A. STATUTES OF LIMITATIONS

Causes of action to recover damages for injury to property, personal injury, or malpractice, other than medical, dental, or podiatric malpractice, must be brought within three years. Causes of action to recover damages for medical, dental, or podiatric malpractice must be brought within two years and six months. Causes of action based on a theory of strict products liability are also subject to the three-year statute of limitations as they sound in tort rather than contract. However, where personal injuries are attributed to a breach of warranty, the action is subject to the four-year limitation period applicable to breaches of sale contracts under the Uniform Commercial Code. The statute of limitations for tortious interference with a contract and misappropriation of a business opportunity is also three years.

A six-year statute of limitations period is applicable to claims of fraud. The time period for a fraud claim runs from the time the plaintiff discovered the fraud or "with reasonable diligence," should have discovered the fraud. New York also allows a plaintiff two extra years to bring an action after discovery or imputed discovery of the facts if the statute of limitations has run. It is important to note that the discovery rule only applies to cases of actual fraud. A cause of action based on constructive fraud must be commenced within six years from the date of the commission of the fraud.

Except where the statute of limitations incorporates a discovery rule, the limitations period begins to run at the time the cause of action accrued.

Claims involving intentional torts, such as assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, and violations of privacy rights, are subject to a one-year limitations period.

New York has a six-year "catch-all" limitations period for actions that are not subject to another statute of limitations or have been excluded from the scope of other statutes.

If a cause of action accrues outside of New York in favor of a nonresident plaintiff, under its "borrowing statute," New York will apply the shorter of the New York statute of limitations or the statute of limitations of the state in which the cause of action accrued to bar the action.

B. TORT REFORM

To date, the New York legislature has not passed any tort reform legislation although many bills have been introduced. However, New York did recently adopt rules that mirror the federal multi-distinct system allowing mass tort
cases to be handled by a single judge for pretrial purposes. Under the new rules, a four-judge panel is being established to decide which lawsuits should be assigned to one or more judges where those cases present common facts and parties.18

C. “NO FAULT” LIMITATIONS

The purpose of New York’s no-fault insurance law, the Comprehensive Motor Vehicle Insurance Reparations Act, is to compensate victims of vehicular accidents in an efficient way so the victim can avoid the costly and time-consuming process of litigation.19 “[T]he legislative intent underlying this law was to weed out frivolous claims and limit recovery to significant injuries.”20

The statutory scheme provides for prompt payment for basic economic losses incurred by the insured up to $50,000.21 The bulk of the basic economic loss includes medical expenses and lost wages.22

Actions for basic economic loss or for noneconomic loss are barred, except in the case of serious injury.23 The statute defines what constitutes a “serious injury.”24 The court decides whether the claimant has a serious injury before the case may be submitted to the jury.25

D. THE STANDARD FOR NEGLIGENCE

To recover for negligence, a plaintiff must show that the defendant owed the plaintiff a cognizable duty of care.26 The existence of a duty to exercise due care is predicated on and varies with the relation of the parties.27 Once the plaintiff establishes the existence of a duty, the plaintiff must demonstrate that the defendant “breached” or failed to discharge that duty because the defendant omitted to do something that should have been done or did something that should not have been done.28

Generally, the standard of care a defendant must observe is ordinary or reasonable care as measured by what a reasonably prudent and careful person would have done under the same circumstances.29 However, the law demands that a greater level of care be provided to those unable to care for themselves, such as children (who are generally expected to act on instinct and impulse).30

The standard of care expected of a child is measured by comparing his or her conduct to the conduct of a reasonable minor of like age, experience, intelligence, and degree of development and capacity under the same circumstances.31 When a child engages in activity normally undertaken only by adults, the child may be held to the standard of an adult without allowance for the child’s immaturity.32 While there is no fixed age at which a child becomes responsible for adhering to a duty of care, a child less than four years old is considered incapable of contributory negligence.33 Parents may be liable for the negligent acts of their children under a negligent entrustment theory where the parents fail to prevent, or at least properly supervise, their children’s improvident use or operation of dangerous instruments.34
E. CAUSATION

