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CPLR 214(2): Three-Year Statute of Limitations Provision for Statutorily-Created Causes of Action Is Applicable to a Claim by an Estate Under the Dram Shop Act Rather Than the Two-Year Period for Wrongful Death Actions in EPTL § 5-4.1

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that the exception was unwisely extended to the executor-beneficiary relationship, and that application of the doctrine of equitable estoppel in such instances would produce results more consistent with the recognized intent behind limitations periods.

Kevin Murphy

CIVIL PRACTICE LAW AND RULES

CPLR 214(2): Three-year statute of limitations provision for statutorily-created causes of action is applicable to a claim by an estate under the Dram Shop Act rather than the two-year period for wrongful death actions in EPTL § 5-4.1

At common law, the victim of an alcohol-related accident had no recourse against a commercial vendor of intoxicating liquors.¹ In response to the troublesome problem of drunk driving,² many states, including New York,³ have extended liability to vendors

¹ See *D'Amico v. Christie*, 71 N.Y.2d 76, 83, 518 N.E.2d 896, 898, 524 N.Y.S.2d 1, 3 (1987); see also *Fox v. Mercer*, 109 App. Div. 2d 59, 60, 489 N.Y.S.2d 792, 794 (4th Dep't 1985) ("The Dram Shop Act created a cause of action unknown at common law by allowing recovery against a tavern owner for injuries caused as a result of patron's intoxication . . ."); *Gabrielle v. Craft*, 75 App. Div. 2d 939, 940, 428 N.Y.S.2d 84, 86 (3d Dep't 1980) ("Under the common law, no tort cause of action lay against one who furnished, whether by sale or by gift, intoxicating liquor to a person who thereby became intoxicated . . ."). Common law courts refused to recognize liability of a commercial vendor because "[e]xcessive alcohol consumption was deemed to be the proximate cause of injuries produced by the inebriate; selling or furnishing alcohol to an adult who elected to become intoxicated was not viewed as the root of the resulting harm." *D'Amico*, 71 N.Y.2d at 83, 518 N.E.2d at 898, 524 N.Y.S.2d at 3.

² See Note, *A Response to Deficiencies in Illinois Dramshop Liability*, 1986 U. ILL. L. REV. 837, 837. The problem was especially ripe for a statutory solution, given the prevalence of alcohol-related fatalities. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., FATAL ACCIDENT REPORTING SYSTEM 1986, at 2-2. In 1986, it was estimated that 23,990 traffic accident fatalities were alcohol-related. *Id.* Although this was a five percent decrease from 1982, it was in fact a seven percent increase over the proportion of alcohol-related deaths occurring in 1985. *Id.*

In response to the serious problem of drunk driving, President Reagan, in 1983, instituted the Presidential Commission on Drunk Driving. See Comment, *Server vs. Driver Liability: A Suggested Change to Reduce Drinking and Driving*, 7 N. ILL. U.L. REV. 257, 257 (1987). "The Commission found that at least 50 percent of all highway deaths involve the use of alcohol" and that "the annual economic loss is estimated at 21 billion dollars." *Id.*

³ See GOL § 11-101 (McKinney 1978 & Supp. 1989). The statute provides that:

1. Any person who shall be injured in person, property, means of support, or

through Dram Shop Acts.⁴ While New York's Dram Shop Act es-

otherwise by any intoxicated person, or by reason of the intoxication of any person, whether resulting in his death or not, shall have a right of action against any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action such person shall have a right to recover actual and exemplary damages.

2. In case of the death of either party, the action or right of action given by this section shall survive to or against his or her executor or administrator, and the amount so recovered by either a husband, wife or child shall be his or her sole and separate property.

3. Such action may be brought in any court of competent jurisdiction.

4. In any case where parents shall be entitled to such damages, either the father or mother may sue alone therefor, but recovery by one of such parties shall be a bar to suit brought by the other.

Id.

