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Jack Wilk

tempted to assert rights under the written agreement between the plaintiff and Conelec and to prove these rights through parol evidence.[160] Thus, the defendants should not have been able to introduce this extrinsic evidence as "strangers." If the Court of Appeals had taken this approach, it seems that the defendants would not have been able to cast doubt upon the express terms of their own agreement with the plaintiff.

Robert J. Sorge, Jr.

Harassment violation conviction cannot be the basis for the use of collateral estoppel in a subsequent civil action

The doctrine of collateral estoppel fosters judicial economy by prohibiting the relitigation of previously adjudicated issues.[161] In practice, the doctrine is not applied unless an adjudicated issue is shown to be identical to and dispositive of the issue in the instant case.[162] Moreover, it must be established that the parties to the original action had a "full and fair opportunity to contest" the issue sought to be relitigated.[163] In assessing whether such a "full

608, 326 N.Y.S.2d 293, 295 (3d Dep't 1971); County Trust Co. v. Mara, 242 App. Div. 206, 208, 273 N.Y.S. 597, 600 (1st Dep't 1934), *aff'd*, 266 N.Y. 540, 195 N.E. 190 (1935).

[160] 53 N.Y.2d at 387, 425 N.E.2d at 808, 442 N.Y.S.2d at 420.

[161] Collateral estoppel is intended to prohibit the relitigation of previously adjudicated issues, since such relitigation is considered "an unjustifiable duplication, an unwarranted burden on the courts as well as on opposing parties." SIEGEL § 442, at 585; *see* Hoag v. New Jersey, 356 U.S. 464, 470 (1958); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 144-45, 225 N.E.2d 195, 197, 278 N.Y.S.2d 596, 599 (1967); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 18, 9 N.E.2d 758, 759 (1937); Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 166 (1969). The doctrine of collateral estoppel developed as a corollary to the doctrine of res judicata, Gramatan Home Investors Corp. v. Lopez, 46 N.Y.2d 481, 485, 386 N.E.2d 1328, 1331, 414 N.Y.S.2d 308, 311 (1979); Weiner v. Greyhound Bus Lines, Inc., 55 App. Div. 2d 189, 191, 389 N.Y.S.2d 884, 886 (2d Dep't 1976), which "requires that when a cause of action has been adjudicated on the merits, the parties to the action are bound by the judgment and may not relitigate the same cause of action between themselves." 5 WK&M ¶ 5011.24, at 50-116.2. The primary distinction between the two doctrines is that res judicata applies to entire causes of action or defenses while collateral estoppel applies to issues. SIEGEL § 457; *see* Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 165-69 (1969).

[162] *See* Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969); Trombley v. Malloy, 66 App. Div. 2d 1020, 1020, 412 N.Y.S.2d 62, 63 (4th Dep't 1978), *aff'd*, 50 N.Y.2d 46, 405 N.E.2d 213, 427 N.Y.S.2d 969 (1980); Hurlburt v. Chenango County Dep't of Social Servs., 63 App. Div. 2d 805, 806, 405 N.Y.S.2d 153, 155 (3d Dep't 1978).

[163] Schwartz v. Public Adm'r, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955,

and fair opportunity" was had, the courts look to several factors, including the significance of the charges leveled in both the initial and subsequent proceedings.[164] Recently, in *Gilberg v. Barbieri*,[165] the Court of Appeals, stressing this factor, held that collateral estoppel does not bar an issue resolved in a harassment violation proceeding from being relitigated in a subsequent civil action.[166]

The dispute in *Gilberg* arose when the defendant refused to answer questions posed by the plaintiff, an attorney for the defendant's wife.[167] At this juncture, the plaintiff ordered the defendant to leave his office.[168] Before leaving, however, the defendant scuffled with the plaintiff.[169] Subsequently, the plaintiff caused the defendant to be charged with harassment,[170] and after a brief nonjury

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960 (1969); Trombley v. Malloy, 66 App. Div. 2d 1020, 1020, 412 N.Y.S.2d 62, 63 (4th Dep't 1978), *aff'd*, 50 N.Y.2d 46, 405 N.E.2d 213, 427 N.Y.S.2d 969 (1980); Read v. Sacco, 49 App. Div. 2d 471, 474, 375 N.Y.S.2d 371, 375 (2d Dep't 1975).

