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Article 38

Collateral Estoppel: Thoughts on Mass Tort Cases and the "Multiple Plaintiff Anomaly"

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beyond the 10-day limit, a mistrial would be declared and a rehearing ordered.[35]

The futility of an article 78 proceeding to order a judge to comply with CPLR 2219(a) is apparent. Presently, the most effective pressure upon a judge comes from an administrative board ruling which requires him to submit a statement "indicating the matters which have been pending undecided before him for a period of 60 days after final submission and the reasons therefor."[36] It seems that some sanction, in addition to the scrutiny of his superiors, should be available against a recalcitrant judge.

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: Thoughts on mass tort cases and the "multiple plaintiff anomaly."

An adjudication of certain questions actually litigated and determined in a civil action may be binding in subsequent litigation under the doctrine of collateral estoppel.[37] Until recently the principle of mutuality of estoppel precluded a party not bound by a prior judgment from benefitting from that judgment by pleading it in a subsequent action.[38] The premise upon which mutuality of estoppel was based concerned an apprehension that unjust results could occur if the benefit of collateral estoppel were extended to persons not parties to the original action.[39] However, some exceptions to the mutuality rule developed as

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35 Professor McLaughlin stated: "If a party wishes to insist upon literal compliance with the sixty-day rule he must call this to the court's attention before the period expires." He does not indicate, however, what effective measure, if any, can be taken should the judge nevertheless delay beyond th sixty days. 7B MCKINNEY'S CPLR 2219, supp. commentary at 20 (1967).

36 22 N.Y.C.R.R. § 20.2.

37 Collateral estoppel must be distinguished from the principle of total res judicata, which prevents a party from relitigating the same cause of action against his opponent following a final judgment rendered on that cause of action. Collateral estoppel renders a final judgment conclusive as to issues necessarily decided in the determination of an action before a competent court. RESTATEMENT OF JUDGMENTS § 68, comment *a*, at 294 (1942). In order for an adjudication to be binding in subsequent litigation, the issue presented in the prior action must be identical to that raised in the subsequent suit and the issue presented must have been actually litigated. In addition, it must have been essential to the prior determination and ultimate in both suits. *See* Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969) [hereinafter Rosenberg].

38 *See* Neenan v. Woodside Astoria Transp. Co., 261 N.Y. 159, 184 N.E. 744 (1933); Atlantic Dock Co. v. Mayor, Alderman & Commonalty of City of New York, 53 N.Y. 64 (1873). *See generally* 2 BLACK, JUDGMENTS § 548 (2d ed. 1902).

39 *See* Moore & Currie, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961); Seavey, *Res Judicata with Reference to Persons Neither Parties Nor Privies-Two California Cases*, 57 HARV. L. REV. 98 (1943); von Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1929).

a result of the feeling that the mutuality requirement worked at cross purposes to the rationale behind res judicata, *i.e.*, that society's interests are served by eliminating repetitious litigation seeking to evince that a prior adjudication was unsound.[40] Gradual erosion by a series of exceptions to mutuality eventually brought about the demise of the priciple and, in 1967, the Court of Appeals declared the doctrine of mutuality "a dead letter" and "inoperative."[41] The use of collateral estoppel by a stranger to a former suit as a sword as well as a shield was thus established.

In *Jacobs v. Del Guercio*,[42] the Supreme Court, New York County, held that the plaintiff could invoke collateral estoppel to preclude relitigation of the issue of the defendant's negligence, where the defendant had a full and fair opportunity to litigate the particular issue in an action in which the plaintiff did not participate. Plaintiff was a passenger in an automobile operated by one of the defendants which was involved in a collision with an automobile owned and operated by another defendant. An action in New Jersey was commenced by a passenger riding in the same vehicle as the present plaintiff. The driver of that vehicle and the owner and operator of the automobile with which it collided were named as defendants. A verdict was returned adverse to the driver of plaintiff's vehicle, with a finding of no cause of action as to the other defendant.

The present suit against those same defendants evoked an explanation by the court of the limits of the offensive and defensive uses of the collateral estoppel doctrine. Plaintiff sought to use the New Jersey

In Postal Tel. Cable Co. v. Newport, 247 U.S. 464, 476 (1918), the Supreme Court outlined the rationale of the mutuality rule:

> The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. . . . And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard . . . so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

40 These exceptions turned on whether the party asserting the prior judgment sought to use it offensively or defensively. *See* 5 WK&M ¶ 5011.39 *et seq*. *See also* Rosenberg, *supra* note 37, at 186-93.

41 B.R. De Witt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.2d 596 (1967). The Court stated that the offensive use of collateral estoppel would be appropriate

> where the issues, as framed by the pleadings, were no broader and no different than those raised in the first lawsuit; where the defendant here offers no reason for not holding him to the determination in the first action; where it is unquestioned (and probably unquestionable) that the first action was defended with full vigor and opportunity to be heard; and where the plaintiff in the present action . . . derives his right to recovery from the plaintiff in the first action . . . although they do not technically stand in the relationship of privity, there is no reason either in policy or precedent to hold that the judgment in the [prior] case is not conclusive in the present action.

