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TORTS

Ralph Michael Stein*

I. INTRODUCTION

While the last several years have witnessed significant change in the field of tort law, viewed as advancement by some and regression by others, 1985 was a relatively stable year, at least in the courtroom. With a sometimes real, sometimes imagined, crisis in the liability insurance field, the drive to change, reform, improve, and re-package the law of civil wrongs has been in full swing. A myriad of legislative proposals followed a continued public debate, fueled by high pressure advertising campaigns, about the societal cost of the common law tort system. Local governments threatened to close parks and police departments; doctors issued their perennial warnings about the looming shortage of practitioners, all of the good ones supposedly having flown away to low-litigation areas. The enactment of some measures, whether reform or not, will affect tort practice in this state during the coming *Survey* year. The changes wrought will be examined in next year's *Survey*.

II. MEDICAL MALPRACTICE

A. *Informed Consent*

Physicians sued for malpractice frequently attempt to offset a possible heavy jury award by seeking to establish the contributory negligence of the plaintiff. If successful, the defendant-physician may reduce significantly the amount of damages awarded under the New York comparative negligence statute.¹ The question whether New York's pure comparative negligence statute applies to causes of action based on lack of informed consent² was dis-

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1. See N.Y. CPLR 1411 (McKinney 1976)

2. N.Y. PUB. HEALTH LAW § 2805-d(1) (McKinney 1985) provides:

Lack of informed consent means the failure of the person providing professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical practi-

cussed in *Bellier v. Bazan*.³ In *Bellier*, the plaintiff had undergone a breast reduction procedure, essentially a cosmetic operation,⁴ from which resulted, so the plaintiff claimed, "severe and unnecessary scarring and discomfort."⁵ The plaintiff alleged both a failure to obtain informed consent and medical malpractice.⁶ The issue of the plaintiff's comparative negligence was put to the jury solely on the medical malpractice cause of action. The jury, however, responding on a verdict sheet, found the defendant to be liable on both causes of action, and also found the plaintiff to be contributorily negligent.⁷ The defendant's motion to set aside the medical malpractice verdict was granted.⁸

The plaintiff moved to set aside the jury's finding that, on the informed consent cause of action, she was responsible for fifteen percent of the \$356,000 of damages.⁹ She contended that "comparative fault cannot be used as a defense in an action sounding in lack of an informed consent,"¹⁰ and that, "even assuming that the doctrine can be applied, no evidence in the instant case supports it."¹¹

The trial court agreed that the defendant simply had failed to meet his burden of presenting evidence of the plaintiff's contributory negligence with reference to the lack of informed consent.¹² Of greater interest, however, is the court's succinct disposition of the plaintiff's claim that New York's comparative negligence concept is inapplicable to informed consent actions. Noting that the informed consent cause of action is "a form of medical malpractice,"¹³ the court found that "[t]he doctrine of mitigation of damages, available as a defense to other forms of medical malpractice, should, therefore, properly apply to a cause of action for lack of informed

tioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.

Id.

3. 124 Misc. 2d 1055, 478 N.Y.S.2d 562 (Sup. Ct., N.Y. Co. 1984).

4. *See id.* at 1056, 478 N.Y.S.2d at 563.

5. *See id.*

6. *See id.* at 1055-56, 478 N.Y.S.2d at 563.

7. *See id.*

8. *See id.* at 1056, 478 N.Y.S.2d at 563-64.

9. *See id.* at 1056, 478 N.Y.S.2d at 564.

10. *Id.*

11. *Id.*

12. *See id.* at 1058, 478 N.Y.S.2d at 564.

13. *Id.* at 1056, 478 N.Y.S.2d at 564.

consent."¹⁴

What the law calls contributory negligence, physicians usually call "patient noncompliance."¹⁵ While specific defenses are provided for by New York's informed consent statute, contributory negligence is not one of them.¹⁶ As the court noted in *Bellier*, however, proper analysis of New York law demonstrates that the doctrine is fully applicable.¹⁷ Factual analysis of lack of informed consent causes of action, especially when they are not accompanied by allegations of medical malpractice, may indicate the potential usefulness of contributory negligence to diminish a plaintiff's recovery.

The Appellate Division, First Department, decided a combined medical malpractice/failure to obtain informed consent case during the *Survey* year. In *Suria v. Shiffman*,¹⁸ the plaintiff, a transsexual, underwent a breast procedure which resulted in various unsightly and unpleasant after-effects. A surgical procedure was recommended to alleviate the iatrogenic complications of Suria's initial encounter with one of the defendants.¹⁹ More medical problems followed.²⁰ One of the defendants was found to have committed malpractice while another was found to have failed in his duty to obtain informed consent.²¹ It is unfortunate that the First Department did no more than mention that the latter defendant altered the informed consent form, after it had been executed, to reflect an acknowledgment by the patient that he was consenting to a more extensive and invasive procedure.²² One won-

14. *Id.* In all probability, a claim by a defendant of contributory negligence in a medical malpractice case will be most likely to succeed when the physician had provided enough information so as to permit some exercise of reasonable decision-making by the patient. The level at which a patient can fail to exercise due care for his/her own life in an informed consent situation may be at a point below that at which a physician will be found to have reasonably discharged the informed consent duty.

15. Patient non-compliance can include acts of both omission and commission. Each type of failure to follow reasonable instructions can, of course, lead to a substantial harm to the patient.

16. See N.Y. PUB. HEALTH LAW § 2805-d (McKinney 1985).

17. See *Bellier*, 124 Misc. 2d at 1058, 478 N.Y.S.2d at 564.

18. *Suria v. Shiffman*, 107 A.D.2d 309, 486 N.Y.S.2d 724 (1st Dep't 1985).

19. See *id.* at 310, 486 N.Y.S.2d at 725.

20. See *id.*

21. See *id.* at 311, 486 N.Y.S.2d at 726.

22. See *id.* at 311, 486 N.Y.S.2d at 725. The consent form stated that the plaintiff would only have a small scar on his chest. One of the defendants changed the form without notifying the plaintiff. See *id.*

ders if the patient, a transsexual, was treated with the professionalism and seriousness with which the defendants would have approached other patients. In any event, the appellate panel was clearly correct in reducing the plaintiff's award to \$800,000 from the \$2 million originally awarded.²³ Such verdicts only serve to continue to fan the "tort law reform" fires in this state.

B. Mental Distress

The nature of medical treatment, even the presence of non-patients in a medical facility, creates recurring fact patterns in which individuals who may not be patients themselves sustain emotional harm in the absence of any actual physical injury or aggravation of an existing condition. New York has recently begun to enlarge the concept of negligent infliction of mental distress and plaintiffs are seeking to bring actions within the sheltering scope of *Bovsun v. Sanperi*.²⁴ Two cases decided during the *Survey* year, each involving institutional or individual health-sector defendants, provide some insight into the direction of this developing area of tort law.²⁵

Of major importance is the Court of Appeals decision in *Johnson v. Jamaica Hospital*.²⁶ Mentioned in last year's *Survey* article,²⁷ *Johnson* involved a tragic situation. The plaintiffs' newborn infant was abducted from the defendant's hospital and was not found by the police for over four months.²⁸ The plaintiffs' brought an action for what they perceived as the defendant's negligent in-

23. See *id.* at 314-15, 478 N.Y.S.2d at 727-28. Multi-million dollar medical malpractice awards in cases where there is no death and no permanent vocation-disabling injuries are almost always predicated on a jury's sympathy for the plaintiff's pain and suffering. Such awards may also be, even if not so denominated, exemplary damage awards. Such awards, when sustained, often constitute the basis for the major part of a plaintiff counsel's remuneration. These awards are difficult to defend on any rational basis and a statutory ceiling on pain and suffering awards in *all* tort actions will alleviate some of the economic problems which seem to feed the current liability crisis nationwide.

24. 61 N.Y.2d 219, 461 N.E.2d 843, 473 N.Y.S.2d 357 (1984) (where defendant negligently creates an unreasonable risk of bodily harm, and such negligence is a substantial factor of resulting physical injuries, the immediate family of the injured person, if within the zone of danger, may recover damages under the theory of negligent infliction of emotional distress).

25. See *Johnson v. Jamaica Hospital*, 62 N.Y.2d 523, 467 N.E.2d 502, 478 N.Y.S.2d 838 (1984); *Tebbutt v. Virotek*, 102 A.D.2d 231, 477 N.Y.S.2d 776 (3d Dep't 1984).

