.S.3d 50 (2017)

In this conspiracy prosecution, Court held that when a conspirator subsequently joins an ongoing conspiracy, any previous statements made by his or her coconspirators in furtherance of the conspiracy are admissible against the conspirator pursuant to the coconspirator exception to the hearsay rule. A new recruit can be thought to have joined the conspiracy with an implied adoption of what had gone on before to enhance the enterprise of which he or she is taking advantage. Moreover, statements made after a coconspirator's alleged active involvement in the conspiracy has ceased, but the conspiracy continues, are admissible unless that conspirator has unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators.

Thus, the Court held trial court in defendant's prosecution for his involvement in a conspiracy to commit official misconduct by preventing the arrest and prosecution of a police department benefactor's son properly admitted into evidence coconspirator hearsay statements made in furtherance of the conspiracy prior to defendant joining the conspiracy and after his active participation had ceased. Defendant, a high-ranking police supervisor, joined the conspiracy after a discussion with a coconspirator in which the coconspirator informed defendant of what had transpired and enlisted his help to prevent the criminal case from proceeding against the son. Moreover, defendant made no argument that he had unequivocally communicated his withdrawal from the conspiracy to his coconspirators.

VI. EXPERT TESTIMONY

A. Appropriate Subject Matter: Necessity/Helpfulness

People v. Inoa
25 N.Y.3d 466, 13 N.Y.S.3d 329 (2015)

In this prosecution, D and Gutierrez were charged with first degree murder with the charge that D murdered V at Gutierrez's request and that he had expected to be paid for doing so. Evidence established some 77 telephone calls made by Gutierrez. A detective, qualified as an expert in decoding phone conversations, offered testimony, some of which bore upon the meanings of what were evidently consistently employed code words (*e.g*., "onion" for marijuana package, "toy" and "malacachin" for gun, and "sneakers" for thousands of dollars), but the bulk of it covering a considerable portion of the trial transcript, consisted of interpreting portions of the phone conversation transcripts which, although sometimes veiled in their reference and import, were not encoded. His transcript explications did not, in the main, draw upon any body of non-case specific expertise, but rather the information that he had acquired from various sources, most notably Ms. Duran, Gutierrez's paramour, as a member of the team investigating and prosecuting the murder. His interpretations essentially harmonized the recorded conversations with the prosecution's overall theory of how the murder plot was carried out, and almost without exception concurred with Ms. Duran's account of what had been communicated between the co-conspirators. Court ruled: "It is, of course, the role of the jury to determine the facts of the case tried before it. The jury may be aided, but not displaced, in the discharge of its fact-finding function by expert testimony where there is reason to suppose that such testimony will elucidate some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence. The decision to allow the testimony of an expert is generally discretionary and reviewable in this Court only where discretion has not been exercised or has been abused. That said there are situations – and this is one – in which an expert so palpably overtakes the jury's function to decide matters within its unaided competence, that abuse may be found." **COMMENT**: Court in stating the standard for admissibility omitted the "beyond the ken" language. The decision was handed down one week after my column" "Admissibility of Expert Testimony: Necessity or Helpfulness Standard," NYLJ, June 4, 2015, p.3, col. 3, wherein I argued the Court of Appeals had in essence adopted the helpfulness standard replacing the "beyond the ken" standard, was published.

People v. McCullough
27 N.Y.3d 1158, 37 N.Y.S.3d 214 (2016)

In this murder prosecution, an issue arose as to the admissibility of D's expert witness about certain factors that could have influenced witness's ability to make a positive identification of D. In a 4-3 decision upholding the exclusion ruling of the trial court, majority held to the extent *People v. LeGrand* (8 N.Y.3d 449, 835 N.Y.S.2d 523 [2007]) has been understood to require courts deciding whether to admit expert testimony on the reliability of eyewitness identification to apply a strict two-part test that initially evaluates the strength of the corroborating evidence, it should instead be read as enumerating factors for trial courts to consider in determining whether expert testimony would aid a lay jury in reaching a verdict. Courts reviewing such a determination simply examine whether the trial court abused its discretion in applying the standard balancing test of prejudice versus probative value.

B. Qualifications

Sadek v. Wesley
27 N.Y.3d 982, 32 N.Y.S.3d 42 (2016)

In this medical malpractice action, Court held the Appellate Division did not abuse its discretion as a matter of law in refusing to preclude P's proposed expert neurological testimony with respect to what was alleged to have been a neurological injury inasmuch as the subject matter of that testimony was within the competence of P's experts and was supported by medical literature. Any defects in the opinions of P's experts or the foundation on which those opinions were based went to the weight to be accorded that evidence by the trier of fact, not to its admissibility in the first instance.

