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Article 11

CPLR 5522: Appellate Division Lacks Discretion to Grant Relief to a Defendant Failing to Take Timely Appeal, Absent a United and Inseverable Interest with a Successful Appellant

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dants avoids conflict with the policy of noninterference.[35] It is submitted, however, that in view of the delicacy of the balance struck by the Court in harmonizing declaratory relief with these policies, the Court's refusal to address the propriety of reopening the criminal court judgment[36] is problematic. It is submitted that the Court should have answered this issue in the negative, since such reopening would pose a dangerous risk of violating the policies against delay in criminal trials and review of prior adjudications. It is hoped that, when a future declaratory judgment is rendered under the *Erlbaum* rule, the Court will allow the judgment to be reopened only in the most limited circumstances so as not to render inappropriate an otherwise innovative and valid solution to a pressing problem.

Catherine A. Brienza

CIVIL PRACTICE LAW AND RULES

Article 55—Appeals Generally

CPLR 5522: Appellate division lacks discretion to grant relief to a defendant failing to take timely appeal, absent a united and inseverable interest with a successful appellant

CPLR 5522 provides appellate courts with broad discretion to fashion relief appropriate to the particular equities of a case before them.[37] This discretion is limited by the general rule that an appel-

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[35] *See supra* note 15 and accompanying text. The *Erlbaum* Court expressly stated that any declaration issued will not be determinative of the ongoing criminal proceeding. 59 N.Y.2d at 155, 451 N.E.2d at 157, 464 N.Y.S.2d at 399. Therefore, the criminal trial will not be interfered with even if the ruling is found to have been incorrect. *Id.*

[36] 59 N.Y.2d at 152 n.3, 451 N.E.2d at 155 n.3, 464 N.Y.S.2d at 397 n.3.

[37] *See* CPLR 5522 (1978). CPLR 5522 provides in pertinent part that "[a] court to which an appeal is taken may reverse, affirm, or modify, wholly or in part, any judgment, or order before it, as to any party." *Id.* This rule is derived from subdivision 1 of CPA section 584, Civil Practice Act, ch. 925, § 584, [1920] N.Y. Laws 205, and is identical to article VI, section 8 of the New York Constitution. 7 WK&M ¶ 5522.02 (1982); *see* CPLR 5522, commentary at 221 (1978). The purpose of the rule is to allow appellate courts to "render whatever decree the justice of the case requires." SECOND REP. at 339, 340; CPLR 5522, commentary at 222 (1978); *see, e.g.*, Ferrari v. Johnson & Johnson, 42 App. Div. 2d 940, 940, 348 N.Y.S.2d 139, 139-40 (1st Dep't 1973) (reviewing court could require plaintiff's attorney to pay costs to defendants for causing delay); Copp v. Bowser, 22 App. Div. 2d 105, 109, 254 N.Y.S.2d 200, 203 (3d Dep't 1964) (concept of fairness mandated new trial as to jury verdict against motorist when lower court incorrectly held accident victim had no claim against truck driver); SIEGEL § 543, at 759; 7 WK&M ¶ 5522.02, at 55-183 (1982). Generally, the

late court cannot grant relief for the benefit of a non-appealing party.[38] The law has remained unsettled, however, as to whether the benefits of review may inure to a nonappellant when his co-defendant wins a reversal on an error applicable to the defenses of both parties.[39] Recently, in *Hecht v. City of New York*,[40] the Court of Appeals held that the appellate division is without discretion to grant relief to a defendant who failed to undertake a timely appeal absent a united and inseverable interest with the successful

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appellate court may do whatever the trial judge could have done. CPLR 5522, commentary at 222 (1978); O'Connor v. Papertsian, 309 N.Y. 465, 471, 131 N.E.2d 883, 886 (1956). The appellate division is also empowered to modify a jury award that it deems insufficient or excessive by having the party adversely affected elect between stipulating to a modification or facing a new trial. *O'Connor*, 309 N.Y. at 473, 131 N.E.2d at 887; 7 WK&M ¶ 5522.02, at 55-183 (1982).