New York follows the general rule that no cause of action will lie unless the plaintiff can demonstrate that the defendant’s negligence was the proximate or legal cause of the plaintiff’s injury.\(^\text{35}\) Negligent conduct is considered the legal or proximate cause of harm to another if the conduct is a substantial factor in causing the injury.\(^\text{36}\)

F. CONTRIBUTORY NEGLIGENCE, COMPARATIVE NEGLIGENCE, AND ASSUMPTION OF RISK

1. Contributory Negligence

Prior to New York’s enactment of the comparative negligence statute,\(^\text{37}\) any finding that a plaintiff was contributorily negligent, even to a slight degree, barred recovery, irrespective of the defendant’s own negligence.\(^\text{38}\) Currently, contributory negligence on the plaintiff’s part will only diminish damages owed by the defendant in proportion to the plaintiff’s own culpable conduct.\(^\text{39}\) Contributory negligence is an affirmative defense that must be pleaded and proved by the defendant.\(^\text{40}\)

2. Comparative Negligence

The New York comparative negligence statute applies to actions for personal injury, injury to property, or wrongful death.\(^\text{41}\) Under that statute, the culpable conduct of the plaintiff or the decedent, including contributory negligence or assumption of risk, is not a bar to recovery, but instead proportionately diminishes the amount of damages recoverable by the claimant’s percentage of fault.\(^\text{42}\) The burden of establishing culpable conduct by the claimant lies with the party asserting the defense.\(^\text{43}\) Punitive damages are not subject to apportionment under the comparative negligence statute.\(^\text{44}\)

3. Assumption of Risk

The New York comparative negligence statute also includes assumption of risk in its definition of culpable conduct, which, once established, proportionately diminishes the damages recoverable by a claimant.\(^\text{45}\) Under the statute, assumption of risk is no longer a complete bar to recovery.\(^\text{46}\) A comparative causation analysis is applied when there is an implied assumption of risk.\(^\text{47}\) Implied assumption of risk requires knowledge or an appreciation of the risk and acceptance of the consequences by continued participation in the activity.\(^\text{48}\) However, there are exceptions to the general rule. Assumption of risk acts as a complete bar to recovery in cases involving express assumption of risk.\(^\text{49}\) Express assumption of risk occurs when the claimant is expressly informed of the risk and undertakes the activity anyway.\(^\text{50}\) Another exception involves “primary” assumption of risk, which is applicable in cases of sporting events.\(^\text{51}\) Primary assumption of risk is based on “actual consent implied from the act of the electing to participate in the activity.”\(^\text{52}\) It is important to note that the above exceptions are not applicable when the risks are “unassumed, concealed or unreasonably increased.”\(^\text{53}\)
G. RES IPSA LOQUITUR AND DANGEROUS INSTRUMENTALITIES

1. Res Ispa Loquitur

Res ipsa loquitur permits an inference of culpability for harm to the plaintiff where the plaintiff establishes that the event: (1) is of a kind that ordinarily does not occur in the absence of negligence; (2) was caused by an agency or instrumentality within the defendant’s exclusive control; and (3) was not due to any voluntary action or contribution by the plaintiff.54 However, even where the plaintiff has established a prima facie case of res ipsa loquitur, the inference of negligence is not a mandatory presumption, but rather a permissive inference.55

2. Dangerous Instrumentalities or Activities

As is generally true in all negligence cases, the standard of care in maintaining a dangerous instrumentality is commensurate with the risk of danger involved.56 Strict liability may only result when the defendant engages in abnormally dangerous or ultrahazardous activities.57