C. *Frye*: Sufficiency of Foundation and Reliability

Sean R. v. BMW of North America
26 N.Y.3d 801, 28 N.Y.S.3d 656 (2016)

In this toxic tort action arising from the birth of P with severe mental and physical disabilities allegedly as a result of in utero exposure to unleaded gasoline vapor caused by a defective fuel line in his mother's BMW, the issue was the admissibility of testimony from his two expert witnesses as to causation. Court held the testimony was not admissible as their opinions were not reached through the use of methods generally accented as reliable. It noted the experts concluded that P was exposed to a sufficient amount of gasoline vapor to have caused his injuries based on the reports by plaintiff's mother and grandmother that the smell of gasoline occasionally caused them nausea, dizziness, headaches and throat irritation. However, the experts did not identify any text, scholarly article or scientific study, that approves of or applies this type of methodology, let alone a "consensus" as to its reliability. **COMMENT:** *See*, Hoenig, "Experts Flunk Reliability Test," NYLJ, 3/15/16, p. 3, col. 3 for a thoughtful discussion of decision.

D. CPLR 3101(d)

Rivera v. Montefiore Med. Ctr.
28 N.Y.3d 999, 41 N.Y.S.3d 454 (2016)

In this M/M action, P moved during trial to preclude the testimony of D's expert on the ground his expert disclosure was deficient. Holding that the issue of whether a party should be precluded from offering testimony of an expert based on the failure to comply with CPLR 3101(d)(1)(i) is committed to the sound discretion of the trial court and the Appellate Division. The Court concluded that the lower courts were entitled to determine that the time to challenge the expert disclosure was before trial when the deficiency was apparent, and could have bene raised and potentially cured. **COMMENT:** For further discussion, *see* Moore, "Expert Disclosures: Timely Objections and Preclusion," NYLJ, Dec. 5, 2016, p. 3, col. 3.

VII. PRIVILEGE

A. Fifth Amendment

El-Dehdan v. El-Dehdan
26 N.Y.3d 19, 19 N.Y.S.3d 475 (2015)

In this matrimonial action in which D was held in civil contempt for failing to comply with an order requiring him to deposit in escrow proceeds of a sale of real property, Court held trial court did not violate D's constitutional rights in drawing a negative inference from his invocation at the contempt hearing of his Fifth Amendment right against self-incrimination with respect to questions regarding the location of the proceeds. The basis for this ruling was D's failure to request to bifurcate the hearing so P's criminal contempt allegations would be considered first. Court also noted a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination; and D's invocation of the privilege did not relieve him of his burden to present adequate evidence of his financial inability to comply with the order so as to avoid civil contempt liability.

People v. Berry
27 N.Y.3d 10, 29 N.Y.S.3d 234 (2016)

In this murder prosecution, Court held trial court did not err in permitting the People to call a witness who invoked his Fifth Amendment privilege against self-incrimination in front of the jury when questioned concerning his observations at the time of the shooting. The record showed that the People did not call the witness for the sole purpose of eliciting his invocation of the privilege or in a conscious and flagrant attempt to build their case out of inferences arising from the use of the privilege. Court noted it is reversible error for the trial court to permit the prosecutor to deliberately call a witness for the sole purpose of eliciting a claim of privilege. The critical inquiry is whether the prosecution exploited the witness's invocation of the privilege either by attempting to build its case on inferences drawn from the witness's assertion of the privilege or by utilizing those inferences to unfairly prejudice D by adding critical weight to the prosecution's case in a form not subject to cross-examination. Here, there were other matters that

warranted the witness being called, and the People did not utilize the witness's invocation on summation to raise impermissible inferences that defendant committed the crimes. Court also commented that the People were prepared to, and did, grant immunity to the witness with regard to specific questions in an effort to provide a clear picture of events leading up to the shooting and its immediate aftermath.

B. Attorney - Client

Ambac Assurance Corp. v. Countrywide
27 N.Y.3d 616, 36 N.Y.S.3d 838 (2016)

After D and Bank of America signed a merger agreement, the parties and their attorneys shared numerous privileged documents, claiming the disclosure was protected by the "common interest privilege". Court held pending or reasonably anticipated litigation is not a necessary element of the common-interest doctrine, whereby a third party may be present at a communication between an attorney and a client without destroying the confidentiality of the attorney-client communication if the communication was for the purpose of furthering a nearly identical legal interest shared by the client and the third party. **COMMENT:** *See*, Hutter, "Attorney-Client Privilege and Ambac", NYLJ, 8/2/16, p.3, col.3.

