

WOMEN ON WHEELS
INSTRUCTIONAL BICYCLING
PROGRAM

Sponsor: Syracuse Bicycle

BICYCLE LAW AND SAFETY TIPS

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OUTLINE

1. Mushroom of Bicycle Usage in the United States with Increased Personal Injury Accidents Insurance Coverage
Presenter: Harrison Williams
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Presenter: Lawrence Ordway
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Section 1: Mushroom of Bicycle
Usage in the United States with
Increased Personal Injury
Accidents Insurance Coverage

Presenter: Harrison Williams

I. STATISTICS

The incidence of bicycle usage in the United States has mushroomed in the last ten years which has resulted in a huge increase in personal injury accidents. Lawyers will now have to be prepared to advise clients regarding the recovery of damages, insurance coverage issues, rules of the road, bicycle manufacturing defects and affirmative defenses to bicycle personal injury claims.

Some of the statistics collected by the Nation Highway Traffic Safety Administration and the Centers for Disease Control and Prevention illustrate this change in American culture. There were reportedly 51,000 cyclists injured in motor vehicle related crashes in 2009; there were 57 million people (27% of the population over 16 years of age) who rode a bicycle once in 2002; presently 30% of the American population own bikes; in 2009 there were 15 million bicycles purchased or 3 times the number of cars and in 2008 head injuries accounted for 70% of cycling fatalities.

Since 1990, there has been a substantial increase in commuter biking with cities creating bike lanes on major roads to encourage bicycle usage and reduce traffic congestion. In many major cities, bike sharing programs are fully operational such as "DecoBike" in Miami Beach, "Nice Ride" in Minneapolis, "Capital Bike" in Washington, D.C., "Like Bike" in New York City and "Velib" in Paris. None of these programs require bike helmet usage. The city of Memphis has just invested 5.7 million dollars to create 160 miles of trails and bike lanes to encourage commuter usage and healthy living.

Bicyclists have risk factors that don't affect car drivers. The main risk factors are decreased stability, lower level of protection and less visibility coupled with the top causes of accidents which are making improper turns, running red lights and stop signs and other improper actions. Although bicyclists have been found to be partially at fault in 30% of cases, left-turning cars are the highest cause of bicycle related injuries. Children between the ages of 10 and 14 account for the highest number of hospitalizations.

This seminar will help attorneys to properly investigate and to evaluate the large number of accidents involving bicycle design and the use of experts in component failures, accident reconstruction design and maintenance issues. We also discuss basic principles of bicycle safety.

II. INSURANCE COVERAGES FOR MEDICAL EXPENSES AND OTHER DAMAGES

A. Accidents Involving Motor Vehicles

Bicyclists in New York State are considered to be "other persons" and thus a "covered person" entitled to first party benefits under the "No-Fault" Insurance Law Article-51 known as The Comprehensive Automobile Insurance Reparations Act". *Oeschger v. Fullforth*, 51 A.D. 2d 864, Section 671 and 2 Insurance Law. Thus if a cyclist has an accident with a motor vehicle he or she will be entitled to those benefits of basic economic loss:

1. Medical, remedial and health care services (Insurance Law 5102(a)(1));
2. Lost earnings during each month for up to three years following the date of the accident not exceeding \$2,000.00 per month (Insurance Law 5102 (a)(2));
3. All other reasonable and necessary expenses up to \$25.00 per day for not more than a year following the date of the accident (Insurance Law 5102 (a)(3)).

The total of the above is limited to \$50,000.00.

A bicyclist who seeks to maintain a personal injury action in common law negligence against a motor vehicle owner and operator for pain and suffering (non-economic loss) must allege and prove "serious injury" in order to recover. The plaintiff bicyclist must, therefore, allege serious injury as defined by subdivision 4 of Section 671 of the Insurance Law or economic loss greater than the basic economic loss defined in subdivision 1 of Section 671 of the Insurance Law. Failure to plead serious injury will subject the complaint to dismissal under CPLR 3016(g).

Additional Personal Injury Protection (APIP) is optional coverage that the insured can select to pay more than the \$2,000.00 a month for lost wages. Plaintiffs must protect the subrogation rights of the APIP carrier. Optional Basic Economic Loss (OBEL) of \$25,000.00 may also be obtained for additional coverage above basis PIP. The claimant in the situation is permitted to designate how the money will be spent.

