

## Collateral Estoppel Effect of a Default Judgment Upon a Medical Malpractice Action

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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.<sup>201</sup> 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.<sup>202</sup> 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.<sup>203</sup> Nevertheless, the Court of Appeals, equating such harassment conviction to a traffic infraction conviction, held that it should not be accorded collateral estoppel effect.<sup>204</sup> Consider, however, a default judgment<sup>205</sup> or a

YEAR	COMPLAINTS		PCT. HEARINGS HEARINGS	PCT. HEARINGS BYPASSED	PCT. HEARINGS BYPASSED	PCT. HEARINGS APPEALED	PCT. HEARINGS APPEALED
	FILED	HEARINGS					
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.

<sup>201</sup> See note 180 *supra*.

<sup>202</sup> See notes 189-191 and accompanying text *supra*.

<sup>203</sup> See *id.*

<sup>204</sup> See note 177 and accompanying text *supra*.

<sup>205</sup> 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*,

confession of judgment<sup>206</sup> executed pursuant to a physician's action to recover payment for medical services rendered. Although it would seem to be unjust to accord collateral estoppel effect to these types of judgments, the New York courts long have held that the existence of a default judgment or a confession of judgment will collaterally estop a malpractice cause of action arising from the same transaction.<sup>207</sup> Recently, in *Kossover v. Trattler*,<sup>208</sup> the Appellate Division, Second Department, had occasion to consider this issue. Although the majority, citing a technicality, held that collateral estoppel properly was not invoked in the instant case,<sup>209</sup> a vigorous concurrence criticized the rule in New York which permits a collateral estoppel bar to be founded upon a default judgment.<sup>210</sup>

In *Kossover*, the defendant Dr. Trattler previously had brought an action against Mr. Kossover to recover for professional services rendered "'on or about the 21st day of May, 1974.'"<sup>211</sup> The patient's failure to answer the complaint resulted in a default judgment in favor of Dr. Trattler.<sup>212</sup> Subsequently, Mr. Kossover commenced an action for medical malpractice "allegedly commit-

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*Barber v. Kendall*, 158 N.Y. 401, 405, 53 N.E. 1, 2 (1899); *Pray v. Hegeman*, 98 N.Y. 351, 358 (1885). Notably, the New York courts have accorded collateral estoppel effect to default judgments arising from various causes of action. *E.g.*, *Reich v. Cochran*, 151 N.Y. 122, 125-29, 45 N.E. 367, 367-69 (1896) (default judgment for nonpayment of rent bars subsequent action alleging that lease was intended as a mortgage and was usurious); *Jordan v. Van Epps*, 85 N.Y. 427, 433-37 (1881) (default judgment in a partition suit is a bar to an action to recover dower); *Roberts v. Strauss*, 108 N.Y.S.2d 733, 734 (Sup. Ct. N.Y. County 1951) (default judgment wherein defendant was held to be negligent is res judicata in an action to redress personal injuries); see Note, *Collateral Estoppel in New York*, 36 N.Y.U. L. REV. 1158, 1158 (1961).

<sup>206</sup> See CPLR 3218 (1970). "[A] judgment by confession may be entered, without an action, either for money due or to become due . . . upon an affidavit executed by the defendant . . . stating [*inter alia*] the sum for which judgment may be entered . . . [and] the facts out of which the debt arose . . ." *Id.*; see *Gates v. Preston*, 41 N.Y. 113, 115-16 (1869) (confession of judgment and payment of outstanding bill for medical services bars subsequent medical malpractice action).

<sup>207</sup> *E.g.*, *Blair v. Bartlett*, 75 N.Y. 150, 152 (1878); *Gates v. Preston*, 41 N.Y. 113, 114-16 (1869); *Bellinger v. Craigue*, 31 Barb. 534, 538-39 (1860).

<sup>208</sup> 82 App. Div. 2d 610, 442 N.Y.S.2d 554 (2d Dep't 1981), *aff'g* 104 Misc. 2d 424, 428 N.Y.S.2d 402 (Sup. Ct. Nassau County 1980).