H. NEGLIGENCE PER SE

Liability under the doctrine of negligence per se arises where there is an unexcused breach of a statutory duty.58 However, to establish liability under this doctrine, the plaintiff must show that he or she is a member of the class intended to be protected by the statute and that the statutory violation was the proximate cause of the injury.59 Violations of local ordinances or administrative rules may constitute negligence or evidence of negligence, but not negligence per se.60

I. JOINT AND SEVERAL LIABILITY

The general rule is that when two or more people commit negligent acts that combine to cause a single injury, these joint tortfeasors will be jointly and severally liable to the victim.61 This means “that each party is individually liable to plaintiff for the whole of the damage.”62 Joint and several liability is imposed only when the tortfeasors act concurrently or in concert.63 There is no joint and several liability among tortfeasors who commit separate and distinct tortious acts that create separate injuries.64 Whether tortfeasors acted concurrently or in concert is a question of fact for the jury.65

While as a general rule, each tortfeasor is liable for the entire damage sustained by the plaintiff,66 under Section 1601 of the Civil Practice Law and Rules, the liability of certain parties who are jointly liable to a claimant is limited under certain circumstances.67 Section 1601 applies when a joint tortfeasor is found to be 50 percent or less liable in a personal injury case.68 The defendant’s liability to the claimant is limited to the tortfeasor’s relative culpability for noneconomic loss.69 While certain exclusions apply to the statute,70 intentional torts fall within its ambit.71 Breach of a non-delegable duty to a plaintiff does not preclude apportionment for noneconomic damages among joint tortfeasors pursuant to Section 1601.72 Notwithstanding Section 1601, culpable joint
tortfeasors remain jointly and severally liable when indemnifying an innocent party who paid a judgment on their behalf.73

When several parties are jointly liable and one party has paid more than its fair share to the claimant, that party will be entitled to contribution from the other tortfeasors.74 By law, a tortfeasor has a right to contribution regardless of whether the victim has sued the other joint tortfeasors.75 The tortfeasor is entitled to contribution in the amount paid to the injured party in excess of its equitable share, derived from the tortfeasor’s relative culpability.76 Relative culpability is determined by the trier of fact.77

A settlement with one tortfeasor will not affect the ability of the injured person to sue another nonsettling tortfeasor.78 In a suit against the nonsettling tortfeasor, the verdict will be reduced to the highest of the amount stipulated in the release, the consideration paid for the release or the settling tortfeasor’s equitable share.79 New York encourages settlement. However, a nonsettling defendant is protected from paying more than its equitable share.80

J. INDEMNITY

Indemnity shifts an entire economic loss to a party who is supposed to bear that loss.81 It differs from contribution in that it “springs from a contract, express or implied, and full, not partial, reimbursement is sought.”82 Indemnity can arise out of an express contractual provision in which there is a promise by the indemnitor to be responsible for any claims brought against the indemnitee by a third party.83 However, indemnity can be imposed under a theory of implied contract or if there is a great disparity in fault between the tortfeasors.84 Indemnity may also be imposed by statute.85

K. BAR OF WORKERS’ COMPENSATION STATUTE

Under the New York Workers’ Compensation Law,86 workers’ compensation is, with certain exceptions, the exclusive remedy against the employer for damages sustained from injury or death that arose out of and in the course of the employment.87 The exclusive remedy doctrine applies not only to the employer and fellow employees, but also to the employer’s insurance companies (not only the workers’ compensation carrier), the insurance companies’ employees, the employee’s collective bargaining agents (the union), the union’s employees, and even when an employee works independently at his employer’s residence.88

