STATE OF NEW YORK COMPENDIUM OF LAW

Prepared by
Arlow M. Linton
Goldberg Segalla LLP
665 Main Street, Suite 400
Buffalo, NY 14203
(716) 566-5400
www.goldbergsegalla.com

Jacqueline Bushwack and Matthew Lampert
Rivkin Radler LLP
926 RXR Plaza
Uniondale, NY 11556
(516) 357-3000
www.rivkin.com

Robert S. Nobel | Kathryn L. Hough
Traub Lieberman Straus & Shrewsberry LLP
7 Skyline Drive
Hawthorne, NY 10532
(914) 347-2600
www.traublieberman.com

Updated 2017

PRE-SUIT AND INITIAL CONSIDERATIONS

Pre-Suit Notice Requirements / Prerequisites to Suit

A) **Filing claims against the State of New York.** Claimants are required to serve "written notice of intention to file a claim" against an employee of the state, for loss to property or personal injury, upon the attorney general within ninety days after the accrual of such claim. N.Y. CT. CL. ACT § 10 (McKinney 2017).

1) The filing of a notice of claim pursuant to the Court of Claims Act § 10 is a condition precedent to suit. *See Alston v. State*, 97 N.Y.2d 159, 737 N.Y.S.2d 45 (2001).

2) Defendant has a right to demand a pre-suit examination of the claimant. N.Y. CT. CL. ACT § 17-a (McKinney 2017).

B) **Filing claims against a municipality.** Claimants are required to serve a notice of claim within ninety days in all cases involving torts against a public corporation, city, town, village, fire district, and school district. The court has discretion to allow late service; however, a court cannot extend the time to serve a notice of claim longer than the applicable statute of limitations. N.Y. GEN. MUN. LAW §§ 50-e, -h, -1 (McKinney 2017).

1) **Condition precedent.** The filing of a notice of claim under General Municipal Law § 50-e is a condition precedent to suit. *See Rodriguez v. City of New York*, 169 A.D.2d 532, 564 N.Y.S.2d 384 (1st Dep't 1991).

Relationship to Federal Rules of Civil Procedure

New York has its own set of rules and regulations regarding civil procedure. They are found in N.Y. C.P.L.R. (MCKINNEY 2017). There are notable differences between the federal rules and New York rules of civil procedure, including how an action is commenced, remedies for defects in venue, jurisdictional scope of class actions, the use of interrogatories, the availability of bills of particulars, issuance of subpoenas, and appeal of intermediate or interlocutory orders, to name a few.

Description of the Organization of the State Court System

New York employs a Unified Court System which is considered one court comprised of all trial and appellate courts of the state. Each court in the system possesses its own level of jurisdiction from the Court of Appeals down to the local Village Courts.

Geographically, New York is divided into four judicial departments, each of which is subdivided into judicial districts comprised of numerous counties within the geographic district. *See* David D. Siegel, NEW YORK PRACTICE 12 (5th ed. 2011).

A) **Structure.**

1) **Court of Appeals**. New York State's highest court is composed of a Chief Judge and six Associate Judges, each appointed by the Governor to a fourteen-year term from a list recommended by a judicial nominating commission. The nominations require senate ratification. Although the Court of Appeals is New York's highest appellate court, it is one of limited jurisdiction, generally reviewing only questions of law. There is no jurisdictional limitation based upon the amount of money at stake in a case or the status or rank of the parties. Most of the appeals to the court are from the appellate division, although cases involving constitutional provisions and the death penalty are appealed directly to this court. The court also has administrative powers to promulgate the rules of court and to regulate the admission of attorneys to the state bar. Lastly, the Court of Appeals is the only court in the state permitted to render an advisory opinion on New York law upon the request of the U.S. Supreme Court, a federal court of appeals, or another states' highest court. *See* Siegel, NEW YORK PRACTICE 14-15 (5th ed. 2011).

2) **Appellate Court.** New York State's intermediate level appellate court is the Appellate Division of the Supreme Court with a court located in each of the four judicial departments. The appellate justices are duly elected members of the Supreme Court chosen by the Governor to sit on the Appellate Division court. The court primarily hears appeals from trial courts and has the power to review both law and facts in civil and criminal cases. The Appellate Division hears appeals directly from the Supreme Court, County Courts, Family Courts, Surrogate's Courts and the Court of Claims. It has original jurisdiction in matters concerning bar admissions, supervision of attorneys, habeas corpus and proceedings against judges of the Supreme Court. *See* Siegel, NEW YORK PRACTICE 15 (5th ed. 2011).

3) **Supreme Court.** In most states, "supreme court" is the name of the highest court in the state. However, the New York Supreme Court is primarily a trial court that is generally equivalent to the district courts and superior courts or circuit courts of other states. The Supreme Court is New York States' trial court of statewide, general jurisdiction. There is a Supreme Court in each of New York State's sixty-two counties, although some of the smaller counties share judges with neighboring counties. The Supreme Court hears both civil and criminal trials, although in practice most criminal trials are heard in County Courts. In New York City, there are both civil and criminal parts with the Supreme Court having jurisdiction of felony charges. Justices are elected to the court from judicial districts for fourteen-year terms. *See* Siegel, NEW YORK PRACTICE 16-17 (5th ed. 2011).

a) **Supreme Court, Appellate Term.** A secondary appellate court established in the more populous downstate region comprising the First and Second Judicial Departments to hear cases on appeal from the Civil and Criminal Courts of the City of New York and from appeals originating in City, Town and Village Courts

within the Second Department. *See* Siegel, NEW YORK PRACTICE 17-18 (5th ed. 2011).

4) **County Courts.** Trial courts with jurisdiction over civil law and equity within certain monetary limits and are subject to jurisdictional residency requirements. There is a county court in each county outside of New York City. Its judges are elected for ten-year terms. Outside New York City, these courts have original jurisdiction over criminal matters and in the Third and Fourth Departments, these courts have appellate jurisdiction over cases originating in City, Town, and Village Courts. Appeals from County courts are heard in the Appellate Division. *See* Siegel, NEW YORK PRACTICE 18-19 (5th ed. 2011).

5) **Specialty Courts.** There is a Family Court and a Surrogate's Court in each county of the state.

   a) There is at least one judge on each Family Court who (outside New York City) sits for a ten-year elected term, but who (within the City) is appointed by the Mayor of New York. Proceedings in Family Court involve child support, custody, foster care, adoption, paternity and juvenile delinquency. Jury trials are not available. *See* Siegel, NEW YORK PRACTICE 20 (5th ed. 2011).

   b) The Surrogates Court handles all matters concerning a decedents' estate. At least one surrogate judge sits on the Surrogate's Court (New York County has two) and position is by county election for terms of fourteen years within the City of New York and ten years elsewhere. *See* Siegel, NEW YORK PRACTICE 19-20 (5th ed. 2011).

6) **Court of Claims.** The Court of Claims has jurisdiction to hear and determine claims against the state or by the state against the claimant. Its jurisdiction is set forth in the Court of Claims Act. Judges are appointed by the Governor with the advice and consent of the senate for nine year terms. *See* Siegel, NEW YORK PRACTICE 20-21 (5th ed. 2011).

7) **New York City Courts.** The Civil Court of New York has jurisdiction of civil matters and equity up to $25,000.00. There is a small claims part for informal dispositions up to $3,000.00 and a housing part for landlord-tenant disputes and housing code violations. Judges of the court are elected to ten-year terms. The New York City Criminal Court has jurisdiction over misdemeanors and violations. Arraignments and preliminary hearings in felony cases are also heard in this court. *See* Siegel, NEW YORK PRACTICE 22-23 (5th ed. 2011).

8) **City, town, and village Courts.** These courts within the cities, towns and villages in New York are the lowest level of the judicial system. There is a city court in each of the sixty-one cities outside New York City. Town and Village courts are called "Justice Courts" and exist in most all municipalities, with some

municipalities sharing courts. Justice courts are likewise designated to handle traffic violations and misdemeanors. The courts lack equity jurisdiction with the exception of landlord-tenant eviction proceedings. *See* Siegel, NEW YORK PRACTICE 23-25 (5th ed. 2011).

B) **Alternative dispute resolution.** New York does not have a comprehensive state-wide statute for all methods of alternative dispute resolution ("ADR"). The New York Office of Court Administration reports that "the Unified Court System partners with local non-profit organizations . . . which provide mediation, arbitration and other dispute resolution options as an alternative to court." *See Alternative Dispute Resolution*, N.Y. STATE UNIFIED CT. SYS., http://www.nycourts.gov/ip/adr/cdrc.shtml (last visited June 30, 2017). Local rules govern the programs.

The Unified Court System offers additional resources and options for alternative dispute resolution for a variety of matters. Specific programs are available to help locate a mediator, including a free or low-cost mediator. Guides are also available for divorce and family law alternative dispute resolution, as well as agricultural mediation. Options are even available to resolve attorney-client fee disputes. *See Alternative Dispute Resolution Programs*, N.Y. STATE UNIFIED CT. SYS., http://www.nycourts.gov/ip/adr/Info_for_parties.shtml#courtbasedprograms (last visited June 30, 2017)

Initiation of Suit

In New York an action is deemed commenced by filing a summons and complaint or summons with notice. N.Y. C.P.L.R. § 304 (MCKINNEY 2017). Upon filing the pleading and remitting the statutory payment of $210.00, the County Clerk's office assigns an index number to the proceeding. N.Y. C.P.L.R. § 306-a (MCKINNEY 2017), *See NY Court Filing Fees* https://www.nycourts.gov/forms/filingfees.shtml (last visited June 30, 2017). Once the matter has been filed, a plaintiff has 120 days to perfect service upon the defendant. N.Y. C.P.L.R. § 306-b (MCKINNEY 2017). New York's Rules of Civil Procedure dictate the manner and methods a plaintiff may effect service on individuals, corporations or municipal entities.

Service of Process

A) **Upon the state.** Service upon the State is made by delivering the summons to an assistant attorney-general at an office of the attorney-general or to the attorney-general within the state. With regard to an action suing a state officer solely in an official capacity, sub-section "2." requires personal service by:

> (1) delivering the summons to such officer or to the chief executive officer of such agency or to a person designated by such chief executive officer to receive service, or,
>
> (2) by mailing the summons by certified mail, return receipt requested, to such officer or to the chief executive officer of such agency, and by personal service upon the state in the manner provided by subdivision one of the statute.

N.Y. C.P.L.R. § 307 (MCKINNEY 2017). Service by certified mail is not deemed complete until the summons is received in a principal office of the agency and until

personal service upon the state in the manner provided by subdivision (1) of the statute is completed. Further, service by certified mail shall not be effective unless the front of the envelope states "URGENT LEGAL MAIL" in capital letters. N.Y. C.P.L.R. § 307 (MCKINNEY 2017).

B) **Personal service upon a natural person.** Personal service on an individual is governed by N.Y. C.P.L.R. § 308 (MCKINNEY 2017):

Personal service upon a natural person shall be made by any of the following methods:

> 1. by delivering the summons within the state to the person to be served; or
>
> 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing, whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law; or
>
> 3. by delivering the summons within the state to the agent for service of the person to be served as designated under rule 318, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;
>
> 4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing, except in matrimonial actions where service hereunder may be made pursuant to an order made in accordance with the provisions of subdivision a of section two hundred thirty-two of the domestic relations law;
>
> 5. in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

6. For purposes of this section, "actual place of business" shall include any location that the defendant, through regular solicitation or advertisement, has held out as its place of business.