The first Dram Shop statute in New York was passed in 1873. *See Note, Liability Under the New York Dram Shop Act*, 8 SYRACUSE L. REV. 252, 253 (1957). The original purpose of the act "was to correct the evils resulting from excessive drinking . . . such as impoverishment of families, injuries to others, and the creation of public burdens." *Recent Decisions*, 31 ALB. L. REV. 167, 168 (1967) (quoting JOYCE, *THE LAW RELATIVE TO INTOXICATING LIQUOR* 476 (1910)). This statute imposed liability on several potential defendants, including the commercial seller's landlord. *See Bertholf v. O'Reilly*, 74 N.Y. 509, 514, 525-26 (1878). New York State's current Dram Shop Act, however, is primarily concerned with providing compensation to those suffering injuries due to the unlawful sale of alcohol. *See Scheu v. High-Forest Corp.*, 129 App. Div. 2d 366, 368, 517 N.Y.S.2d 798, 800 (3d Dep't 1987).

Under the current statute, persons with standing to sue are those who are "injured in person, property, means of support, or otherwise by an intoxicated person." GOL § 11-101(1) (McKinney 1978). Therefore, the statute protects two classes of plaintiffs: those directly injured by the intoxicated individual and those who suffer a loss of support as a result of his or her acts. *See Recent Decisions, supra*, at 169. Those who sue for support may include parents of the intoxicated, *see McNally v. Addis*, 65 Misc. 2d 204, 224, 317 N.Y.S.2d 157, 178 (Sup. Ct. Westchester County 1970), as well as his or her spouse and children, *see Valicenti v. Valenze*, 108 App. Div. 2d 300, 303, 488 N.Y.S.2d 834, 836 (3d Dep't 1985).

The most significant restriction of the class of permissible plaintiffs is that the intoxicated person has no cause of action. *See Moyer v. Lo Jim Cafe, Inc.*, 19 App. Div. 2d 523, 523-24, 240 N.Y.S.2d 277, 279 (1st Dep't 1963), *aff'd*, 14 N.Y.2d 792, 200 N.E.2d 212, 251 N.Y.S.2d 30 (1964). This restriction is imposed because an intoxicated person "is guilty of complicity in procuring the liquor himself." *Recent Decisions, supra*, at 169.

⁴ *See Comment, supra* note 2, at 265. In 1987, fourteen states had Dram Shop Acts. *Id.* By imposing this type of liability, the states are easing the cost victims, their families, and society as a whole must bear due to these accidents by spreading "the costs of alcohol-related injuries among those persons whom legislatures or courts presume can afford to bear and distribute these costs." *See Note, supra* note 2, at 837.

The New Jersey Supreme Court has gone beyond vendor liability to impose liability on a social host in order to ease the burden on the victim of an alcohol-related accident. *See Kelly v. Gwinnell*, 96 N.J. 538, 548, 476 A.2d 1219, 1224 (1984) (social host liable to injured third party if he serves alcohol "knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle").

establishes the necessary elements of the cause of action,⁵ it does not include an applicable period of limitations.⁶ Under New York law, if a particular statute creating a cause of action does not specify a statute of limitations, the CPLR will provide the applicable period.⁷ Recently, in *Bongiorno v. D.I.G.I., Inc.*,⁸ the Appellate Division, Second Department, held that the three-year period specified in CPLR 214(2),⁹ rather than the two-year wrongful death limitation, is the applicable statute of limitations in a Dram Shop action

⁵ See GOL § 11-101(1) (McKinney 1978). There are four elements for liability under the Dram Shop Act: "(1) unlawful sale, (2) of liquor, (3) to an intoxicated person which (4) cause[s] injury." *McNally*, 65 Misc. 2d at 209, 317 N.Y.S.2d at 164-65.

