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Collateral Estoppel: Defendant denied defensive use of collateral estoppel despite having met a greater burden of proof on the issue of contributory negligence as plaintiff in a prior action.

In *Schwartz v. Public Administrator*,¹¹³ the Court of Appeals set out two requirements which must be met if the doctrine of collateral estoppel is to be successfully invoked:

[A]n identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and . . . a full and fair opportunity to contest the decision now said to be controlling.¹¹⁴

In *Nesbitt v. Nimmich*,¹¹⁵ the Court acknowledged the additional requirement that the burden of proof met in establishing the issue in the previous adjudication must have been at least as great as that faced by the party claiming the estoppel in the present action. *Nesbitt* involved adversaries who had been co-defendants in a prior negligence action wherein the instant defendant had been found negligent and the instant plaintiff had been exonerated. The instant plaintiff's attempt to invoke the doctrine of collateral estoppel on the issue of contributory negligence failed, the Appellate Division reasoning that as a defendant in the prior action he had met a lesser burden of proof on the issue of his own negligence than he would have to meet as plaintiff.¹¹⁶

Recently, in *Walsdorf v. Miller*,¹¹⁷ the Civil Court of the City of New York, Queens County, was presented with a variation of the *Nesbitt* situation. In a previous action by Miller against Walsdorf and other defendants, Walsdorf had been exonerated but Miller had succeeded in recovering against another defendant. In the instant action by Walsdorf against Miller, Miller attempted to plead collateral estoppel, arguing that as a prevailing plaintiff in a prior action he had proved his own freedom from contributory negligence. It should be noted that Miller had met a greater burden as plaintiff in the prior action than he would have to meet to escape liability as a defendant. The *Nesbitt* case, where only a lesser burden had been previously met, is, therefore, clearly distinguishable. Despite this difference, the court

¹¹³ 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969), discussed in *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 135, 144-51 (1969).

¹¹⁴ 24 N.Y.2d at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960. For a discussion of the expansion of the doctrine of collateral estoppel in New York which led up to this liberal standard, see Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969).

¹¹⁵ 30 N.Y.2d 622, 282 N.E.2d 328, 311 N.Y.S.2d 438 (1972), *aff'g mem.*, 34 App. Div. 2d 958, 312 N.Y.S.2d 766 (2d Dep't 1970) (mem.), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 521 (1971).

¹¹⁶ 34 App. Div. 2d at 959, 312 N.Y.S.2d at 768.

¹¹⁷ 73 Misc. 2d 221, 342 N.Y.S.2d 381 (N.Y.C. Civ. Ct. Queens County 1973).

held *Nesbitt* in point and refused to allow Miller to plead the estoppel. The court tersely reasoned that "although the source of energy has shifted, the principle of law has not."¹¹⁸

The *Nesbitt* reasoning should apply only when the party claiming the estoppel has shifted his position from defendant to plaintiff, thereby incurring a greater burden of proof. Logic dictates that a party who has successfully shown his own freedom from negligence by a clear preponderance of the evidence should not be held liable subsequently to one who had opposed him in the action wherein this showing was made. When the "full and fair opportunity" and "identity of issue" requirements enunciated in the *Schwartz* case have been met, a party who has previously met a greater burden of proof than is required of him in the instant action should have the benefit of collateral estoppel.

Apart from the issue of the changing burdens of proof, however, there may be valid reasons why a party in the position of the defendant in *Walsdorf* should be denied collateral estoppel. The *Schwartz* case dictates that the factual issue as to which the estoppel is invoked must necessarily have been determined in the prior action. If the prior decision could have rested on any of several possible factual findings, none of these findings is deemed established for the purposes of collateral estoppel.¹¹⁹ An ordinary negligence action provides a simple illustration. Where *A* sues *B* in negligence and the jury returns a verdict for *B*, neither *B*'s freedom from negligence nor *A*'s contributory negligence has necessarily been determined because either alone would support the verdict. In the case where *A* sues *C* and the jury returns a verdict for *A*, both issues have necessarily been determined in *A*'s favor. In *Walsdorf*, these two hypotheticals are combined, *A* having sued both *B* and *C*, prevailing against *B* but losing against *C*. A plausible argument can be made that the issue of *A*'s contributory negligence was necessarily decided only as between *A* and *B*. As a defendant, *C* had the option of proving either *A*'s contributory negligence or his own freedom from negligence. He is entitled to rest his case on the latter ground, leaving the question of contributory negligence to be litigated between his co-defendant and the plaintiff. In many cases, it will be unjust to bind *C* in a subsequent action by a factual determination which, at the time it was made, was of importance only to *A* and *B*.

¹¹⁸ *Id.* at 223, 342 N.Y.S.2d at 382 (emphasis in original).

¹¹⁹ See *Lewis v. Ocean Nav. & Pier Co.*, 125 N.Y. 341, 348, 26 N.E. 301, 303 (1891); *Purpora v. Coney Island Dairy Products Corp.*, 262 App. Div. 908, 28 N.Y.S.2d 1008 (2d Dep't 1941); *Rosenberg, Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 182 (1965).

Since *C* was never required to address himself to the issue of *A*'s negligence, he may argue with considerable force that *A*'s subsequent use of collateral estoppel denies him a "full and fair opportunity to contest" the question.¹²⁰

Dissimilarity of issues is another possible ground for denying collateral estoppel in the *Walsdorf* case. Conceivably a party to an accident may be responsible for injuries to others without being negligent with respect to his own injuries. In such a case, he should recover as a plaintiff but be held liable as a defendant. In many cases, of course, the two issues will be indistinguishable.

These considerations illustrate the fallacy of applying mechanical rules in determining the availability of collateral estoppel.¹²¹ Each case must be examined individually on its facts to determine whether the broad requirements set out in *Schwartz* and *Nesbitt* have been met. Only a case by case approach will prevent inconsistent adjudications while ensuring that a party is not denied his day in court.

ARTICLE 41 — TRIAL BY A JURY

CPLR 4110-b: New York adopts federal pre-charge conference procedure.

The newly added CPLR 4110-b¹²² substantially adopts Rule 51 of the Federal Rules of Civil Procedure. It allows counsel at trial to submit written jury-charge requests at the close of the evidence or at such earlier time as the court may request. The provision contemplates that court and counsel will confer out of the hearing of the jury before the closing arguments so that counsel can be informed of the charge to be given. The new section further provides that the jury must be charged after counsels' closing arguments and that any objection forming the basis for an assignment of error on appeal must be made before the jury retires to deliberate. The new provision should benefit all concerned. Counsels' written requests will assist the trial judge in preparing his charge by forewarning him of objections. Additionally, the pre-charge conference will give attorneys an opportunity to structure their summations around the charge.

¹²⁰ Perhaps a party in *C*'s position should be treated as a stranger to the *A-B* action. Cf. *Neenan v. Woodside Astoria Transp. Co.*, 261 N.Y. 159, 184 N.E. 744 (1933).

¹²¹ See *Rosenberg, Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 195 (1969).

¹²² L. 1973, ch. 233, at 312, eff. Sept. 1, 1973.