B. Other Sources of Recovery

Homeowners insurance policies generally provide medical payments for the insured, members of the household, and third-party claimants. These policies also frequently provide liability coverage to claimants which would be fault based.

An inquiry should also be made for umbrella coverages that would supplement basic liability coverage.

C. Claims Against the Bicyclist

In the reverse of the above-situation, pedestrians, other bikers and motorists can commence claims against the bicyclist for personal injury without being limited by the No-Fault law because bicyclists are not "motor vehicles" as defined in the No-Fault Law, Insurance Law 5102(f), Vehicle & Traffic Law 311(2) 125 and 102 (See P.J.I. 2:75).

D. Fact Patterns

a. Biker negligently injures another biker or causes property damage. Injured party could have medical payments coverage from his personal insurance policy but can make claim against the tortfeasor and recover if the tortfeasor has homeowners and/or umbrella coverage.

b. Biker negligently injures a pedestrian. The same as (a) above.

c. Biker injured by an uninsured motorist, in this case, the "uninsured motorist coverage" of his policy should apply or if he does not own a vehicle than the uninsured motorist portions of the NY Insurance Law would apply.

Section 2: Rules of the Road for Bicyclists

Presenter: Lawrence Ordway

d. Pedestrians or bicyclists hurt by the negligence of a bicyclist with no insurance coverage, the only recourse would be against the personal assets of the tortfeasor.

III. RULES OF THE ROAD FOR BICYCLISTS AND APPLICABLE STATUTES

Any case involving bicyclists requires a complete familiarity with the "Rules of the Road" for bicyclists found in Article 34 of the Vehicle and Traffic Law and Section 1146 of the Vehicle and Traffic Law. The statutes are summarized as follows:

1. Section 1146 Vehicle and Traffic Law: "Drivers to Exercise Due Care"

Every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist upon any roadway and shall give warning by sounding the horn when necessary.

If such driver of a motor vehicle causes serious physical injury while failing to exercise due care in violation of (a), then there shall be a rebuttable presumption that as a result of such failure to exercise due care, such person operated the motor vehicle in a manner than caused serious injury.

Article 34: Operation of Bicycles

2. Section 1230 Vehicle and Traffic Law: Effect of Regulations

a. The parent of a child shall NOT authorize or knowingly permit a child to violate any provision of Article 34.

b. These regulations apply whenever a bicycle is operated on a highway, a private road open to public motor vehicles or paths set aside exclusively for bicyclists.

3. Section 1231 Vehicle and Traffic Law: Traffic Laws Apply to Persons Riding Bicycles

Every person riding a bicycle upon a roadway shall be granted all the rights and shall be subject to all the duties applicable to the driver of a vehicle except as to those provisions which by their nature can have no application.

4. Section 1232 Vehicle and Traffic Law: Riding on Bicycles

A person propelling a bike shall ride on a permanent and regular seat and keep his feet on the pedals. No bicycle shall be used to carry more persons than the number for which it is designed.

5. Section 1233 Vehicle and Traffic Law: Clinging to Vehicles

No person riding a bicycle shall attach himself to a vehicle being operated on a roadway. Some exceptions can be made for parades, emergencies, farm equipment and riding on truck cargo areas.

6. Section 1234 Vehicle and Traffic Law: Riding on Roadways, Shoulders, Bicycle Lanes or Bicycle Paths

Upon all roadways a bicycle shall be driven either on a usable bike lane or if no lane is provided near the right hand curb or edge of the roadway or upon a useable right hand shoulder in such a manner as to prevent undue interference with the flow of traffic except when preparing for a left turn or when reasonably necessary to avoid conditions which would make it unsafe to continue along near the right hand curb or edge. Conditions to be considered include fixed or moving objects, vehicles, bikes, animals, pedestrians, surface hazards or traffic lines too narrow for a bike and vehicle to travel safely side by side within the lane.

Bicycles shall not ride more than two abreast on a roadway but may ride on a shoulder or bike lane or path except when passing another bike or vehicle.

Any bicyclist entering a roadway from a private road, driveway, alley or over a curb shall come to a full stop before entering the roadway.