[164] In Schwartz v. Public Adm'r, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969), the court listed several factors which should be referred to in determining whether a party had a full and fair opportunity to litigate his claim. *Id.* at 72, 246 N.E.2d at 729, 298 N.Y.S.2d at 961. Included among these are "the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation." *Id.* In applying these factors it is necessary that the court examine the realities of the prior litigation. *E.g.*, People v. Plevy, 52 N.Y.2d 58, 65, 417 N.E.2d 518, 522, 436 N.Y.S.2d 224, 228 (1980). Indeed, the circumstances surrounding each case must be scrutinized carefully to ensure that the party being estopped is treated neither unfairly nor prejudicially. 800 Executive Towers, Inc. v. Board of Assessors, 53 App. Div. 2d 463, 475-76, 385 N.Y.S.2d 604, 612 (2d Dep't 1976). For a discussion of the *Schwartz* factors, see SIEGEL § 467.

[165] 53 N.Y.2d 285, 423 N.E.2d 807, 441 N.Y.S.2d 49 (1981), *rev'g* 74 App. Div. 2d 913, 426 N.Y.S.2d 72 (2d Dep't 1980).

[166] 53 N.Y.2d at 293-94, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. In its discussion of collateral estoppel, the *Gilberg* Court used the terms "collateral estoppel" and "issue preclusion" interchangeably. To avoid confusion, however, and to facilitate both analysis and exposition, the Court of Appeals had previously stated that the term "issue preclusion" should be used. *In re* American Ins. Co., 43 N.Y.2d 184, 189 n.2., 371 N.E.2d 798, 801 n.2, 401 N.Y.S.2d 36, 39 n.2 (1977); *see, e.g.*, Pace v. Perk, 81 App. Div. 2d 444, 460, 440 N.Y.S.2d 710, 720 (2d Dep't 1981); Brown v. Lockwood, 76 App. Div. 2d 721, 735, 432 N.Y.S.2d 186, 196 (2d Dep't 1980). The term "issue preclusion," it should be noted, was adopted by the American Law Institute in section 68 of the Second Restatement of Judgments. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977).

[167] 53 N.Y.2d at 289, 423 N.E.2d at 807, 441 N.Y.S.2d at 49. The defendant was present in the plaintiff's office for an examination before trial, in connection with an alleged breach of a separation agreement. *Id.* at 288-89, 423 N.E.2d at 807, 441 N.Y.S.2d at 49.

[168] *Id.* at 289, 423 N.E.2d at 807, 441 N.Y.S.2d at 49.

[169] *Id.*

[170] *Id.* The plaintiff commenced the action by filing an information in the City Court of Mount Vernon charging the defendant with harassment. *Id.* Harassment is defined in the Penal Law, which provides in part: "[a] person is guilty of harassment when, with intent to

trial in the city court, the defendant was convicted.[171] The plaintiff next instituted a civil action for damages[172] and shortly thereafter moved for summary judgment, arguing that the defendant's previous harassment conviction called for application of the doctrine of collateral estoppel regarding the issue of the defendant's liability.[173] The trial court granted the plaintiff's motion[174] and the Appellate Division, Second Department, affirmed, holding that the defendant's harassment conviction established his liability as a matter of law.[175]

A closely divided Court of Appeals[176] reversed the appellate division, holding that collateral estoppel does not prevent the relitigation in a civil action of an issue resolved in a harassment proceeding.[177] In an opinion by Judge Wachtler, the majority observed that, preliminary to the application of collateral estoppel, the Court must conduct a "practical inquiry" into whether a party

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harass, annoy or alarm another person; 1) He strikes, shoves, kicks or otherwise subjects him to physical contact, or attempts or threatens to do the same . . . . Harassment is a violation." N.Y. PENAL LAW § 240.25 (McKinney 1980). A violation such as harassment is any offense other than a traffic infraction for which a person cannot be imprisoned in excess of 15 days. *Id.* § 10(3) (McKinney 1975).