C. Physician-Patient

Chanko v. American Broadcasting Co.
27 N.Y. 3d 46, 29 N.Y.S. 3d 231 (2016)

Defendants filmed decedent's medical treatment and death in a hospital ER without his consent and then broadcast a portion of the footage as part of a documentary series about medical trauma. Court held complaint sufficiently stated a cause of action against the hospital and treating physicians for breach of physician-patient confidentiality. However, as those actions were not so extreme and outrageous as to support a cause of action by the decedent's family members for intentional infliction of emotion distress. **COMMENT:** Judge Stein's opinion contains a thoughtful discussion of the physician-patient privilege.

Davis v. South Nassau Communities Hosp.
26 N.Y.3d 563, 26 N.Y.S.3d 231 (2015)

In this malpractice action, Court held D health care providers owed a duty of due care to P, who was injured in a MV accident when patient of Ds drove her car negligently, allegedly as a result of medications Ds prescribed to her. Dissenting, Judge Stein noted, among other matters, that the duty recognized is unworkable on a practical level as a result of the privilege. She noted, for example, where a patient who was administered medication without a warning against driving defaults in a legal action brought by an injured third party, or decides not to shift blame to the physician, the physician-patient privilege would bar disclosure to the injured party of the patient's medical records and communications with the physician. An injured third-party will, therefore, be unable to obtain the information necessary to establish or obtain a remedy for a breach of the physician's purported duty to that party.

VIII. NON-TESTIMONIAL EVIDENCE

A. Photographs

Mazella v. Beals
27 N.Y.3d 694, 37 N.Y.S.3d 46 (2016)

In this medical malpractice and wrongful death action, Court held trial court did not abuse its discretion in admitting photograph of decedent's body depicting the manner in which decedent committed suicide as its probative value outweighed the risk of any undue prejudice. The photograph was relevant to the theory that the violent nature of the suicide- death by self-inflicted knife wounds- was a result of the decedent's extreme mental and emotional condition, induced by his long-term use of prescription drugs which were prescribed by defendant. Its admission was not unduly prejudicial as there was already testimony from a paramedic describing the condition in which he found the body, and the official autopsy report was admitted into evidence without objection.

B. Recordings: Video and Audio

People v. Davis
28 N.Y.3d 294, 44 N.Y.S.3d 358 (2016)

In this felony murder prosecution, which was based upon the underlying D's predicate felonies of robbery and burglary, Court held the trial court did not err in denying D's motion to preclude use of DVD video clips culled from the surveillance system on the victim's apartment building showing D enter and exit the building and in the area of the victim's apartment. The authenticating witness, who maintained the surveillance system, testified that during the computeriz4ed process of compressing and archiving the digital video files, certain images may overlap. However, he further testified that the process, which he personally conducted, did not conjure up persons that were not originally present in the camera shot. As such, the Court noted, the trial court did not abuse its discretion in concluding that the image-overlap issue went to weight, but not admissibility, of the video evidence.

C. Writings/Records

People v. Kangas
28 N.Y.3d 984, 41 N.Y.S.3d 189 (2016)

In this DWI prosecution, Court held that a record of the simulator solution used during breath test administered to D, which did not include a verification pursuant to CPLR 4539(b) showing that the record could not be tampered with was properly admitted as compliance with that statute was not necessary. CPLR 4518(a) controlled as the record was originally created in electronic form.

D. Electronic Evidence

People v. Price
29 N.Y.3d 472, 58 N.Y.S.3d 259 (2017)

In this robbery prosecution, at issue was whether the People proffered a sufficient foundation at trial to authenticate a photograph – purportedly of defendant holding a firearm and money – that was obtained from an internet profile page allegedly belonging to defendant. Court held the People's proof was insufficient to establish the requisite authentication to render the photograph admissible. Noting the traditional authentication methods available for tape recordings and photographs, Court concluded there was insufficient proof of compliance with these methods as the victim was unable to identify the weapon as the one used in the robbery, and no other witnesses testified that the photograph was a fair and accurate representation of the scene depicted, or that it was unaltered. It then rejected the People's argument that where, as here, a photograph is obtained from an internet profile page controlled by D, authentication is present. In doing so, Court, assuming adoption of the People's theory, noted People failed to present sufficient evidence that the website belonged to, and was controlled by D. It wrote: "Notably absent was any evidence regarding whether defendant was known to use an account on the website in question, whether he had ever communicated with anyone through the account, or whether the account could be traced to electronic devices owned by him. Nor did the People proffer any evidence indicating whether the account was password protected or accessible by others, whether non-account holders could post pictures to the account, or whether the website permitted defendant to remove pictures from his account if he objected to what was depicted therein. Without suggesting that all of the foregoing information would be required, or sufficient in each case, or that different information might not be relevant in others, we are convinced that the authentication requirement cannot be satisfied solely by proof that defendant's surname and picture appears on the profile page."

NOTES