NOTE: The DMV has held that a bicyclist getting a traffic ticket for failure to keep right is considered a moving violation but not subject to points or surcharges on the driver's license. (Practice Commentaries, McKinney's Vol. 62A, Section 1234 Vehicle and Traffic Law, Joseph R. Carrieri.)

7. Section 1235 Vehicle and Traffic Law: Carrying Articles

No operator of a bicycle shall carry any package which prevents the driver from keeping at least one hand upon the handle bars.

8. Section 1236 Vehicle and Traffic Law: Lamps and Other Equipment on Bicycles

Every bicycle when in use for the period from one-half hour after sunset to one-half hour before sunrise shall be equipped with a lamp on the front which shall emit a white light visible during hours of darkness from a distance of at least five hundred feet to the front and with a red light visible to the rear for three hundred feet and at least one light visible to the side two hundred feet.

No person shall operate a bike unless it is equipped with a bell or other device capable of giving a signal audible for a distance of at least one hundred feet, except that a bicycle shall not be equipped with nor shall any person use upon a bicycle any siren or whistle.

Every bicycle shall be equipped with a brake which will enable the operator to make the braked wheels skid on dry, level, clean pavement.

Every new bicycle shall be equipped with reflective tires or, alternately, a reflex reflector mounted on the spokes of each wheel, said tires and reflectors to be of types approved by the commissioner. The reflex reflector mounted on the front wheel shall be colorless or amber, and the reflex reflector mounted on the rear wheel shall be colorless or red.

The devices used must meet the standards published by the Commissioner (15 NYCRR 59.1)

9. Section 1237 Vehicle and Traffic Law: Method of Giving Hand and Arm Signals]

by Bicyclists

1. Left turn. Left hand and arm extended horizontally.
2. Right turn. Left hand and arm extended upward or right hand and arm extended horizontally.
3. Stop or decrease speed. Left hand and arm extended downward.

Note: Bicyclists while preparing to pass another bicyclist frequently give verbal warnings by yelling, "on your left". There is no statutory basis for this. Question: Is it the safest warning? Is it a custom long since adopted by the bicycling public?

10. Section 1238 Vehicle and Traffic Law: Passengers on Bicycles Under One Year of Age Prohibited; Passengers and Operators Under 14 Years of Age to Wear Protective Headgear (Helmets) ("The Helmet Law")

1. No person operating a bicycle shall allow a person who is under one year of age to ride as a passenger on a bicycle nor shall such person be carried in a pack fastened to the operator.

2. No person operating a bicycle shall allow a person one or more years of age and less than five years of age to ride as a passenger on a bicycle unless:

(a) Such passenger is wearing a helmet meeting standards established by the Commissioner. For the purposes of this subdivision wearing a helmet means having a helmet of good fit fastened securely upon the head with the helmet straps; and

(b) Such passenger is placed in a separate seat attached to the bicycle and such seat shall have adequate provision for retaining the passenger in place and for protecting the passenger from the moving parts of the bicycle.

3. The commissioner shall promulgate rules and regulations establishing standards for helmets required to be worn while bicycling, in-line skating, or operating a skate board. Such standards to the extent practicable, shall reflect the standards recommended by the Snell Memorial Foundation, ANSI, Safety Equipment Institute, or United States Consumer Product Safety Commission.

Note: Standards are attached as well as instructions on fitting helmets.

4. No person operating a bicycle shall allow a person five or more years of age and less than fourteen years of age to ride as a passenger on a bicycle unless such passenger is wearing a helmet meeting standards established by the commissioner.

(b) No person, one or more years of age and less than fourteen years of age, shall operate a bicycle unless such person is wearing a helmet meeting standards established by the commissioner.

(c) For the purposes of this subdivision wearing a helmet means having a helmet of good fit fastened securely upon the head with the helmet straps.

5. The failure of any person to comply with the provisions of this section shall not constitute contributory negligence or assumption of risk, and shall not in any way bar, preclude or foreclose an action for personal injury or wrongful death by or on behalf of such person, nor in any way diminish or reduce the damages recoverable in any such action.