[171] 53 N.Y.2d at 289, 423 N.E.2d at 808, 441 N.Y.S.2d at 50. The plaintiff's stenographer, a witness at the harassment proceeding, testified that she was present at the time of the altercation between the plaintiff and the defendant and that it was the defendant who had struck the first blow. *Id.* After a brief trial, the court found the defendant guilty of harassment and sentenced the defendant to a 1-year conditional discharge with the stipulation that he have no encounters with the plaintiff's law firm during that period. *Id.* at 289-90, 423 N.E.2d at 808, 441 N.Y.S.2d at 50.

[172] *Id.* at 290, 423 N.E.2d at 808, 441 N.Y.S.2d at 50. The plaintiff instituted a civil action for assault in which he sought $250,000 in damages for his injuries. *Id.*

[173] *Id.*

[174] *Id.* After granting the motion for summary judgment, the court ordered the trial to proceed solely on the issue of damages. *Id.*

[175] 74 App. Div. 2d 913, 913, 426 N.Y.S.2d 72, 73 (2d Dep't 1980), *rev'd*, 53 N.Y.2d 285, 423 N.E.2d 807, 441 N.Y.S.2d 49 (1981). Justice Gibbons dissented from the decision on the theory that the defendant's constitutional right to a jury trial, which is paramount to the doctrine of collateral estoppel, had been abridged. 74 App. Div. 2d at 914, 426 N.Y.S.2d at 74 (Gibbons, J., dissenting).

[176] Judges Gabrielli, Jones, and Fuchsberg joined with Judge Wachtler. Judge Meyer dissented and voted to affirm in a separate opinion in which Chief Judge Cooke and Judge Jasen concurred.

[177] 53 N.Y.2d at 293-94, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. Notably, it is well-settled that misdemeanor and felony convictions *can* be the basis for the use of collateral estoppel in subsequent civil actions. *See, e.g.*, S.T. Grand, Inc. v. City of New York, 32 N.Y.2d 300, 304-05, 298 N.E.2d 105, 107-08, 344 N.Y.S.2d 938, 941-42 (1973); Read v. Sacco, 49 App. Div. 2d 471, 473, 375 N.Y.S.2d 371, 374 (2d Dep't 1975). *See also In re* Levy, 37 N.Y.2d 279, 281, 333 N.E.2d 350, 352, 372 N.Y.S.2d 41, 43 (1975) (per curiam); Vavolizza v. Krieger, 33 N.Y.2d 351, 355-56, 308 N.E.2d 439, 442, 352 N.Y.S.2d 919, 923 (1974).

against whom the doctrine is asserted had had a full and fair hearing.[178] Noting that harassment charges are similar to other "insignificant"[179] violations which are stripped of collateral estoppel effect by statute, such as traffic infractions,[180] the Court reasoned that the defendants in such actions cannot be expected to defend themselves vigorously.[181] Judge Wachtler concluded, therefore, that the defendant in *Gilberg* had been denied a full and fair opportunity to litigate his liability and that he properly could relitigate that issue in a civil action.[182]

Authoring a vigorous dissent, Judge Meyer asserted that collateral estoppel properly may be premised upon a harassment conviction.[183] Judge Meyer stressed that the defendant's harassment

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[178] 53 N.Y.2d at 292, 423 N.E.2d at 809, 441 N.Y.S.2d at 51.

[179] *Id.* at 293, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. In addition to terming harassment charges "insignificant," the Court noted that harassment proceedings, unlike civil actions, may be tried without a jury. *Id. Compare* Baldwin v. New York, 399 U.S. 66, 73-74 (1970) (jury trial not required unless potential imprisonment is for a period greater than 6 months) *and* N.Y. PENAL LAW § 10(3) (McKinney 1975) (maximum sentence for a violation conviction is 15 days) *with* CPLR 4101 (1963) (jury trial required in civil actions for a sum of money only).