[38] *See* Hegger v. Green, 646 F.2d 22, 30 (2d Cir. 1981) (citing Statella v. Robert Chuckrow Constr. Co., 28 App. Div. 2d 669, 671, 281 N.Y.S.2d 215, 218 (1st Dep't 1967)); Schultz v. United States Fidelity & Guar. Co., 201 N.Y. 230, 234, 94 N.E. 601, 602 (1911); St. John v. Andrews Inst. for Girls, 192 N.Y. 382, 386, 85 N.E. 143, 144 (1908), *appeal dismissed sub nom.* Smithsonian Inst. v. St. John, 214 U.S. 19 (1909). CPLR 5522 is not considered the "central authority for the court's jurisdiction and powers of review," rather, it delineates the options a reviewing court has in a case before it. *See* CPLR 5522, commentary at 222 (1978). The scope of an appellate court's review power is set forth in CPLR 5501. *See* CPLR 5501 (1978). Specifically, the appellate division has the competency to examine both questions of law and fact. *See id.* 5501(c), commentary at 30.

To commence an appeal as of right, a party must file notice of appeal within 30 days after being served with a copy of the judgment or order with notice of its entry. *Id.* 5513. This time limit is strictly enforced. *See* Ocean Accident & Guar. Corp. v. Otis Elevator Co., 291 N.Y. 254, 255, 52 N.E.2d 421, 421 (1943) (per curiam) (an untimely appeal will be dismissed even if the parties agreed to an extension). *See generally* SIEGEL § 534, at 743.

[39] *Compare* Schultz v. United States Fidelity & Guar. Co., 201 N.Y. 230, 234-35, 94 N.E. 601, 602 (1911) (only appellant servant benefitted from reversal of judgment for false imprisonment; non-appealing master remained vicariously liable) *and* Frankel v. Berman, 10 App. Div. 2d 838, 839, 199 N.Y.S.2d 261, 262 (1st Dep't 1960) (benefit of appeal by third-party defendants did not run to non-appealing defendant despite failure by plaintiff to establish cause of action) *and* Bonat v. Crosswell, 241 App. Div. 230, 231, 271 N.Y.S. 582, 583 (1st Dep't 1934) (although plaintiff failed to prove default on lien by any of the defendants, reversal would inure only to defendant who appealed) *with* Manning v. Joseph, 304 N.Y. 278, 281, 107 N.E.2d 446, 447 (1952) (city engineers denied extra compensation by comptroller received additional wages although only one appealed) *and* Arnold v. District Council No. 9, Int'l Bhd. of Painters & Allied Traders, 61 App. Div. 2d 748, 749, 401 N.Y.S.2d 811, 813 (1st Dep't 1978) (since lack of jurisdiction applied equally to all defendants, judgment would be overturned even as to defendants who failed to seek review), *appeal dismissed*, 45 N.Y.2d 732, 380 N.E.2d 329, 408 N.Y.S.2d 503 (1978), *rev'd on other grounds*, 46 N.Y.2d 999, 389 N.E.2d 830, 416 N.Y.S.2d 235 (1979). Reversal has been permitted to benefit non-appealing tortfeasors. *See, e.g.*, Statella v. Chuckrow Constr. Co., 28 App. Div. 2d 669, 670, 281 N.Y.S.2d 215, 217-18 (1st Dep't 1967); *see* Monahan v. Fiore, 76 App. Div. 2d 884, 884, 428 N.Y.S.2d 717, 717-18 (2d Dep't 1980) (mem.).

[40] 60 N.Y.2d 57, 454 N.E.2d 527, 467 N.Y.S.2d 187 (1983).

appellant.[41]

In *Hecht*, the Supreme Court, New York County found the defendants, Square Depew Garage Corporation and the City of New York, equally liable for negligence for breaching a duty to maintain a sidewalk in reasonable repair.[42] The Appellate Division, First Department, vacated the jury verdict, holding that, as a matter of law, there was no actionable defect in the sidewalk.[43] Although only the City had appealed, the First Department determined that the dismissal had to be extended to the defendant corporation as well.[44] On appeal, the Court of Appeals reinstated the judgment against the garage, holding that a judgment against a non-appellant may not be vacated absent a united and inseverable interest with the successful appellant.[45]

Writing for a unanimous court, Chief Judge Cooke began with the general rule that since an appellate court may render relief to a party "properly before it," reversal of a judgment cannot inure to the benefit of a non-appealing coparty.[46] Appellate courts, Chief Judge Cooke found, have neither the statutory nor constitutional authority to exercise discretionary power over a party who did not appeal.[47] Only in cases where the interests of the parties are united

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[41] *Id.* at 62, 454 N.E.2d at 530, 467 N.Y.S.2d at 190.