11. Section 1240 Vehicle and Traffic Law: Leaving the Scene of An Incident Involving a Wheeled Non-Motorized Means of Conveyance Without Reporting in the Second Degree

1. Any person age eighteen years or older operating a wheeled non-motorized means of conveyance, including, but not limited to bicycles, in-line skates, roller skates and skate boards, who, knowing or having cause to know, that physical injury, as defined in subdivision nine of section 10.00 of the penal law, has been caused to another person, due to the operation of such non-motorized means of conveyance by such person, shall, before leaving the place where the said physical injury occurred, stop, and provide his name and residence, including street and street number, to the injured party, if practical, and also to a police officer, or in the event that no police officer is in the vicinity of the place of said injury, then such person shall report said incident as soon as physically able to the nearest police station or judicial officer.

Section 3: Liability in Dog-Related Bicycle Injuries

Presenter: Harrison Williams

be the target defendant. If there was a crash there could be a cause of structural integrity of a component. In such a case, an expert witness like a mechanical engineer or metallurgist would be needed.

Many parts such as seat parts and front forks are made of carbon. Many high end bikes are upgraded so in screening this type of case, don't assume that the name plate covers every part on the bike.

In screening the case, always find out if there was a prior accident. One expert used frequently in structural cases is Dr. Thomas Sheldon of Baton Rouge, Louisiana.

VIII. BICYCLES AND DOGS

Most bicyclists have had incidents with dogs and some have been seriously injured. The general rule of liability for dog owners is whether the dog owner knew of or should have known the vicious propensities of the dog in order for liability to attach.

As a matter of safety, the bicyclist can usually out run a dog. Many bikers carry sticks or pepper spray. If the biker is knocked off the bike, he should keep the bike between himself and the dog.

Lawyers should check in dog cases whether there are leash laws in effect in the town, county, city or homeowner association. Proof of a violation of the leash law will not form a basis for liability, but in presenting a case to a jury such proof if allowed by the Court would be useful to a plaintiff. In screening a dog bite case, sources of information on the dog may be found in the local town courts, with the animal control officers, with neighbors and with local police agencies.

A complete review of the proof required in dog cases can be found in PJI 2:220. The plaintiff must show that the dog had vicious propensities and that the defendant knew or should have known about those propensities. Vicious propensity is defined as a natural inclination or usual habit to act in a way that endangers people. Factors such as previous attacks may be shown but it

is not necessary to find that the dog had previously bitten or jumped someone. Mere barking or an isolated straining at a leash would not demonstrate a vicious propensity. The fact that a dog was kept on a chain or rope may establish knowledge by the defendant of dangerous propensities. There is no such thing as the "one bite rule".

See *Craft v. Whittmarsh*, 83 AD3d 1271, and *Bard v. Jahnke*, 6 N.Y. 3d 592. The strict liability doctrine applies to those who harbor animals, landlords, and others who know of the dog's propensity. A landlord's liability may not extend to the street and the landlord's liability is dependent on whether he mentioned sufficient control of the premises to require removal of the animal.

The *Bard* case involved a carpenter performing repairs in a dairy barn. While Bard was on his knees, a harmless dairy bull named Fred slammed Bard into some pipes fracturing his ribs, lacerating a liver and injuring his spine. The proof showed that Fred had never attacked a farm animal or human. Proof submitted by Bard by a professor of animal science that breeding bulls are dangerous was disregarded by the Court because of its prior decisions that the breed of an animal is not sufficient to show vicious propensities. The dismissal of the Complaint by the Supreme Court was affirmed.

A bicyclist attempting to escape from a dog and striking a car may recover damages. *Pollard v. United Parcel Service, et al.* 302 AD2d 884.

The Courts have held that the owner is strictly liable if he knows of the dog's abnormal dangerousness. *Petrone v. Fernandez*, 12 N.Y. 3d 546. Violation of a leash law is considered only "evidence of negligence" and not a sufficient basis on its own to find liability. Liability in vicious propensity cases is strict and not dependent on proving negligence.

In *Petrone*, plaintiff was a mail carrier who saw an unleashed Rottweiler as she approached the home. Postal workers "flag" houses with unrestrained dogs. The plaintiff turned back toward the vehicle and then ran when the dog began running at her. She tried to leap through the window

of her truck and got stuck with one leg inside the truck and one outside. The dog did not bite the plaintiff. The Court of Appeals citing its decision in *Collier v. Zambito*, 1 NY 3d 444, held that the only liability the owner of a domestic animal faces is for strict liability where the owner knows or should have known of the animal's vicious propensities. The Court emphasized there is no cause of action for negligence and that violation of a local leash law is irrelevant since a violation is only evidence of negligence and negligence in New York is no longer a basis for imposing liability. The plaintiff's cause of action for injury to her finger was dismissed.