[180] 53 N.Y.2d at 293, 423 N.E.2d at 809-10, 441 N.Y.S.2d at 51-52. A statutory provision expressly denies collateral estoppel effect to traffic convictions. N.Y. VEH. & TRAF. LAW § 155 (McKinney Supp. 1980-1981). Small claims actions have also been stripped of collateral estoppel effect. N.Y. UNIFORM CITY CT. ACT § 1808 (McKinney Supp. 1980-1981); N.Y. CITY CIV. CT. ACT § 1808 (McKinney 1963); N.Y. UNIFORM JUST. CT. ACT § 1808 (McKinney Supp. 1980-1981).

[181] 53 N.Y.2d at 293, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. The Court stated that "[t]he brisk, often informal, way in which these matters must be tried, as well as the relative insignificance of the outcome, afford the party neither opportunity nor incentive to litigate thoroughly or as thoroughly as he might if more were at stake." *Id.*

[182] *Id.* at 294, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. In denying collateral estoppel effect to harassment convictions, the *Gilberg* Court commented that a "contrary ruling . . . would not reduce the amount of litigation in the long run." *Id.* The Court premised this conclusion on two grounds. First, Judge Wachtler observed that, were harassment convictions to have collateral estoppel effect, potential civil plaintiffs would be wise "to file minor criminal charges before commencing a civil action." *Id.* Second, the majority noted that defendants, aware of this possibility, would defend minor charges "with a vigor out of all proportion to . . . [their] otherwise petty nature." *Id. See* Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 177 (1969). It is urged, however, that the majority's reasoning is ill-founded. Because they may result in prison sentences, harassment charges are not petty in nature. *See* note 192 and accompanying text *infra.*

[183] 53 N.Y.2d at 294-95, 423 N.E.2d at 810-11, 441 N.Y.S.2d at 52-53 (Meyer, J., dissenting). Judge Meyer stated that although it was the plaintiff's burden to show identical issues and that the issue was previously decided, it was the defendant's burden to prove that he did not have a full and fair opportunity to litigate his liability. *Id.* at 295, 423 N.E.2d at 811, 441 N.Y.S.2d at 53 (Meyer, J., dissenting) (citing Schwartz v. Public Adm'r, 24 N.Y.2d 65, 73, 246 N.E.2d 725, 730, 298 N.Y.S.2d 955, 962 (1969); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 148, 225 N.E.2d 195, 199, 278 N.Y.S.2d 596, 601 (1967)). Judge Meyer con-

trial was a sufficiently formal and extensive hearing,[184] that the defendant had been given a fair opportunity to present evidence and witnesses,[185] and that the defendant had not met his burden of proving otherwise.[186] The dissent further claimed that the defendant's nonjury harassment conviction properly could be used to collaterally estop relitigation of his liability in a subsequent civil action, irrespective of whether the defendant had a constitutional right to a trial by jury in that subsequent action.[187] Concluding, Judge Meyer remarked that since the legislature had created express exceptions to the collateral estoppel rule for certain minor violations, the court "should not extend that list by implication."[188]

It is submitted that the *Gilberg* Court unjustifiably disparaged the state system of prosecuting harassment charges by declaring that convictions obtained thereunder are inadequate to support the invocation of collateral estoppel. Surely, city court proceedings are imbued with several elements which serve to ensure that harassment charges adequately are conducted. To obtain a harassment conviction, for instance, the prosecution must prove beyond a

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tended that the plaintiff had met his burden but that the defendant had not. 53 N.Y.2d at 297, 423 N.E.2d at 812, 441 N.Y.S.2d at 54 (Meyer, J., dissenting). In reaching this conclusion, Judge Meyer stated that the Court need only examine those *Schwartz* factors raised in the defendant's pleading since it was the defendant's burden to produce evidence showing a new trial was necessary. *Id.* (Meyer, J., dissenting); *see* Zuckerman v. City of New York, 49 N.Y.2d 557, 560, 404 N.E.2d 718, 718, 427 N.Y.S.2d 595, 596 (1980).