An injured worker may sue a third party who may in turn implead the employer for contribution or indemnity.89 The employer’s liability for contribution or indemnity is limited to instances where the employee sustained a “grave” injury.90 The statute contains a restrictive list of injuries that are considered “grave.” The limitations to an impleader action extend to fellow employees as well as to the employer’s insurance carrier and the employee’s collective bargaining unit.91 Other exceptions to the exclusive liability rule include the employer’s failure to provide coverage by one of the methods required in the statute92 or where the injury results from an intentional tort carried out or authorized by the employer.93
If a worker has collected workers’ compensation and then sues a third party in connection with the same incident, the workers’ compensation carrier may be subrogated to the rights of the employee against the third party. If the employee successfully sues the third party, the insurer may be reimbursed for previously paid workers’ compensation benefits. The proceeds available for reimbursement are reduced by the amount of reasonable litigation costs, which are equitably apportioned between the employee and the carrier to the extent each was benefitted by the recovery. The employer or the workers’ compensation carrier must approve any settlement or further workers’ compensation payments may be cut off.

L. PREMISES LIABILITY

Under New York law, landowners are held to a single standard of reasonable care under the circumstances whereby foreseeability is a measure of liability. A landowner’s liability for injuries sustained on the premises no longer depends on the plaintiff’s status as a trespasser, licensee, or invitee. Rather, the duty of a landowner to persons on the premises is to keep the premises in a reasonably safe condition, considering all of the circumstances including the likelihood of injury, the seriousness of the injury, the burden of avoiding the risk, and the purpose of the person’s presence.

M. DRAM SHOP LIABILITY

The New York Dram Shop Act establishes a cause of action on behalf of a person injured due to the intoxication of another. Liability arises when a person has caused or contributed to another’s intoxication by illegally selling or assisting in procuring liquor for the intoxicated person and the intoxicated person causes injury to another. The injured plaintiff must demonstrate some reasonable or practical connection between the unlawful sale and the injury. Proximate causation does not have to be established. The injured party has a right to recover actual and exemplary damages. No special duties exist under the Act with respect to minors. Social hosts are generally not liable under the Dram Shop Act. However, social hosts may be liable if they are engaged in commercial activity that includes the sale of liquor for a profit. In addition, a social host would be liable for injuries or damages caused by an intoxicated minor whom the host knowingly served alcohol.

N. ECONOMIC LOSS

New York does not recognize a cause of action based on strict liability and negligence where the suit seeks recovery of economic loss. A limited exception is permitted for claims of negligent performance of contractual services.

O. FRAUD AND MISREPRESENTATION

The New York Civil Practice Law and Rules require a cause of action for fraud to be pleaded with particularity.
The elements of a claim for fraud, deceit, or intentional misrepresentation are: (1) a representation of fact; (2) falsity; (3) scienter (intent); (4) reliance; (5) injury; and (6) proximate causation. All of the foregoing elements must be proved by clear and convincing evidence.

A claim for negligent misrepresentation must allege: (1) carelessness in imparting words; (2) on which others were expected to rely; (3) on which they did justifiably rely; (4) to their detriment; and (5) the author expressed the words directly, with knowledge they be acted on, to one whom the author is bound by some special relation or duty of care. A claim for negligent misrepresentation exists only where there is a special relationship of trust and confidence which imposes a duty on a person to impart correct information to another. New York requires that negligent misrepresentation be proved by clear and convincing evidence.

P. CONSUMER FRAUD STATUTES

Sections 349-350 of New York’s General Business Law, referred to as Consumer Protection from Deceptive Acts and Practices, protects consumers from deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in the state. The Attorney General may bring an action relating to violations of these laws. Private actions are also available under these statutes. While the statutes are consumer oriented, a business may file a deceptive practices claim if it was injured while acting as a consumer. Reasonable attorney’s fees may be awarded to a prevailing plaintiff.

In claims brought under Sections 349 or 350, the plaintiff must show that: (1) the alleged practice was misleading in a material respect; and (2) the plaintiff was injured. There is no requirement that the defendant’s actions be shown to be intentional, fraudulent, or even reckless. With respect to claims arising under Section 349, the plaintiff does not have to prove reliance, although they must prove that the defendant’s “material deceptive act” caused the injury.