C) **Personal service upon an infant, incompetent or conservatee.** Service upon an infant, incompetent or conservatee is governed by N.Y. C.P.L.R. § 309 (MCKINNEY 2017):

> (a) Upon an infant. Personal service upon an infant shall be made by personally serving the summons within the state upon a parent or any guardian or any person having legal custody or, if the infant is married, upon an adult spouse with whom the infant resides, or, if none are within the state, upon any other person with whom he resides, or by whom he is employed. If the infant is of the age of fourteen years or over, the summons shall also be personally served upon him within the state.
>
> (b) Upon a person judicially declared to be incompetent. Personal service upon a person judicially declared to be incompetent to manage his affairs and for whom a committee has been appointed shall be made by personally serving the summons within the state upon the committee and upon the incompetent, but the court may dispense with service upon the incompetent.
>
> (c) Upon a conservatee. Personal service on a person for whom a conservator has been appointed shall be made by personally serving the summons within the state upon the conservator and upon the conservatee, but the court may dispense with service upon the conservatee.

D) **Personal service upon a partnership.** Service upon a partnership is governed under N.Y. C.P.L.R. § 310 (MCKINNEY 2017):

> (a) Personal service upon persons conducting a business as a partnership may be made by personally serving the summons upon any one of them.
>
> (b) Personal service upon said partnership may also be made within the state by delivering the summons to the managing or general agent of the partnership or the person in charge of the office of the partnership within the state at such office and by either mailing the summons to the partner thereof intended to be served by first class mail to his last known residence or to the place of business of the partnership. Proof of such service shall be filed within twenty days with the clerk of the court designated in the summons; service shall be complete ten days after such filing; proof of service shall identify the person to whom the summons was so delivered and state the date, time of day and place of service.
>
> (c) Where service under subdivisions (a) and (b) of this section cannot be made with due diligence, it may be made by affixing a copy of the summons to the door of the actual place of business of the partnership within the state and by either mailing the summons by first class mail to the partner intended to be so served to such person to his last known residence or to said person at the office of said partnership within the state. Proof of such service shall be filed within twenty days thereafter with the clerk of the court designated in the summons; service shall be complete ten days after filing.
>
> (d) Personal service on such partnership may also be made by delivering the summons to any other agent or employee of the partnership authorized by appointment to receive service; or to any other person designated by the partnership to receive process in writing, filed in the office of the clerk of the county wherein such partnership is located.

> (e) If service is impracticable under this section, it may be made in such manner as the court, upon motion without notice, directs.

E) **Personal service upon a limited liability partnership.** Service upon a domestic or foreign limited liability partnership is governed by N.Y. C.P.L.R. § 310-a (MCKINNEY 2017):

> by delivering a copy personally to any managing or general agent or general partner of the limited partnership in this state, to any other agent or employee authorized by appointment to receive service, or to any other person designated by the limited partnership to receive process.

1) **Limited liability partnerships.** Other methods of service of process are available against limited liability partnerships that are subject to the provisions of Article 8-a of the partnership law (N.Y. P'SHIP LAW § 121-109) and in general by service pursuant to N.Y. P'SHIP LAW § 121-1505. *See* N.Y. C.P.L.R. § 310-a (MCKINNEY 2017). If service is impracticable under this section, "it may be made in such manner as the court, upon motion without notice, directs." N.Y. C.P.L.R. § 310-a(b) (MCKINNEY 2017).

F) **Service upon a corporation or governmental subdivision.** Service upon a Corporation or Government Subdivision is governed by N.Y. C.P.L.R. § 311 (MCKINNEY 2017) by service:

> (a) Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:
>
> 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law. A not-for-profit corporation may also be served pursuant to section three hundred six or three hundred seven of the not-for-profit corporation law;
>
> 2. upon the city of New York, to the corporation counsel or to any person designated to receive process in a writing filed in the office of the clerk of New York county;
>
> 3. upon any other city, to the mayor, comptroller, treasurer, counsel or clerk; or, if the city lacks such officers, to an officer performing a corresponding function under another name;
>
> 4. upon a county, to the chair or clerk of the board of supervisors, clerk, attorney or treasurer;
>
> 5. upon a town, to the supervisor or the clerk;
>
> 6. upon a village, to the mayor, clerk, or any trustee;
>
> 7. upon a school district, to a school officer, as defined in the education law; and
>
> 8. upon a park, sewage or other district, to the clerk, any trustee or any member of the board.

If service upon a domestic or foreign corporation within the 120 days allowed is impracticable, "service upon the corporation may be made in such manner, and proof of service may take such form, as the court, upon motion without notice, directs." N.Y. C.P.L.R. § 311(b) (MCKINNEY 2017).

G) **Personal service on limited liability companies.** To serve a Limited Liability Company, plaintiffs must look to N.Y. C.P.L.R. § 311-a:

> (a) Service of process on any domestic or foreign limited liability company shall be made by delivering a copy personally to (i) any member of the limited liability company in this state, if the management of the limited liability company is vested in its members, (ii) any manager of the limited liability company in this state, if the management of the limited liability company is vested in one or more managers, (iii) to any other agent authorized by appointment to receive process, or (iv) to any other person designated by the limited liability company to receive process, in the manner provided by law for service of a summons as if such person was a defendant. Service of process upon a limited liability company may also be made pursuant to article three of the limited liability company law.

N.Y. C.P.L.R. § 311-a(a) (MCKINNEY 2017). If service is impracticable under this section, it may be made in such manner as the court, upon motion without notice, directs. N.Y. C.P.L.R. § 311-a(b) (MCKINNEY 2017).

H) **Personal service by mail.** New York does provide for service by mail. A plaintiff seeking to serve a defendant by mail must comply with each requirement of the statute. N.Y. C.P.L.R. § 312-a (MCKINNEY 2017). The statute states:

> (a) Service. As an alternative to the methods of personal service authorized by section 307, 308, 310, 311 or 312 of this article, a summons and complaint, or summons and notice, or notice of petition and petition may be served by the plaintiff or any other person by mailing to the person or entity to be served, by first class mail, postage prepaid, a copy of the summons and complaint, or summons and notice or notice of petition and petition, together with two copies of a statement of service by mail and acknowledgement of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender.
>
> (b) Completion of service and time to answer.
>
> 1. The defendant, an authorized employee of the defendant, defendant's attorney or an employee of the attorney must complete the acknowledgement of receipt and mail or deliver one copy of it within thirty (30) days from the date of receipt. Service is complete on the date the signed acknowledgement of receipt is mailed or delivered to the sender. The signed acknowledgement of receipt shall constitute proof of service.
>
> 2. Where a complaint or petition is served with the summons or notice of petition, the defendant shall serve an answer within twenty (20) days after the date the signed acknowledgement of receipt is mailed or delivered to the sender.

N.Y. C.P.L.R. § 312-a (MCKINNEY 2017). The statute provides a detailed example of the type of affirmation that must be used in order to comply with the statute:

> Where the signed acknowledgement of receipt is not returned within thirty (30) days after receipt of the documents mailed pursuant to subdivision (a) of this section, the reasonable expense of serving process by an alternative method shall be taxed by the court on notice pursuant to § 8402 of this chapter as a disbursement to the party serving process, and the court shall direct immediate judgment in that amount.

N.Y. C.P.L.R. § 312-a(f) (MCKINNEY 2017).

Statutes of Limitations

A) **Personal injury.** Actions for damages for an injury to the person must be commenced within three years after the cause of action accrues. N.Y. C.P.L.R. § 214 (MCKINNEY 2017).

B) **Wrongful death.** Actions for wrongful death must be commenced within two years of the moment of death. N.Y. EST. POWERS & TRUSTS LAW § 5-4.1 (McKinney 2017). A wrongful death action is available only where the deceased had a claim that was not time-barred on or before death. *Id.*

C) **Survival.** If a potential plaintiff dies before the expiration of the applicable statute of limitations, the decedent's personal representative has one year from the date of death within which to commence the action. N.Y. C.P.L.R. § 210(a) (MCKINNEY 2017).

D) **Property.** Actions to recover damages for an injury to property, to recover a chattel or damage for the taking/detaining of a chattel, shall be commenced within three years after the cause of action accrued. N.Y. C.P.L.R. § 214 (MCKINNEY 2017).

E) **Contracts.** Actions based upon an oral or written contract (express or implied), except as otherwise provided in N.Y. C.P.L.R. § 213-a or Article 2 of the Uniform Commercial Code, shall be commenced within six years after the cause of action accrued. N.Y. C.P.L.R. § 213(2) (MCKINNEY 2017).

F) **Warranties and sales contracts.** Actions for breach of a sales contract and/or breach of warranty shall be commenced with four years after the cause of action accrued. N.Y. U.C.C. LAW § 2-725 (McKinney 2017).

G) **Breach of employment.** Actions for breach of an employment contract must be commenced within six years after the cause of action accrued. N.Y. C.P.L.R. § 213 (MCKINNEY 2017).

H) **Indemnity or contribution.** Actions for indemnity or contribution must be commenced within six years after the cause of action accrued, *i.e.*, judgment or settlement is paid. N.Y. C.P.L.R. § 213 (MCKINNEY 2017).

I) **Rent overcharge.** Action for residential rent overcharge must be commenced within four years after the cause of action accrued. N.Y. C.P.L.R. § 213-a. (MCKINNEY 2017).

J) **Local governments.** All actions that lie in tort against local governments must be commenced within ninety days after the cause of action accrued. N.Y. GEN. MUN. LAW § 50-I (McKinney 2017). However, § 50-e of the General Municipal Law contains a condition precedent, that requires that a Notice of Claim must be served on the local government entity within ninety days after the cause of action accrued. N.Y. GEN. MUN. LAW § 50-e (McKinney 2017).

K) **Sheriffs.** Actions against a sheriff, coroner or constable; against an officer for the escape of a prisoner; for assault, battery, false imprisonment, malicious prosecution, libel or slander; and for violation of the right of privacy must be commenced within one year from the date the cause of action accrues. N.Y. C.P.L.R. § 215 (MCKINNEY 2017).

L) **Tolling.** If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, N.Y. C.P.L.R. § 208 provides a tolling of the statute of limitations. The length of time the statute is tolled is based upon the time period of the applicable statute of limitations, with a limitation on the tolling period of ten years.

1) **Less than three years.** "If the time period for the applicable statute of limitations is less than three years, the time for commencing the action is extended by the period of disability." N.Y. C.P.L.R. § 208 (MCKINNEY 2017).

2) **Three years or greater.** If the time period for the applicable statute of limitations is three years or more, the plaintiff will have three years from the time the disability ceases. Thus, if an individual is under the age of eighteen years of age or is disabled when such a cause of action accrues, the person may bring an action within three years after the person attains eighteen years of age or is no longer disabled. *Id.*

M) **Professional malpractice.** Malpractice actions against licensed engineers, architects, land surveyors or landscape architects must be commenced within ten years. N.Y. C.P.L.R. § 214-d (MCKINNEY 2017). Written notice of such a claim must be served upon the architect, engineer, land surveyor or landscape architect at least ninety days prior to the commencement of the action. Pursuant to N.Y. C.P.L.R. § 214-d(6), such an action is subject to a cut-off period of ten years. N.Y. C.P.L.R. § 214-d (MCKINNEY 2017).

N) **Medical malpractice.** Medical, dental or podiatric malpractice actions must be commenced within "two years and six months of the act, omission or failure complained of or last treatment where there is continuous treatment for the same illness, injury or condition which gave rise to said act, omission or failure." N.Y. C.P.L.R. § 214-a (MCKINNEY 2017). An exception is made for actions commenced for discovery of foreign objects in the body of the patient, which may be commenced within one year of the date of such discovery or of the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier. *Id.*

O) **Victims of criminal offenses.** Actions by victims of a criminal offense must be commenced against a defendant "(1) convicted of a crime which is the subject of such action, for any injury or loss resulting therefrom within seven years of the date of the crime or (2) convicted of a specified crime as defined in Executive Law § 632-a(1)(e), which is the subject of such action for any injury or loss resulting therefrom within ten years of the date the defendant was convicted of such specified crime." N.Y. C.P.L.R. § 213-b (MCKINNEY 2017).