In order to determine if there has been an unlawful sale, there must be a "prohibited sale" as that term is defined by section 65 of the Alcohol Beverage Control Law. See *Kohler v. Wray*, 114 Misc. 2d 856, 857, 452 N.Y.S.2d 831, 833 (Sup. Ct. Steuben County 1982). A prohibited sale is defined as the selling, delivering, or giving of alcohol to: "1. Any person, actually or apparently, under the age of twenty-one years; 2. Any visibly intoxicated person; 3. Any habitual drunkard known to be such to the person authorized to dispense any alcoholic beverages." N.Y. ALCO. BEV. CONT. LAW § 65 (McKinney 1987).

In analyzing the fourth element, causation, courts have held that a remote proximate cause is sufficient for imposition of liability. See *McNally*, 65 Misc. 2d at 209-10, 317 N.Y.S.2d at 165. Required is "some practical or reasonable connection between the act it makes wrongful and the injuries sustained." *Id.* at 210, 317 N.Y.S.2d at 165 (quoting *Daggett v. Keshner*, 284 App. Div. 733, 738, 135 N.Y.S.2d 524, 529 (2d Dep't 1954)). In order to meet the burden of proving causation, the plaintiff "must establish that the accident occurred while the consumer was intoxicated and that the sale contributed to the intoxication in the slightest degree." *Id.* (citations omitted).

⁶ See GOL § 11-101 (McKinney 1978 & Supp. 1989).

⁷ See CPLR 201 (McKinney 1972). CPLR 201 provides that:

An action, including one brought in the name or for the benefit of the state, must be commenced within the time specified in this article unless a different time is prescribed by law or a shorter time is prescribed by written agreement. No court shall extend the time limited by law for the commencement of an action.

Id.

Article 2 of the CPLR "encompasses the principal periods of limitation, and rules governing their application." 2 CARMODY-WAIT 2D, CYCLOPEDIA OF NEW YORK PRACTICE § 13:2, at 297 (1965). See generally T. MIRVIS, NEW YORK PRACTICE UNDER THE CPLR 96-114 (6th ed. 1986) (listing various periods of limitations included in article 2).

The purpose of a statute of limitations is "to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost." *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945). The running of the limitations period, however, does not always prevent a claim from being heard; it is classified as an affirmative defense and deemed waived unless raised in the defendant's answer or by motion to dismiss. See CPLR 3211(e) (McKinney 1989). See generally 1 WK&M ¶ 201.03, at 2-13—2-14 (1988) (reviewing history of New York statute of limitations from 1829 to present).

⁸ 138 App. Div. 2d 120, 529 N.Y.S.2d 804 (2d Dep't 1988).

⁹ See CPLR 214(2) (McKinney Supp. 1989). The statute provides in pertinent part that: "The following action[] must be commenced within three years: . . . 2. an action to recover upon a liability, penalty or forfeiture created or imposed by statute . . ." *Id.*

brought by an estate.¹⁰

In *Bongiorno*, Nancy Alfonso was killed in an automobile accident while riding as a passenger.¹¹ Almost three years later, the plaintiff, as administratrix, instituted an action against two social clubs.¹² The claim asserted that the driver had been served an excessive amount of liquor while at the defendant New Bay Club in East Quogue, New York.¹³ It was also alleged that the driver of the second car involved in the accident had been served excessive alcohol by the codefendant Neptune Beach Club.¹⁴

In their answers, the defendants pleaded the expiration of the statute of limitations.¹⁵ The defendants argued that the plaintiff's claim was in essence an action for wrongful death disguised as a Dram Shop action, and therefore section 5-4.1 of the EPTL, the wrongful death statute of limitations, was applicable.¹⁶ Furthermore, the defendants asserted that even if the action was properly classified as one under the Dram Shop Act, section 5-4.1 should still apply since the legislature did not provide a statute of limitations in the Dram Shop Act.¹⁷ In response, the plaintiff moved for dismissal of the defendants' affirmative defense, and the Supreme Court, Special Term, granted the plaintiff's motion.¹⁸

On appeal, the Appellate Division, Second Department, unanimously affirmed the Supreme Court's decision, holding that in a Dram Shop action the applicable period of limitation is three years under CPLR 214(2).¹⁹ Writing for the court, Justice Kooper observed that the plaintiff's action was one properly brought under the Dram Shop Act, and was not an action for wrongful death as

¹⁰ See *Bongiorno*, 138 App. Div. 2d at 127-28, 529 N.Y.S.2d at 808.