26. 62 N.Y.2d 523, 467 N.E.2d 502, 478 N.Y.S.2d 838 (1984).

27. See Stein, *Torts, 1984 Survey of N.Y. Law*, 36 SYRACUSE L. REV. 595, 620 (1985).

28. See *Johnson*, 62 N.Y.2d at 525, 467 N.E.2d at 502, 478 N.Y.S.2d at 838.

fiction of mental distress.²⁹ A motion to dismiss the complaint by the defendant hospital was denied by the trial court.³⁰ A divided Second Department panel affirmed Special Term and the case was certified to the Court of Appeals.³¹ For reasons which I find highly unpersuasive,³² the State's highest court reversed, dismissing the complaint.³³

In an opinion authored by Judge Kaye, the Court noted that the plaintiffs do not come under the recently announced *Bovsun* rule³⁴ because the parents of the abducted girl "have not alleged that they were within the zone of danger and that their injuries resulted from contemporaneous observation of serious physical injury or death caused by defendant's negligence."³⁵

Citing the always-available prime duty case, *Palsgraf v. Long Island Railroad*,³⁶ the Court of Appeals noted that if any duty was breached, it was to the abducted infant and not to the parents.³⁷ The Court's reasoning relied heavily on *Kalina v. General Hospital*.³⁸ It is unfortunate that the analytical underpinning for the majority's analysis of duty is based on a case concerning a botched circumcision,³⁹ hardly a parallel in kind or degree with kidnapping, a crime that arouses universal revulsion and involves unquestioned psychic trauma for parents.

The Court of Appeals also rejected predicated liability on ei-

29. See *id.*

30. See *id.*

31. See *id.*

32. See *infra* notes 35-46 and accompanying text.

33. See *Johnson*, 62 N.Y.2d at 537-38, 467 N.E.2d at 510, 478 N.Y.S.2d at 846.

34. See *supra* note 24.

35. *Johnson*, 62 N.Y.2d at 526, 467 N.E.2d at 503, 478 N.Y.S.2d at 839. Judge Kaye continued:

Plaintiffs contend . . . that their complaint states a cause of action because the defendant hospital owed a duty directly to them, as parents, to care properly for their child, and that it was or should have been foreseeable to defendant that any injury to Kawana, such as abduction, would cause them mental distress. There is no basis for establishing such a direct duty. This court has refused to recognize such a duty on the part of a hospital to the parents of hospitalized children . . . and there is no reason to depart from that rule here.

Id. at 526-27, 467 N.E.2d at 503, 478 N.Y.S.2d at 839 (citing *Kaling v. General Hospital*, 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 399 (1963)).

36. 248 N.Y.2d 339, 162 N.E.2d 99 (1928).

37. See *Johnson*, 62 N.Y.2d at 527, 467 N.E.2d at 503, 478 N.Y.S.2d at 839.

38. 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963).

39. See *id.*

ther *in loco parentis*⁴⁰ or contractual grounds.⁴¹ The Court's analysis of the *in loco parentis* argument is technically correct, but is essentially tangential to the real issue: the predication of liability based on a straight common law negligence, duty analysis.

Towards the end of the majority's opinion, an old rationale for denying the existence of a cause of action slips past in a short but familiar sentence: "In considering a new duty, the court's concern for its ramifying consequences should hardly be disparaged."⁴² There it is, gentle reader, the judicial specter of a horde of suitors rushing to claim their compensation for their abducted children with the resultant clogging of the courts.

In his cogent dissent, Judge Meyer tackled the just-referred-to shibboleth head-on. "I had thought that the fear of 'open-ended liability for indirect emotional injury' . . . had long ago been laid to rest."⁴³ Apparently not. Judge Meyer correctly noted that *Bovsun* did not prevent recognizing the cause of action raised by the plaintiffs in *Johnson*:

In my view the parental weight to custody is sufficiently distinct from physical injury to or death of a child, the class of persons permitted to recover sufficiently limited, and the psychological trauma to the parents resulting from infringement of their custodial rights is direct rather than consequential and sufficiently probable in human experience that they should be permitted to recover upon proof of a serious and verifiable emotional disturbance.⁴⁴

With reference to the duty issue, Judge Meyer noted that, "[t]he policy determination to be made may be stated as whether the interests of plaintiffs and defendant and the relationship between them are such that defendant rather than plaintiffs should be required to bear the burden of plaintiffs' psychic injury."⁴⁵ Judge Meyer examined the record and found that no undue burden would be placed on the defendant hospital if this cause of action was allowed because the exercise of reasonable care towards

40. The literal interpretation of *in loco parentis* is "in place of the parent."

41. See *Johnson*, 62 N.Y.2d at 528, 467 N.E.2d at 504, 478 N.Y.S.2d at 840-41.

42. *Id.* at 531, 467 N.E.2d at 506, 478 N.Y.S.2d at 842.

43. *Id.* (Meyer, J., dissenting) (citing *Battala v. New York*, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961)).

44. *Id.* at 533, 467 N.E.2d at 507, 478 N.Y.S.2d at 843 (Meyer, J., dissenting).

45. *Id.* at 533, 467 N.E.2d at 507, 478 N.Y.S.2d at 844 (Meyer, J., dissenting).

the infant would also be the basis for finding a breach of the claimed duty asserted by the parents.⁴⁶

Although I find Judge Meyer's approach to the duty issue to be analytically stronger than the majority's treatment of this pivotal concept, it is interesting that neither majority nor dissent *raised*, let alone *discussed*, key public policy concerns. Any jurist in this country today may, without criticism, take judicial notice of the fact that the American public is somewhat preoccupied with the real or imagined epidemic of missing children, a large number of whom have been abducted criminally. The faces of missing children are found in public utility bills, on milk containers and posters that seem to be everywhere. That dealing with the phenomenon of missing children is a national priority is beyond dispute. Part of the national awareness campaign concerning missing children has been the highlighting of the intense anguish of parents. The social reality of the missing children issue is a model for advancing common law duty concepts to better deal with a newly recognized issue. Tort law has a prophylactic function in helping to establish standards of reasonable behavior so as to prevent future and additional harms. Imposing a duty upon a hospital to safeguard helpless babies from abductors with the duty running to the parents who suffer, in some instances, such as *Johnson*, the only measurable harm, will demonstrate the continued rational vitality and relevance of the common law, while affording some measure of compensation for great emotional distress.

In *Tebbutt v. Virostek*,⁴⁷ the Third Department affirmed a summary judgment dismissing a complaint predicated on emotional stress to a woman caused by the stillbirth of her fetus. The

46. See *id.* at 534, 467 N.E.2d at 508, 478 N.Y.S.2d at 844. Apparently the Johnson baby, recovered by the police, was unharmed physically and had not been mistreated emotionally. A cause of action on behalf of the infant for actual physical or emotional injuries, had they occurred, is well-grounded in New York law. If such an action was brought against the hospital, it would be difficult for the hospital to seriously claim that they owed the baby no duty to safeguard her from being feloniously spirited from the premises. The breach of that duty, to be proven by the plaintiff, is exactly the same breach of care claimed by the baby's parents in the instant case. Recognizing the plaintiffs' negligent infliction of mental distress cause of action in this case would not have resulted in the imposition of a new and socially unacceptable burden upon this or any other health facility. Even if one accepts the prevailing majority concern of the Court of Appeals that causes of action for negligent infliction of mental distress must be accepted slowly if at all, the Johnson scenario is itself a readily "controlled" or encapsulated problem opening no new doors to future litigants.

47. 102 A.D.2d 231, 477 N.Y.S.2d 776 (3rd Dep't 1984).

stillbirth was alleged to be a result of the negligence of the defendant doctor.⁴⁸ The patient based her cause of action on *Bovsun v. Sanpieri*.⁴⁹ As Justice Main noted, *Tebbutt* lacked the *Bovsun* requirements of either observation of harm inflicted, or a contemporaneous awareness of the situation.⁵⁰

The court also noted that predicating liability upon the theory of an injury done to the fetus was untenable under current New York law.⁵¹ New York law holds that "a child *en ventre sa mere* is not considered a person unless it sees the light of day."⁵² The appellate court concluded that "it is conceptually difficult to say that plaintiff's emotional distress is incidental to the physical injury of a third person, the unborn child who never saw the light of day."⁵³ Given the amount of litigation involving injury or death to fetuses, it is likely that the issues raised in this case will be before the Court of Appeals within the next few terms of court.