Q) **Fraud.** Actions for damages resulting from fraud "must be commenced within the greater of six years from the date the cause of action accrued or two years from the time the plaintiff or the person under whom the plaintiff claims discovered the fraud, or could with reasonable diligence have discovered it." N.Y. C.P.L.R. § 213(8) (MCKINNEY 2017).

Statute of Repose

New York has not adopted a statute of repose. New York has recognized and enforced other state's statute of repose, should a choice of law analysis require it. *See Kniery v. Cottrell, Inc.*, 59 A.D.3d 1060, 873 N.Y.S.2d 803 (4th Dep't 2010); *Tanges v. Heidelberg N. Am.*, 93 N.Y.2d 48, 687 N.Y.S.2d 604 (1999).

Venue Rules

A) In New York, venue is governed by Article 5 of the New York Civil Practice Laws and Rules. *See* N.Y. C.P.L.R. § 500 (MCKINNEY 2017). There are separate sections of the New York Civil Practice Law and Rules which address venue for contract actions (N.Y. C.P.L.R. § 501), actions against local governments (N.Y. C.P.L.R. § 504), and actions against public authorities (N.Y. C.P.L.R. § 509).

B) **County of residence.** Generally speaking, unless otherwise prescribed by law, an action may be commenced in New York within a county where one of the parties to the actions resided at the time of the commencement of the action. If no party resides in the state at the commencement of the action, but other grounds exist for jurisdiction within New York (*see* N.Y. C.P.L.R. § 302 for acts which are the basis of jurisdiction in New York for non-domiciliaries), then the action may be commenced in any county designated by the plaintiff. If a party is a resident in more than one county of the state, then for purposes of venue they will be deemed to be a resident of each county. N.Y. C.P.L.R. § 503 (MCKINNEY 2017).

C) **Change of venue.** A court, upon motion, may change the venue when: (1) the county designated is not proper; (2) an impartial trial cannot be had in the designated county or (3) the convenience of the material witnesses and the ends of justice will be promoted by the change. N.Y. C.P.L.R. § 510 (MCKINNEY 2017); *see O'Brien v. Vassar Bros. Hosp.*, 207 A.D.2d 169, 622 N.Y.S.2d 284 (2d Dep't 1995). The proponent of the motion must demonstrate a "strong possibility" not just mere belief of bias. *See DeBolt v. Barbosa*, 280 A.D.2d 821, 720 N.Y.S.2d 283 (3d Dep't 2001).

1) **Procedure.** N.Y. C.P.L.R. § 511 sets forth the means by which an application for a change of venue is to be made. A demand for change of venue must be served with the defendant's answer where it is claimed that the county designated is not proper. This must thereafter be followed by a motion to change venue filed within fifteen days after the service of the demand for change of venue, unless the plaintiff, within five days after service of the demand, serves a written consent to change venue. Applications for change of venue on alternative grounds are to be made by motion within a reasonable time after the commencement of the action. N.Y. C.P.L.R. § 511 (MCKINNEY 2017).

NEGLIGENCE

Comparative Fault / Contributory Negligence

New York follows a pure comparative negligence system. *See Yun Jeong Koo v. St. Bernard*, 89 Misc. 2d 775, 392 N.Y.S.2d 815 (N.Y. Sup. Ct. 1977). Under this system, the culpable conduct attributable to the claimant or decedent shall not bar recovery. N.Y. C.P.L.R. § 1411 (MCKINNEY 2017). Instead, the claimant's or decedent's damages are discounted in proportion to his or her equitable share of the blame. *Id.*; *see also Whalen v. Kawasaki Motors Corp., U.S.A.*, 92 N.Y.2d 288, 680 N.Y.S.2d 435 (1998). Damages are reduced by the individual's portion of the fault as determined by a jury. *Soto v. City of New York*, 139 A.D.2d 551, 526 N.Y.S.2d 605 (2d Dep't 1988).

Exclusive Remedy - Workers' Compensation Protections

An employee's claim for benefits under Workers' Compensation Law is the employee's exclusive remedy against the employer and fellow servants (co-employees). *See generally* N.Y. WORKERS' COMP. LAW (McKinney 2017). Thus, no common law tort action is permitted against either. If an employee is injured on the job, and the employer has provided workers' compensation coverage, the injured employee finds the exclusive remedy under the provisions of the Workers' Compensation Law. N.Y. WORKERS' COMP. LAW §§ 11, 29(6) (McKinney 2017). The benefits afforded cover payment for medical treatment and a fractional part of the earnings lost during disability. Every employer subject to the Workers' Compensation Law shall secure compensation to the employees and pay or provide compensation for their disability or death from injury arising out of and in the course of employment without regard to fault as a cause of the injury. There are exceptions to this rule in that there shall be no liability for compensation when the injury has been:

A) Solely occasioned by intoxication of the injured employee while on duty,

B) Solely occasioned by willful intention of the injured employee to bring about the injury or death of himself or another, or

C) Incurred during voluntary participation in an off-duty athletic activity.

N.Y. WORKERS' COMP. LAW § 10(1) (McKinney 2017).

Indemnification

"Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer." *Trs. of Columbia Univ. v. Mitchell/Giurgola Assoc.*, 109 A.D.2d 449, 451, 492 N.Y.S.2d 371 (1st Dep't 1985). "The right to indemnification may be created by express contract, or may be implied by law to prevent an unjust enrichment or an unfair result." *Id*. at 451-52. However, a party cannot seek indemnity for its own negligence. An attempt to do so may render the indemnity clause void as against public policy. *See* N.Y. GEN. OBLIG. LAW § 5-322.1 (McKinney 2017).

Joint and Several Liability

Joint and several liability applies to economic loss claims. However, under Article 16 of the C.P.L.R, a defendant in an action involving two or more tortfeasors found 51% or more at fault can be held liable for 100% of plaintiff's non-economic damages. *See* N.Y. C.P.L.R. art. 16 (MCKINNEY 2017). A defendant found 50% or less at fault is liable only for its percent of non-economic loss (*i.e.* pain and suffering). N.Y. C.P.L.R. § 1601 (MCKINNEY 2017). However, the statute contains exceptions for claims such as contractual indemnity, administrative proceedings, workers' compensation claims, intentional torts, toxic torts, motor vehicle cases, etc. For a full list of exceptions, see N.Y. C.P.L.R. § 1602 (MCKINNEY 2017).

Strict Liability (Product)

A) **Standard.** In New York, the rule of strict liability in tort establishes liability without fault. Plaintiff has the burden of proving the following in order to submit his case to a jury under the doctrine of strict liability:

> 1. The product was actually defective to the extent that it was unreasonably dangerous; 2. the defect existed when the product left the supplier; 3. the defect was the proximate cause of the plaintiff's injury; and 4. at the time of injury the use of the product was one reasonably to be foreseen under the circumstances.

Wilsey v. Sam Mulkey Co., 56 Misc. 2d 480, 485-86, 289 N.Y.S.2d 307 (N.Y. Sup. Ct. 1968). The Court of Appeals has equated strict tort liability with strict liability in warranty or, in other words, has considered a breach of implied warranty involving a dangerous instrument as a tortious wrong separate and distinct from a breach of a sales contract. The court stated that "strict liability in tort and implied warranty in the absence of privity are merely different ways of describing the very same cause of action." *Mendel v. Pittsburgh Plate Glass Co.*, 25 N.Y.2d 340, 345, 305 N.Y.S.2d 490 (1969), *overruled on other grounds by Victorson v. Bock Laundry Mach. Co.*, 37 N.Y.2d 395, 373 N.Y.S.2d 39 (1975). Essentially strict tort liability and strict warranty liability are considered synonymous. *See* 2 FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 16 A [4] (1997). The doctrine of strict liability has received approval in the RESTATEMENT (SECOND) TORTS § 402A. *Ciampichini v. Ring Bros., Inc.*, 40 A.D.2d 289, 339 N.Y.S.2d 716 (4th Dep't 1973).

B) **Learned intermediary doctrine.** The learned intermediary or responsible intermediary doctrine typically is applied to cases involving prescription drugs and medical devices where manufacturers or sellers who supply products to sophisticated or knowledgeable intermediaries are not liable for a failure to warn the users of product related hazards. *Martin v. Hacker*, 83 N.Y.2d 1, 607 N.Y.S.2d 598 (1993); *Wolfgruber v. Upjohn*, 72 A.D.2d 59, 423 N.Y.S.2d 95 (4th Dep't 1979), *aff'd*, 52 N.Y.2d 768, 436 N.Y.S.2d 614 (1980); *Polimeni v. Minolta Corp.*, 227 A.D.2d 64, 653 N.Y.S.2d 429 (3d Dep't 1997). In order to invoke the doctrine, the warning supplied to the physician "must be correct, fully descriptive, and complete and it must convey updated information as to all of the drug's known side effects." *Martin v. Hacker*, 83 N.Y.2d 1, 607 N.Y.S.2d 598 (1993); *see also Fane v. Zimmer*, 927 F.2d 124 (2d Cir. 1991) (where manufacturer of internal fixation device warned physicians but not patient of risks, no liability imposed on manufacturer). The learned intermediary doctrine, however, cannot be used as an exception to the hearsay rule to admit evidence of warnings given by drug manufacturers. *Spensieri v. Lasky*, 94 N.Y.2d 231, 701 N.Y.S.2d 689 (1999) (holding that the doctrine does not permit a party to introduce the Physician's Desk Reference into evidence to establish the standard of care in medical malpractice actions).

Willful and Wanton Conduct

A) **Distinguishing from gross negligence.** In New York, willful and wanton conduct, or misconduct, is often cited in cases dealing with causes of action for gross negligence, which is substantially and appreciably higher in magnitude and more culpable than ordinary negligence.

> Gross negligence is equivalent to the failure to exercise even a light degree of care. It is materially more want of care than constitutes simple inadvertence. It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care. It is very great negligence, or the absence of slight diligence, or the want of even scant care. It amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected. It is a heedless and culpable violation of legal duty respecting the right of others. The elements of culpability which characterizes all negligence is, in gross negligence, magnified to a high degree as compared with that present in ordinary negligence. Gross negligence is manifestly a smaller amount of watchfulness and circumspection than the circumstances require of a prudent man.

O'Malley v. Jegabbi, 12 A.D.2d 389, 391, 211 N.Y.S.2d 547 (3rd Dep't 1961) (emphases omitted).

B) **Standard.** *Noonan v. Luther*, 119 A.D. 701, 104 N.Y.S. 684 (3rd Dep't 1907) (quoting 6 SEYMOUR D. THOMPSON, THOMPSON'S COMMENTARIES ON THE LAW OF NEGLIGENCE § 7167 (1901)), states:

> [W]illful and wanton conduct, justifying the award of exemplary damages, may occur where the conduct is so gross as to raise the presumption of a conscious indifference to consequences, or a wanton disregard of the rights of others. It is only where this reckless

disregard of the rights of others and conscious indifference to consequences are shown that it properly can be said that exemplary damages are recoverable.