[42] *Id.* at 60-61, 454 N.E.2d at 529, 467 N.Y.S.2d at 189.

[43] Hecht v. City of New York, 89 App. Div. 2d 524, 525, 452 N.Y.S.2d 443, 444 (1st Dep't 1982), *modified*, 60 N.Y.2d 57, 64, 454 N.E.2d 527, 531, 467 N.Y.S.2d 187, 191 (1983). In his dissent, Justice Kupferman asserted that the sidewalk had been negligently maintained. 89 App. Div. 2d at 525, 452 N.Y.S.2d at 445 (Kupferman, J., dissenting). Since the sidewalk was used mainly by cars entering the garage, he determined that the garage was eighty percent at fault and the city twenty percent. *Id.* (Kupferman, J., dissenting).

[44] 89 App. Div. 2d at 524, 452 N.Y.S.2d at 444. The First Department reasoned that, under CPLR 5501, the whole of the judgment was before it, and, therefore, any determination it made on the issue of liability would necessarily affect the defendant garage as well. *Id.* at 525, 452 N.Y.S.2d at 444.

[45] 60 N.Y.2d at 62-63, 454 N.E.2d at 530, 467 N.Y.S.2d at 190. The Court affirmed the dismissal of the complaint against the City of New York, agreeing with the appellate division that the alleged defect could "only be described as trivial." *Id.* at 61, 454 N.E.2d at 529, 467 N.Y.S.2d at 189.

[46] *Id.* at 61-62, 454 N.E.2d at 529-30, 467 N.Y.S.2d at 189-90. The scope of review, the Court noted, is ordinarily limited to those aspects of the judgment that have been appealed and that aggrieve the appealing party. *Id.* at 61, 454 N.E.2d at 529, 467 N.Y.S.2d at 189.

[47] *Id.* at 63, 454 N.E.2d at 530, 467 N.Y.S.2d at 190. The Court pointed out that the statutory predecessors to CPLR 5522 were intended to abrogate the common-law rule that an error as to one party mandated reversal as to all parties. *Id.* at 63-64, 454 N.E.2d at 530-31, 467 N.Y.S.2d at 190-91. These provisions, Chief Judge Cooke declared, were not intended to expand the jurisdiction of an appellate court or its scope of review. *Id.* Relief to a non-appellant is permissible, the Court found, only when necessary to effectuate complete relief to the successful appellant. *Id.* at 64, 454 N.E.2d at 530, 467 N.Y.S.2d at 190.

and inseverable may the non-appellant receive full relief.[48] The Court concluded that as joint tortfeasors, the City and the corporation were jointly and severally liable; thus, the benefit of the appeal would redound exclusively to the appellant City.[49]

The Court of Appeals in *Hecht*, it is submitted, unnecessarily inhibited appellate discretion to provide relief, resulting in an inequitable result for a party who foregoes an appeal. The garage in *Hecht* not only remained liable for negligence despite a holding that there was no violation of a legal duty, but also lost its right to contribution from the City.[50] Thus, although the Court of Appeals found that the appellate division lacked the authority to grant relief to a nonappellant, the Court's reversal of the judgment against the City necessarily involved the exercise of authority over the non-appellant garage through the elimination of the garage's rights to contribution. This narrow interpretation of the statute, it is suggested, contradicts the governing principle of CPLR 5522—to provide the flexibility necessary to render a just result.

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[48] *Id.* at 62, 454 N.E.2d at 529-30, 467 N.Y.S.2d at 189-90. The Court declined to enumerate the specific instances where relief to a non-appellant would be necessary. *Id.* Other courts have noted that a joint interest among or between co-parties is united and inseverable. *See, e.g.*, St. John v. Andrews Inst. for Girls, 192 N.Y. 382, 386, 85 N.E. 143, 144 (1908) (dictum) (joint judgment against partners or joint obligors must either be affirmed as to co-litigants or reversed), *appeal dismissed sub nom*, Smithsonian Inst. v. St. John, 214 U.S. 19 (1909).