A three-year limitations period applies to actions alleging deceptive acts or practices pursuant to Section 349. Plaintiffs suing under Section 349 will not be able to take advantage of any discovery rule extending the limitations period even if they did not discover the deception in time to sue.

Q. PUNITIVE DAMAGES

New York permits punitive or exemplary damages to be awarded in order to punish a defendant for the wrong in a particular case, to protect the public from similar acts, and to deter the defendant and others from similar acts. In negligence actions, punitive damages are awarded where the defendant is found to have engaged in misconduct involving malice, oppression, insult, wanton or reckless disregard of the plaintiff’s rights, or other egregious circumstances. Gross negligence can support an award of punitive damages.
Punitive damages are recoverable in a wrongful death action.\textsuperscript{129} The amount awarded should bear some relationship to the actual damages.\textsuperscript{131} The court has the power to reduce the jury’s verdict if the award is based on prejudice or partiality, or if the amount awarded is so unreasonable as to “shock the judicial conscience.”\textsuperscript{132}

There is no separate cause of action for punitive damages.\textsuperscript{133} To justify punitive damages, there must be a showing of actual injury that justifies an award of compensatory damages,\textsuperscript{134} although punitive damages can be awarded in connection with nominal damages.\textsuperscript{135}

Factors considered include the defendant’s financial assets or wealth\textsuperscript{136} as well as his or her conduct and state of mind.\textsuperscript{137} Punitive damages are not recoverable for an ordinary tort.\textsuperscript{138} They must be assessed against the actual tortfeasor; punitive damages may not be imposed where liability is vicarious.\textsuperscript{139}

\textbf{R. \hspace{1em} WRONGFUL DEATH AND SURVIVORSHIP ACTIONS}

Under New York common law, there is no recovery for wrongful death.\textsuperscript{140} Instead, wrongful death actions are governed entirely by statute.\textsuperscript{141} The law authorizes an action by a personal representative to recover damages on behalf of a decedent’s beneficiaries for a “wrongful act, neglect or default” that caused the decedent’s death.\textsuperscript{142} It is important to note that the two-year statute of limitations accrues on the date of the decedent’s death.\textsuperscript{143}

Under New York common law, all actions automatically ended on the death of any party.\textsuperscript{144} However, a New York statute now permits survival actions by or against decedents.\textsuperscript{145} The law authorizes either the bringing or continuation of an action by a personal representative on behalf of a decedent’s estate for personal injuries or property damage.\textsuperscript{146}
1. With respect to claims of professional malpractice, C.P.L.R. 214(6) provides a three-year statute of limitations regardless of whether the underlying theory is based in contract or tort. N.Y. C.P.L.R. 214(6) (2003). This statute, which was amended in September 1996 to shorten the statute of limitations for nonmedical malpractice claims from six years to three, applies to causes of action that accrued before the amendment’s effective date not yet interposed by that date. See Brothers v. Florence, 95 N.Y.2d 290, 739 N.E.2d 733, 716 N.Y.S.2d 367 (2000).


3. Id. § 214-a (2003). The cause of action accrues on the date of the last continuous treatment for the complained-of illness or injury, unless the action is based on the discovery of a foreign object in the body, in which case the discovery rule would apply. Although governed by the three-year limitation period in C.P.L.R. 214(b), attorney malpractice claims are also subject to an analogous tolling provision, the “continuous representation rule,” which starts the statute of limitations for a legal malpractice action running at the end of an attorney-client relationship that is continuous, ongoing, developing and dependant. See Aaron v. Roemer, Wallens & Mineaux, LLP, 272 A.D.2d 752, 754, 707 N.Y.S.2d 711, 713–14 (3d Dep’t 2000).