DISCOVERY

Electronic Discovery Rules

Electronic Discovery relates to the discovery of electronically stored information. Although New York has yet to adopt e-discovery related amendments to its civil rules, the Uniform Rules of the New York State Courts address e-discovery. Specifically Part 202.12(c)(3) sets forth the matters "to be considered" at a preliminary conference with the court as concerns e-discovery:

> Where the court deems appropriate, it may establish the method and scope of any electronic discovery. In establishing the method and scope of electronic discovery, the court may consider the following non-exhaustive list, including but not limited to: (i) identification of potentially relevant types or categories of ESI and the relevant time frame; (ii) disclosure of the applications and manner in which the ESI is maintained; (iii) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible; (iv) implementation of a preservation plan for potentially relevant ESI; (v) identification of the individual(s) responsible for preservation of ESI; (vi) the scope, extent, order, and form of production; (vii) identification, redaction, labeling, and logging of privileged or confidential ESI; (viii) claw-back or other provisions for privileged or protected ESI; (ix) the scope or method for searching and reviewing ESI; and (x) the anticipated cost and burden of data recovery and proposed initial allocation of such cost.

N.Y. RULES OF COURT § 202.12(c), 22 NYCRR Part 202.12(c)(3)(McKinney's 2014).

Expert Witnesses

A) **Forms of Disclosure.** Expert witnesses are governed by N.Y. C.P.L.R. § 3101(d)(1). There are no depositions or written interrogatories of another's expert, however "upon request" a party intending to offer the testimony of an expert retained to testify at a trial must disclose the expert's identity. N.Y. C.P.L.R § 3101(d)(1)(iii). However, the identity of the expert does not have to be disclosed in a medical malpractice case. N.Y. C.P.L.R § 3101(d)(1)(ii) (MCKINNEY 2017). The following must be disclosed: the expert's qualifications, subject matter on which the expert will testify, substance of the expert's opinion, and the basic overall summary of the grounds that form the basis of the expert's opinion. The disclosure should identify the documents that the expert bases his/her opinion on (note that these documents will be subject to disclosure). N.Y. C.P.L.R § 3101(d)(1)(i) (McKinney 2017McKinney 2017); *see Shirinova v. N.Y. City Health & Hosps. Corp.*, 34 A.D.3d 442, 824 N.Y.S.2d 137 (2d Dep't 2006). *Cioffi v. S.M. Foods, Inc.*, 142 A.D.3d 520, 36 N.Y.S.3d 475 (2d Dep't 2016).

B) **Discovery of expert work product.** Expert reports made in preparation for litigation are protected from disclosure as materials prepared in anticipation of litigation and "may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable" to obtain them without undue hardship. N.Y. C.P.L.R. § 3101(d)(2) (MCKINNEY 2017).

C) There is no obligation to disclose experts retained solely for case/trial preparation (consulting experts are protected from disclosure). See *Santariga v. McCann*, 161 A.D.2d 320, 322, 555 N.Y.S.2d 309, 310 (1st Dep't May 10, 1990)

Non-Party Discovery

A) **Subpoenas.** N.Y. C.P.L.R. § 3101(a)(4) allows for the discovery of non-parties. N.Y. C.P.L.R. § 2303 governs the service of subpoenas and payment in advance. A copy of the subpoena must be served on all other parties before the time scheduled for the production of the document or other things sought. N.Y. C.P.L.R. § 2303 (MCKINNEY 2017). The subpoena cannot request a production of a person or materials any less than twenty (20) days after the service of the subpoena. N.Y. C.P.L.R. § 3120 (MCKINNEY 2017). N.Y. C.P.L.R. § 2305 covers attendance required pursuant to a subpoena and possession of books, records, documents or papers. N.Y. C.P.L.R. § 8001 (MCKINNEY 2017) provides that a non-party shall receive fifteen dollars for each day's attendance, and an additional three dollars for each day's attendance subpoenaed to give testimony, or produce books, papers and other things at an examination before trial.

B) **Time frame for responses.** N.Y. C.P.L.R. § 3122(a) (MCKINNEY 2012) requires a non-party objecting to disclosure to serve a response within twenty (20) days. A party may move for a motion to quash, fix conditions, or modify a subpoena under N.Y. C.P.L.R. § 2304. N.Y. C.P.L.R. § 3103 (MCKINNEY 2012) allows the non-party to move for a protective order to limit, condition or regulate the disclosure device used. The non-party may move to quash, fix conditions to or modify the subpoena under N.Y. C.P.L.R. § 2304 (MCKINNEY 2012). *See Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 A.D.3d 104, 811 N.Y.S.2d 5 (1st Dep't 2006).

C) **Out-of-state discovery.** N.Y. CPLR § 3119 (McKinney 2017), effective as of January 1, 2011, adopts the Uniform Interstate Depositions and Discovery Act, allows for disclosure in New York State related to an action pending in another United States jurisdiction without the need for a court order. The party seeking the discovery need only submit the out-of-state subpoena "to the county clerk in the county in which discovery is sought to be conducted in this state." N.Y. CPLR § 3119(b)(1) (McKinney 2017). Subsequently, the county clerk "shall promptly issue a subpoena for service upon the person to which the out-of-state subpoena is directed." N.Y. CPLR § 3119(b)(1) (McKinney 2017). The non-party from whom discovery is sought may move for a protective order or to squash or modify the subpoena in the county in which the discovery is to be conducted.

Privileges

In New York "[u]pon objection by a person entitled to assert the privilege, privileged matter shall not be obtainable." N.Y. C.P.L.R. § 3101(b) (MCKINNEY 2017). The party asserting the privilege bears the burden of establishing that the documents sought are covered by the privilege asserted. *Spectrum Sys. Intern. Corp. v Chem. Bank*, 78 N.Y.2d 371, 575 N.Y.S.2d 809 (1991); *accord China Privatization Fund (Del.), L.P. v. Galaxy Entm't Grp. Ltd.*, 139 A.D.3d 449, 32 N.Y.S.3d 71 (1st Dep't 2016). A party seeking to protect documents from disclosure should

compile a "privilege log" describing why the documents should be privileged. *In re Subpoena Duces Tecum*, 99 N.Y.2d 434, 442, 757 N.Y.S.2d 507, 512 (2003). When asked to produce documents and:

> such person withholds one or more documents that appear to be within the category of the documents required by the notice, subpoena duces tecum or order to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum.

N.Y. C.P.L.R. § 3122(b) (MCKINNEY 2017).

A) **Attorney-client privilege.** N.Y. C.P.L.R. § 4503 (MCKINNEY 2017) is a codification of a common law evidentiary privilege, and promotes candor and trust between attorneys and their clients. An attorney-client relationship must have been established, where the attorney was contacted for the purpose of obtaining legal advice or services and the information sought to be protected by the privilege was confidential and made for the purpose of obtaining legal advice or services. The party claiming the privilege has the burden of proving each element of the privilege, and public policy may require disclosure. *In re Grand Jury Subpoena*, 1 Misc. 3d 510, 770 N.Y.S.2d 568 (N.Y. Sup. Ct. 2003) (citing *Priest v. Hennessy*, 51 N.Y.2d 62, 431 N.Y.S.2d 511 (1980)); *see also Matter of Vanderbilt*, 57 N.Y.2d 66, 453 N.Y.S.2d 662 (1982).

B) **Work product.** N.Y. C.P.L.R. § 3101(c) (MCKINNEY 2017) makes attorney work product undiscoverable. Attorney work product is a very narrow area involving an attorney's subjective analysis of the case and includes legal theories, trial strategy, mental impressions, or opinions. *Wickham v. Socony Mobil Oil Co.*, 45 Misc. 2d 311, 256 N.Y.S.2d 342 (N.Y. Sup. Ct. 1965). Attorney work product is distinct from materials prepared in advance of litigation. Additionally, facts that an attorney might discover through investigation are not protected by § 3101. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 157 A.D.2d 444, 558 N.Y.S.2d 486 (1st Dep't 1990).

C) **Confidentiality.** Under the New York Rules of Professional Conduct Rule 1.6, New York lawyers are prohibited from knowingly revealing confidential information to the disadvantage of a client. Confidential information consists of information that is a) protected by the attorney-client privilege; b) embarrassing or detrimental to the client; or c) information the client requested be kept confidential. 22 N.Y.C.R.R. § 1200.0, 22 N.Y.A.D.C. § 1200.0 (McKinney 2017).

1) **Exception.** A lawyer may reveal a confidence or secret if the client gives consent or if the lawyer reasonably believes it necessary to 1) prevent death or bodily harm; 2) prevent client from committing a crime; 3) withdraw advice to a third-party that was based upon false information or is being used to further a crime or fraud; 4) secure legal advice about compliance with these rules; 5) defend an

accusation of wrongful conduct; or 6) to comply with a court order. 22 N.Y.C.R.R. § 1200.0, 22 N.Y.A.D.C § 1200.0 (McKinney 2017).

D) **Statements.** "A party may obtain a copy of his own statement." N.Y. C.P.L.R. § 3101(e) (MCKINNEY 2017).

E) **Other Privileges.** New York recognizes the following other privileges: statements between spouses (N.Y. C.P.L.R. § 4502), doctor and patient (N.Y. C.P.L.R. § 4504), priest and confessant (N.Y. C.P.L.R. § 4505), psychologist and patient (N.Y. C.P.L.R. § 4507), social worker and client (N.Y. C.P.L.R. § 4508), records of library activity (N.Y. C.P.L.R. § 4509), and rape crisis counselor and client (N.Y. C.P.L.R. § 4510).

F) **Self-critical analysis.** When the documents sought are relevant to the case, New York statutes and case law will not uphold the self-critical analysis doctrine. *RKB Enters. V. Ernst & Young*, 195 A.D.2d 857, 600 N.Y.S.2d 793 (3d Dep't 1993). For example, New York did not allow a self-critical analysis privilege in an employment discrimination suit. *Hardy v. N.Y. News, Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987). The First Department explains that self-critical privilege "has never been recognized under New York law." *Uniformed Fire Officers Ass'n, Local 854 v City of New York*, 100 AD3d 546, 547, 955 N.Y.S.2d 5 (1st Dep't 2012).

1) **Balancing.** New York courts will balance the need for disclosure weighed against the harm it might cause in terms of discouraging companies from creating self-critical documents. The courts may allow a company to invoke the doctrine to protect parts of a document, but compel the production of other parts such as statistical and demographic analyses. *Abel v. Merrill Lynch & Co.*, 1993 WL 33348 (S.D.N.Y. 1993). In another employment discrimination case, the court refused to force Goldman Sachs to produce reports that included employee interviews. *Flynn v. Goldman, Sachs & Co.*, 1993 WL 362380 (S.D.N.Y. 1993).

Requests to Admit

A) N.Y. C.P.L.R. § 3123 governs the notice to admit, a discovery device where one party will request that an adversary agree on the genuineness or correctness of any documents or other photographic evidence, or the truth of any matters of fact over which there can be no substantial dispute at the trial. The notice to admit may be served any time after service of the answer or after the expiration of twenty days from service of the summons, whichever is sooner, and not later than twenty days before the trial. N.Y. C.P.L.R. § 3123 (MCKINNEY 2017). A notice to admit may not be used to decide an ultimate issue of fact. *Singh v. G & A Mounting & Die Cutting, Inc.*, 292 A.D.2d 516, 739 N.Y.S.2d 578 (2d Dep't 2002); *accord Jet One Grp., Inc. v. Halcyon Jet Holdings, Inc.*, 111 A.D.3d 890, 976 N.Y.S.2d 128 (2d Dep't 2013).

B) A court will consider items admitted if a party fails to respond timely to the notice to admit, although a party is not required to respond if the requests were improper. *Meadowbrook-Richan, Inc. v. Cicchiello*, 273 A.D.2d 6, 709 N.Y.S.2d 521 (1st Dep't 2000). However, the safer option for responding to an improper notice to admit is to

move for a protective order within the twenty day period allotted for a response. See *Nader v Gen. Motors Corp.*, 53 Misc 2d 515, 517 (Sup Ct 1967) affd, 29 A.D.2d 632, 286 N.Y.S.2d 209 (1st Dep't 1967). A party's admission is only for the pending action and may not be used against that party in any other proceeding. *Leveski v. Hydraulic Elevator & Mach. Co.*, 243 F. Supp. 614 (S.D.N.Y 1965). N.Y. C.P.L.R. §§ 3102(f) and 408 allow parties to serve notices to admit on the State.