Comparative negligence can be shown if a person unnecessarily puts himself in harms way. *Arbegast v. Board of Education, et al.* 65 N.Y. 2d 161. This is true even though the plaintiff alleges and proves strict liability. There is no rule that a dog is entitled to one bite and the breed of a dog is insufficient to show that a dog has vicious propensities or that the owner had knowledge of the propensities. The Court may not take judicial notice of the viciousness of a particular breed but testimony would be received on that issue for consideration.

IX. SCREENING BICYCLE CASES

In screening a bicycle case, there are certain basic rules to follow:

1. Get the police report.
2. Go to the scene of the accident.
 - a. What is the condition of the road? Are there defects?
 - b. Lighting on the road? Visibility?
 - c. Geography, are there curves or hills?
 - d. Signage, bike warning signs?
 - e. Take photographs of scene, the bike and the client
3. Retain the expert early in road defect cases and take him to the scene.

Section 4: General Safety Tips

Presenter: Lawrence Ordway

XII. GENERAL SAFETY TIPS AND BICYCLE HELMET RESEARCH

1. Left Turning Cars

The most common cause of accidents by motorists with bicycles is motorists making left turns.

Tip: Do not assume the motorist sees you. Take one hand off the handlebar and wave at them. Establish eye contact.

2. Passing Stopped Cars

Always give at least 5 feet clearance to avoid striking the driver side door while it is being opened.

3. Wear brightly colored clothing. Visibility is the key to safety.

4. Use the rear and front lights both at night and during the day.

5. Motorists Making Right Turns Cutting Off a Cyclist Riding Parallel to the Vehicle

The second most common cause of accidents are motorists failing to yield the right of way at intersections. Tip: Slow down at intersections and don't assume a motorist making a right turn or coming from a stop sign sees you or will yield to you.

6. Carry an emergency card or wristband in case of accidents.

7. Report all accidents.

8. Bicyclists must also yield the right of way when entering an intersection from a stop sign or flashing signal.

9. Use hand signals well in advance of turns. The third most common cause of accidents involve bicyclists merging into the path of motorists who frequently misjudge the space required to pass a cyclist or the duty to yield to bicyclists who are signaling their intention to turn. The National Highway Traffic Safety Administration maintains a database for bicycle fatalities and accidents. See also the Institute for Traffic Safety Analyses (ITSA) for statutes.

10. Install and use a bike mirror but don't overly rely on the mirror.

11. Bicycle Helmets

Ninety percent of all bicyclists killed in 2000 in the US were not wearing helmets. Except for infants up to the age of 14 years, wearing a helmet is not required in New York State. None of the bike rental and sharing programs in major cities such as Velib in Paris or DecoBike in Miami require a helmet as a condition of usage. Anyone who has ever used a bicycle in Europe will find that helmet usage is rare. European health experts claim that forcing people to wear helmets discourages them from riding bicycles leading to more obesity, heart disease and diabetes.

One professor from Marquarie University did a mathematical model and concluded the benefits outweigh the risks by 20 to 1 to justify his opinion that wearing helmets is not warranted.

The final safety tip: WEAR A HELMET. The arguments set forth above were answered by Bruce Sigsbee, President of the American Academy of Neurology in a New York Times OpEd of October 3, 2012. As a neurologist, he said he had seen the devastating effect of brain injuries incurred from the accidents. He cited the small cost of helmet protection and taking personal responsibility as a hedge against thousands of dollars in medical bills or loss of a loved one. According to a study done by New Zealand, bicycle helmets reduce the risk of brain injury by 88% and facial injury by 65%. A report in the Journal of the American Medical Association by Dr. Jeffrey Sachs found that for the period studied, 2500 of the 2985 deaths would have been prevented by helmet use. He also found that 757,000 of 905,752 head injuries would have been prevented and one death every day would have been saved.

What Type of Helmet Should be Used

The Consumer Product Safety Commission sets the standards for all helmets sold in the United States. In selecting a helmet, one should go to a reputable bike shop and get helmet

certified to standards set ASTM F 1997, ANSI or Snell B-95. All of these standards are set by dropping helmets in a lab upside down onto an anvil. Drop distances are 3.3 feet to 6.6 feet and to pass, the headform must register less than 300 g's during the impact. (Bike Helmet Safety Institute). (See the attached study).