5. N.Y. U.C.C. § 2-725(1) (1993); see also Heller v. U.S. Suzuki Motor Corp., 64 N.Y.2d 407, 488 N.Y.S.2d 132, 477 N.E.2d 434 (1985); Calabria v. St. Regis Corp., 124 A.D.2d 514, 508 N.Y.S.2d 186 (1st Dep’t 1986); N.Y. U.C.C. § 2-318 (1993) (providing that “[a] seller’s warranty whether express or implied extends to any natural person if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of warranty”).


460, 461 (2d Dep't 1999) (asserting that “[t]he burden of establishing that
the fraud could not have been discovered before the two-year period prior
to the commencement of the action rests on the plaintiff, who seeks the benefit
of the exception”).

10. N.Y. C.P.L.R. 203(g) (2003). However, this provision is not applicable to
Article 2 of the U.C.C. or N.Y. C.P.L.R. 214-a. Id.

11. Quadrozzi Concrete Corp. v. Mastroianni, 56 A.D.2d 353, 392 N.Y.S.2d 687, 688
(2d Dep't 1977).

12. Id.

13. Under the discovery rule referred to by C.P.L.R. 214, the tolling period for
actions to recover damages for personal injury or injury to property caused
by the “latent effects of exposure to any substance or combination of
substances, in any form, upon or within the body or upon or within the
property,” begins to run from the earlier of the date of discovery of the
injury or the date when through exercise of reasonable diligence, such
injury should have been discovered. N.Y. C.P.L.R. 214-c(2) (2003).


15. Id. § 215 (2003).


17. Where the action accrues in the state of which the plaintiff is a resident, the


N.E.2d 1088 (1982)).


22. Id.

23. Id. § 5104 (2000). This section allows recovery for basic non-economic loss
in case of serious injury or economic loss otherwise.

24. Id. § 5102. The definition includes personal injuries that result in death,
dismemberment, or significant disfigurement.


32. See Neumann v. Shlansky, 58 Misc. 2d 128, 294 N.Y.S.2d 628 (Westchester County Ct. 1968) (where a minor golfer struck another golfer with a golf ball, the minor was held to the standard of the reasonable man on the golf course since golf can easily be determined to be an adult activity engaged in by children), aff’d, 63 Misc. 2d 587, 312 N.Y.S.2d 951 (App. Term 1970), aff’d, 36 A.D.2d 540, 318 N.Y.S.2d 925 (2d Dep’t 1971).


34. See Rios v. Smith, 95 N.Y.2d 647, 744 N.E.2d 1156, 722 N.Y.S.2d 220 (2001) (parent owed a duty to protect third parties from harm that was clearly foreseeable from child’s use of ATV vehicles that could attain speeds of 20 to 30 miles an hour); see also Danielle v. Christopher, 3 Misc. 3d 357, 776 N.Y.S.2d 446 (Richmond County Sup. Ct. 2004) (granting plaintiffs summary judgment against defendant child’s parents based on the child’s underage use of an “air gun” with the parents’ permission).

35. See Doundoulakis v. Town of Hempstead, 42 N.Y.2d 440, 398 N.Y.S.2d 401, 368 N.E.2d 24 (1977) (stating that defendant’s activity must have been the proximate cause of the harm in order to impose liability on a theory of strict liability or negligence); Cisse v. S.F.J. Realty Corp., 256 A.D.2d 257, 682 N.Y.S.2d 199, 201 (1st Dep’t 1998); see also Nieves v. Holmes Prot., Inc., 56 N.Y.2d 914, 453 N.Y.S.2d 430, 438 N.E.2d 1145 (1982).


40. Id. § 1412 (1997).

41. Id. § 1411.

42. Id.

43. Id. § 1412.


45. N.Y. C.P.L.R. 1411.

46. Id.


48. See also Mesick, 118 A.D.2d at 218–19, 504 N.Y.S.2d at 282.

49. Arbegast v. Board of Educ., 65 N.Y.2d 161, 490 N.Y.S.2d 751, 480 N.E.2d 365 (1985) (dismissing the complaint based on plaintiff’s admission that she was informed of the risk of injury and that participants acted at their own risk).