EVIDENCE, PROOFS & TRIAL ISSUES

Accident Reconstruction

A) An accident reconstruction is performed by expert witnesses who testify to the details of an incident, most often involving automobiles and airplanes. "The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *De Long v. Cnty. of Erie*, 60 N.Y.2d 296, 457 N.E.2d 717 (1983).

B) **Test for admissibility.** If the expert's qualifications have been challenged by the opposing party, New York Courts will apply the four-fold test for the admissibility of scientific expert evidence, as set forth in *Frye v. United States*, 293 F. 1013 (1923).

1) The four part *Frye* test of admissibility is as follows:

a) The expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable;

b) Expert testimony must be based on a scientific principle or procedure which has been sufficiently established to have gained general acceptance in the particular field in which it belongs;

c) Is the proffered expert testimony is beyond the ken of the jury; and

d) The expert's opinion must be relevant to the issue and facts of the individual case.

See People v. Smith, 2004 NY Slip Op 50172U, 1 (N.Y. Sup. Ct. 2004).

Appeal

A) **When Permitted.** An appeal may be taken only from an order or judgment, not from a decision, memorandum, opinion, report, ruling, or verdict. N.Y. C.P.L.R. §§ 5511, 5512(a) (MCKINNEY 2017).

1) **As of right.**

a) **Appellate Division.** An appeal as of right may be taken to the Appellate Division in an action originating in the supreme court or a county court from all final or interlocutory judgments (*i.e.*, non-final), unless the judgment is entered subsequent to an order of the appellate division that disposes of all issues in the action. N.Y. C.P.L.R. § 5701(a)(1) (McKinney 2017).

> An appeal as of right may be taken to the appellate division on an order in the following circumstances:
>
> > (i) grants, refuses, continues or modifies a provisional remedy; or
> > (ii) settles, grants or refuses an application to resettle a transcript or statement on appeal; or
> > (iii) grants or refuses a new trial; except where specific questions of fact arising upon the issues in an action triable by the court have been tried by a jury, pursuant to an order for that purpose, and the order grants or refuses a new trial upon the merits; or
> > (iv) involves some part of the merits; or
> > (v) affects a substantial right; or
> > (vi) in effect determines the action and prevents a judgment from which an appeal might be taken; or
> > (vii) determines a statutory provision of the state to be unconstitutional, and the determination appears from the reasons given for the decision or is necessarily implied in the decision; or
> > (viii) grants a motion for leave to reargue made pursuant to subdivision (d) of rule 2221 or determines a motion for leave to renew made pursuant to subdivision (e) of rule 2221.
>
> N.Y. C.P.L.R. § 5701(a)(2) (McKinney 2017). Certain orders that are not appealable as a right are listed in N.Y. C.P.L.R. § 5701(b).

b) **Court of Appeals.** An appeal as of right may be taken to the Court of Appeals (New York's highest court) from an order of the Appellate Division which finally determines the action, only where there is a dissent by at least two justices on the same question of law in favor of the appellant. N.Y. C.P.L.R. § 5601(a) (McKinney 2017).

An appeal as of right also may be taken to the Court of Appeals from an order of the appellate division that finally determines an action where there is directly involved the construction of the constitution of the state or of the United States. N.Y. C.P.L.R. § 5601(b) (McKinney 2017). The constitutional issue must be "substantial." *Gerzof v. Gulotta*, 40 N.Y.2d 825, 387 N.Y.S.2d 568 (1976).

An appeal from a trial-level final judgment that presents only the question of the validity of a New York or Federal statute under the New York Constitution or the Federal Constitution, bypasses all intermediate courts and is appealable as of right directly to the Court of Appeals. N.Y. C.P.L.R. § 5601(b)(2) (McKinney 2017).

2) **Leave to appeal.**

1) **Appellate Division.** Any order from an action originating in the supreme court or county court, not appealable as of right, may be appealed by permission of the judge who made the order or by a judge or justice of the Appellate Division in the department to which the appeal can be taken. N.Y. C.P.L.R. § 5701(c) (MCKINNEY 2017).

2) **Court of Appeals.** Appeals to the Court of Appeals by permission are governed by N.Y. C.P.L.R. § 5602 (MCKINNEY 2017).

B) **Timing.** An appeal as of right must be taken within thirty days after the appellant has been served with a copy of the judgment or order to be appealed, with notice of entry. N.Y. C.P.L.R. § 5513(a) (MCKINNEY 2017). Similarly, a motion for leave to appeal must be made within thirty days after the appellant has been served with a copy of the judgment or order to be appealed, with notice of entry. N.Y. C.P.L.R. § 5513(b) (MCKINNEY 2017).

1) **Service.** When the service of a judgment or order to be appealed, or from which leave to appeal is sought, has been made by mail, five days are added on, increasing the thirty day time to take the appeal to thirty-five days. N.Y. C.P.L.R. § 2103(b)(2) (MCKINNEY 2017).

2) **Extensions.** Extensions of time to take an appeal are generally not permitted except in very limited circumstances. *See* N.Y. C.P.L.R. § 5514(c) (MCKINNEY 2017).

Biomechanical Testimony

A) Biomechanical testimony, if probative, is admissible in New York. *See Valentine v. Grossman*, 283 A.D.2d 571, 724 N.Y.S.2d 504 (2001). New York courts have accepted biomechanical engineering as a "competent science to aid in evaluating the injuries sustained by a plaintiff in comparison with the severity of an incident." *Aspromonte v Judlau Contr., Inc.*, 2017 N.Y. Misc. LEXIS 1920, *9 (N.Y. Sup. Ct. 2017).

B) ***Frye* standard.** The New York Court of Appeals has reaffirmed its rejection of the *Daubert* standard of scientific reliability when deciding the admissibility of expert testimony, which would include biomechanical testimony. *See Parker v. Mobile Oil Corp.*, 7 N.Y.3d 434, 824 N.Y.S.2d 584 (2006). New York has retained the *Frye* general acceptance test. *Id*.

1) ***Frye* test.** In order to satisfy the *Frye* test, (as described in more detail in the section pertaining to accident reconstruction, *supra.*) proponents of opinion testimony must show that the theories propounded by their experts were based on tests, procedures or methodology sufficiently established to have gained general

acceptance in the particular field to which it belongs. While this does not mean that the methodology used must be unanimously indorsed by the scientific community, it must be shown to be generally accepted as reliable. *See id.*

A biomechanical expert's lack of medical training does not render the expert unqualified to opine that the force of the incident could not have caused the injuries allegedly sustained. V*argas v Sabri*, 115 A.D.3d 505, 505, 981 N.Y.S.2d 914, 914 (1st Dep't 2014) (finding that the lower court did not improvidently exercise its discretion in denying plaintiff's request for a Frye hearing). This goes to the weight of the expert's testimony and not the admissibility. *Id.*

Collateral Source Rule

A) The collateral source rule prohibits the admission of evidence that an injured party's damages were or will be compensated by a source other than the person/entity which caused the injury. *Oden v. Chemung Cnty. Indus. Dev. Agency,* 87 N.Y.2d 81, 637 N.Y.S.2d 670 (1995). Collateral sources of payment pursuant to CPLR 4545 must be pleaded as an affirmative defense. *Wooten v. State*, 302 A.D.2d 70, 73, 753 N.Y.S.2d 266 (4th Dep't 2002), *appeal denied,* 1 N.Y.3d 501, 775 N.Y.S.2d 239 (2003).

B) **Inapplicability.** N.Y. C.P.L.R. § 4545 partially abolished the collateral source rule in most tort actions in New York. *See* N.Y. C.P.L.R § 4545 (MCKINNEY 2017). N.Y. C.P.L.R § 4545 allows the Courts to consider evidence of collateral source payments in diminution of a portion of the damages relating to past, as well as, future expenses, which would with "reasonable certainty" be replaced or indemnified. *Id.* The admissibility of collateral source payments are permitted in medical, dental and podiatric malpractice actions, public employees against public employers (for past payments only) and any other personal injury, property damage or wrongful death action. However, the following collateral source payments are excluded:

1) Charitable contributions;
2) Life insurance;
3) Medicare benefits; and
4) When a collateral source payor is entitled by law to a lien against the plaintiff's recovery.

Id.; *see also* 42 U.S.C.A § 1395 *et seq.* (2005).

C) **Procedure.** The issue of collateral source payments is resolved during post-trial hearings before the court; the jury does not hear any evidence of collateral source payments. *Wooten v. State*, 302 A.D.2d 70, 753 N.Y.S.2d 266 (4th Dep't 2002), *appeal denied,* 1 N.Y.3d 501, 775 N.Y.S.2d 239 (2003).

D) **Future collateral source payments.** The rule also applies to awards for future collateral source payments. If the court finds that, with reasonable certainty, the plaintiff is legally

entitled to the continued receipt of such collateral source payments, then the award may be reduced by the amount expected to be paid. N.Y. C.P.L.R. § 4545(c) (MCKINNEY 2017). If, however, the plaintiff has received a voluntary charitable contribution, such contribution will not be admissible as evidence of a collateral source of payment. *Id.*

Convictions – Use of a Witness' Prior Convictions

N.Y. C.P.L.R. § 4513 (MCKINNEY 2017) states:

> A person who has been convicted of a crime is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer.

A) **Criminal.** A civil litigant is granted broad authority to use the criminal convictions of a witness to impeach the credibility of that witness. *Morgan v. Nat'l City Bank*, 32 A.D.3d 1264, 822 N.Y.S.2d 201 (4th Dep't 2006). When admitting evidence regarding previous crimes, the judge has discretion to curtail or limit the scope of cross examination regarding such evidence. *Lancaster v. Doctor's Hosp*. 222 A.D.2d 301, 636 N.Y.S.2d 8 (1st Dep't 1995).

1) **Accusations of guilt.** The witness may not be asked about "arrests" or "indictments" because these are merely accusations of guilt. *Dance v. Town of Southampton*, 95 A.D.2d 442, 467 N.Y.S.2d 203 (2d Dep't 1983).

B) **Traffic Violations.** "A traffic infraction is not a crime and the punishment imposed therefore shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof." N.Y. VEH. & TRAF. LAW § 155 (McKinney 2017). Evidence of a conviction for a traffic infraction cannot be used to impeach the credibility of a witness in a civil suit. *Fishman v. Scheuer*, 39 N.Y.2d 502, 384 N.Y.S.2d 716 (1976).

1) **Civil suit.** A conviction for a traffic violation or infraction may not be used as evidence in a subsequent action for damages. *Gilberg v. Barbieri*, 74 A.D.2d 913, 426 N.Y.S.2d 72 (2d Dep't 1980), *rev'd on other grounds by* 53 N.Y.2d 285, 441 N.Y.S.2d 49 (1981). Whether a traffic violation has occurred is a question of fact for the jury. *Calia v. Khoury*, 14 Misc. 2d 243, 450 N.Y.S.2d 996 (N.Y. Sup. Ct. 1982).

2) **Guilty plea.** However, a guilty plea to a traffic infraction is an admission to the act charged and constitutes some evidence of negligence. *Lohraseb v. Miranda*, 46 A.D.3d 1266, 848 N.Y.S.2d 440 (3d Dep't 2007). A defendant is generally given an opportunity to explain the circumstances surrounding a guilty plea to a traffic infraction, such as the convenience of entering a plea rather than traveling to contest the ticket. *Id*.