¹¹ *Id.* at 122, 529 N.Y.S.2d at 805.

¹² *Id.* On July 16, 1984, approximately one year after the accident, plaintiff had instituted a suit against the drivers and owners of the two cars involved in the accident. *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See *Bongiorno v. D.I.G.I., Inc.*, 135 Misc. 2d 516, 517, 515 N.Y.S.2d 969, 970 (Sup. Ct. Suffolk County 1987), *aff'd*, 138 App. Div. 2d 120, 529 N.Y.S.2d 804 (2d Dep't 1988).

¹⁶ *Id.* EPTL section 5-4.1 provides in pertinent part that "an action to recover damages for a wrongful act, neglect or default which caused the decedent's death . . . must be commenced within *two years* after the decedent's death." EPTL § 5-4.1(1) (McKinney Supp. 1989) (emphasis added). Application of this statute would have resulted in dismissal of the plaintiff's cause of action since it was brought two years and ten months after the decedent's death. See *Bongiorno*, 138 App. Div. 2d at 122, 529 N.Y.S.2d at 805.

¹⁷ *Bongiorno*, 138 App. Div. 2d at 125, 529 N.Y.S.2d at 807.

¹⁸ *Id.* at 122-23, 529 N.Y.S.2d at 805.

¹⁹ *Id.* at 128, 529 N.Y.S.2d at 808.

the defendants contended.²⁰ In addition, the court refused to accept the defendants' contention that by failing to provide a period of limitations, the legislature must have intended that all death actions be governed by the statute of limitations applicable to wrongful death.²¹ The court concluded that since the Dram Shop Act was a statutorily-created liability,²² the proper statute of limitations governing the action was the time prescribed by CPLR 214(2).²³

By rejecting the statute of limitations defense, the *Bongiorno* court furthered the underlying purpose of a Dram Shop action—providing a means to compensate the victims of alcohol-related accidents.²⁴ Moreover, the court's decision further supports the accepted principle that a Dram Shop action is separate and distinct from a wrongful death action.²⁵ It should be noted, however, that

²⁰ *Id.* at 124, 529 N.Y.S.2d at 806. The defendants claimed that the pleadings closely resembled an action pursuant to section 5-4.1 of the EPTL. *Id.* at 123-24, 529 N.Y.S.2d at 806. Among the items that the defendants contended resembled a wrongful death claim were the fact that the action was brought by the administratrix of the decedent's estate, and that the action in essence sought recovery of "pecuniary damages" and "funeral expenses"—the types of damages usually sought in a wrongful death action. *Id.*

²¹ *Id.* at 125-26, 529 N.Y.S.2d at 807. The court further stated that a Dram Shop action is separate and distinct from a wrongful death action, referring to *McNally v. Addis*, 65 Misc. 2d 204, 223, 317 N.Y.S.2d 157, 178 (Sup. Ct. Westchester County 1970). *Bongiorno*, 138 App. Div. 2d at 126, 529 N.Y.S.2d at 807. One difference the court pointed to was the fact that a wrongful death action does not create an independent illegality since it is available to a distributee "only if the decedent would himself have had a cause of action against the defendant and based on the defendant's commission of a 'wrongful act, neglect or default.'" *Id.* at 127, 529 N.Y.S.2d at 808 (quoting EPTL § 5-4.1(1)). On the other hand, the Dram Shop Act creates a separate and distinct cause of action "even where the individual whose death gives rise to the injuries sustained would himself possess no cause of action under the Act." *Id.* For example, according to the court's rationale, if the decedent was the intoxicated party, the decedent's dependents would have a cause of action even though the decedent would not have one had he or she lived. *See supra* note 3 (intoxicated party barred from suit).