Consumer Reports published in May 2012 a report on bike helmets. The "Bontrager Solstice Youth" and Specialized Echelon rated highest for impact test results. There were no Bell True Fit models tested.

The important thing is to go to a bike store, obtain a standards rated helmet and have it properly fitted. Attached are instructions on how to fit a bicycle helmet.

XIII. EXPERT WITNESSES

The following are expert witnesses gleaned from the cited cases in accident reconstruction and forensic engineering:

1. Robson Forensic Inc.
12 Corporate Drive
Clifton Park, New York 12065
(Attn: Mr. J. Lucas Elrath, an engineer and former Product Manager at Trek and Advanced Sports)
2. Thomas C. Onions, BCFE, FRCFE
P.O. Box 667
Orchard Park, New York 64127
(Accident Reconstruction Specialist)
3. Alan Gonseth (Civil engineer and bicycle accident reconstructionist)
4. James Green (Civil engineer, author of "Bicycle Accident Reconstruction for the Forensic Engineer")
5. Thomas Sheldon (mechanical engineer and metallurgist, Baton Rouge, LA)

Sources: American College of Forensic Examiners, National Association of Professional Accident Reconstruction Specialists, NY Society of Traffic Accident Reconstruction Specialists

Section 5: Waivers and Releases
at Bike Events – Are They
Enforceable?

Presenter: Harrison Williams

4. Observe the number of bicyclists. This may constitute notice to the driver.
5. Line up witnesses.

X. WAIVERS

It is not uncommon for the sponsors of bicycle events to require waivers or releases of responsibility to be exempted from liability in the event of personal injury. Agreements made between the owner of places of amusement and their customers where a fee is paid, such as gyms and pools to exempt the owners from liability for damages caused by their own negligence are void as against public policy. General Obligations Law 5-326.

These exculpatory agreements however, are enforced in biking events even though Plaintiffs have attempted to recover under the General Obligations Law provision. Two standard and typical forms are attached. One is a form required by participants in the famous "Bike New York" five borough bike tour and the other is a form being used by The Newland Center for Adult Literacy for a Syracuse area fundraising ride to be held in June 2013.

Theodore Tedesco was seriously injured on the Verrazano Narrows Bridge in 1998 while riding in the Bike New York event. The Second Department in *Tedesco v. Triborough Bridge & Tunnel Authority*, 250 AD2d 758 sustained a motion to dismiss the complaint finding the release enforceable and further held that General Obligations Law 5-326 involves places of amusement or recreation and that the Bike New York event failed to meet that threshold. See also the case of *Fazzinga v. Westchester Track Club, et al.* 48 AD3d 410 involving a runner who collapsed and died during a five kilometer foot race sponsored by the club. The Court upheld the release in that case again finding that General Obligations Law 5-326 was not applicable to the facts of the case. The decedent Fazzinga was overweight, had high cholesterol, had failed stress tests and had a family history of heart disease. It was alleged that there were no emergency medical services provided.

Although these contractual exemptions from liability are permitted, they are not favored in New York. See 79 N.Y. Jur.2d Negligence Sec. 8. They cannot grant exemption from liability for intentional wrongdoing, gross negligence or reckless indifference.

In examining these provisions, the Courts will determine how close the parties were in bargaining power, whether they were on equal terms, whether the limitation of liability language is clear and unequivocal and provides notice to the injured party. If the affected party fails to read the release, that does not render it unenforceable. *Blog v. Battery Park City Authority, et al.*, 234 AD2d 99. Blog was injured in a go-kart charity event when she hit a tire wall. The Court held failure to read the release does not constitute fraud or duress.

A minor is generally not bound by an exculpatory contract signed by his parent. *Alexander v. Kendall Central School District, et al.*, 221 AD2d 898, Vol 19A N.Y. Jur.2d Sec. 130, Vol 79 N.Y. Jur.2d Sec. 6. The Kendall case is a Fourth Department case and is also cited for holding that exculpatory agreements to be enforced must "plainly and precisely" limit liability of the defendant for its own negligent acts. The release cannot simply limit liability in broad language such as for "all injuries sustained but must use the word negligence in its form." The Newland Center form, attached in this outline, would clearly not be enforceable. The Fourth Department rule has repeated in *Carol Barone v. St. Joseph's Villa*, 255 A.D. 2d 973 that "a release may not be construed to exculpate defendant for its own negligence absent clear and explicit language to that effect."