Several other cases decided during the *Survey* year concerning medical malpractice are worth brief mention. *Needham v. County of Nassau*⁵⁴ concerned the appealability of an order denying a motion to vacate the findings of a medical malpractice panel.⁵⁵ The Second Department, relying on legislative intent, found that there is no appeal as of right in such circumstances.⁵⁶

Two cases demonstrated the difficulty juries have in grappling with the complex factual testimony in medical malpractice cases. In *Tiernan v. Heinzen*,⁵⁷ the Second Department affirmed a verdict for the plaintiff in a breast cancer malpractice case, but re-

48. *See id.*

49. *See id.* at 231, 477 N.Y.S.2d at 777.

50. *See id.* at 232, 477 N.Y.S.2d at 777.

51. *See id.*

52. *See id.* at 232, 477 N.Y.S.2d at 777-78. Justice Maim opined:

In this case, plaintiff did not become aware of any problem with the fetus for several weeks after the alleged negligence of defendant. Thus, there was no contemporaneous observation or instantaneous awareness of injury or death and, even if the other elements of the *Bovsun* rule were satisfied, the failure on this aspect prevents plaintiff from recovery thereunder. A more expansive interpretation of "contemporaneous observation" should come not from us, but from the Court of Appeals.

Id.

53. *Id.* at 233, 477 N.Y.S.2d at 778.

54. 109 A.D.2d 783, 486 N.Y.S.2d 91 (2d Dep't 1985).

55. For more information, see N.Y. JUD. LAW § 148(a) (McKinney 1983).

56. *See id.*

57. 104 A.D.2d 645, 480 N.Y.S.2d 24 (2d Dep't 1984).

duced as extremely excessive a jury verdict of \$1.5 million.⁵⁸ Of interest is Justice Titone's dissent in which he pointed out that the jury's verdict as to the several defendants was inconsistent and unsupported by the record.⁵⁹

What must have been an even more difficult case for the trial court was *Mertsaris v. 73rd Corp.*⁶⁰ The Second Department, affirming in part and reversing in part, ordered a new trial in a medical malpractice setting where the plaintiffs had alleged that sequential acts of professional negligence resulted in the birth of a baby with permanent, disabling athetoid cerebral palsy.⁶¹ The court provided clear guidelines for the new trial to prevent the problems encountered on appeal.⁶² Considering, however, that a \$7 million verdict was reached at the first trial, it is doubtful if the defendants will actually accept a second trial.⁶³ Justice O'Connor's opinion, well-written and convincing, is an excellent depiction of the evidentiary quagmire of a major medical malpractice action.

III. NEGLIGENCE

A. General

The line between a cause of action properly denominated as negligent supervision of a child, and negligence as to the child, is the subject of many motions each year. New York law rejects the former concept while recognizing the latter as actionable.⁶⁴ In *Malin v. Malin*,⁶⁵ Justice Fudeman denied the defendant's motion for summary judgment. The infant plaintiff was injured by an unattended family car.⁶⁶ The defendant mother tried to invoke *Holodook v. Spencer*,⁶⁷ which prohibits actions based on alleged

58. *See id.* at 648, 480 N.Y.S.2d at 26.

59. *See id.* at 648, 480 N.Y.S.2d at 27 (Titone, J., dissenting).

60. 105 A.D.2d 67, 482 N.Y.S.2d 792 (2d Dep't 1984).

61. *See id.* at 69-73, 482 N.Y.S.2d at 794-96.

62. *See id.* at 88, 482 N.Y.S.2d at 806.

63. *See id.* at 69, 482 N.Y.S.2d at 794.

64. *See Holodook v. Spencer*, 36 N.Y.2d 35, 50, 324 N.E.2d 338, 346, 364 N.Y.S.2d 859, 871 (1974).

65. 124 Misc. 2d 1078, 478 N.Y.S.2d 1011 (Sup. Ct., Erie Co. 1984).

66. *See id.*

67. 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974). In *Holodook*, a four-year-old jumped out between two parked cars and was struck by the defendant's vehicle. The infant, by his father, sued the defendant for personal injuries. The defendant then brought a third-party action against the infant's mother for negligently failing to perform her paren-

breaches of a standard of conduct peculiarly associated with child-rearing.⁶⁸ The Erie County juries found that "[t]he duty of the defendant to park carefully was owed to the world at large; and derived from the parties' relation as driver and pedestrian. The fact that the parties were mother and son was irrelevant to both the duty and a determination of its breach."⁶⁹ New York law has consistently refused to find a cause of action based on what would be, in essence, negligent parenting.⁷⁰ While the doctrine of intrafamilial immunity, with regard to actions brought against parents by minors has been modified, it has not been abolished.⁷¹

Although the existence and nature of physical harm is generally a question of fact for the jury, an issue of law may arise when a plaintiff seeks damages outside the scope of New York's so-called No-Fault Law.⁷² In *Bader v. Santana*,⁷³ the Fourth Department reversed a \$60,000 award for the plaintiff finding, as a matter of law, that he had not sustained a serious injury (as statutorily required) to permit recovery in a tort action.⁷⁴ Although plaintiff Bader undoubtedly, in the view of the court, sustained a painful injury, it was not a serious injury entitling the plaintiff to a jury determination.⁷⁵

While the trend in the law of damages in New York has recently seen many appellate remittiturs, a case decided by the Fourth Department reflects judicial wisdom and compassion in restoring a jury verdict of \$500,000 after the trial court ordered a new trial unless the plaintiff accepted \$30,000.⁷⁶ In *Bartolone v. Jeckovich*,⁷⁷ the plaintiff, a middle-aged carpenter and physical fit-

tal duty to provide for the proper care, maintenance and supervision of the child. The Court dismissed the claim, finding that New York would not recognize a third-party action based on negligent parental supervision.

68. See *Malin*, 124 Misc. 2d at 1079, 478 N.Y.S.2d at 1012.

69. *Id.*

70. See *Holodook*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859. Although the *Holodook* Court held that actions based upon negligent parental supervision are not maintainable, the Court did note that actions maintainable apart from the family relation would not be withheld because the parties were parent and child. See *id.* at 50, 324 N.E.2d at 346, 364 N.Y.S.2d at 871.

71. See *id.*

72. N.Y. INS. LAW § 5221 (McKinney 1985).

73. 106 A.D.2d 858, 483 N.Y.S.2d 143 (4th Dep't 1984).

74. See N.Y. INS. LAW § 5221 (McKinney 1985).

75. See *Bader*, 106 A.D.2d at 859, 483 N.Y.S.2d at 144.

76. See *Bartolone v. Jeckovich*, 103 A.D.2d 632, 481 N.Y.S.2d 545 (4th Dep't 1984).

77. 103 A.D.2d 632, 481 N.Y.S.2d 545 (4th Dep't 1984).

ness enthusiast, sustained minor injuries in a car collision caused by the defendants' negligence.⁷⁸ Following the accident, the plaintiff became psychotic and dysfunctional, a condition described by his expert witness as irreversible.⁷⁹ The trial court ordered a new trial unless the plaintiff accepted \$30,000, based on its determination "that there was no basis on which the jury could conclude that plaintiff's total mental breakdown could be attributed to a minor accident."⁸⁰ Such an order was illogical for, if the trial court so believed, it was obligated to enter judgment notwithstanding the verdict, not to offer a compromise.

The appellate court found ample proof in the record to support the jury's verdict.⁸¹ Although the plaintiff, not surprisingly, had a past history of mental problems, "[t]he circumstances of [the] case before us illustrate[s] the truth of the old axiom that a defendant must take a plaintiff as he finds him and hence may be held liable in damages for aggravation of a pre-existing illness."⁸²

Although the appellate court restated a long-accepted principle, the generally greater acceptance of psychiatry and the increased availability of therapy indicate that defenses based on the existence of a previously diagnosed mental condition will be more common. Plaintiffs' counsel and judges share a responsibility to insure that a prior history of mental disease does not serve to wipe out claims for aggravated harm initiated by a negligent defendant's actions.