50. See id.


52. Turcotte, 68 N.Y.2d at 439, 510 N.Y.S.2d at 53, 502 N.E.2d at 968 (noting that sports participants can be deemed to have consented “to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation”).

53. Benitez, 73 N.Y.2d at 658, 543 N.Y.S.2d at 33, 541 N.E.2d 29. See also Turcotte, 68 N.Y.2d at 439, 510 N.Y.S.2d at 53, 502 N.E.2d at 968 (stating that “participants do not consent to acts which are reckless or intentional”).
54. *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494, 655 N.Y.S.2d 844, 846, 678 N.E.2d 456 (1997). The plaintiff does not need to conclusively eliminate all other possible causes of injury to rely on *res ipsa loquitur*. Rather, “[i]t is enough that the evidence supporting the three conditions afford a rational basis for concluding that ‘it is more likely than not’ that the injury was caused by defendant’s negligence.” *Id.* at 494, 655 N.Y.S.2d at 846, 678 N.E.2d at 458 (citing Restatement (Second) of Torts § 328D cmt. e).

55. *Id.*


57. *Doundoulakis*, 42 N.Y.2d at 448, 398 N.Y.S.2d at 404, 368 N.E.2d at 27 (stating that the policy behind this rule is that “those who engage in activity of sufficiently high risk of harm to others, especially where there are reasonable even if more costly alternatives, should bear the cost of harm”).


59. *Id.* at 445, 467 N.Y.S.2d at 206.


68. Id. The statute is not applicable to property damage or wrongful death claims.


70. N.Y. C.P.L.R. 1602 (1997). See the statute for a comprehensive list of all of the exclusions.


75. N.Y. C.P.L.R. 1401 (1997) (providing that “two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought”).

76. N.Y. C.P.L.R. 1402.

77. Ravo, 70 N.Y.2d at 313, 520 N.Y.S.2d at 538, 514 N.E.2d at 1108.


79. Id.


84. *General Conference of Seventh Day Adventists*, 860 F. Supp. at 986; see also *Mas*, 75 N.Y.2d at 690, 555 N.Y.S.2d at 674, 554 N.E.2d at 1262 (recognizing "[t]hat the right to [indemnity] may be based upon an express contract, but more commonly the indemnity obligation is implied,...based upon the law's notion of what is fair and proper as between the parties").


87. Id. § 11 (Supp. 2001).


89. This practice, first allowed by *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143, 331 N.Y.S.2d 382, 382 N.E.2d 388 (1972), was limited by statute in 1996. See N.Y. Work. Comp. Law § 11. If the injured employee enters into a settlement agreement with his or her employer, then the employer can seek dismissal of third-party action under General Obligations Law § 15-108. See *Trzaska v. Cincinnati, Inc.*, 715 N.Y.S.2d 810, 810-11 (4th Dep't 2000).


91. N.Y. Work. Comp. Law § 29(6).

92. If the employer has failed to secure workers’ compensation coverage for its employee, the injured employee has the choice of electing coverage under the compensation laws or maintaining an action for damages against the employer. N.Y. Work. Comp. Law § 11. In damage actions filed under this exception, the employer may not use contributory negligence, assumption of risk, or the negligence of a fellow employee as a defense. If the employee elects to sue the employer, he may not sue fellow employees, their collective bargaining agent, or the employer’s insurance company or its employees. N.Y. Work. Comp. Law § 29(6).

the employee must prove that the specific act showed a willful intent to harm the particular employee. Id.; Blanchard v. Integrated Food Sys., 220 A.D.2d 895, 632 N.Y.S.2d 329 (3d Dep’t 1995). The act must reflect more than gross negligence or reckless conduct against the employee. Acevedo, 189 A.D.2d 497, 596 N.Y.S.2d at 71; Blanchard, 220 A.D.2d 895, 632 N.Y.S.2d at 330.