<sup>209</sup> 82 App. Div. 2d 610, 612, 442 N.Y.S.2d 554, 556 (2d Dep't 1981).

<sup>210</sup> *Id.* at 613, 442 N.Y.S.2d at 556 (Gibbons, J., concurring).

<sup>211</sup> *Id.* at 610, 442 N.Y.S.2d at 555. Dr. Trattler had operated to repair, for the second time, the herniation of a scar which had been caused by an earlier operation. 104 Misc. 2d at 425, 428 N.Y.S.2d at 403.

<sup>212</sup> 82 App. Div. 2d at 610, 442 N.Y.S.2d at 555; 104 Misc. 2d at 425, 428 N.Y.S.2d at 403-04.

ted . . . 'between May 27, 1974 and June 22nd, 1974.'<sup>213</sup> Prior to trial, Dr. Trattler moved to amend his answer to include the affirmative defenses of collateral estoppel and res judicata, contending that the default judgment precluded the plaintiff's medical malpractice claim.<sup>214</sup> Denying these motions, the trial court held that collateral estoppel should not apply since the plaintiff's absence in the prior action prevented the court from considering the malpractice issue.<sup>215</sup> Alternatively, the court stated that collateral estoppel was unavailable in the instant case because the dates of medical service alleged in Dr. Trattler's action and in Mr. Kossover's action were dissimilar.<sup>216</sup>

On appeal, the Appellate Division, Second Department, affirmed.<sup>217</sup> Writing for the majority, Justice Gulotta<sup>218</sup> stated that preliminary to the invocation of the doctrine of collateral estoppel, an identity of issues between the prior and subsequent actions must be demonstrated.<sup>219</sup> Noting that the dates at issue in the plaintiff's medical malpractice complaint and in the prior default

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<sup>213</sup> 82 App. Div. 2d at 610, 442 N.Y.S.2d at 555; 104 Misc. 2d at 425, 428 N.Y.S.2d at 404. Mr. Kossover's action for malpractice was commenced in March 1976, against North Shore Hospital and Dr. Trattler. 82 App. Div. 2d at 610, 442 N.Y.S.2d at 555.

<sup>214</sup> 82 App. Div. 2d at 610-11, 442 N.Y.S.2d at 555; 104 Misc. 2d at 425, 428 N.Y.S.2d at 404.

<sup>215</sup> 104 Misc. 2d at 428, 428 N.Y.S.2d at 405. The court discussed three cases relied upon by Dr. Trattler. *Id.* at 426, 428 N.Y.S.2d at 404. The court noted that in *Blair v. Bartlett*, 75 N.Y. 150 (1878), the Court of Appeals had held that an action for recoupment of fees, wherein the defendant had withdrawn his answer, barred a subsequent action for malpractice. 104 Misc. 2d at 426, 428 N.Y.S.2d at 404. The court further noted that in *Gates v. Preston*, 41 N.Y. 113 (1869), a judgment by confession was held to bar a malpractice suit. 104 Misc. 2d at 426, 428 N.Y.S.2d at 404. Finally, the court recognized that in *Goldfarb v. Cranin*, 35 Misc. 2d 126, 229 N.Y.S.2d 43 (Sup. Ct. Nassau County 1962), the doctrine of collateral estoppel was invoked because the patient had interposed a counterclaim for malpractice but failed to appear. 104 Misc. 2d at 426, 428 N.Y.S.2d at 404. Justice Niehoff distinguished these cases as indeterminative because, in *Blair* and *Gates*, the Court of Appeals had considered the quality of services rendered, and in *Goldfarb*, the defendant had chosen not to defend the malpractice action which he had instituted. *Id.* at 427, 428 N.Y.S.2d at 404-05. Justice Niehoff concluded that a medical malpractice action should not be collaterally estopped absent actual litigation of such issue. *Id.* at 428, 428 N.Y.S.2d at 405.

<sup>216</sup> 104 Misc. 2d at 428-29, 428 N.Y.S.2d at 406.