²² *Bongiorno*, 138 App. Div. 2d at 128, 529 N.Y.S.2d at 808. Causes of action created by statute are limited to those for which liability did not exist at common law. *See Loengard v. Santa Fe Indus.*, 573 F. Supp 1355, 1358 (S.D.N.Y. 1983); *State Farm Mut. Auto Ins. Co. v. Regional Transit Serv.*, 79 App. Div. 2d 858, 859, 434 N.Y.S.2d 486, 487 (4th Dep't 1983). Since there was no Dram Shop action at common law, the court considered it to be a statutorily-created liability. *See Bongiorno*, 138 App. Div. 2d at 127, 529 N.Y.S.2d at 808.

²³ *Bongiorno*, 138 App. Div. 2d at 128, 529 N.Y.S.2d at 808.

²⁴ *See supra* notes 3-4 (discussing compensatory purposes and reasons for Dram Shop Act). Commentators appear to have approved of the *Bongiorno* holding. *See, e.g.*, 9A P. ROHAN, *NEW YORK CIVIL PRACTICE* ¶ 5-4.1[10], at 5-415 & n.78 (1988); Anderson, *Three-Year Statute Set on Dram Shop Suits*, N.Y.L.J., June 24, 1988, at 1, col. 5.

²⁵ *See McNally*, 65 Misc. 2d at 223, 317 N.Y.S.2d at 178; *see also Dowling v. Stephan*, 206 Misc. 518, 521, 133 N.Y.S.2d 667, 671 (Sup. Ct. Kings County 1954) (Dram Shop action "creates a cause of action for the wife and child independent of and not created by Section

given the holding in *Morano v. St. Francis Hospital*,²⁶ the three-year statute of limitations set by the *Bongiorno* court will not apply if the plaintiff's action is in reality a wrongful death claim having as the basis of liability a violation of the Dram Shop Act.

In *Morano*, the plaintiff brought an action, based on allegations of malpractice, approximately two years and six months after her husband died.²⁷ Subsequently, the defendants raised an argument similar to that raised in *Bongiorno*—that the plaintiff's action was a wrongful death claim couched in the language of malpractice in order to take advantage of the longer period of limitations.²⁸ Here, however, the court granted defendant's motion, concluding that the suit was in fact a wrongful death action and the clear intention of section 5-4.1 of the EPTL was to allow a two-year statute of limitations in wrongful death cases regardless of the underlying conduct giving rise to the claim.²⁹ It is submitted that this is an appropriate result because it will prevent litigants from mislabeling their actions in order to benefit from a longer statute of limitations.

Although the *Bongiorno* court's choice of the three-year limitations period for claims based upon the Dram Shop Act involved determining a question of first impression,³⁰ the *Bongiorno* holding is supported by an earlier holding of the Supreme Court, New York County, that addressed the problem of whether to apply CPLR 214(2) or the wrongful death statute of limitations in a slightly different context.³¹ In *Commissioners of State Insurance*

130 of the Decedent Estate Law" (former wrongful death statute)).

²⁶ 100 Misc. 2d 621, 420 N.Y.S.2d 92 (Sup. Ct. Dutchess County 1979).

²⁷ See *id.* at 623, 420 N.Y.S.2d at 94. Specifically, plaintiff's husband died on November 12, 1972, and she brought the action on May 12, 1975. *Id.* at 622-23, 420 N.Y.S.2d at 93-94. The claim for malpractice arose after the plaintiff had a pathologist perform an autopsy on her husband, which indicated "foreign objects" in the body. *Id.*

²⁸ *Id.* at 623, 420 N.Y.S.2d at 94.