[49] 60 N.Y.2d at 62-63, 454 N.E.2d at 530, 467 N.Y.S.2d at 190. Since each defendant is individually liable for the entire judgment, the Court reasoned, the garage's interest was severable from that of the City. *Id.*

[50] *See id.* at 60-61, 454 N.E.2d at 530, 467 N.Y.S.2d at 190 (city and garage were found by the trial court to be equally liable). As a tortfeasor, the non-appellant garage in *Hecht* was still liable for the entire judgment when its co-party was released from liability, *see id.* at 64, 454 N.E.2d at 531, 467 N.Y.S.2d at 191 (1983); Statella v. Chuckrow Constr. Co., 28 App. Div. 2d 669, 670, 281 N.Y.S.2d 215, 218 (1st Dep't 1967), since plaintiff is entitled to recover from any tortfeasor the total amount of compensable damage incurred, *see* Klinger v. Dudley, 41 N.Y.2d 362, 367, 361 N.E.2d 974, 978, 393 N.Y.S.2d 323, 326 (1977); Kelly v. Long Island Lighting Co., 31 N.Y.2d 25, 30, 286 N.E.2d 241, 243, 334 N.Y.S.2d 851, 855 (1972); Schlimmeyer v. Yurkiw, 80 Misc. 2d 226, 227-28, 363 N.Y.S.2d 61, 62-63 (Sup. Ct. Sullivan County 1974), *aff'd mem.*, 50 App. Div. 2d 616, 374 N.Y.S.2d 427 (3d Dep't 1975); CPLR 1404, commentary at 381 (1976). Once the City was released from liability, however, the garage could no longer seek contribution from the City for any payment it was to make on the judgment. *See* Mulligan v. New York University, 254 App. Div. 107, 110, 3 N.Y.S.2d 982, 984 (1st Dep't 1938); CPLR 5522, commentary at 33 (McKinney Supp. 1983); *see also* United States Printing & Lithograph Co. v. Powers, 233 N.Y. 143, 155, 135 N.E. 225, 228 (1922). This inequitable result, it is submitted, also appears to pose a threat to the defendant who fails to appeal when a party he has impleaded for indemnification has successfully challenged an appeal for plaintiff below. *See* CPLR 5522, commentary at 223-24 (1978); *Failing to Appeal Denies Defendant Fruits of Co-Defendant's Appellate Victory*, N.Y.S. LAW DIG., Sept. 1983 [hereinafter cited as *Failing to Appeal*].

As the *Hecht* Court noted, the statutory antecedents to CPLR 5522 were intended to abrogate the common-law rule that an error requiring reversal as to one party mandated reversal as to other parties.[51] Ironically, had the common-law rule been in effect it would have worked a more equitable result. Since it is clear that the legislature intended to provide the appellate courts with greater discretion, rather than reduce their authority over parties to the judgment, the Court's declaration that the appellate division lacked authority to determine the liability of the garage is unwarranted.

The statute is arguably ambiguous on its face[52] and previous judicial interpretations have not been entirely consistent.[53] The Court of Appeals cited no policy reasons for its decision, but relied instead on the blanket assertion that neither statutory nor constitutional authority is vested in appellate courts to exercise discretionary power over a party who failed to pursue appellate review.[54]

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[51] *See* 60 N.Y.2d at 64, 454 N.E.2d at 531, 467 N.Y.S.2d at 191; Geraud v. Stagg, 10 How. Pr. 369, 373 (N.Y.C. C.P. Genita County 1855). At common law, judgments were regarded as inseverable and entire. *See* Harmon & Harmon v. Brotherson, 1 Denio 537, 540 (N.Y. Sup. Ct. Rochester County 1845); Sheldon v. Quinlen, 5 Hill 441, 442-43 (N.Y. Sup. Ct. Utica County 1843). Since a judgment was entire, a reversible error as to one party would require reversal as to all, irrespective of the error's relevance to their defenses or theories of liability. *See Sheldon*, 5 Hill at 442; Cruikshank v. Gardner, 2 Hill 333, 334-35 (N.Y. Sup. Ct. Albany County 1842); Comment, *Judgments Against Joint Tortfeasors—Problems Arising on Appeal By Only One Defendant*, 31 Mo. L. Rev. 141, 142 (1966).

