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THE SURVEY OF NEW YORK PRACTICE

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INTRODUCTION*

In this first issue of Volume 56, *The Survey* discusses current

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* The following abbreviations will be used uniformly throughout *The Survey*:

New York Civil Practice Law and Rules (McKinney)	CPLR
New York Civil Practice Act	CPA
New York Criminal Procedure Law (McKinney)	CPL
New York Code of Criminal Procedure	CCP
Real Property Actions and Proceedings Law (McKinney)	RPAPL
Domestic Relations Law (McKinney)	DRL
Estates, Powers and Trusts Law (McKinney)	EPTL
General Municipal Law (McKinney)	GML

trends in various areas of New York law. The doctrine of collateral estoppel is treated in two of the decisions analyzed. In *Gilberg v. Barbieri,* although recognizing that a harassment violation is similar in significance to a traffic infraction, the Court of Appeals held that a conviction in a harassment violation proceeding will not bar relitigation of the same issue in a subsequent civil action. The Appellate Division, Second Department, in *Kossover v. Trattler,* also denied collateral estoppel effect to a default judgment rendered in a physician's action to recover payment for services rendered. Thus, a subsequent medical malpractice action was not precluded. The majority decision was based on a technicality, however, and has not changed the general New York rule which gives such default judgments collateral estoppel effect.

The second Court of Appeals decision analyzed in *The Survey* is *Marine Midland Bank-Southern v. Thurlow.* Faced with the question whether the parol evidence rule applies only to evidence of prior agreements *between the parties* to a written contract, the Court in *Marine Midland* held that the parol evidence rule will bar evidence of prior inconsistent agreements between one of the parties to a written contract and a third party. Also highlighted in this issue is the Appellate Division, First Department's decision in *Schiavone Construction Co. v. Elgood Mayo Corp.* The *Schiavone* court held that in a strict products liability cause of action, economic losses may be recovered against a manufacturer with whom the plaintiff was not in privity. Notably, the court deviated from

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General Obligations Law (McKinney) ..... GOL
D. SIEGEL, NEW YORK PRACTICE (1978) ..... SIEGEL
WEINSTEIN, KORN & MILLER, New York Civil Practice (1979) ..... WK&M
The Biannual Survey of New York Practice ..... *The Biannual Survey*
The Quarterly Survey of New York Practice ..... *The Quarterly Survey*
The Survey of New York Practice ..... *The Survey*

Extremely valuable in understanding the CPLR are the five reports of the Advisory Committee on Practice and Procedure. They are contained in the following legislative documents and will be cited as follows:

1957 N.Y. Leg. Doc. No. 6(b) ..... FIRST REP.
1958 N.Y. Leg. Doc. No. 13 ..... SECOND REP.
1959 N.Y. Leg. Doc. No. 17 ..... THIRD REP.
1960 N.Y. Leg. Doc. No. 120 ..... FOURTH REP.
1961 FINAL REPORT OF THE ADVISORY COMMITTEE ON PRACTICE AND PROCEDURE ..... FINAL REP.

Also valuable are the two joint reports of the Senate Finance and Assembly Ways and Means Committee:

1961 N.Y. Leg. Doc. No. 15 ..... FIFTH REP.
1962 N.Y. Leg. Doc. No. 8 ..... SIXTH REP.

the traditional view that economic losses are only recoverable in a breach of warranty cause of action. It is hoped that *The Survey*'s treatment of these and other developments in New York law will be of help and of interest to the New York practitioner.

CIVIL PRACTICE LAW AND RULES
ARTICLE 14A—COMPARATIVE NEGLIGENCE

CPLR 1411: Comparative negligence statute applies to loss of consortium action and operates to reduce consortium award by degree of spouse's contributory negligence

In New York, a cause of action for loss of consortium is considered to be derived from, not independent of, the injured spouse's direct cause of action.[1] Consequently, prior to the enact-

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[1] Liff v. Schildkrout, 49 N.Y.2d 622, 632, 404 N.E.2d 1288, 1291, 427 N.Y.S.2d 746, 749 (1980); *see, e.g.*, Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 507-08, 239 N.E.2d 897, 902-03, 293 N.Y.S.2d 305, 312 (1968); Maxson v. Tomek, 244 App. Div. 604, 605, 280 N.Y.S. 319, 320 (4th Dep't 1935); *cf.* Reilly v. Rawleigh, 245 App. Div. 190, 191, 281 N.Y.S. 366, 367 (4th Dep't 1935) (derivative action for child's medical expenses). The loss of consortium cause of action has been described as encompassing "not only loss of support or services, [but] also . . . such elements as love, companionship, affection, society, sexual relations, solace and more." Millington v. Southeastern Elevator Co., 22 N.Y.2d at 502, 239 N.E.2d at 899, 293 N.Y.S.2d at 308.

Before the widespread adoption of comparative fault principles, most jurisdictions held that an injured spouse's contributory negligence would bar any recovery by the consortium spouse on the ground that the loss of consortium cause of action was derived from the personal injury claim. *See, e.g.*, Note, *Torts—Action for Loss of Consortium—Husband's Contributory Negligence as a Bar*, 11 WAYNE L. REV. 824, 827 (1965). Commentators have criticized the derivative status of loss of consortium claims, noting that such status permitted the courts effectively to impute negligence. *See, e.g.*, Gilmore, *Imputed Negligence*, 1 WIS. L. REV. 193, 211-12 (1921); James, *Imputed Contributory Negligence*, 14 LA. L. REV. 340, 354-56 (1954); Love, *Tortious Interference with the Parent-Child Relationship: Loss of an Injured Person's Society and Companionship*, 51 IND. L.J. 590, 630-31 (1976); note 16 *infra*. Notably, the loss of consortium cause of action has been envisioned as analogous to claims for property damage occurring when a contributorily negligent person damages his spouse's automobile in a collision with a third party. *See* James, *supra*, at 354-56. Observing that the spouse's negligence is not imputed to the owner of the car in an action for property damage, commentators have argued that the loss of consortium plaintiff should not be subject to the imputation of fault and should be treated as having an "independent" claim. *See* Gregory, *The Contributory Negligence of Plaintiff's Wife or Child In An Action for Loss of Services, Etc.*, 2 U. CHI. L. REV. 173, 174-91 (1935); James, *supra*, at 354-56. One author has suggested a compromise position under which consortium claims would be considered only factually derivative. Love, *supra*, at 630-31. Under this view, the consortium plaintiff would be required to establish a prima facie case in favor of his spouse against the defendant. *Id.* The action, however, would be considered independent for all other purposes, thus precluding imputation to the spouse of the primary plaintiff's negligence. *Id.*

New York has refused to hold that consortium claims can exist independently of the spouse's personal injury claim. *See, e.g.*, Liff v. Schildkrout, 49 N.Y.2d 622, 632, 404 N.E.2d