²⁹ *Id.* at 625, 420 N.Y.S.2d at 95. The court also decided that the malpractice discovery statute, section 203 of the CPLR, does not apply in a wrongful death action. *Id.* The court, however, did allow the plaintiff the right to amend her complaint to include a cause of action for conscious pain and suffering pursuant to section 11-3.2 of the EPTL. *Id.* at 625-26, 420 N.Y.S.2d at 95.

³⁰ Other states have been faced with the problem of choosing a statute of limitations for Dram Shop Acts. Among those states are Illinois, see *Desiron v. Peloza*, 308 Ill. App. 582, 32 N.E.2d 316 (1941), and Michigan, see *Cussans v. Harris*, 118 Mich. App. 567, 325 N.W.2d 793 (1982).

³¹ See *Commissioners of State Ins. Fund v. Empire Trust Co.*, 184 Misc. 947, 55 N.Y.S. 631 (Sup. Ct. N.Y. County 1945). Although the New York courts have not often dealt with the problem of choosing between CPLR 214(2) and the wrongful death statute of limita-

Fund v. Empire Trust Co.,³² the insurance carrier of the defendant employer brought suit to recover money paid out for the death of an employee caused by the employer's negligence.³³ As in *Bongiorno*, the defendants pleaded the running of the two-year statute of limitations under a wrongful death action.³⁴ The court rejected this argument, holding that the insurance carrier's cause of action was a statutorily-created penalty which was separate and distinct from a wrongful death action, and was therefore within the purview of section 49 of the CPA, CPLR 214(2)'s predecessor.³⁵ The decision to apply section 49 instead of the wrongful death statute of limitations parallels the *Bongiorno* court's decision to apply CPLR 214(2).

By firmly establishing that CPLR section 214(2) is the applicable statute of limitations in an estate's cause of action under the Dram Shop Act, the *Bongiorno* court provided the practitioner with a useful guideline for future litigation that is especially important in light of the fatal nature of statute of limitations errors. Although the three-year limitations period is applicable to actions by estates, practitioners must remain wary because actions brought under the Dram Shop Act directly by dependents of the decedent

tions, they have frequently discussed the applicability of CPLR 214(2) to statutorily-created rights. See, e.g., *Murphy v. American Home Prods.*, 58 N.Y.2d 293, 307, 448 N.E.2d 86, 93, 461 N.Y.S.2d 232, 239 (1983) (three-year, statutorily-created liability period of limitations applies to claim based on age discrimination); *DeGiacomo v. Kissinger*, 62 App. Div. 2d 1048, 1048, 404 N.Y.S.2d 298, 299 (2d Dep't 1978) (mem.) (actions under GML § 207-c governed by CPLR 214(2)); *Conrad v. Home & Auto Loan Co.*, 53 App. Div. 2d 48, 51, 385 N.Y.S.2d 979, 981 (4th Dep't 1976) (CPLR 214(2) applies to action under New York Banking Law). CPLR 214(2) has also been applied in cases involving federal statutes. See, e.g., *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 449 (2d Cir. 1980) (CPLR 214(2) applicable in suits involving 42 U.S.C. § 1983, Federal Civil Rights Law); *Hornblower & Weeks-Hemphill, Noyes v. Burchfield*, 366 F. Supp. 1364, 1367 (S.D.N.Y. 1973) (actions under Federal Securities Exchange Act subject to CPLR 214(2)).

³² 184 Misc. 947, 55 N.Y.S.2d 631 (Sup. Ct. N.Y. County 1945).

³³ *Id.* at 948, 55 N.Y.S.2d at 632. The insurance carriers, pursuant to subdivision 5 of section 9 of the Workmen's Compensation Law, sought to recover \$2,000 from the employer, claiming that the employee's death was due to the employer's negligence. *Id.* at 947-48, 55 N.Y.S.2d at 631. The statute, however, does not include a specific statute of limitations. See N.Y. WORK. COMP. LAW § 29(5) (McKinney 1965).