Section 278 of the original Code of Procedure (the Field Code) vested appellate courts with authority to reverse, affirm or modify a judgment before it. Code of Procedure, ch. 379, § 278, [1848] N.Y. Laws 547-48 (current version at CPLR 5522 (1978)). Although this provision did not mention parties, *see id.*, it was interpreted as a codification of the common-law rule that reversal as to one required reversal as to all, *see* Farrell v. Calkins, 10 Barb. 348, 353 (N.Y. Sup. Ct. Gen. T. Chenango County 1851). In 1849, the Code of Procedure was amended to permit appellate courts to alter a lower court decision "as to any or all of the parties." Code of Procedure, ch. 438, § 330, [1849] N.Y. Laws 681 (current version at CPLR 5522 (1978)). This amendment was interpreted as an attempt to abrogate the common-law doctrine by allowing courts to modify judgments without affecting all co-parties. *See* 60 N.Y.2d at 64, 454 N.E.2d at 531, 467 N.Y.S.2d at 191; Geraud v. Stagg, 10 How. Pr. 369, 372-73 (N.Y.C. C.P. N.Y. County 1855). With the enactment of the CPLR, the statute was modified slightly to authorize disposition of an appeal "as to *any* party." CPLR 5522 (1978).

[52] CPLR 5522 provides that an appellate court may alter "any judgment, or order before it, as to *any* party." CPLR 5522 (1978) (emphasis added). Although the *Hecht* Court rejected the view that the term "any party" encompasses a non-appealing party, *see* 60 N.Y.2d at 63, 454 N.E.2d at 530, 467 N.Y.S.2d at 190, it is suggested that the statute could fairly be read to include any party to the action, *see supra* note 37 and accompanying text.

[53] *See supra* note 39 and accompanying text.

[54] *See* 60 N.Y.2d at 63, 454 N.E.2d at 530, 467 N.Y.S.2d at 190; *supra* notes 46-49 and accompanying text. As a matter of policy, it may be suggested that the overburdened courts

The authority of this premise, however, is diminished by the Court's declaration that under certain circumstances such power must be exercised.[55] Indeed, there seems to be little reason not to extend the exception to cases of joint and several liability where the non-appellant will be deprived of his right to contribution and the error on appeal is applicable to the defenses of both parties.[56] Permitting appellate courts the discretion to fashion such relief would not be inconsistent with the language of the statute and would promote the efficient administration of justice.[57]

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have no interest in encouraging an appeal by defendants who are willing to accept a judgment. *See Failing to Appeal, supra* note 50.

[55] *See* 60 N.Y.2d at 62, 454 N.E.2d at 530, 467 N.Y.S.2d at 190; *supra* note 45 and accompanying text. It should be noted that reviewing courts have extended the benefits of an appeal to non-appealing litigants who were members of a class of litigants. *See* Manning v. Joseph, 304 N.Y. 278, 281, 107 N.E.2d 446, 447 (1952); Union Trust Co. of N.Y. v. Cole, 198 App. Div. 539, 540, 190 N.Y.S. 858, 859 (1st Dep't 1921). The appellate division has also made exceptions to the general rule against reviewing questions not formally before it on appeal. *See, e.g.*, Resnick v. Levine, 80 App. Div. 2d 699, 699-700, 436 N.Y.S.2d 448, 449 (3d Dep't 1981) (mem.) (award of damages for unjust enrichment modified although issue not raised); People *ex rel.* Schick v. Marvin, 246 App. Div. 71, 72, 283 N.Y.S. 203, 204 (4th Dep't 1935) (appellate court must consider whether there is a right of appeal even if the issue was not raised in arguments), *rev'd on other grounds*, 271 N.Y. 219, 2 N.E.2d 634 (1936), *aff'd*, 275 N.Y. 587, 11 N.E.2d 767 (1937).

[56] *Cf. In re* Union Trust Co., 219 N.Y. 537, 541, 114 N.E. 1048, 1049 (1916). In *Union Trust*, the surrogate court had awarded 20 equal shares of a testator's trust fund to his grandchildren and great grandchildren. *Id.* at 539, 114 N.E. at 1048. Only one of the distributees, a grandchild, actually appealed the decision to the appellate division. *Id.* The appellate court declared that only the eight grandchildren were entitled to shares. *Id.* at 540, 114 N.E. at 1048. Instead of granting a one-eighth share to each of the grandchildren, the appellate division gave the appellant grandchild a one-eighth share, and each of the 19 remaining distributees who did not appeal was awarded an equal share of the remainder. *Id.*, 114 N.E. at 1049. On appeal, the Court of Appeals modified the judgment. *Id.* at 541, 114 N.E. at 1049. The Court reasoned that since the non-appellant grandchildren, although otherwise entitled to a one-eighth share, would have to "co-operate in complying with the judgment of [the appellate] court by suffering a reduction of the amount which otherwise they would have received under the decree of the Surrogate," they were entitled to receive the fruits of the appeal. *Id.*