<sup>217</sup> 82 App. Div. 2d at 611, 442 N.Y.S.2d at 555.

<sup>218</sup> Joining Justice Gulotta in the majority opinion were Justices Mangano and O'Connor. Justice Gibbons concurred in a separate opinion, joined by Justice Lazar. *Id.* at 624, 442 N.Y.S.2d at 556.

<sup>219</sup> *Id.* at 612, 442 N.Y.S.2d at 555. See *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); *Schuykill Fuel Corp. v. B.&C. Nieberg Realty Corp.*, 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929).

judgment were different, the court ruled that the plaintiff's suit presented a novel claim.<sup>220</sup> Thus, the court concluded, the trial court was correct in refusing to collaterally estop the plaintiff's malpractice cause of action.<sup>221</sup>

In a concurring opinion, Justice Gibbons chided the majority for its failure to address the unjust results occasioned by New York's archaic and inequitable default judgment collateral estoppel rule.<sup>222</sup> Notably, the concurrence assailed the practice of New York courts in equating the questions whether services were rendered and whether such rendered services were deficient.<sup>223</sup> Indeed, observed Justice Gibbons, "implicit in the finding [by a New York court] that the fee was earned, there . . . [is] also a finding that the treatment was beneficial and therefore not the proper subject for future litigation on the malpractice action by the patient."<sup>224</sup> Preferring an approach antithetical to that traditionally adhered to in New York, the concurrence posited that a patient's medical malpractice claim should be deemed independent of his physician's cause of action for payment for services rendered, and that a collateral estoppel bar should attach only to such discrete issues as had been litigated previously.<sup>225</sup> Otherwise, asserted the concurrence, patients would be obligated to interpose their malpractice claims during the pendency of their doctor's action for remuneration, thereby denying the patients the "right to seek recourse at a time of, and in the forum of their choice."<sup>226</sup> Additionally, the con-

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<sup>220</sup> 82 App. Div. 2d at 611, 442 N.Y.S.2d at 555.

<sup>221</sup> *Id.* at 612, 442 N.Y.S.2d at 556.

<sup>222</sup> *Id.* at 613, 442 N.Y.S.2d at 556 (Gibbons, J., concurring).

<sup>223</sup> *Id.* at 615-19, 442 N.Y.S.2d at 557-60 (Gibbons, J., concurring).

<sup>224</sup> *Id.* at 619, 442 N.Y.S.2d at 560 (Gibbons, J., concurring).

<sup>225</sup> *Id.* at 615-19, 442 N.Y.S.2d at 557-60 (Gibbons, J., concurring). Justice Gibbons quoted decisions from several jurisdictions in support of his contention that "[t]he better view . . . is that the actions, one by the physician for services and the other by the patient for malpractice, are *independent* and remain so unless and until the patient, when sued for services injects the issue of malpractice, either to defeat the claim, or to obtain damages by way of recoupment or counterclaim." *Id.* at 615, 442 N.Y.S.2d at 557 (Gibbons, J., concurring) (quoting *Leslie v. Mollica*, 236 Mich. 610, 615, 211 N.W. 267, 268 (1926)) (emphasis supplied by Justice Gibbons).

<sup>226</sup> 82 App. Div. 2d at 620, 442 N.Y.S.2d at 560 (Gibbons, J., concurring). Justice Gibbons further asserted that New York's default judgment collateral estoppel rule subjects malpractice claimants to inequities and dilemmas. First, the concurrence noted "the destructive effect . . . [which the application of collateral estoppel] has upon the rights of a defendant, who, in opting not to oppose one claim, finds that he loses another, a consequence which was never within his contemplation at the time of his default." *Id.* at 613, 442 N.Y.S.2d at 556-57 (Gibbons, J., concurring). Second, the concurrence observed that if the malpractice plaintiff, in conformance with the New York rule, had interposed his malprac-

currence observed that the New York rule could prompt defendants to adjudicate petty claims out of all proportion to their significance for fear that latent issues subsumed within such petty claims might subsequently be foreclosed.<sup>227</sup>