Proximate cause remains a difficult concept for definition and application. In a negligence case based on an alleged violation of a statute, *Dowling v. Consolidated Carriers Corp.*,⁸³ the First Department explored the proximate cause problem. In reversing the dismissal of an injured truck passenger's complaint, the appellate court noted that the trial court had misrelied on an inapposite case.⁸⁴ Citing the opinion of Mr. Justice Hopkins, one of the greatest jurists in recent New York history, the appellate panel in *Dowling* found a close relationship between the defendant's violation of

78. See *id.* at 632, 481 N.Y.S.2d at 546.

79. See *id.* at 633, 481 N.Y.S.2d at 546.

80. *Id.* at 634, 481 N.Y.S.2d at 546.

81. See *id.* at 635, 481 N.Y.S.2d at 547.

82. *Id.* (citing *Malahill v. New York Transp. Co.*, 201 N.Y. 221, 223-24 (1911)).

83. 103 A.D.2d 675, 478 N.Y.S.2d 883 (1st Dep't 1984), *aff'd*, 65 N.Y.2d 799, 482 N.E.2d 912, 493 N.Y.S.2d 116 (1985).

84. See *id.* at 677, 478 N.Y.S.2d at 885.

a statute and the subsequent incident which resulted in harm to the plaintiff.⁸⁵ The discussion of foreseeability in *Dowling* is excellent.

New York courts have resisted attempts to weaken Worker's Compensation as the main, and generally exclusive, remedy⁸⁶ of the injured employees. Each year attempts are made to breach the barrier of the exclusive remedy. In *Bardere v. Zafir*,⁸⁷ the First Department affirmed the dismissal of an injured employee's claim in tort against his employer. The plaintiff tried to bring his cause of action within the scope of intentional torts, an area outside the purview of Worker's Compensation, by showing that the employer had modified a machine, knowing that it would be hazardous to employees.⁸⁸ Justice Fein analyzed the plaintiff's claim and found that he was essentially pleading gross negligence rather than intentional tort.⁸⁹ The remedy for gross negligence is Worker's Compensation.

Tort litigation against landlords is increasingly common, with new theories of duty being propounded each year. One such theory was rejected by Justice Tenney in Onondaga County in *Georgianna v. Gizzy*.⁹⁰ In *Georgianna*, the plaintiff's infant son was bitten by a dog which had previously bitten another person.⁹¹ The special twist to this case was the plaintiff's contention that in the absence of actual knowledge of the dog's vicious propensities, which the defendant admittedly lacked, constructive knowledge was sufficient to find liability.⁹² Constructive knowledge in this instance, according to the plaintiff, was a report filed with the local

85. See *id.* Justice Hopkins, sitting on the Second Department bench, commented that, "the definition of proximate cause has been elusive, probably because the public policy underlying the concept cannot be described other than in general terms." *Pagan v. Goldberger*, 51 A.D.2d 508, 509, 382 N.Y.S.2d 549, 551 (1976). Most law students would agree with Justice Hopkins.

86. See N.Y. WORK. COMP. LAW § 11 (McKinney 1985).

87. 102 A.D.2d 422, 477 N.Y.S.2d 131 (1st Dep't), *aff'd*, 63 N.Y.2d 850, 472 N.E.2d 37, 482 N.Y.S.2d 261 (1984).

88. See *id.* at 423, 477 N.Y.S.2d at 133.

89. See *id.* at 424, 477 N.Y.S.2d at 134.

90. 126 Misc. 2d 766, 483 N.Y.S.2d 892 (Sup. Ct., Onondaga Co. 1984).

91. See *id.* at 766, 483 N.Y.S.2d at 893. One reason why many landlords do not want their tenants to harbor dogs is that the landlords may be liable if a dog known to them to be vicious bites someone. See *id.* (citing *Zwinge v. Love*, 37 A.D.2d 874, 325 N.Y.S.2d 107 (3d Dep't 1971)).

92. See *id.*

town and county of the previous biting incident.⁹³ The court rejected this theory finding that the defendant landlord had no duty to search for governmental reports and documents, noting that "[s]uch a burden would be oppressive and unreasonable."⁹⁴

A Second Department case featured a strong "pro-dog" dissenting opinion by Justice Mangano.⁹⁵ The alleged culprit in this rear-end auto collision was the defendant's nine-year old, twenty-five pound Scotch terrier. A jury verdict in favor of the defendant was reversed by the appellate majority.⁹⁶ The jury had accepted the defendant's evidence that the dog, who had "never budged" in the past, jumped off the seat and onto the gas pedal, thus dislodging the defendant's foot from the brake.⁹⁷ As the dissent noted, the majority found that, as a matter of law, the defendant was negligent.⁹⁸ Justice Mangano found that the cases relied on by the majority for finding a matter-of-law liability were inapposite to the unique facts in *Conyer v. Vinti*.⁹⁹ Justice Mangano viewed the reversal of the jury's verdict as "an affront to that particular species of the animal kingdom, i.e., the tame dog 'which the law, guided by experience, has always regarded as the friend and companion of man.'"¹⁰⁰

B. State and Municipal Entities

An area of concern for law enforcement officers nationwide are lawsuits based on injuries sustained during the "hot pursuit" of actual or suspected offenders. Two such cases were before the Third Department during the *Survey* year.¹⁰¹ In *Rightmeyer v. State*,¹⁰² the plaintiff was fleeing a state trooper who sought to

93. *See id.*

94. *Id.* at 767, 483 N.Y.S.2d at 894.

95. *See Conyers v. Vinti*, 107 A.D.2d 787, 484 N.Y.S.2d 620 (2d Dep't 1985) (Mangano, J., dissenting).

96. *See id.* at 789, 484 N.Y.S.2d at 622.

97. *See id.* at 788, 484 N.Y.S.2d at 621.

98. *See id.* at 790, 484 N.Y.S.2d at 623.

99. *See id.* The majority relied on cases in which the defendant had acted affirmatively with the collision occurring subsequently. *See, e.g., Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974). In *Conyers* the defendant was acted upon by her dog.

100. *Conyers*, 107 A.D.2d at 790, 484 N.Y.S.2d at 623 (citing *Kennett v. Sossnitz*, 260 A.D.2d 759, 761, 23 N.Y.S.2d 961, 962 (1940), *aff'd*, 286 N.Y. 623, 36 N.E.2d 459 (1941)).

101. *See Rightmeyer v. State*, 108 A.D.2d 1047, 486 N.Y.S.2d 99 (3d Dep't 1985); *Mitchell v. State*, 108 A.D.2d 1033, 486 N.Y.S.2d 97 (3d Dep't 1985).

102. 108 A.D.2d 1047, 486 N.Y.S.2d 99 (3d Dep't 1985).

question him after observing that the plaintiff's vehicle inspection sticker had expired.¹⁰³ The trooper was using his siren and emergency lights. The plaintiff's car collided with a tree as he tried to evade the trooper and the plaintiff incurred severe injuries.¹⁰⁴ The Third Department affirmed the Court of Claims' summary judgment in favor of the State.¹⁰⁵

In *Mitchell v. State*,¹⁰⁶ the plaintiff collided with a reckless driver who was being pursued by a state trooper.¹⁰⁷ Unlike the facts in *Rightmyer*, the trooper in *Mitchell* was in violation of departmental regulations as he was *not* using his siren and emergency lights during the pursuit.¹⁰⁸ The Court of Claims, however, found that the failure of the trooper to follow proper procedures was not a proximate cause of the plaintiff's injuries.¹⁰⁹ The Third Department affirmed the Court of Claims' dismissal of the claim.¹¹⁰

Tort actions sounding in assault and battery against police officers, and their respective governments, by persons arrested for crimes are increasingly common. *Arnold v. State*¹¹¹ involved injuries largely caused by a pre-existing, but not obvious, physical condition when the plaintiff was wrestled to the ground by state troopers.¹¹² The troopers had a warrant for the subject's arrest, and according to the troopers, he refused to go with them.¹¹³ The troopers had also received reports that Arnold had weapons on or near him.¹¹⁴ The Court of Claims dismissed the plaintiff's claim and the Third Department affirmed.¹¹⁵

Presiding Justice Mahoney's dissent is disturbing because he, in effect, attempted to second guess the officers' decision to use force without bringing to light any relevant facts not considered by

103. See *id.* at 1047, 486 N.Y.S.2d at 100.

104. See *id.* at 1048, 486 N.Y.S.2d at 100.

105. See *id.* at 1047, 486 N.Y.S.2d at 100.

106. 108 A.D.2d 1033, 486 N.Y.S.2d 97 (3d Dep't 1985).