[184] 53 N.Y.2d at 300, 423 N.E.2d at 813, 441 N.Y.S.2d at 55 (Meyer, J., dissenting). Judge Meyer observed that "the trial was conducted and completed with as much formality, dignity and decorum as any Supreme Court trial." *Id.* (Meyer, J., dissenting).

[185] *Id.* at 298, 423 N.E.2d at 812-13, 441 N.Y.S.2d at 54-55 (Meyer, J., dissenting). In addition to noting that the defendant had had an ample opportunity to argue his case, *id.*, the dissent stressed that the collateral estoppel effect of the trial should not be annulled on the theory that the plaintiff's civil action was unforeseeable. *Id.* at 301, 423 N.E.2d at 814, 441 N.Y.S.2d at 56 (Meyer, J., dissenting). Indeed, Judge Meyer contended that to state that the subsequent civil action was unforeseeable would be to greatly underestimate the competence of the trial judge and of the defendant's attorney. *Id.* (Meyer, J., dissenting).

[186] *Id.* at 305, 423 N.E.2d at 816, 441 N.Y.S.2d at 58 (Meyer, J., dissenting). The dissent maintained that the claim that the defendant had not had a full and fair opportunity to litigate his liability was totally inconsistent with the record of the case. *Id.* at 300, 423 N.E.2d at 813, 441 N.Y.S.2d at 55 (Meyer, J., dissenting).

[187] *Id.* at 303, 423 N.E.2d at 815, 441 N.Y.S.2d at 57 (Meyer, J., dissenting) (citing Parklane Hosiery Co. v. Shore, 439 U.S. 322, 333-37 (1979)). For a discussion of the right to a jury trial as it relates to collateral estoppel, see Note, *Mutuality of Estoppel and the Seventh Amendment: The Effect of* Parklane Hoisery, 64 CORNELL L. REV. 1002, 1018-29 (1979); Comment, *Collision Course; Collateral Estoppel and the Seventh Amendment:* Parklane Hosiery Co. v. Shore, 57 DEN. L. J. 115, 122-26 (1979).

[188] 53 N.Y.2d at 305, 423 N.E.2d at 816, 441 N.Y.S.2d at 58 (Meyer, J., dissenting).

reasonable doubt that the defendant committed every element of the offense charged.[189] Furthermore, although a defendant charged with a harassment violation is not entitled to a jury trial,[190] the conduct of the presiding judge is governed by a statutory provision intended to forestall the improprieties which might ensue when a judge sits as the trier of fact.[191]

Apart from the integrity of city court harassment proceedings, it is notable that such proceedings can lead to prison sentences.[192] Since most persons would contest vigorously any charge which could result in a deprivation of their personal freedom,[193] it is urged that the *Gilberg* Court improperly termed harassment charges "insignificant."[194] Indeed, the Court should not have perfunctorily equated harassment charges with traffic violations which, in and of themselves, cannot result in prison sentences.[195]

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[189] CPL § 70.20 (1971). Since a violation is considered an offense by the Penal Law, *see* note 170 *supra*, the standard of proof for a violation conviction is found in CPL § 70.20, which provides that "[n]o conviction of an offense by verdict is valid unless based upon trial evidence which establishes beyond a reasonable doubt every element of such offense and the defendant's commission thereof." CPL § 70.20 (1971). Moreover, evidence is not legally sufficient unless it is competent and, if necessary, corroborated. CPL § 70.10(1) (1971). The reason for these strict requirements is the overriding importance in a criminal proceeding to reach a correct decision, whereas the primary concern in a civil dispute is to resolve the matter in a peaceful, orderly, and impartial manner. *See* People v. Plevy, 52 N.Y.2d 58, 64, 417 N.E.2d 518, 521-22, 436 N.Y.S.2d 224, 227-28 (1980); People v. Berkowitz, 50 N.Y.2d 333, 345, 406 N.E.2d 783, 789-90, 428 N.Y.S.2d 927, 933-34 (1980). *See also* SIEGEL § 453.