It is submitted that Justice Gibbons' concurring opinion in *Kossover* correctly called for a reexamination of New York's incontestable application of collateral estoppel to default judgments.<sup>228</sup> Surely, the present approach is violative of the spirit of the Court of Appeals' decision in *Schwartz v. Public Administrator*,<sup>229</sup> wherein the Court enunciated several factors to be considered in employing the collateral estoppel doctrine.<sup>230</sup> In light of these factors, which include the significance of the claim which is to be accorded collateral estoppel effect, the forum in which such claim was litigated, and the extent of the litigation,<sup>231</sup> it appears that New York's rigid application of collateral estoppel to default judgments and confessions of judgment improperly precludes medical malpractice plaintiffs from an opportunity to litigate meritorious claims. Indeed, it is submitted that a brief analysis of all of the *Schwartz* factors would illustrate vividly the impropriety of ascribing collateral estoppel effect to medical fees, default judgments, and confessions of judgment.<sup>232</sup>

tice claim during the physician's action for payment for services, "an injustice . . . [might nevertheless] be worked on the . . . [claimant] because the claim for medical malpractice could exceed the jurisdictional monetary limits of the court in which the default judgment was obtained." *Id.* at 617, 442 N.Y.S.2d at 559 (Gibbons, J., concurring).

<sup>227</sup> *Id.* at 620, 442 N.Y.S.2d at 560 (citing Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 177 (1969)). Of course, the application of collateral estoppel to all "necessarily implied" issues, *Pray v. Hegeman*, 98 N.Y. 351, 358 (1885), results in decreased foreseeability as to the consequences of a default judgment. Note, *Collateral Estoppel in Default Judgments: The Case for Abolition*, 70 COLUM. L. REV. 522, 523-24 (1970) [hereinafter cited as Note, *The Case for Abolition*]. Consequently, "collateral estoppel, unless confined, may force the parties to litigate not only the claim asserted in the pleadings but all others—including those presently unanticipated—which might involve some of the same issues." Note, *Collateral Estoppel by Judgment*, 52 COLUM. L. REV. 647, 650 (1952) [hereinafter cited as Note, *Estoppel by Judgment*].

<sup>228</sup> See 82 App. Div. 2d at 613, 442 N.Y.S.2d at 556 (Gibbons, J., concurring).

<sup>229</sup> 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

<sup>230</sup> See *The Survey*, note 164 *supra*.

<sup>231</sup> *Id.*

<sup>232</sup> A brief recitation of several of the *Schwartz* factors, see *The Survey* note 164 *supra*, is illustrative:

1) *The size of the claim.* Although not evident in *Kossover*, the size of the physician's claim for services rendered may differ significantly from his patient's malpractice claim. In one New York case in which collateral estoppel effect was accorded to a confession of judgment, the physician's claim was for \$6.58, while the malpractice claim was almost 1000 times

Of course, the New York courts have defended their position. Reasoning that the merit of a physician's action for recoupment of his fee, as evidenced by a default judgment, is indicative of the illegitimacy of a malpractice cause of action, the state's courts have concluded that litigation of a malpractice claim in such circumstance properly may be estopped.<sup>233</sup> It is submitted, however, that

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greater. See *Gates v. Preston*, 41 N.Y. 113, 113 (1869). Clearly, in such a situation, it would appear that a patient would attach much less significance to his physician's claim than to his own medical malpractice claim. Hence, the propriety of according collateral estoppel effect to the physician's default judgment certainly would be questionable.

2) *The forum of the prior litigation.* The decision to default may be influenced by such a consideration when, for example, the amount of a patient's medical malpractice claim exceeds the jurisdictional limits of the court chosen by the physician. Surely, it would be unfair to require a malpractice claimant to subject himself to a jurisdictional monetary limit in order to avoid the collateral estoppel effect of a default judgment. See *Jordahl v. Berry*, 72 Minn. 110, 123, 75 N.W. 10, 12 (1898). But see CPLR 325(b) (1972) (when court in which action "is pending does not have jurisdiction to grant the relief to which the parties are entitled, a court having such jurisdiction may remove the action to itself upon motion").