3) **Medicare Fraud.** Even though certified copies of Department of Health records showing a conviction of Medicare fraud do not constitute a certified copy of a criminal conviction, the records may be admissible pursuant to N.Y. C.P.L.R. § 4540. Lawton v Palmer, 126 A.D.3d 945, 947, 7 N.Y.S.3d 177, 179 (2d Dep't 2015)

Day in the Life Videos

"Day in the Life" videos are prepared by plaintiffs in personal injury actions, and are offered at trial to demonstrate the severity of plaintiff's injuries, disabilities, and/or the increased difficulty of activities of daily living. These videos have been held to be admissible in New York. *See Sullivan v. Locastro*, 178 A.D.2d 523, 577 N.Y.S.2d 631 (2d Dep't 1991). Admissibility hinges upon a balancing test between potential prejudice and probative value. Admission of such evidence at trial is within the "sound discretion of the trial court" and a trial court's determination of admissibility will not be disturbed unless the appellate court finds an "abuse of discretion." *Caprara v. Chrysler Corp.*, 71 A.D.2d 515, 423 N.Y.S.2d 694 (3d Dep't 1979). "[T]he mere fact that there is ample uncontradicted medical testimony concerning the nature and extent of plaintiff's injuries should not, in and of itself, prevent a plaintiff from showing to the jury a motion picture illustrating in an informative and noninflammatory manner the impact that the accident has had on his or her life." *Id.* at 523, 423 N.Y.S.2d at 699. Failure to disclose such a video in advance of trial may result in its preclusion from evidence. *Vigio v. N.Y. Hosp.*, 264 A.D.2d 668, 696 N.Y.S.2d 19 (1st Dep't 1999).

Dead Man's Statute

A) New York's Dead Man's Statute precludes a person who is interested in the outcome of litigation — *i.e.*, a party or his successor — from testifying to any personal transaction or communication with a deceased or mentally ill person, or any of their representatives or successors. N.Y. C.P.L.R. § 4519 (McKINNEY 2017).

B) **Exceptions.** Several exceptions to the rule apply, and an interested person is not disqualified from testifying if:

1) The decedent's representative, survivor or successor, or a mentally ill person's representative or successor, is examined in his or her own behalf;

2) Testimony concerning the subject transaction or communication is introduced by the representative or successor of a mentally ill or deceased person;

3) The witness is the stockholder or officer of a banking corporation that is a party or is interested in the outcome; or

4) Testimony concerns facts of an accident involving wrongful death or negligence arising from the operation of a motor vehicle, aircraft, or vessel (although testimony concerning alleged discussions with the decedent or incompetent person remains prohibited).

5) Those that have standing to assert the Dead Man's Statute and disqualify potential witnesses include the executor, administrator, or survivor of a decedent, a representative of a mentally ill person, and any of their successors.

See id.

Medical Bills

A) Generally, medical bills can be introduced into evidence through the business records exception to the hearsay rule. N.Y. C.P.L.R. § 4518 (MCKINNEY 2017). Even though medical bills are not specifically provided for, N.Y. C.P.L.R. § 4518 does provide for the introduction of hospital bills into evidence as *prima facie* evidence of the facts contained therein. N.Y. C.P.L.R. § 4518(b) (MCKINNEY 2017). This provision mandates that the hospital bill bear a certification by the head of the hospital or by a responsible employee in the controller's or accounting office that: (1) "the bill is correct;" (2) "each of the items was necessarily supplied;" and (3) "the amount charged is reasonable." N.Y. C.P.L.R. § 4518(b) (MCKINNEY 2017). This rule is generally inapplicable in a surrogate's court proceeding or an action brought by the hospital itself to recover payment for services or supplies provided to a patient. N.Y. C.P.L.R. § 4518(b) (MCKINNEY 2017).

B) **Bills under $2,000.00.** In addition to the above rule, medical bills that are under $2,000.00 may be admissible as prima facie evidence of the reasonable value and necessity of the medical care. N.Y. C.P.L.R. § 4533-a (MCKINNEY 2017).

1) **Proximate cause.** It is important to note that this does not dispense of the plaintiff's requirement of showing that the injuries suffered were proximately caused by the alleged negligence. *See Rivera v. State*, 115 Misc. 2d 523, 454 N.Y.S.2d 408 (N.Y. Ct. Cl. 1982).

Offers of Judgment

A) N.Y. C.P.L.R. §§ 3219, 3220, 3221 (McKinney 2017) govern tenders and/or offers by a defendant, or any party against whom a claim is asserted. Each statute applies to a certain type of case, but generally, under each statute a defendant makes an offer/tender to the plaintiff in advance of trial conceding something in the hope of securing some incidental advantage in return. The plaintiff either accepts or refuses the offer, but a refusal may result in a penalty to the plaintiff if the thing being offered/tendered is ultimately determined to have been adequate. Under each statute, the offer/tender must be accepted within ten days and is not made known to the jury.

1) **Contracts.** N.Y. C.P.L.R. § 3219 governs "tenders" by a defendant who was sued based upon an implied or express contract. Under this statute, the defendant concedes liability but disputes the damages. If plaintiff accepts, the court clerk enters judgment in the amount of the tender and dismisses the pleading, without costs. If the plaintiff refuses the tender and does not obtain a judgment at trial more favorable then the tender, plaintiff may not recover interest or costs and

shall pay defendant's costs to defend the action from the time of the tender. N.Y. C.P.L.R. § 3219 (MCKINNEY 2017).

2) **Liquidated damages.** N.Y. C.P.L.R. § 3220 governs "offers to liquidate damages conditionally" where the defendant disputes liability and/or damages in an express or implied contract case. Under this statute, the defendant offers to pay a specific sum of money only if the plaintiff establishes liability at trial. If plaintiff accepts the offer and plaintiff establishes liability and damages at trial, the damages specified in the offer is paid to the claimant. If claimant refuses the offer and at trial fails to obtain a more favorable judgment then offered, the plaintiff must pay defendant's expenses to try the damage portion of the case. N.Y. C.P.L.R. § 3220 (MCKINNEY 2017).

B) **Offers to Compromise.** N.Y. C.P.L.R. § 3221 governs "offers to compromise" and applies to all cases, except matrimonial matters. Under this statute, defendant offers plaintiff a judgment for a specified sum or property. If accepted, the clerk will enter judgment in accordance with the offer. If refused and the plaintiff fails to obtain a more favorable judgment, plaintiff shall not recover costs from the time of the offer, but rather shall pay defendant's costs from that time. N.Y. C.P.L.R. § 3221 (MCKINNEY 2017).

Offers of Proof

When evidence offered is objected to by the opposing party and excluded by the court, the proponent of such evidence has an opportunity to summarize the substance of the evidence if it had been allowed. This is called an offer of proof. An offer of proof must be made outside the presence of the jury. *People v. Williams*, 6 N.Y.2d 18, 187 N.Y.S.2d 750 (1959). Because it is necessary to preserve the issues for appeal, the offer of proof will automatically become part of the trial record. *Id*. Offers of proof must be made clearly and unambiguously. *Id.*

> Before a party excepts on account of the rejection of evidence, he should make the offer in such plain and unequivocal terms as to leave no room for debate about what was intended. If he fails to do so, and leave the offer fairly open to two constructions, he has no right to insist, in a court of review, upon that construction which is most favorable to himself, unless it appears that it was so understood by the court which rejected the evidence.

Daniels v. Patterson, 3 N.Y. 47, 51 (1849).

Prior Accidents

Evidence of prior accidents that are relevant to the subject litigation may be admissible if properly authenticated. "It is well settled that proof of a prior accident, whether offered as proof of the existence of a dangerous condition or as proof of notice thereof, is admissible only upon a showing that the relevant conditions of the subject accident and the previous one were substantially the same." *Hyde v. Cnty. of Rensselaer*, 51 N.Y.2d 927, 434 N.Y.S.2d 984 (1980). Evidence that any party has been involved in a prior accident which is offered merely to show that party has a propensity to get into accidents is generally inadmissible. *In re Matter of Brandon*, 55 N.Y.2d 206, 448 N.Y.S.2d 436 (1982).

Relationship to Federal Rules of Evidence

The New York law of evidence is a combination of case law and a few statutory rules found chiefly in N.Y. C.P.L.R. article 45. New York does not have a comprehensive evidentiary scheme codified nor based on the Federal Rules of Evidence. While New York's courts have adopted many principles enumerated in the Federal Rules of Evidence, there are significant distinctions between the two on some issues, including competency of witnesses; admissibility of discussions in the context of offers to compromise; impeachment of witnesses; and privileges, to name a few.

Seatbelt and Helmet Use Admissibility

Evidence that plaintiff failed to wear her seatbelt is admissible only if defendant is prepared to offer competent evidence showing that any of plaintiff's injuries were caused, enhanced, or exacerbated by failure to wear her seatbelt. *Siegfried v. Siegfried*, 123 A.D.2d 621, 507 N.Y.S.2d 20 (2d Dep't 1986). Except in unusual circumstances, failure to use an available seatbelt is to be considered only in mitigation of damages and should not be considered by the trier of fact in resolving the issue of liability. *Spier v. Barker*, 35 N.Y.2d 444, 450, 363 N.Y.S.2d 916 (1974); *Cummins v. Rose*, 185 A.D.2d 839, 586 N.Y.S.2d 988 (2d Dep't 1992); *Robles v. Polytemp, Inc.*, 127 A.D.3d 1052, 7 N.Y.S.3d 441 (2d Dep't 2015), see Vehicle and Traffic Law §1229-c(8) (MCKINNEY 2017). In a wrongful death action, failure to wear an available seatbelt may be asserted as a defense only if there is evidence that the decedent would have survived had he or she worn the seatbelt. *Baginski v. N.Y. Tel. Co.*, 130 A.D.2d 362, 515 N.Y.S.2d 23 (1st Dep't 1987).

Spoliation

Spoliation is the destruction, or the significant and meaningful alteration, of a document or instrument relevant to a legal proceeding. BLACK'S LAW DICTIONARY 1401 (6th ed. 1990) (citations omitted).

A) **Recourses.** New York does not recognize an independent tort of spoliation of evidence. *Ortega v. City of New York*, 9 N.Y.3d 69, 845 N.Y.S.2d 733 (2007). *accord Lalima v. Consol. Edison Co. of New York, Inc.*, 2017 WL 2562870, 2017 N.Y. Slip Op. 04825 (2d Dep't 2017). N.Y. C.P.L.R. § 3126 (MCKINNEY 2017), however, gives the Court broad discretion if a party destroys or alters relevant evidence. *Id.* Such recourse includes requiring spoliator to pay costs to the injured party, precluding proof favorable to the spoliator, and striking any responsive pleadings. *Id.*

B) **Duty to preserve.** In New York, the notice of a lawsuit typically creates a duty to preserve evidence and supports a claim of spoliation. *Amaris v. Sharp Elecs. Corp.*, 304 A.D.2d 457, 758 N.Y.S.2d 637 (1st Dep't 2003). Even where the evidence is destroyed prior to the commencement of an action, a party has a duty to preserve evidence so long as the party had notice that the evidence might be needed for future litigation. *Id.*

Subsequent Remedial Measures

Subsequent remedial measures refer to a change, repair or precaution that is taken after an accident has occurred. Generally, such evidence is not admissible to prove culpability for the accident. However, the evidence can be admitted to establish other facts that are at issue such as ownership, control and feasibility. It also can be introduced to impeach a witness.

A) **Negligence actions.** Evidence of subsequent remedial measures is not admissible in a negligence case unless there is an issue of maintenance or control. "The cases are legion in holding that evidence of subsequent repairs [are] not discoverable or admissible in a negligence case." *Klatz v. Armor Elev. Co. Inc.*, 93 A.D.2d 633, 462 N.Y.S.2d 677 (2d Dep't 1983) (citations omitted); *see also Graham v. Kone, Inc.*, 130 A.D.3d 779, 12 N.Y.S.3d 546(Mem) (2d Dep't 2015).