The United States District Court for the Northern District of New York in a 2002 case involving a rafting accident on the Niagara River upheld the release and in commenting on the NY rule in Kendall held even though the word "negligence" is not used if words of a similar import are used the release will be enforced. *Le Blanc, et al. v. Cleveland and Syd and Dusty Outfitters, et al.*, 979 F. Supp 142. A copy of the release is attached. The Fourth Department rulings seem to

contradict *Gross v. Sweet*, 49 NY 2d 424, which holds the word "negligence" does not have to be specifically used in exculpatory agreements so long as words of similar import appear.

For further release cases see *Chieco v. Paramarketing, Inc.*, 228 AD2d 462 (paragliding) and *Stuhlweissenburg v. Town of Orangetown, et al.*, 223 AD2d 633 (softball league).

XI. LIABILITY FOR PARENTS FOR TORTS OF CHILDREN AND INTERPRETATION OF PARENTS' NEGLIGENCE TO CHILDREN

The negligence of parents may not be imputed to an infant in a personal injury or a wrongful death action. But the reverse is also true that a parent is not responsible for the acts of children (PJI 2:261). There are exceptions where knowledge by a parent of vicious propensities of a child but there must be proof of a failure to use a reasonable means to prevent a specific type of activity. *Steinberg v. Cauchois, et al.*, 249 AD 518.

VTL Section 1230(a) does provide that, "the parent of any child shall not authorize or knowingly permit a child to violate any provisions of this article." In the case of *Pederson v. Balzan, et al.*, 117 AD2d 933, a 13 year old child was fatally injured while crossing Route 212 in the Town of Saugerties in New York. The defendant testified she never saw the infant until she was at her left front fender crossing the street at a 45 degree angle. The Appellate Division held that the trial court erred in charging VTL Section 1230(a) since the testimony was that the parents had instructed the child to ride on the south shoulder of the road due to the prior condition of the north side.

Question: Would the charge have been correct had the parents instructed the child that it could cross the highway at any point without maintaining a "proper lookout" relying upon the duties of the driver to yield the right of way to a bicyclist?