99. See Scurti, 40 N.Y.2d at 437, 387 N.Y.S.2d at 56 (stating that liability of landowners should not be governed “by the ancient and antiquated distinctions between trespassers, licensees, and invitees decisive under common law”).


102. See id.


106. See Conigliaro v. Franco, 122 A.D.2d 15, 504 N.Y.S.2d 186, 186 (2d Dep’t 1986); see also Gabrielle v. Craft, 75 A.D.2d 939, 428 N.Y.S.2d 84, 86 (3d Dep’t 1980) (stating that the Dram Shop Act should be narrowly construed in order to effectuate its purpose, which is to “impose liability upon commercial dispensers of alcoholic beverages”).

107. See Conigliaro, 122 A.D.2d 15, 504 N.Y.S.2d 186 (granting summary judgment for defendant when plaintiff failed to allege an unlawful sale); Kohler v. Wray, 114 Misc. 2d 856, 452 N.Y.S.2d 831, 833 (Steuben County Sup. Ct. 1982) (stating that the Act “has no application to a social host in a non-commercial setting”).


118. Id. §§ 349(b), 350-c.

119. Id. §§ 349(h), 350-d.


123. Oxman, 172 Misc. 2d 773, 659 N.Y.S.2d at 968. If there is proof of scienter, the court can treble damages up to $1,000. Oswego Laborers’ Local 214, 85 N.Y.2d at 26, 623 N.Y.S.2d at 533, 647 N.E.2d 741.


125. Gaidon v. Guardian Life Ins. Co. of Am., 96 N.Y.2d 201, 208–09, 727 N.Y.S.2d 30, 75 N.E.2d 1078 (2001) (explicitly rejecting the use of a six-year statute of limitations for claims brought under N.Y. Gen. Bus. Law § 349). Until Gaidon, the question of whether the six-year period applicable to fraud claims or the three-year period applicable to rights created by statute should be applied to claims arising under Section 349 had not been resolved.

126. See Wender, 276 A.D.2d at 312, 716 N.Y.S.2d at 41; Russo, 274 A.D.2d at 879; 711 N.Y.S.2d at 255.


131. See, e.g., Manolas v. 303 West 42nd Street Enters., Inc., 173 A.D.2d 316, 569 N.Y.S.2d 701, 702 (1st Dep’t 1991) (setting aside punitive damage award that was almost 80 times the amount awarded for compensatory damages).


135. *Chlystun v. Kent*, 185 A.D.2d 525, 586 N.Y.S.2d 410, 412 (3d Dep't 1992) (affirming punitive damages award of $15,000 for trespass where the compensatory damages were $1); *Bryce*, 39 A.D.2d 291, 333 N.Y.S.2d at 616. Punitive damages have been awarded where equitable relief was sought. See *I.H.P. Corp. v. 210 Central Park South Corp.*, 16 A.D.2d 461, 228 N.Y.S.2d 883 (1st Dep't 1962).


142. N.Y. E.P.T.L. § 5-4.1.

143. Id. The decedent must have a cause of action on the date of death. If the statute of limitations has run on the decedent's personal injury cause of action before the commencement of the wrongful death action, the distributee can only sue for wrongful death, not personal injury. See *Marlowe v. E.I. Dupont de Nemours & Co.*, 112 A.D.2d 769, 492 N.Y.S.2d 268 (4th Dep't 1985).


146. N.Y. E.P.T.L. § 11-3.2. Punitive damages are not recoverable against an estate under the statute. See id.; see also Flaum v. Birnbaum, 177 A.D.2d 170, 582 N.Y.S.2d 853 (4th Dep’t 1992). However, it is important to remember that punitive damages are recoverable in a wrongful death action, so long as plaintiff has made the required evidentiary showing. See Rigano v. Coran Bus Servs., 226 A.D.2d 274, 641 N.Y.S.2d 285 (1st Dep’t 1996).