3) *The use of initiative;* and 4) *The extent of the litigation.* These factors relate to the vigor of the patient's defense in the physician's action to recoup payment for services rendered. Of course, in the case of a default judgment, there is no defense. See CPLR 3215(a) (1970 & Supp. 1980-1981); note 205 *supra*. Certainly, the absence of a thorough adjudication of the patient's malpractice claim during the physician's action would appear to preclude estopping the litigation of such issue in the patient's medical malpractice suit.

5) *The competence and experience of counsel.* An important factor in evaluating a patient's decision to default or enter into a confession of judgment is whether legal counsel was consulted. Absent legal advice, a patient may not appreciate that his malpractice claim will be estopped should he fail to defeat his physician's action. See Note, *Estoppel by Judgment*, *supra* note 227, at 654 n.38.

6) *Indications of a compromise verdict.* Clearly, when a confession of judgment is entered into, the likelihood exists that the medical malpractice claimant was merely settling an outstanding debt. Indeed, it is conceivable that the patient settled the debt in order to avoid detraction from his medical malpractice claim, not to concede the invalidity of such claim. In any event, the intent of the patient in paying his medical debt must be examined prior to the employment of collateral estoppel.

<sup>233</sup> See, e.g., *Blair v. Bartlett*, 75 N.Y. 150, 154 (1878). Other considerations also underlie the New York rule. Significantly, when a defendant appears in an action, he is provided with an opportunity to prove the proper disposition of the questions presented. Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464, 486 (1981). Apparently, the investment of time and money involved in defending some issues creates an inference that the failure to raise other potential defenses constitutes an admission of the invalidity of such defenses. See *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 691 (1895); Vestal, *supra*, at 495; Vestal, *Preclusion/Res Judicata Variables: Nature of the Controversy*, 1965 WASH. U.L.Q. 158, 164-69; Note, *Estoppel by Judgment*, *supra* note 227, at 654. Moreover, unlitigated claims may be so closely related to adjudicated issues that the preclusion of a subsequent action asserting such unlitigated claims is a foreseeable consequence. *Fairchild, Arabatzis and Smith, Inc. v. Prometco Co.*, 470 F. Supp. 610, 617 n.8 (S.D.N.Y. 1979). Thus, "when a given finding necessarily underlies a judgment, and the judgment's very existence can be explained only by assuming the fact to be thus and so, the fact may become the basis of an estoppel even if it was not litigated in the

this is a questionable means of protecting the parties to the action and the courts from duplicative litigation. On the one hand, it would appear that the requisite identity of issues, upon which collateral estoppel must be founded, is absent. Indeed, the majority of jurisdictions have held that a physician's action for fees and a patient's medical malpractice cause of action are distinct and independent.<sup>234</sup> On the other hand, irrespective of whether a medical malpractice claim is identical to a physician's cause of action for collection of his fees, it is clear that in the case of a default judgment or a confession of judgment, the patient has not had a "full and fair opportunity" to litigate his malpractice claim.<sup>235</sup> Clearly, since such an opportunity to litigate was contemplated by the Court of Appeals in *Schwartz*,<sup>236</sup> any rule which would accord collateral estoppel effect to a default judgment or a confession of

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earlier action." SIEGEL § 464, at 614. Notably, the New York courts have considered a medical malpractice cause of action and a physician's cause of action for remuneration to be so related. See note 207 *supra*.