B) **Products liability.** In the context of strict product liability actions based on a defect in design or failure to adequately warn or instruct, subsequent remedial measures are not admissible. However, if the strict liability product claim is based on a manufacturing defect, such evidence would be admissible. The evidence is also admissible in other product liability contexts where it is offered not as proof of negligence or defective design, but as proof of some other relevant fact such as control, feasibility of a design alternative or failure to warn of a known risk. *Capara v. Chrysler Corp.*, 52 N.Y.2d 114, 436 N.Y.S.2d 251 (1981).

Use of Photographs

A) Relevant photographs are generally admissible to describe a person, place or thing. RICHARD T. FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 4-212 (Supp. 2002) A witness must first authenticate a photograph and establish that it is a fair and accurate depiction of the subject portrayed during the relevant time period at issue, but need not prove the identity and accuracy of the photographer. *People v. Byrnes*, 33 N.Y.2d 343**,** 352 N.Y.S.2d 913 (1974). Where the probative value of the photograph is slight as compared to its ability to inflame the emotions of the jury and cause undue prejudice the photograph should be excluded. "Photographic evidence should be excluded only if its sole purpose is to arouse the emotions of the jury and to prejudice the defendant." *People v. Wood*, 79 N.Y.2d 958, 582 N.Y.S.2d 992 (1992); *see also People v. Morin*, 146 A.D.3d 901, 45 N.Y.S.3d 512 (2d Dep't 2017)

B) **Medical films.** A personal injury plaintiff's X-Rays and MRI films may be admitted without testimony provided (1) it has been exchanged to the other party; (2) it identifies the plaintiff, the date of the film, the medical facility which took the film; and (3) it is accompanied by a notice of intention to offer the film at trial at least ten days prior to trial which annexes an affirmation from the physician who took the films that he would testify that these were the films that they took and that if called as a witness they would testify to that. N.Y. C.P.L.R. § 4532-a (MCKINNEY 2017).

DAMAGES

Caps on Damages

A) **Outrageous awards.** Although New York has not enacted statutory limits on damages awarded in personal injury actions, it guards against outrageous damage awards by empowering trial judges to provide post judgment relief under N.Y. C.P.L.R. § 4404. Under this provision, New York Judges are permitted to grant various forms of post judgment relief; including: ordering a new trial on the issue of liability or damages; or directing a verdict in favor of another party where such a judgment is required as a matter of law. N.Y. C.P.L.R. § 4404 (MCKINNEY 2017).

B) **New trial on damages.** New York also allows the trial judge to enter a conditional order for a new trial on damages, unless the parties agree to stipulate to a damage amount that is either above or below an amount set by the trial court. *See* Siegel, NEW YORK PRACTICE 688 (5th ed. 2011). This conditional order is permitted where the trial judge determines that the damages awarded by the jury are either excessive, remittitur), (beyond the maximum dollar-amount supported by the evidence), or inadequate to compensate the plaintiff for his injuries, (additur). *Id.*; *see also Kupitz v. Elliot*, 42 A.D.2d 898, 347 N.Y.S.2d 705 (1st Dep't 1973).

C) **Modification of damage awards.** N.Y. C.P.L.R. § 5501(c) permits the Appellate Division to modify a damage award if it, "deviates materially from what would be reasonable compensation," which is a less difficult standard to meet than the old "shocks the conscience" standard of review. N.Y. C.P.L.R. § 5501(c) (MCKINNEY 2017). The "material deviation standard" is the same standard of review that the trial court should apply when deciding whether to enter a conditional order for a new trial on damages. *Wendell v. Supermarkets Gen. Corp*., 189 A.D.2d 1063, 592 N.Y.S.2d 895 (3d Dep't 1993).

Calculation of Damages

A) **Itemization.** There is no exact science to determining the dollar value of any particular injury. In order to minimize speculation and guess-work, New York requires that a jury, upon entry of a judgment, itemize with particularity the categories and amounts of damages it has awarded to a plaintiff. In itemizing amounts intended to compensate for future and economic and pecuniary damages other than in wrongful death actions, the jury shall set forth as to each item of damage, (i) the annual amount in current dollars, (ii) the period of years for which such compensation is applicable and the date of commencement for that item of damage, (iii) the growth rate applicable for the period of years for the item of damage, and (iv) a finding of whether the loss or item of damage is permanent. N.Y. C.P.L.R. 4111(d)-(f) (MCKINNEY 2017); *see* Siegel, NEW YORK PRACTICE 672 (4th ed. 2005).

B) **Special verdict form.** Assessing damages is largely a fact sensitive endeavor. *Faas v. State*, 249 A.D.2d 731, 672 N.Y.S.2d 145 (3d Dep't 1998). The use of the special verdict

form by trial courts helps to minimize speculation and undue arbitrariness by requiring the jury to, at least, justify the amounts it deems reasonable compensation for the plaintiff's injuries. *See* Siegel, NEW YORK PRACTICE 672-73 (4th ed. 2005).

C) **Purpose.** As a general principal, the purpose of damage awards in tort actions is to place the plaintiff in as good of a position as they might be in, had they not suffered an injury. In New York, damages are meant to justly compensate a plaintiff for their injuries, not to provide a plaintiff with a windfall recovery as a "reward" for being injured. *Tate v. Colabello*, 58 N.Y.2d 84, 459 N.Y.S.2d 422 (1983). In keeping with a policy of actual compensation, New York requires damages to be "reasonably ascertainable" and must not be based upon undue speculation. *Heary Bros. Lightning Prot. Co., Inc. v. Intertek Testing Servs.*, 9 A.D.3d 870, 780 N.Y.S.2d 691 (4th Dep't 2004).

Available Items of Personal Injury Damages

A) **Economic damages.** Economic damages are compensation for a plaintiff's pecuniary losses associated with their injury. There are several categories of economic damages.

1) **Lost earnings.** Lost earnings are often a significant source of economic loss to the plaintiff. The burden is on the plaintiff to demonstrate with reasonable certainty and minimal speculation that they are, indeed, entitled to compensation for lost earnings. *Faas v. State*, 249 A.D.2d 731, 672 N.Y.S.2d 145 (3d Dep't 1998). There is no direct requirement that the plaintiff produce income tax returns, but the plaintiff must be able to establish the level of pay earned prior to the alleged accident with reasonable certainty, *e.g.*, by producing pay-stubs, IRS-W2 forms, IRS-W9 forms, or other sufficient evidence to demonstrate the plaintiff's lost earnings. However, the issue of lost earnings is always a question of fact for which any relevant evidence, including expert testimony, is permissible to reasonably establish a plaintiff's entitlement to compensation for lost earnings. *See generally Kirschhoffer v. Van Dyke*, 173 A.D.2d 7, 577 N.Y.S.2d 512 (3d Dep't 1991).

2) **Future lost earnings.** An injured plaintiff may recover for the loss of future earning capacity that is reasonably certain to occur as a result of their injuries. *Weir v. Union Ry. Co. of N.Y. City*, 188 N.Y. 416, 81 N.E. 168 (1907). Relevant factors will include the plaintiff's age, education, training, life expectancy (prior to the sustained injury), potential for advancement and present wages. *Tenczar v. Milligan*, 47 A.D.2d 773, 365 N.Y.S.2d 272 (3d Dep't 1975).

3) **Past expenses.** A plaintiff is entitled to recover for reasonable out-of pocket medical expenses, including hospital bills and reasonable expenditures for medication and rehabilitation. *Jones v. N.Y. Cent. & Hudson River. R.R. Co.*, 99 A.D. 1, 90 N.Y.S. 422 (3d Dep't 1904). The plaintiff bears the burden of proving these damages by way of bills, receipts or other available documentation. *Liebman v. Otis Elevator Co.*, 145 A.D.2d 546, 536 N.Y.S.2d 100 (2d Dep't 1988).

4) **Future medical expenses.** A plaintiff may also recover for future medical expenses, so long as the damage award is reasonable and predicated upon a reasonable likelihood of necessity of future treatment. *Lamica v. Pecore*, 273 A.D.2d 647, 709 N.Y.S.2d 694 (3d Dep't 2000).

B) **Non-economic damages.** Non-economic damages are those that compensate the plaintiff for the non-pecuniary loss she has suffered, *i.e.*, her pain and suffering or her loss of services, etc.

1) **Past and present pain and suffering.** A plaintiff bears the burden of establishing damages for pain and suffering by a "reasonable certainty," *Cummins v. Cnty. of Onondaga*, 84 N.Y.2d 322, 618 N.Y.S.2d 615, (1994). An award for pain and suffering must be based on some concrete evidence in the record, such as evidence of a physical injury, broken bones, disfigurement, etc., and cannot be purely speculative or based solely on the plaintiff's subjective complaints of pain. *See id*.

a) **Real physical pain.** The plaintiff must demonstrate, objectively, that he or she actually experienced real physical pain, or some form of pre-impact terror. *Jones v. Simeone*, 112 A.D.2d 772, 492 N.Y.S.2d 270 (4th Dep't 1985). This is a particularly important issue in wrongful death cases, where there are often disputed facts as to whether the plaintiff actually suffered physical pain or experienced fright prior to death.

b) **Evidence.** Direct evidence of pain and suffering in the form of medical records and expert testimony is permissible and may be referenced during summation. *Cotilletta v. Tepedino*, 151 Misc. 2d 660, 573 N.Y.S.2d 396 (N.Y. Sup. Ct. 1991). Circumstantial evidence of pain and suffering in the form of evidence of physical suffering is also admissible and may be referenced during summation. *Caprara v. Chrysler Corp.*, 71 A.D.2d 515, 423 N.Y.S.2d 694 (3d Dep't 1979) (where an unsuccessful attempt by a decedent to escape a fire was admissible and may be referenced on summation to demonstrate the likelihood of sustained pain and suffering).

c) **Impermissible arguments.** Two categories of arguments on summation that are specifically banned are the "golden rule" analogy and the "per diem" compensation argument. The golden rule argument is one where an attorney asks that the jury compensate the plaintiff commensurate with what each individual juror would like to be compensated if they, the jury, were to have sustained the same injuries as the plaintiff. *Weintraub v. Zabotinsky*, 19 A.D.2d 906, 244 N.Y.S.2d 905 (2d Dep't 1963). The per diem compensation argument, is one in which plaintiff's counsel asks that the jury allocate damages for each day the plaintiff suffers from the injuries she has sustained. *De Cicco v. Methodist Hosp. of Brooklyn*, 74 A.D.2d 593, 424 N.Y.S.2d 524 (2d Dep't 1980). Both of these arguments

are considered unduly suggestive and thus are impermissible on summation.

2) **Mental Anguish.** A plaintiff may recover for mental anguish suffered as a result of a defendant's negligence where the plaintiff has suffered a physical injury. *Ferrara v. Galluchio,* 5 N.Y.2d 16, 176 N.Y.S.2d 996 (1958). There are, however, certain situations where a plaintiff may recover for mental anguish where there is no corresponding physical injury.

a) A plaintiff may recover damages for injuries suffered resulting from "shock or fright due to the contemporaneous observation of the serious physical injury or death" of a member her immediate family where the defendant's conduct negligently exposes the plaintiff to an unreasonable risk of bodily injury or death and the defendant's negligence is also a substantial factor bringing about the injury or death of the plaintiff's immediate family member. *Bovsun v. Sanperi,* 61 N.Y.2d 219, 473 N.Y.S.2d 357 (1984).

b) **Absence of physical injury.** Damages for emotional harm can also be recovered in the absence of physical injury "when there is a duty owed by defendant to plaintiff, [and a] breach of that duty result[s] directly in emotional harm." *Perry-Rogers v. Obasaju,* 282 A.D.2d 231, 723 N.Y.S.2d 28 (1st Dep't 2001). However, "a plaintiff must produce evidence sufficient to guarantee the genuineness of the claim," such as "contemporaneous or consequential physical harm", which is "thought to provide an index of reliability otherwise absent in a claim for psychological trauma with only psychological consequences." *Id*.

c) **Expert testimony.** Practically speaking, claims for mental anguish will require well developed expert testimony to assist in either proving or disproving an actual mental injury. In the class of cases where mental anguish is predicated on something other than a physical injury sustained by the plaintiff, expert medical testimony is required. *Id*.