[57] Other jurisdictions permit appellate courts in similar cases to fashion appropriate relief for parties who do not appeal. *See, e.g.*, Continental Casualty Co. v. Phoenix Constr. Co., 46 Cal. 2d. 423, 433 n.8, 296 P.2d 801, 811 n.8 (1956); E & K Agency, Inc. v. Van Dyke, 60 N.J. 160, 163, 286 A.2d 706, 708 (1972); Kure v. Chevrolet Motor Div., 581 P.2d 603, 610 & n.9 (Wyo. 1978). In *E & K Agency*, the Supreme Court of New Jersey explained the rationale for granting appellate courts broader discretion:

> In the exercise of its appellate jurisdiction a reviewing court has the power and indeed the duty to make such ultimate disposition of the case as justice requires. Here it has been finally held, after being twice heard at the trial level and twice

CRIMINAL PROCEDURE LAW

CPL § 50.20: Transactional immunity should not be granted to a witness without conformance to the procedures mandated under the statute providing the immunity

In order to elicit testimony from a witness who refuses to testify by invoking his fifth amendment privilege against self-incrimination,[58] a prosecutor may request that a "competent authority"[59]

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reviewed on appeal, that plaintiff's claim is groundless. The basis for the asserted contention against each defendant is the same. It would indeed be a travesty of justice were plaintiff to be allowed to satisfy a substantial claim of this nature against one defendant when the courts of the State have gone to no small pains to reach a deliberate determination that the claim is without merit. Appellate courts of this State, in line with those of many others, have recognized the responsibility of appellate review as including a requirement that the ultimate disposition of a case be just, not only as to parties directly before the reviewing court but also as to others who will perforce be affected by the action of the court.

60 N.J. at 164-65, 286 A.2d at 709.

[58] U.S. CONST. amend. V. The fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." *Id.* The New York State Constitution also prohibits compelled testimonial self-incrimination. N.Y. CONST. art. 1, § 6. Historically, the privilege against self-incrimination grew out of opposition to practices such as those of the Star Chamber of several centuries ago, which often compelled subjects to admit guilt. *See* Michigan v. Tucker, 417 U.S. 433, 440 (1974). The fifth amendment embodies, among other things, "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses." Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964). Although protection of the individual is a compelling reason for this privilege, the primary policy behind it is the preservation of the integrity of a judicial system based on innocence. Tehan v. United States, 382 U.S. 406, 415 (1966).

A witness asserts the privilege by refusing to answer specific questions while on the stand. *See* United States v. Monia, 317 U.S. 424, 427 (1943); People v. Ianniello, 21 N.Y.2d 418, 427, 235 N.E.2d 439, 444, 288 N.Y.S.2d 462, 470, *cert. denied*, 393 U.S. 827 (1968). A defendant, however, waives the privilege against self-incrimination if he takes the stand. *See* 3 C. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 401, at 61 (12th ed. 1975). When a claim of privilege is made by a witness, three requirements must be satisfied. First, the testimony must be compelled. *See, e.g.*, United States v. De Lorenzo, 151 F.2d 122, 124 (2d Cir. 1945). A voluntary offer of testimony is construed as a waiver and will not be privileged. *See id.* at 124-25. Second, the evidence must be testimonial. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 761 (1966). Third, the evidence must be incriminating, *see, e.g.*, Hoffman v. United States, 341 U.S. 479, 486 (1951), and the witness must reasonably suspect that his answer will incriminate him before he asserts the privilege, *id.*; *see* Commission of Social Servs. v. Charles A.C., 72 App. Div. 2d 770, 770, 421 N.Y.S.2d 394, 395 (2d Dep't 1979). Thus, the fifth amendment privilege against self-incrimination does not extend to testimony that merely impairs the witness' reputation; the testimony must tend to expose him to criminal prosecution. *See id.*; R. MCNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE § 13.11, at 209 (1982). Nevertheless, mere implication of injurious effects on a witness' criminal liability from the response is all that the trial judge need find to uphold the privilege. *See Hoffman*, 341 U.S. at 486-87.

[59] *See* CPL § 50.30 (1981). A request by the district attorney that the court confer