<sup>234</sup> *E.g.*, *Goble v. Dillon*, 86 Ind. 327, 337-38 (1882); *Leslie v. Mollica*, 236 Mich. 610, 615, 211 N.W. 267, 268 (1926); *Jordahl v. Berry*, 72 Minn. 119, 125-26, 75 N.W. 10, 11-13 (1898); *Gwynn v. Wilhelm*, 226 Or. 606, 360 P.2d 312, 314 (1961). In the majority of jurisdictions, a patient's claim for malpractice is deemed independent of a doctor's claim for recovery of his fee "unless and until the patient, when sued for services, injects the issue of malpractice." *Leslie v. Mollica*, 236 Mich. 610, 615, 211 N.W. 267, 268 (1926); see *Barton v. Southwick*, 258 Ill. 515, 522, 101 N.E. 928, 929-30 (1913) (per curiam); *Sale v. Eichberg*, 105 Tenn. 333, 59 S.W. 1020, 1024 (1900); *Ressequie v. Byers*, 52 Wis. 650, 656, 9 N.W. 779, 781 (1881). Notably, commentators uniformly oppose the New York rule. *E.g.*, RESTATEMENT OF JUDGMENTS § 68, Comment d (1942); SIEGEL § 451, at 598; 5 WK&M ¶ 5011.30; Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 195 (1969); Note, *The Case for Abolition*, *supra* note 227, at 537; Note, *Estoppel by Judgment*, *supra* note 227, at 663. Indeed, the Restatement of Judgments provides that "[a] judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action." RESTATEMENT OF JUDGMENTS § 68(2) (1942) (emphasis added). The Restatement illustrates the defendant's ability to bring an action, where he has failed to raise a counterclaim or defense, as follows:

A, a physician, brings an action against B for medical services rendered to B. B fails to plead and judgment by default is given against him. B is not precluded from subsequently maintaining an action against A for malpractice and recovering for harm done to him by such malpractice.

*Id.* at § 58, Comment b, Illustration 3 (1942).

<sup>235</sup> See *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 959 (1969). Of course, the mere opportunity to litigate a claim does not constitute a "full and fair" adjudication of such claim. Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, *supra* note 233, at 468. Moreover, the absence of a due process violation does not guarantee that the party has had a "full and fair opportunity" to litigate his claim. *People v. Plevy*, 52 N.Y.2d 58, 65, 417 N.E.2d 518, 522, 436 N.Y.S.2d 224, 228 (1980).

<sup>236</sup> *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 959 (1969).

judgment would appear to be in derogation of the Court of Appeals' stated position.

In light of the uniform condemnation, by courts and commentators alike,<sup>237</sup> of New York's default judgment collateral estoppel rule, it is suggested that the state's courts should not feel compelled to adhere to longstanding precedent.<sup>238</sup> Rather, the courts should review the facts of each case to determine whether the patient-plaintiff has had a "full and fair opportunity" to litigate the malpractice issue which is to be estopped.<sup>239</sup> Of course, if stern action must be taken to forestall undue litigation, the legislature should consider imposing a compulsory malpractice counterclaim in actions for recovery of medical fees.<sup>240</sup> In any event, it is hoped that the New York courts will, in the future, limit the harsh application of the collateral estoppel rule, a rule which unjustly has impeded the opportunity of medical malpractice plaintiffs to litigate their claims.

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<sup>237</sup> See note 234 *supra*.

<sup>238</sup> The Court of Appeals has stated that the doctrine of stare decisis will not prohibit the overruling of judicial precedent when such precedent is in "opposition to the uniform convictions of the entire judiciary of the land." *Klein v. Maravelas*, 219 N.Y. 383, 386, 114 N.E. 809, 811 (1916).

<sup>239</sup> See SIEGEL § 451, at 598 (case-by-case determination of the applicability of collateral estoppel to a defaulting patient's medical malpractice claim may be the only practical way to introduce some flexibility into New York's present approach).

<sup>240</sup> Although, presently, all counterclaims are permissive in New York, see SIEGEL § 224, at 270, a compulsory claim modeled after the federal rule could be judicially or legislatively adopted. See RESTATEMENT OF JUDGMENTS § 58, Comment f (1942). Federal Rule of Civil Procedure 13, for instance, provides that a counterclaim must be raised "if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." FED. R. CIV. P. 13(a). Of course, the court in which the physician has brought his claim for payment for services may lack jurisdiction to award the amount of damages requested in the patient's malpractice counterclaim. In such situation, the patient may move to transfer the case to the proper court. See CPLR 325(b) (1972); SIEGEL § 25, at 24-25.