107. See *id.* at 1033, 486 N.Y.S.2d at 98.

108. See *id.* at 1034, 486 N.Y.S.2d at 99.

109. See *id.*

110. See *id.*

111. 108 A.D.2d 1021, 486 N.Y.S.2d 94 (3d Dep't), *appeal dismissed*, 65 N.Y.2d 722, 481 N.E.2d 569, 492 N.Y.S.2d 65 (1985).

112. See *id.*

113. See *id.* at 1022, 486 N.Y.S.2d at 95.

114. See *id.* at 1023, 486 N.Y.S.2d at 96.

115. See *id.*

the majority.¹¹⁶ That the plaintiff was being arrested for an offense that was "nonviolent and relatively minor"¹¹⁷ is only one factor which the arresting officers were confronted with at the scene.¹¹⁸ The dissent emphasizes the seriousness of the injury, produced because of a pre-existing condition, and ignores the effect of the report of firearms.¹¹⁹ Justice Mahoney would have the police engage in excessive and impracticable hair-splitting which might well increase the likelihood of serious violence at an arrest scene.¹²⁰

The Third Department also upheld a Court of Claims award of \$75,000 to a former prison inmate who suffered permanent injuries to his left arm when his arm became ensnared in a "bread proofing" machine.¹²¹ Based on the plaintiff's impaired earning ability, the appellate court found that the amount awarded was not excessive.¹²²

In an action against the State of New York under New York's strict liability labor statute concerning scaffolding,¹²³ the Second Department upheld an award of \$525,000 on behalf of the claim-

116. *See id.* (Mahoney, J., dissenting).

117. *See id.* at 1024, 486 N.Y.S.2d at 96.

118. *See id.* at 1025, 486 N.Y.S.2d at 97. Adjunct Professor of Criminal Justice, Donald Singer of Mercy College, was interviewed in connection with the analysis of this case. Singer, an attorney, is Chief of the Greenburgh (N.Y.) Police Department and he is a highly regarded authority on modern police practices. Singer stated:

The decision to physically restrain an uncooperative subject must be made with little time for reflection. Generally, restraint does not result in any real injury to anyone. While the knowledge that a subject is suspected of a violent or serious crime serves to put arresting officers on their guard, the fact that a warrant is being executed for a minor crime must not lull the officer into insecurity. Many officers have been hurt or even killed making arrests for "minor" offenses. The bottom line is that you never know for sure what the subject of the arrest is thinking. Sometimes people accused of relatively minor offenses, people who do not have criminal records, become berserk when faced with arrest. We see that all the time with driving while intoxicated arrests. Professional police officers have a legal and moral obligation not to use excessive force, but they also have the right to be as safe as a police officer making an arrest can be. And that requires making quick decisions.

Interview with Donald Singer, Chief of Police, Greenburgh, New York (Dec. 5, 1985) (notes on file with author).

119. *See Arnold*, 108 A.D.2d at 1024-25, 486 N.Y.S.2d at 96-97 (Mahoney, J., dissenting).

120. *See id.*

121. *See Georgiadis v. State*, 106 A.D.2d 706, 708, 483 N.Y.S.2d 753, 755 (4th Dep't 1984).

122. *See id.* at 709, 483 N.Y.S.2d at 756.

123. N.Y. LAB. LAW § 240 (McKinney 1965).

ant.¹²⁴ The court found that even though another statute required a safety rail only when the scaffolding was more than twenty feet high, a proper regard for safety could require a rail on lower scaffolding.¹²⁵ The plaintiff was working on a state-owned bridge at the time of injury.¹²⁶

IV. STRICT LIABILITY

A. *Products Liability*

No doctrinally significant products liability decisions were handed down during the *Survey* year. However, several cases are worthy of brief notice.

Perhaps the most interesting products liability case of the *Survey* year is *Cooley v. Carter-Wallace, Inc.*¹²⁷ Plaintiffs husband and wife brought this action after the husband was painfully and permanently injured by a depilatory cream applied to his genital area.¹²⁸ Cooley applied the cream on the recommendation of a physician prior to a vasectomy procedure.¹²⁹ The plaintiffs action alleged inadequacy of the product warning, not its absence. Justice Tenney, sitting in the Supreme Court, Onondaga County, granted summary judgment on the motion of the defendant manufacturer. Justice Tenney, in effect, found that the warning on the product, "Nair," was adequate as a matter of law.¹³⁰ Justice Tenney's judicial superiors at the Fourth Department disagreed and reversed.¹³¹

Inadequate warning actions are among the most difficult in the defective products cosmos. As the appellate court in *Cooley* noted, "[u]nlike the often highly technical design or manufacturing defect cases, warning cases usually center on a factual determination of whether an adequate warning was given."¹³² While it might seem from the foregoing words of the court that such cases are in fact

124. See *Kalofonos v. State*, 104 A.D.2d 75, 481 N.Y.S.2d 415 (2d Dep't 1984).

125. See *id.* at 80, 481 N.Y.S.2d at 419.

126. See *id.* at 76, 481 N.Y.S.2d at 416.

127. 102 A.D.2d 642, 478 N.Y.S.2d 375 (4th Dep't 1984).

128. See *id.* at 643, 478 N.Y.S.2d at 376.

129. See *id.*

130. See *id.* at 648, 478 N.Y.S.2d at 379.

131. See *id.* at 649, 478 N.Y.S.2d at 380.

132. *Id.* at 644, 478 N.Y.S.2d at 376. The *Cooley* court noted that there must first be a duty to warn, which is determined by balancing the seriousness of the potential harm to the consumer against the cost to the manufacturer. See *id.* Once a warning is given, the focus is on the adequacy of the warning. See *id.*

easier than their counterparts, the design and manufacture cases, this is not so. The import of words, their effect on the consumer, their susceptibility to misinterpretation, the balance of the duty to warn against the manufacturer's not unreasonable reluctance to alarm unduly—these and other factors must be carefully considered.

In *Cooley*, the warning on the product package specifically cautioned against applying the product to genital areas.¹³³ However, the appellate court noted that the warning, while directing that the product not be used in the genital area, did not indicate the seriousness of harm which such use could occasion.¹³⁴ Only irritation or allergic reaction were indicated, while plaintiff *Cooley* suffered massive harm.¹³⁵ In addition, the warning was located close to the directions on the package. Such location minimized, to a certain degree, the impact of the warning.¹³⁶ It is beyond the scope of this article to analyze whether the warning on the particular product was adequate. It is clear, however, that it cannot be viewed as adequate as a matter of law and that submission to a jury is the only proper route.¹³⁷

133. *See id.* at 643, 478 N.Y.S.2d at 376. The warning read as follows:

WARNING: IRRITATION OR ALLERGIC REACTION MAY OCCUR WITH SOME PEOPLE, EVEN AFTER PRIOR USE WITHOUT ADVERSE EFFECT. THEREFORE, TEST BEFORE EACH USE BY APPLYING NAIR ON A SMALL PART OF THE AREA WHERE HAIR IS TO BE REMOVED. FOLLOW DIRECTIONS AND WAIT 24 HOURS. IF SKIN APPEARS NORMAL, PROCEED. DO NOT USE ON IRRITATED, INFLAMED, OR BROKEN SKIN. KEEP AWAY FROM EYES. SHOULD NAIR TOUCH THE EYES, WASH THOROUGHLY WITH LUKEWARM WATER. RINSE WITH BORIC ACID SOLUTION AND IF IRRITATION OCCURS, CONSULT YOUR PHYSICIAN. KEEP OUT OF REACH OF CHILDREN. NAIR LOTION CAN BE USED ON LEGS, ARMS, FACE, ANYWHERE EXCEPT . . . EYES, NOSE, EARS OR ON BREAST NIPPLES, PERIANAL [sic] OR VAGINAL/GENITAL AREAS.

Id.

134. *See id.* at 648, 478 N.Y.S.2d at 379.

135. *See id.* at 643, 478 N.Y.S.2d at 376.

136. *See id.* at 649, 478 N.Y.S.2d at 379-80.