3) **Hedonic damages.** Damages for the loss of pleasures of life are regarded as an important aspect of recovery in tort actions. However, New York courts have consistently held that this aspect of recovery is to be considered as a part of the overall damage award for pain and suffering and is not a separate and distinct category of recovery. *See Nussbaum v. Gibstein*, 73 N.Y.2d 912, 539 N.Y.S.2d 289 (1989). A condition precedent to recovery for the loss of pleasures of life is that the plaintiff must have a conscious realization of his loss. *McDougald v. Garber*, 73 N.Y.2d 246, 538 N.Y.S.2d 937 (1989). As with any recovery for pain and suffering, the calculation of damages for the loss of the pleasures of may not be purely speculative or arbitrary. *Cummins v. Cnty. of Onondaga,* 84 N.Y.2d 322, 618 N.Y.S.2d 615 (1994).

Lost Opportunity Doctrine

A) **Loss of a chance of a cure.** In New York, a physician is liable when he or she deprives a patient of a significant chance of a cure or extended lifespan, provided that such deprivation is a substantial factor in causing the plaintiff's ultimate condition or death. *See Kallenberg v. Beth Israel Hosp.*, 45 A.D.2d 177, 357 N.Y.S.2d 508 (1st Dep't 1974), *aff'd*, 37 N.Y.2d 719, 337 N.E.2d 128 (1975); *Collins v. N.Y. Hosp.*, 49 N.Y.2d 965, 428 N.Y.S.2d 885 (1980).

B) **Loss of chance.** In a loss of chance case, the plaintiff is entitled to damages subject to the rule that a defendant can offer proof that a decedent already had a diminished life expectancy due to the illness that caused death, or that a plaintiff's condition could not have been entirely cured under any circumstances. *Dunham v. Vill. of Canisteo*, 303 N.Y. 498, 506, 104 N.E.2d 872 (1952).

Mitigation

A plaintiff also has the duty to mitigate his own damages. *Van Guilder v. Sands Hecht Constr. Corp*., 240 A.D.2d 318, 659 N.Y.S.2d 439 (1st Dep't 1997). Like comparative negligence, the plaintiff's failure to mitigate will not bar recovery. It will only reduce the amount of damages the plaintiff may obtain from the defendant commensurate with the percentage of the sustained damages that are attributable to the plaintiff's failure to mitigate.

Punitive Damages

A) New York reserves punitive damages for particularly egregious acts:

> "Because the standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases, the conduct justifying such an award must manifest 'spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton.'"

Marinaccio v. Town of Clarence, 20 N.Y.3d 506, 511, 986 N.E.2d 903, 906 reargument denied, 21 N.Y.3d 976, 992 N.E.2d 1088 (2013).

B) **Standard.** "Even where there is gross negligence, punitive damages are awarded only in 'singularly rare cases' such as cases involving an improper state of mind or malice or cases involving wrongdoing to the public." *Anonymous v. Streitferdt*, 172 A.D.2d 440, 568 N.Y.S.2d 946 (1st Dep't 1991) (citation omitted). Courts will only impose punitive damages where the defendant exhibits a high degree of moral culpability with a conscious disregard of the rights of others. *Longo v. Armor Elevator Co., Inc.*, 307 A.D.2d 848, 763 N.Y.S.2d 597 (1st Dep't 2003). In New York, the courts are unclear about whether the standard of proof for punitive damages awards is preponderance of the evidence or clear-and-convincing evidence. For example, *Greenbaum v. Svenska Handelsbanken*, N.Y., 979 F.Supp. 973, 975–82 (S.D.N.Y.1997) held that New York law requires proof of punitive damages by a preponderance of the evidence while *Randi A.J.*

v. Long Island Surgi–Center, 46 A.D.3d 74, 86, 842 N.Y.S.2d 558 (2d Dep't 2007) held that clear and convincing evidence is required to impose punitive damages.

C) **Insurability.** New York will generally not allow for the payment of punitive damages with insurance proceeds. *Home Ins. Co. v. Am. Home Prods. Corp.*, 75 N.Y.2d 196, 551 N.Y.S.2d 481 (1990).

Recovery of Pre- and Post-Judgment Interest

Unlike contract cases in New York, where interest is computed from the date of breach until satisfaction of the judgment; interest in personal injury cases is only available from the date of entry of judgment until the time in which the judgment is satisfied. *See* N.Y. C.P.L.R. § 5002 (MCKINNEY 2017); *see also Van Nostrand v. Froehlich*, 44 A.D.3d 54, 844 N.Y.S.2d 293 (2d Dep't 2007). New York has set a maximum statutory interest rate of nine-percent for post-judgment interest. N.Y. C.P.L.R. § 5004 (MCKINNEY 2017).

Recovery of Attorneys' Fees

Attorney's fees are almost never recoverable in New York. New York takes the position that each party should generally bear the cost of litigation. A party may only recover attorney's fees if allowed by a specific court rule, a statutory or contractual provision, or an agreement between the parties. *Chapel v. Mitchell*, 84 N.Y.2d 345, 618 N.Y.S.2d 626 (1994).

Taxation of Costs

A) **Statutory costs.** Statutory costs are provided for under the Civil Practice Laws and Rules, as of right, to any party victorious in an action. *See* N.Y. C.P.L.R. § 8101 (MCKINNEY 2017). These are *de minimus* sums that a victorious party is automatically entitled to without proof of entitlement. A party need only demonstrate that it was indeed victorious in the action to be entitled to "costs" in New York. However, as noted, costs are generally minimal, *i.e.* "three hundred dollars for each trial, inquest or assessment of damages." N.Y. C.P.L.R. § 8201(3) (MCKINNEY 2017).

B) **Taxable disbursements.** Taxable disbursements, by contrast, are only available to a party that can demonstrate its entitlement to statutory costs under N.Y. C.P.L.R. § 8101 (MCKINNEY 2017), and where that party can specifically demonstrate that it is entitled to the additional taxable disbursements sought. *Two Guys From Harrison-N.Y. v. S.F.R. Realty Assocs.*, 186 A.D.2d 186, 587 N.Y.S.2d 96 (2d Dep't 1992).

1) **Burden.** The party seeking taxable disbursements has the burden of demonstrating that the disbursements are reasonable, that the disbursements were actually incurred by the party and that they were a necessary expense incurred in either the prosecution or defense of the action, *see* N.Y. C.P.L.R. § 8401 (MCKINNEY 2017). Speculative disbursements submitted by a party or other disbursements that are not sum certain will generally not be awarded to a party.

2) **Specific disbursements.** N.Y. C.P.L.R. 8301(a) provides for a number of disbursements that a victorious party may be entitled. Such disbursements include: reasonable expenses for certain necessary re-printing of papers for trial; sheriff's fees incurred in executing a judgment; or "such other reasonable and necessary expenses as are taxable according to the course and practice of the court, by express provision of law or by order of the court." N.Y. C.P.L.R. 8301(a) (MCKINNEY 2017).

Unique Damages Issues

A) **Bifurcated trials in personal injury actions.** Bifurcation is the process of conducting separate complete trials on specific issues in a case. New York judges are encouraged, but not required, to order bifurcation in personal injury actions on the issues of liability and damages. New York Rules of Court § 202.42(a) [22 N.Y.C.R.R. § 202.42(a)] (McKinney 2017). When bifurcation is ordered, a trial on liability shall take place first and then, if necessary, a trial on damages will be held. *Id.*

1) **Unified trials.** Trial courts generally do not bifurcate trials in personal injury actions and all trials are unified unless an application is made by one of the parties and the Court grants the application. While trial courts are afforded great deference in deciding whether to conduct a bifurcated trial, as a general rule, New York Courts favor bifurcated trials and will generally only order a unified trial for good cause. New York Courts will order a unified trial on liability and damages in cases where "the nature, extent, and gravity of the injuries sustained have an important bearing on the issue of liability." *Lynch v. Nacewicz*, 126 A.D.2d 708, 511 N.Y.S.2d 121 (2d Dep't 1987). As a practical matter, courts will look to see whether or not the issues of the plaintiff's injuries are inextricably intertwined with the issue of the defendant's liability to determine whether or not a unified trial is appropriate. If it is determined that these issues are essentially inseparable, then a Court can and will order a unified trial. *Id.*

2) **Damages in a wrongful death action.** Damages for wrongful death in New York are controlled entirely by statute. N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 2012). As a matter of public policy, the goal in a wrongful death action in New York is to compensate the plaintiff, (surviving distributees of the decedent), for no more than their pecuniary loss suffered as a result of the decedent's death. There are four categories of recovery for wrongful death in New York: "(1) the decedent's loss of earnings; (2) loss of services each survivor might have received from the decedent; (3) loss of parental guidance from the decedent; and (4) the possibility of inheritance from the decedent." *Huthmacher v. Dunlop Tire Corp.*, 309 A.D.2d 1175, 765 N.Y.S.2d 111 (4th Dep't 2003). However, in order to be entitled to any of the above categories of damages, the plaintiff's must demonstrate that they could reasonably have expected support from the decedent, had he continued to live and that they were actually dependent on the decedent at the time of death. *Id*.

3) **Funeral and medical costs.** In appropriate cases, damages for funeral costs and medical expenses are also appropriate. *Id.* A decedent's dependents may recover for loss of inheritance on the theory that the decedent would have accumulated a more substantial estate, had she lived out her normal life span. *See De Clara v. Barber S. S. Lines*, 309 N.Y. 620, 132 N.E.2d 871 (1956). However, in order to award damages for loss of inheritance, the plaintiff must demonstrate with reasonable certainty, that the decedent would have continued to accumulate an estate at a reasonable rate, and that the decedent's beneficiaries would have been alive and able to inherit the decedent's estate at some reasonable future date. *Keenan v. Brooklyn City R.R. Co.*, 145 N.Y. 348, 40 N.E. 15 (1895).

4) **Non-pecuniary damages.** The only non-pecuniary damages available to a decedent's estate are pain and suffering and pre impact terror. However, damages of this sort may only be awarded when they are sought in conjunction with a cause of action for a wrongful act such as negligence or medical malpractice. *Krumenacker v. Gargano*, 276 A.D.2d 750, 715 N.Y.S.2d 710 (2d Dep't 2000). Pain and suffering in the context of wrongful death speaks of the pain suffered by the decedent from the moment of injury until the moment of death. *Williams v. City of New York*, 169 A.D.2d 713, 564 N.Y.S.2d 464 (2d Dep't 1991). However, such damages may be minimal where the duration of survival was particularly short. *Id*. Furthermore, the burden of demonstrating that the plaintiff consciously suffered pain following their injury and prior to their death rests with the estate. *Id*. An estate may also recover for the decedent's pre-impact terror caused by the defendant's negligent act, if it can be demonstrated with reasonable certainty that the decedent was actually frightened and feared their imminent grave injury or death. *Lang v. Bouju*, 245 A.D.2d 1000, 667 N.Y.S.2d 440 (3d Dep't 1997).