The Survey of New York Practice Table of Contents

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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

In this first issue of Volume 59, The Survey examines a variety of issues of recent importance in New York law. Among the decisions considered are two opinions construing sections of the CPLR. In Parker v. Mack, the Court of Appeals determined that the service of a bare summons—a summons without either a complaint or a section 305(b) notice—constitutes a defect in personal jurisdiction. Therefore, because the action in Parker was not timely commenced, the Court held that the plaintiff could not invoke the 6-month extension allowed by section 205(a). The Appellate Division, Second Department, decided in Warren v. Delaney that an action for wrongful deprivation of due process may lie against officials who had acted under the CPLR provisions on enforcement of money judgments before they were held unconstitutional. Although these provisions had not been called into question at the time the defendants acted under them, the Warren court sustained the plaintiffs' subsequent challenge.

In Giblin v. Nassau County Medical Center, the Court of Ap-
peals resolved that the statute of limitations for municipal tort liability tolls from the time the plaintiff applied for permission to file a late notice of claim until the time such relief is ordered. The Court held that a 1976 amendment to the General Municipal Law that allows a plaintiff to apply for permission to serve a late notice of claim after beginning the action did not preclude the period of that application from operating as a toll. Thus, the Giblin Court determined that the Barchet rule applied and tolled the statute of limitations.

In the realm of criminal law, the Court of Appeals, in People v. Morse, determined that the enhanced punishment provisions of the Penal Law for violent offenders must be applied even if the earlier conviction that is the basis for the enhanced punishment was not classified as a violent offense at the time of the earlier conviction. Moreover, in construing section 70.08 of the Penal Law, the Morse Court held that the felony convictions that serve as predicates for enhanced punishment must have occurred in sequence; that is, each subsequent felony must have occurred after the sentence had been imposed for the preceding felony. In People v. Wallert, the Appellate Division, First Department, held that a prosecutor’s duty to provide the defendant with exculpatory evidence requires a prosecutor with knowledge that the complaining witness intended to file a civil suit after the criminal trial to divulge that information to the defendant. The Wallert court reasoned that such information might have aided the defendant in raising a reasonable doubt by suggesting a motive for the witness to lie.

Lastly, in the area of tort litigation, the Court of Appeals, in Bovsun v. Sanperi, concluded that a party may recover for emotional distress caused by witnessing a member of his immediate family suffer injury or death as a result of the defendant’s negligent conduct. Rather than recognize an independent duty in these circumstances, the Bovsun Court required that the plaintiff himself be within the physical zone of danger at the time he witnessed the injury to the member of his family. Thus, the Court noted that it was merely recognizing a new element of damages, not a new duty.

The members of Volume 59 hope that the discussion and analysis of the cases contained in The Survey will be of interest and value to the New York bench and bar.