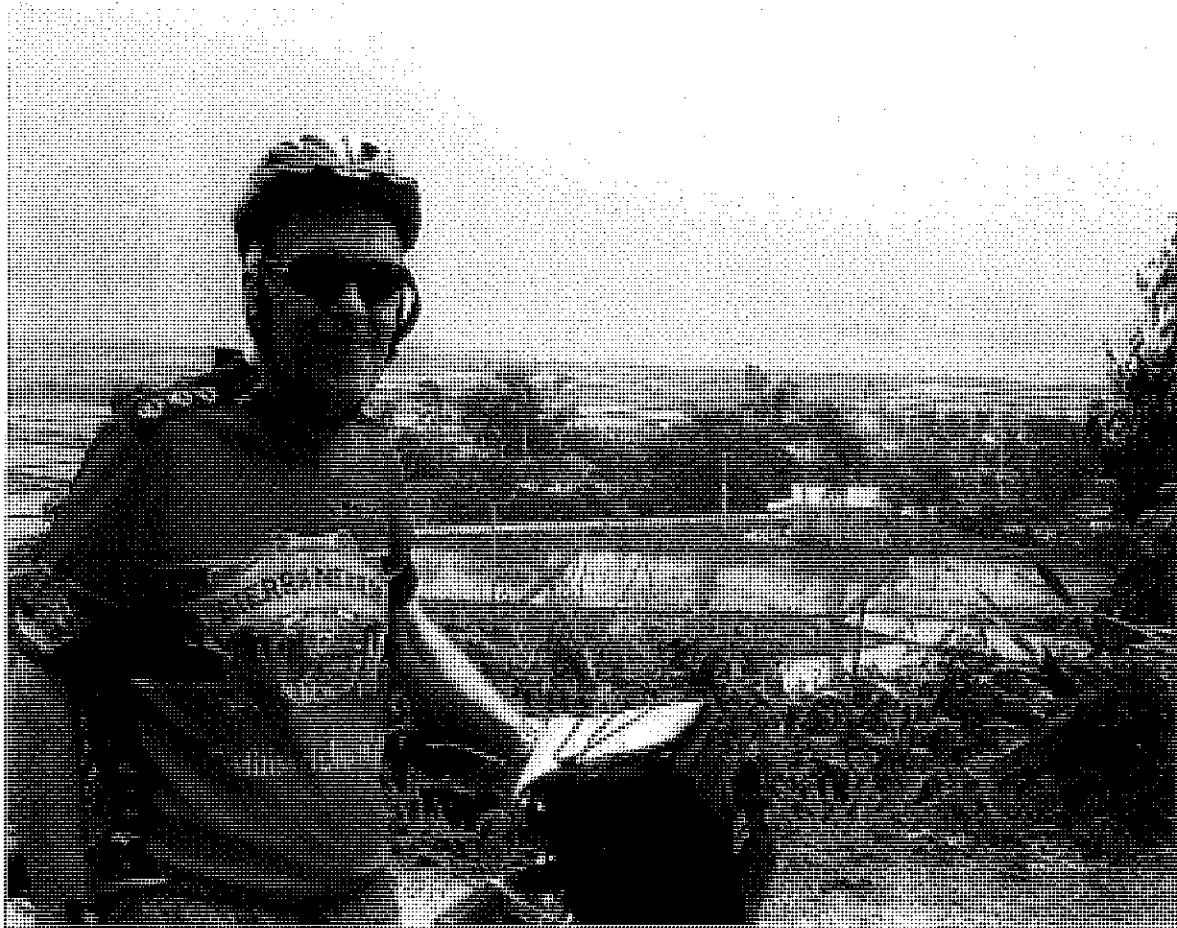
Biographies for the Presenters

ABOUT THE AUTHOR

Harrison V. Williams, Jr., Esq. is a partner in the litigation department of Bousquet Holstein PLLC, in Syracuse, New York and has tried cases in the State and Federal Courts for over thirty years.

He is a graduate of St. Lawrence University and the Syracuse University College of Law. He has represented both insurance companies and individual plaintiffs in personal injury litigation. He is a member of the Onondaga County Bar Association, the New York State Bar Association, the American Bar Association and a charter member of the Academy of Trial Lawyers of New York State. He has achieved an AV rating from Martindale-Hubbell.

Mr. Williams has a substantial background and experience in bicycling. He has participated in long distance bicycling events on numerous occasions in Europe. In 2006 he spent three weeks bicycling throughout Vietnam and Cambodia ending up in Hanoi on New Year's Eve. He is the owner of a Trek 5000 Carbon Fiber bicycle and on occasion commutes to work from his suburban home.



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L. Micha Ordway

Litigation by its nature is an arduous and challenging undertaking. Success requires setting realistic goals, creating intelligent tactics, undertaking meticulous preparation and retaining seasoned, confident counsel. Micha Ordway's experiences representing both plaintiffs and defendants in and out of the courtroom along with his dauntless advocacy have made him a sought-after attorney for corporations and individuals alike.

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Practice Areas

Litigation
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Education

J.D., Albany Law School,
1997

B.A., Hamilton College, 1990

Admissions

New York
Massachusetts
United States District Court,
Northern and Western
District of New York

Highly regarded for his ability to navigate through the often confusing and chaotic litigation process, Micha assists his clients with determining their needs and goals and generates strategies designed to achieve the best outcomes possible - all the while keeping the economics of litigation in mind.

A skilled courtroom attorney, Micha has litigated a wide range of matters from inception all the way to the New York's highest Appellate Court.

Micha's experience includes:

- Banking disputes under Articles 3 & 4 of the U.C.C.
- Business disputes/ dissolution actions
- Complex commercial litigation matters
- Construction law
- Contract disputes
- Employment discrimination and retaliation claims in state and federal courts and before the New York Division of Human Rights.
- Insurance coverage disputes
- Labor and employment matters
- Personal injury and product liability claims
- Scaffolding law claims under Labor Law 240
- Shareholder derivative actions
- Unfair Labor Practice Charges before the National Labor Relations Board
- Wage and Hour claims
- Whistleblower suits

Micha also practices in the areas of alternative dispute resolution through arbitration and mediation.