137. *See id.* at 648, 478 N.Y.S.2d at 379; *see also supra* note 133. The warning indicates a low threshold of potential harm to a limited number of users. The warning does, of course, specifically deny that the product is suitable for, or should be used in the genital region. The plaintiff victim relied on the recommendation of his physician and the physician may or may not have been acting reasonably in making the recommendation. While physicians often recommend products for uses different than those for which they are advertised, the clear language on the Nair package suggests that the physician may have been negligent. A finder of fact may well find that the warning on the Nair package was adequate and that the defendant manufacturer should not be strictly liable in tort because a physician gave a pa-

A second warning case, in this instance a diversity action, was *Berg v. Underwood's Hair Adaption Process, Inc.*¹³⁸ The plaintiffs, who sustained harm when a medical doctor implanted synthetic fibers into their scalps as part of a baldness treatment, sought to recover from the manufacturers of the fibers.¹³⁹ The fibers were manufactured for non-medical purposes and were distributed as such. The plaintiffs claimed, however, that the fiber manufacturer knew of the medical application of their product and failed to warn potential victims of possible side effects. The United States Court of Appeals for the Second Circuit affirmed the district court's grant of summary judgment in favor of the fiber manufacturer.¹⁴⁰ Correctly interpreting New York law, the federal bench declined to find any duty to warn under these circumstances. The court opined:

Plaintiffs were injured by a bizarre and deliberate abuse by a licensed medical practitioner of a non-medical commercial product. In light of the wide availability of the fibers . . . we do not believe a New York court would impose liability on these appellees. The duty to guard against a potential misuse of a product does not extend this far.¹⁴¹

It is important to note that the manufacturer did not promote

tient overriding advice. To hold a warning to be adequate as a matter of law will deny an injured plaintiff the right to have a jury examine the impact of the warning from the consumers' viewpoint. Judges are often less able to assess the product which is the subject of litigation in its "real world" environment than a jury.

Justice Moule expressed concern that the plaintiff read the warning and became concerned. He also noted that to require a manufacturer to cite every possible harm "would pose an unreasonable burden on manufacturers." 102 A.D.2d at 650, 478 N.Y.S.2d at 380 (Moule, J., dissenting). Not discussed, but a major argument, for allowing the case to proceed before a jury is the question of whether the defendant was aware that its product was being recommended by physicians for pre-operative hair removal. Such knowledge might well be seen by the jury as leading to a requirement for a stronger or more directed warning. The cost of such a warning, as balanced against the harm sought to be prevented, is minimal.

138. 751 F.2d 136 (2d Cir. 1984).

139. *See id.*

140. *See id.* at 137.

141. *Id.* *Berg* may be usefully contrasted with *Cooley*. *See supra* notes 127-37 and accompanying text. The product in *Cooley*, Nair, was manufactured for direct application to the body, and with the defendant-manufacturer's full knowledge that some people experienced side effects with its use. The defendant manufacturer in *Berg* supplied its product for use in hairpieces and wigs. To hold the defendant liable because a doctor decided to adapt its product is clearly unreasonable.

its product for medical use.¹⁴² Where a manufacturer does so promote a product, the duty to warn may well be found to exist even where the application is a striking, even bizarre, departure from accepted medical procedure.

While the majority of product liability scenarios do not disclose moral, as opposed to legal, culpability on the part of the defendant, *Young v. Robertshaw Controls Co.*,¹⁴³ decided by the Third Department, does. The majority permitted the maintenance of a common law fraud cause of action where the plaintiff alleged that the defendant not only manufactured a defective and dangerous product, but willfully withheld material facts from consumers while lying to the Consumer Product Safety Commission.¹⁴⁴ Plaintiff's husband was killed in an explosion caused by an allegedly defective propane gas water heater control valve.¹⁴⁵

Although punitive damages could not be recovered in *Young*,¹⁴⁶ the availability of a fraud cause of action increases the likelihood that punitive damages will be awarded in certain products liability actions. A finding of fraud also has potentially serious ramifications for a defendant, and thus it is a cause of action that, in limited and appropriate circumstances, may advance the policy objectives of products liability law.

B. Dram Shop

With the campaign against drunken driving intensifying, the application of the Dram Shop Act¹⁴⁷ becomes an even more useful tool than it has been in the past. Vendors of intoxicating spirits continually seek to limit their liability under the Act.

In *Smith v. Guli*,¹⁴⁸ the Fourth Department applied the existing principle that Dram Shop Act liability for compensatory damages can be spread among multiple tortfeasors through contri-

142. See *supra* notes 138-41 and accompanying text.

143. 104 A.D.2d 84, 481 N.Y.S.2d 891 (3d Dep't 1984).

144. See *id.* at 85, 481 N.Y.S.2d at 893.

145. See *id.*

146. See *id.* at 88, 481 N.Y.S.2d at 895. "Because at the time of decedent's death herein punitive damages were unavailable in a wrongful death action, it necessarily follows that such damages are inaccessible to the widow." *Id.* Punitive damages are now recoverable in New York wrongful death actions.

147. N.Y. GEN. OBLIG. LAW §§ 11-100, 11-101 (McKinney 1983 & Supp. 1986).

148. 106 A.D.2d 120, 484 N.Y.S.2d 740 (4th Dep't 1985).

bution.¹⁴⁹ While the Fourth Department's analysis is dictated by statute and precedent,¹⁵⁰ I wonder if the goals of the Dram Shop Act might not be met more effectively if contribution was denied. In all likelihood, this would require an amendment of the statute.

In another opinion from the Fourth Department, *Bartlelett v. Grande*,¹⁵¹ the court rejected a vendor's attempt to secure contribution from a deceased vendee's estate.¹⁵² "To permit the vendors to seek contribution from the estate of the vendee when it is the vendee's dependents who are seeking recovery, would diminish the plaintiffs' potential recovery and allow the vendor to reduce liability substantially."¹⁵³ The Fourth Department recognized that such a step would frustrate an important public policy.¹⁵⁴

V. INTENTIONAL TORTS

A. *Privacy and Publicity*

In the absence of a common law right of privacy, most litigation in New York State alleging what amounts to tortious invasion of privacy is brought under section 51 of the Civil Rights Law,¹⁵⁵ around which a considerable body of case law has developed. The most significant section 51 case of the *Survey* year is *Stephano v. News Group Publications, Inc.*,¹⁵⁶ unanimously decided by the Court of Appeals. The plaintiff, working as a professional model, posed for several photographs in which he modeled a new jacket for men. He alleged that he agreed to commercial use of the photograph for one advertisement only.¹⁵⁷ The photographs were subse-

149. See *id.* at 122, 484 N.Y.S.2d at 742 (citing N.Y. CPLR 1401; *Wood v. City of New York*, 39 A.D.2d 534, 330 N.Y.S.2d 923 (1st Dep't 1972); *Anderson v. Comardo*, 107 Misc. 2d 821, 436 N.Y.S.2d 669 (Sup. Ct., Livingston Co. 1981)). Exemplary damages awarded pursuant to the Dram Shop Act are not, however, subject to contribution. See *Smith*, 106 A.D.2d at 122, 484 N.Y.S.2d at 742 (citing *Mitchell v. The Shoals, Inc.*, 48 Misc. 2d 381, 264 N.Y.S.2d 865 (Sup. Ct., N.Y. Co. 1965), *aff'd*, 19 N.Y.2d 338, 227 N.E.2d 21, 280 N.Y.S.2d 113 (1967)).

150. See N.Y. CPLR 1401 (McKinney 1976); *Wood v. City of New York*, 39 A.D.2d 534, 330 N.Y.S.2d 923 (1972); *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 383 (1972).

151. 103 A.D.2d 671, 481 N.Y.S.2d 566 (4th Dep't 1984).

152. See *id.* at 672, 481 N.Y.S.2d at 566.

153. See *id.* at 672, 481 N.Y.S.2d at 567.

154. See *id.* at 673, 481 N.Y.S.2d at 567.

155. N.Y. CIV. RIGHTS LAW § 51 (McKinney 1976 & Supp. 1986).

156. 64 N.Y.2d 174, 474 N.E.2d 580, 485 N.Y.S.2d 220 (1984).