³⁴ See *Empire Trust Co.*, 184 Misc. at 948, 55 N.Y.S.2d at 632. At the time this suit was brought, the wrongful death statute was codified in section 130 of the Decedent Estate Law. *Id.*

³⁵ *Id.* at 948, 55 N.Y.S.2d at 633. The court concluded that the action was instituted to recover a penalty under the Workmen's Compensation Law and, therefore, the statute of limitations governing penalties applied. *Id.*

may be governed by the two-year wrongful death statute of limitations. Overall, however, the *Bongiorno* decision will improve judicial efficiency to the extent that courts will not have to spend time deciding issues extraneous to the merits and litigants will not waste judicial resources by asserting unwarranted statute of limitations defenses.

Olympia Bizekis

CPLR 3121: In a child custody action, production of a potential custodian's hair sample for drug testing is reasonable and relevant

CPLR 3121(a) permits a party to an action to compel the physical, mental, or blood examination of another party¹ when the latter's physical, mental, or blood condition is in controversy.² A

¹ CPLR 3121(a) (McKinney Supp. 1988). Although CPLR 3121(a) makes no explicit provision for the testing of corporeal samples other than blood, any relevant test given as part of a physical examination authorized by this provision generally would be permitted. See *id.*, commentary at 571 (McKinney 1970); 3A WK&M ¶ 3121.02, at 31-430 (1988); see, e.g., *Adlerstein v. South Nassau Communities Hosp.*, 109 Misc. 2d 158, 164, 439 N.Y.S.2d 605, 610 (Sup. Ct. Nassau County 1981) (in medical malpractice action alleging sterility, plaintiff required to submit semen sample for physical examination); *Cardinal v. University of Rochester*, 188 Misc. 823, 825-26, 71 N.Y.S.2d 614, 615-17 (Sup. Ct. Monroe County 1946) (X-rays, urine sample, stomach pumping), *aff'd*, 271 App. Div. 1048, 69 N.Y.S.2d 352 (4th Dep't 1947).

² CPLR 3121(a) (McKinney Supp. 1988); see, e.g., *Fisher v. Fossett*, 45 Misc. 2d 757, 758, 257 N.Y.S.2d 821, 822 (Sup. Ct. Erie County 1965) (in property damage action where driver's defense would be based on blacking out, physical condition was in controversy).

The moving party bears the burden of proving that the condition is in controversy. See *Soybel v. Gruber*, 132 Misc. 2d 343, 346, 504 N.Y.S.2d 354, 356 (N.Y.C. Civ. Ct. N.Y. County 1986). This showing may be made either by reference to the other party's affirmative injection of the matter into dispute or by offering substantiation of the condition's relevancy. Cf. *id.* (plaintiff landlord's unsupported assertion that eighty-four-year-old tenant too ill to maintain her apartment did not place tenant's condition in controversy). An allegation of personal injury in a suit for damages subjects that party to a physical examination at the request of the other party. See, e.g., *Evens v. Denny's, Inc.*, 129 Misc. 2d 767, 768, 494 N.Y.S.2d 67, 68 (Sup. Ct. Erie County 1985) (plaintiff initiating personal injury action brings physical condition into controversy); *Adlerstein*, 109 Misc. 2d at 161, 439 N.Y.S.2d at 608 (same). In cases not involving personal injury, a party may affirmatively inject his or her physical condition into dispute by referring to it either during pretrial examination or in the pleadings. See, e.g., *Wegman v. Wegman*, 37 N.Y.2d 940, 941, 343 N.E.2d 288, 288, 380 N.Y.S.2d 649, 649 (1975) (in divorce action, wife who counterclaimed for alimony alleging her poor health put her condition in controversy); *Nalbandian v. Nalbandian*, 117 App. Div.