[190] CPL § 340.40 (1971). If all the required elements for the application of collateral estoppel are present, it is clear that the absence of a jury trial should not prevent the doctrine's use. Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on* Rachal v. Hill, 85 HARV. L. REV. 442, 456 (1971). The Second Restatement of Judgments has adopted a similar view: "[t]he determination of an issue by a judge in a proceeding conducted without a jury is conclusive in a subsequent action whether or not there would have been a right to a jury in that subsequent action if collateral estoppel did not apply." RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment d, at 7 (Tent. Draft No. 4, 1977); *see* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335-36 (1979).

[191] *See* CPL § 350.10 (1971). CPL section 350.10 was enacted to regulate the conduct of judges presiding over nonjury trials in local criminal courts. CPL § 350.10, commentary at 68 (1971). The statute contains guidelines regarding, *inter alia*, the delivery of opening addresses by attorneys, CPL § 350.10 (3)(a) (1971), the order in which evidence must be offered, *id.* at (3)(b), the delivery of summations, *id.* at (3)(c), and motion practice, *id.* at (4).

[192] *See* N.Y. PENAL LAW § 10(3) (McKinney 1975); *id.* § 240.25 (McKinney 1980); note 170 *supra*.

[193] The *Gilberg* Court appears to have deemphasized the importance people place on their freedom. *See* Baldwin v. New York, 399 U.S. 66, 73 (1970). In *Baldwin*, the court noted that "the prospect of imprisonment for however short a time will seldom will be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation." *Id.*

[194] 53 N.Y.2d at 293, 423 N.E.2d at 810, 441 N.Y.S.2d at 52.

[195] *Id. See* N.Y. VEH. & TRAF. LAW § 227(3) (McKinney Supp. 1980-1981). The Vehicle

Moreover, other factors serve to distinguish harassment violations from traffic violations.[196] In a traffic violation hearing the state must prove its case by clear and convincing evidence and not, as in a harassment proceeding, by the heavier burden of reasonable doubt.[197] There is also a greater emphasis upon speedy disposition of traffic violations.[198] Indeed, it is suggested that the mere convenience of indicating a guilty plea in the space so provided on a "mailer" form[199] encourages quick resolution of such matters. It is evident that most drivers prefer this alternative to a day in Traffic Court.[200]

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and Traffic Law provides that:

> The commissioner or his designee may . . . [impose] . . . any penalty authorized by any provision of this chapter for a conviction of . . . [a traffic infraction], except that no penalty therefore shall include imprisonment.

Id. Further evidence of the insignificance of traffic infractions is that they are not governed by the CPL. *See* Sulli v. Appeals Bd. of Administrative Adjudication Bureau, 55 App. Div. 2d 457, 460, 390 N.Y.S.2d 758, 760 (4th Dep't 1977); [1981] 15 N.Y.C.R.R. § 121.2.

[196] Perhaps the most obvious distinction between a harassment violation and a traffic conviction is statutory. Indeed, a violation, including harassment, is defined as an offense *other than a traffic infraction* for which a person cannot be imprisoned in excess of 15 days. N.Y. PENAL LAW § 10(3) (McKinney 1975). In addition to harassment, the Penal Law labels several other offenses as violations. *See, e.g.*, N.Y. PENAL LAW § 100.00 (McKinney Supp. 1980-1981) (criminal solicitation in the fifth degree); *id.* § 140.05 (McKinney 1975) (trespass); *id.* § 240.20 (McKinney 1980) (disorderly conduct).

[197] *See* Rosenthal v. Hartnett, 36 N.Y.2d 269, 271, 326 N.E.2d 811, 812, 367 N.Y.S.2d 247, 248 (1975). *Compare* N.Y. VEH. & TRAF. LAW § 227(1) (McKinney Supp. 1980-1981) (clear and convincing evidence is necessary to sustain traffic infraction conviction) *with* CPL § 70.20 (1971) (conviction for an offense requires proof beyond a reasonable doubt of every element of the offense). In *Rosenthal*, the court held that an adjudication of a traffic infraction by an administrative agency may be based upon clear and convincing evidence since the maximum penalty which may be imposed is a fine. 36 N.Y.2d 269, 271, 326 N.E.2d 811, 812, 367 N.Y.S.2d 247, 248 (1975).