157. See *id.* at 180, 474 N.E.2d at 580, 485 N.Y.S.2d at 221.

quently published in several issues of *New York* magazine in what can be described as consumer news columns. Price and availability of the modeled jacket were given, but no advertiser paid for the feature.¹⁵⁸

The plaintiff brought a section 51 claim. The trial court granted the defendant's motion for summary judgment while the appellate division reversed.¹⁵⁹ The state's highest court reversed the appellate division.¹⁶⁰ Part of the plaintiff's claim hinged upon his contention that the defendant sought additional or new advertising revenue through use of the column which featured photos of him.¹⁶¹ The Court of Appeals rejected this theory. The Court noted:

The newsworthiness exception [to section 51] applies not only to reports of political happenings and social trends . . . but also to news stories and articles of consumer interest including developments in the fashion world . . . [T]he event or matter of public interest which the defendant seeks to convey is not the model's performance, but the availability of the clothing items displayed.¹⁶²

The Court of Appeals provides a good discussion of the contemporary policy purposes of section 51 in *Stephano*. Perhaps because of the absence of a common law remedy for invasion of privacy, section 51 has acquired a degree of creative interest it would otherwise lack. The Court of Appeals has been sensitive to preventing inroads which, by classifying activity as commercial and for purposes of trade and advertising, would threaten first amendment rights and propel section 51 litigation into the Supreme Court.

158. See *id.* at 179, 474 N.E.2d at 582, 485 N.Y.S.2d at 220-21.

159. See *id.* at 187, 474 N.E.2d at 586, 485 N.Y.S.2d at 227.

160. See *id.* at 185, 474 N.E.2d at 583, 485 N.Y.S.2d at 225.

161. See *id.*

162. *Id.* at 184, 474 N.E.2d at 582-83, 485 N.Y.S.2d at 225. The Court also noted: The fact that the defendant may have included this item in its columns solely or primarily to increase the circulation of its magazine and therefore its profits . . . does not mean that the defendant has used the plaintiff's picture for trade purposes within the meaning of the statute. Indeed, most publications seek to increase their circulation and also their profits. It is the content of the article and not the defendant's motive or primary motive to increase circulation which determines whether it is a newsworthy item, as opposed to a trade usage, under the Civil Rights Law.

Id. at 184-85, 474 N.E.2d at 585, 485 N.Y.S.2d at 225.

The First Department, in *Caesar v. Chemical Bank*,¹⁶³ affirmed the trial court determination which certified as a class bank employees who alleged commercial unauthorized use of their photographs by the defendant bank.¹⁶⁴ The court also affirmed, somewhat reluctantly, the longstanding mandate of section 51 that consent must be in writing and that oral consent goes only to the matter of damages but not to liability.¹⁶⁵ The majority invited legislative intervention to permit oral consent,¹⁶⁶ while the dissenting justices found the requirement for a written consent to be a bolster for a "technically meaningless claim."¹⁶⁷ The dissent argued that the fact that the pictures were posed indicates consent.¹⁶⁸ This makes no sense since the stated reason for photographing employees may have nothing to do with the eventual use to which the photos are put.

The interrelationship of the federal Constitution and section 51 is well illustrated in *Lerman v. Flynt Distributing Co.*¹⁶⁹ The plaintiff in *Lerman* brought her action in the United States District Court for the Southern District of New York after learning that she had been incorrectly identified in defendant's publication as having appeared nude in a movie role.¹⁷⁰ The publication featured photos of a nude actress, allegedly, but not actually, the plaintiff.¹⁷¹ The plaintiff had never appeared nude in a film.¹⁷²

In the district court, the plaintiff secured an award of ten million dollars.¹⁷³ The Second Circuit Court of Appeals reversed.¹⁷⁴ While sympathy for the plaintiff is not hard to find, the appellate court correctly analyzed section 51 law and found that the plaintiff was not able to successfully maintain her claim. The federal appeals court found that the article in question was not an advertisement but a story about a matter of some, if not general, public

163. 106 A.D.2d 353, 483 N.Y.S.2d 16 (1st Dep't 1984).

164. *See id.*

165. *See id.* at 353, 483 N.Y.S.2d at 17-18.

166. *See id.*

167. *See id.* at 353, 483 N.Y.S.2d at 18 (Kupferman, J., dissenting).

168. *See id.* at 354, 483 N.Y.S.2d at 17-18 (Kupferman, J., dissenting).

169. 745 F.2d 123 (2d Cir. 1984).

170. *See id.* at 127.

171. *See id.*

172. *See id.*

173. *See id.* at 128.

174. *See id.* at 142.

interest.¹⁷⁵ The plaintiff's strongest claim to section 51 protection rested under an interpretation of that statute whereby even a news article may result in liability if the person depicted without consent bore no reasonable relationship to the subject of the article.¹⁷⁶ Here the plaintiff was the author of both the book and the screen script of the movie which was the subject of the article.¹⁷⁷ She was, within the meaning of the first amendment, a limited purpose public figure and, as such, she failed to meet the substantially higher burden placed on such figures in order for them to prevail in actions against media defendants.¹⁷⁸

The Second Circuit Court of Appeals made a regrettable observation, which is extraneous to the issues decided and is probably incorrect:

Finally, we note that reputational damage to Ms. Lerman could not have been great. Only the readers of *Adelina*, a magazine of relatively modest circulation that Ms. Lerman describes as "sordid" and "obscene" would have seen the offending material. In fact, given the number of famous persons portrayed in this fashion, one wonders whether such pictures are even capable of producing genuine reputational harm.¹⁷⁹

Whether such pictures produce harm depends on many factors, all of which are, in a properly alleged and valid action, questions for the finder of fact. It is unlikely that any of the justices of the appellate court would be amused to be misidentified in nude photos in *Adelina*. Of equal importance is the established concept that harm to reputational interests may not be manifested for some time after publication. Premature pronouncements by jurists on the possibility of harm are unrealistic and unfair. Finally, section 51 does not require reputational harm. Indeed, case law reflects many instances where reputations may have been enhanced by unlawful misappropriation of a person's likeness. Reputational harm is relevant to damages, but not to liability.

The lack of a reasonable relationship between the illustrations used in a news article and the alleged identified subjects in the illustration as a basis for section 51 liability was highlighted in

175. See *id.* at 130.

176. See *id.* at 137.

177. See *id.* at 132.

178. See *id.* at 142.

179. *Id.* at 141.

Quezada by De Lamota v. Daily News.¹⁸⁰ The infant plaintiffs were, allegedly, identifiable in a drawing which accompanied a news story on juvenile drug use.¹⁸¹ There was no issue that the plaintiffs were not meant to be implicated in drug trafficking. The artist supposedly used a photograph of the juveniles in executing the commissioned drawing.¹⁸² The court, in denying that part of the defendant's summary judgment motion which sought to eliminate the section 51 cause of action, noted that the issue of whether the plaintiffs could be identified from the drawing was one of fact.¹⁸³ However, if they were identifiable, their admitted lack of association with the subject of the article would result in liability.¹⁸⁴

The continuing lesson of cases such as *Quezada* is that the media must use the utmost care in utilizing photographs and drawings as illustrations for what are clearly news articles. An increasing number of section 51 cases focus on this area of liability, where past case law focused mostly on advertisements.

B. Libel and Slander

The New York Court of Appeals reversed the First Department in *Gaeta v. New York News, Inc.*,¹⁸⁵ thus dismissing a libel action brought by the former wife of a patient in a state mental health facility. The defendant newspaper had investigated conditions in the state mental health system and reported its conclusions in a series of articles.¹⁸⁶ An article detailed the experiences of the plaintiff and stated that she allegedly had affairs during her marriage to the patient, her infidelity supposedly contributing to his mental problems.¹⁸⁷

Judge Kaye, writing for a unanimous court, noted that "[t]his libel action, brought by a nonpublic figure against a newspaper publisher and reporter, tests the reach of *Chapadeau v. Utica Ob-*

180. 125 Misc. 2d 302, 479 N.Y.S.2d 682 (Civ. Ct., N.Y. Co. 1984).

181. *See id.* at 302, 479 N.Y.S.2d at 683.

182. *See id.* at 302-03, 479 N.Y.S.2d at 683.

183. *See id.*

184. *See id.*

185. 62 N.Y.2d 340, 465 N.E.2d 802, 477 N.Y.S.2d 82 (1984).

186. *See id.* at 346, 465 N.E.2d at 803, 477 N.Y.S.2d at 83. The articles were part of an investigative reporting project.

187. *See id.* at 346, 465 N.E.2d at 803-04, 477 N.Y.S.2d at 83-84.

server-Dispatch.¹⁸⁸ *Chapadeau* is a major Court of Appeals decision which holds that a plaintiff in a libel action must demonstrate gross irresponsibility on the part of the defendant if the article concerned is a matter of legitimate public concern.¹⁸⁹

The *Gaeta* plaintiff maintained that no such concern could embrace references to her in a news article and that a simple negligence standard was appropriate for determining liability.¹⁹⁰ The Court of Appeals disagreed and found that *Chapadeau* was controlling.¹⁹¹ The state's highest court also found that the plaintiff had not alleged any conduct on the part of the defendants which could be construed by a jury as constituting gross irresponsibility and thus dismissed the action.¹⁹²

There is nothing new in *Gaeta*, but the Court of Appeals took the opportunity to clearly re-state the policy and rationale of *Chapadeau*, perhaps in the hope of providing guidance in this difficult area.¹⁹³

A former Schenectady mayor witnessed the dismissal of his libel action against a local newspaper in *Duci v. Daily Gazette Co.*¹⁹⁴ The Third Department reversed the trial court's denial of the defendant's motion to dismiss.¹⁹⁵ A teenaged lifeguard had been quoted in a news report of a drowning that the Mayor had just stood around laughing and talking while futile rescue efforts were undertaken.¹⁹⁶ The appellate court found the former Mayor's com-

188. *Id.*

189. See 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975). In *Chapadeau*, the appellant was arrested and charged with criminal possession of a hypodermic instrument, and criminal possession of a dangerous drug in the fourth degree. The respondent's newspaper reported the appellant's arrest, and also stated that the appellant was part of a group or party where drugs and beer were present when he was arrested. The appellant claimed that these latter statements libeled him. The newspaper admitted the falsity of the latter statements, but contended that the article, when viewed in its entirety, was fair and accurate. The Court of Appeals affirmed a summary judgment in favor of the newspaper, holding that there needs to be grossly irresponsible conduct for liability. In this case, the Court found that the newspaper exercised reasonable methods to insure accuracy.

190. See *Gaeta*, 62 N.Y.2d at 346, 465 N.E.2d at 803, 477 N.Y.S.2d at 83.

191. See *id.* at 350, 465 N.E.2d at 806, 477 N.Y.S.2d at 86.

192. See *id.*

193. During the *Survey* year, the First Department considered libel issues involving the interpretation and application of *Chapadeau*. See *Ortiz v. Valdescastilla*, 102 A.D.2d 513, 478 N.Y.S.2d 895 (1st Dep't 1984). While essentially a fact-sensitive case, the discussion of the majority in *Ortiz* usefully compliments *Gaeta*.

194. 102 A.D.2d 940, 477 N.Y.S.2d 760 (3d Dep't 1984).

195. See *id.* at 941, 477 N.Y.S.2d at 762.

196. See *id.* at 940, 477 N.Y.S.2d at 761.

plaint defective on two theories. First, he failed to show that the words quoted, in an article concerning a matter of public concern, were susceptible of the defamatory meaning which the plaintiff ascribed to them.¹⁹⁷ Second, since he alleged only one act of supposed defamation against the defendant, he was bound to show special damages, which he did not do.¹⁹⁸

"Death is an honorable estate, so that no one is demeaned or belittled by the report of his or her death."¹⁹⁹ So noted Justice Greenfield in dismissing an action brought by a non-dead plaintiff and his parents.²⁰⁰ Plaintiff David Rubinstein saw an obituary notice about himself in both the New York Daily News and the New York Post, neither of which was aware that he was, in fact, alive.²⁰¹ He claimed severe physical and emotional trauma and an inability to work. Not to be outdone, his parents sued for their own psychic anguish in addition to claiming mutual loss of consortium.²⁰²

Justice Greenfield stated that the plaintiffs' action did not sound in libel, a reality which the plaintiffs themselves acknowledged.²⁰³ The jurist's well-written opinion briefly reviews the real basis for asserting this action, a variation on the infliction of mental distress theme.²⁰⁴ The justice's review of New York law led him to find that merely being incorrectly reported as dead does not, by itself, fit into any recognized cause of action.²⁰⁵

C. *Miscellaneous Intentional Torts*

In *Moye v. Gary*,²⁰⁶ United States District Judge Sweet dismissed a complaint by the *pro se* plaintiff, who alleged intentional infliction of mental distress by her supervisor.²⁰⁷ Both were federal employees at the time of the action. Judge Sweet noted that the conduct of the defendant, even if it had actually occurred, at most

197. *See id.* at 940, 477 N.Y.S.2d at 762.

198. *See id.* at 941, 477 N.Y.S.2d at 762.

199. *Rubinstein v. New York Post Corp.*, 128 Misc. 2d 1, 3, 488 N.Y.S.2d 331, 332 (Sup. Ct. N.Y. Co. 1985).

200. *See id.* at 6, 488 N.Y.S.2d at 335.

201. *See id.* at 2, 488 N.Y.S.2d at 332.

202. *See id.*

203. *See id.* at 3, 488 N.Y.S.2d at 333.

204. *See id.* at 4-6, 488 N.Y.S.2d at 333-35.

205. *See id.* at 6, 488 N.Y.S.2d at 335.

206. 595 F. Supp. 738 (S.D.N.Y. 1984).

207. *See id.* at 739.

constituted insults and indignities which New York law excludes from the concept of intentional infliction of mental distress.²⁰⁸

A troublesome case involving an allegation of false imprisonment against the State of New York was decided incorrectly by the Second Department. In *Gonzalez v. State*,²⁰⁹ the appellate panel overturned a Court of Claims judgment for the claimant. The claimant had been found by a New York City transit police officer on subway tracks and, after being removed from the tracks, was taken first to Kings County Hospital and then to Kingsboro, a state psychiatric facility.²¹⁰ He was held for observation for about two days before being discharged. The appellate court majority found that the forced hospitalization was privileged, based upon its review of the record.²¹¹

Justice Mangano, in dissent, acknowledged that the facts in the record were susceptible to several interpretations.²¹² He asserted, however, that "there was ample evidence in the record to support the holding of the Court of Claims."²¹³ He also noted the findings of an admitting psychiatrist who found no evidence of psychosis on the morning of the subway incident.²¹⁴

The willingness of an appellate court to search a trial record in order to arrive at a new factual determination favorable to the State of New York is unfortunate in itself. Even more regrettable is the fact that the appellate court majority reversed a false imprisonment judgment for a plaintiff in an action involving the mental health system. Even with increased safeguards, both substantive and procedural, the deck is largely stacked against a person confined for observation. The reports of police officers, the preconceptions of hospital staff, and the reality that such persons often are not quite in top form are generally factors that combine to sway a court to find against a claim of false imprisonment. Perhaps this is inevitable and largely unavoidable. When a court does find, however, that a person had been illegally held, an appellate court should exercise the greatest reluctance to interfere with that find-

208. See *id.* at 740.

209. 110 A.D.2d 810, 488 N.Y.S.2d 231 (2d Dep't 1985).

210. See *id.* at 812, 488 N.Y.S.2d at 232.

211. See *id.* at 812, 488 N.Y.S.2d at 233.

212. See *id.* at 814, 488 N.Y.S.2d at 234 (Mangano, J., dissenting).

213. See *id.*

214. See *id.*

ing. Public policy demands that mental health officers understand the concept of false imprisonment and care about avoiding its commission. *Gonzalez* does nothing to further that goal.

VI. CONCLUSION

Well-funded advertising campaigns are attempting to convince the New York public that common law tort remedies are a burden society cannot afford. Counter-campaigns invoke the image of greedy insurance companies, incompetent physicians and helpless consumers who are the victims of the shoddy and the dishonest and who have only the law of tort to look for recovery of damages. The rhetoric is extreme and the solutions proposed are often draconian. No system is perfect and some change is not only to be expected, but to be welcomed. The vitality of the common law and its ability to adapt to changing circumstances must not be overlooked or hastily rejected because of special interests whether they be from the plaintiffs' or the defendants' territory. Municipal tort liability is an even more pressing problem than medical malpractice. Mass disaster tort cases threaten the economic viability of national resources, often with national defense implications. Whatever the route taken by New York legislatures, both judges and legal practitioners share a duty to uphold the rich heritage of the common law.

A number of important state and local government liability cases are expected to be decided during the coming *Survey* year. Judicial scrutiny of damage awards, on the increase over the past few years, will continue. These and other developments will be analyzed in the next annual *Survey* article.