[198] The intent of the legislature in creating an administrative agency to handle traffic infractions was to reduce overcrowding in criminal courts and to provide a means to dispose of moving violation charges speedily. Ch. 1074, § 1, [1969] N.Y. Laws 2873.

[199] N.Y. VEH. & TRAF. LAW § 226(2)(b) (McKinney Supp. 1980-1981) provides:

> Answer by mail—admitting charge. If a person charged with the violation admits to the violation as charged in the summons, he may complete an appropriate form prescribed by the commissioner and forward such form and summons . . . to the office of the department specified on such summons. If a schedule of penalties for violations has been established, and such schedule appears on the answer form, a check or money order in the amount of the penalty for the violation charged if included in such schedule, must also be submitted with such answer.

Id.

[200] In 1979, the New York Traffic Violations Bureau processed 1,145,538 traffic violation complaints. [1979] N.Y.S. DEP'T OF MOTOR VEHICLES ANN. REP. 13. Of these, approximately 575,934 "resulted in pleas of guilty, which were submitted by mail and did not result in hearings." *Id.* The following table, compiled from several annual reports of the New York Department of Motor Vehicles, is illustrative:

In summary, it is clear that when the legislature has determined that a judgment should be denied collateral estoppel effect, it has codified that intent.[201] Therefore, in the absence of such an express legislative intent, it is submitted that the courts should not preclude application of collateral estoppel absent circumstances which strongly suggest otherwise.

Jack Wilk

Collateral estoppel effect of a default judgment upon a medical malpractice action

The preceding case demonstrated that harassment violation proceedings may properly be imbued with collateral estoppel effect.[202] Among other things, the threat of a prison sentence, the decorum of city court proceedings, and the active defense conducted by the defendant in *Gilberg* evinced the defendant's awareness of the significance of the proceedings.[203] Nevertheless, the Court of Appeals, equating such harassment conviction to a traffic infraction conviction, held that it should not be accorded collateral estoppel effect.[204] Consider, however, a default judgment[205] or a

YEAR	COMPLAINTS FILED	HEARINGS	PCT. HEARINGS	HEARINGS BYPASSED	PCT. BYPASSED	HEARINGS APPEALED	PCT. APPEALED
1980	1,079,266	521,691	48.3%	557,575	51.7%	1,170	.22%
1979	1,145,538	569,604	49.5%	575,934	50.3%	1,350	.24%
1978	1,102,174	545,758	49.5%	556,416	50.5%	1,135	.21%
1977	965,423	466,058	48.3%	499,365	51.7%	922	.20%
1976	951,394	460,982	48.5%	490,412	51.5%	680	.15%

[1980] N.Y.S. DEP'T OF MOTOR VEHICLES ANN. REP. 7; [1979] N.Y.S. DEP'T OF MOTOR VEHICLES ANN. REP. 13; [1978] N.Y.S. DEP'T OF MOTOR VEHICLES ANN. REP. 9; [1977] N.Y.S. DEP'T OF MOTOR VEHICLES ANN. REP. 23; [1976] N.Y.S. DEP'T OF MOTOR VEHICLES ANN. REP. 12. Notably, the opportunity for a hearing is bypassed in over 50% of the traffic infraction cases. Of even greater interest is that when hearings are conducted less than one percent of the decisions rendered are appealed.

[201] *See* note 180 *supra.*

[202] *See* notes 189-191 and accompanying text *supra.*

[203] *See id.*

[204] *See* note 177 and accompanying text *supra.*

[205] *See* CPLR 3215 (1970). "When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." *Id.* The United States Supreme Court has stated that "a judgment by default is just as conclusive an adjudication . . . [on] essential [facts] to support the judgment as one rendered after answer and contest." Last Chance Mining Co. v. Tyler Mining Co., 157 U.S. 683, 691 (1895); *accord,*