Id. at 148, 225 N.E.2d at 199, 278 N.Y.S.2d at 601-02.

42 67 Misc. 2d 606, 324 N.Y.S.2d 773 (Sup. Ct. New York County 1971).

judgment offensively vis-à-vis the defendant driver of the vehicle in which she was a passenger. The liability of this defendant was adjudicated in the New Jersey action wherein this defendant "had a full opportunity to participate . . . and be heard on the issue of . . . responsibility for the very accident that is here involved."[43]

However, the court rejected the second defendant's attempt at precluding litigation of his liability vis-à-vis the present plaintiff based upon a plea of collateral estoppel arising from the New Jersey finding of no cause of action by plaintiff's fellow passenger. "[E]ach [passenger] is entitled to proceed in the manner best designed to further his own interests with respect to forum, counsel, and other such considerations, and each is clearly entitled to have a full and fair opportunity to be heard on the issues involved."[44]

Application of the doctrine of collateral estoppel in the manner employed in the *Jacobs* decision presents no patent inequities. However, if the rationale of the court is logically extended in mass tort cases, a curious phenomenon comes to light, viz., the so-called "multiple plaintiff anomaly."[45] The problem may be best illustrated by supposing that a 747 airliner crashes, a disaster in which some 300 passengers perish. A number of suits arising out of the disaster are instituted in diverse jurisdictions against the airline. Assume further that a judgment is rendered in an action brought by the first plaintiff to institute suit, holding in favor of the airline. The airline cannot plead that judgment as a bar to a second plaintiff's suit, because this second plaintiff was not a party to the first action and cannot be denied his day in court. The second through one hundredth plaintiff to sue also lose in separate actions. Then, plaintiff number 101 establishes negligence on the part of the airline and wins. Plaintiffs number 102 through 300 attempt to preclude relitigation of the issue of the airline's negligence by entering a plea of

43 *Id.* at 609, 324 N.Y.S.2d at 777. Citing Schwartz v. Public Adm'r of Bronx County, 24 N.Y.2d 65, 266 N.E.2d 725, 298 N.Y.S.2d 955 (1969), the Court stated that "[w]here a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one and the prior determination will be held to be conclusive upon him." *Id.*

44 *Id.* at 609, 324 N.Y.S.2d at 776. The court stated that "the fundamental *sine qua non* of collateral estoppel [is] that the party against whom it is applied 'must have had at least one opportunity to litigate the issue involved.'" *Id.*, *quoting* Molino v. County of Putnam, 35 App. Div. 2d 578, 579, 314 N.Y.S.2d 341, 342 (2d Dep't 1970), *aff'd*, 29 N.Y.2d 44, 272 N.E.2d 323, 323 N.Y.S.2d 817 (1971), *discussed in The Quarterly Survey*, 46 ST. JOHN'S L. REV. 355, 374 (1971). *See also* Schwartz v. Public Adm'r of Bronx County, 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 (1969).

45 *See* Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 STAN. L. REV. 281, 286-89 (1957); Seavey, *Res Judicata with Reference to Persons Neither Parties Nor Privies-Two California Cases*, 57 HARV. L. REV. 98, 104-05 (1943); *cf.* Comment *Privity and Mutuality in the Doctrine of Res Judicata*, 35 YALE L.J. 607 (1926).

collateral estoppel based upon the holding in plaintiff number 101's action. What result? By the *Jacobs* rationale, those plaintiffs subsequent to plaintiff number 101 "get a free ride." Is this result to be tolerated?[46]

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[46] Perhaps a few cases decided in other jurisdictions may aid in resolving the enigma. In United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962), *aff'd in part and modified in part on other grounds on opinion below sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964), a collision occurred involving an air carrier's plane and a United States military plane, killing all of the 42 passengers on the air carrier's plane and its crew, and the two air force pilots in the military jet. Suits were filed in 11 different jurisdictions in the United States. After protracted litigation, the issue of the air carrier's liability was decided in favor of a plaintiff in the Southern District of California, with judgment for the plaintiff on a verdict against the air carrier entered. In the present case, involving the same collision, a motion for summary judgment made by plaintiffs — none of whom were parties to the California action — was granted on the ground that the defendant air carrier was collaterally estopped to deny liability under the doctrine of res judicata. Whether or not the same decision would have ensued if the court had found other actions, premised upon the collision decided at an earlier date with a different result, is unclear. *See also* Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

Compare the result in the *United Air Lines* case with another case involving an airline disaster, Berner v. British Commonwealth Pac. Airlines, Ltd., 346 F.2d 532 (2d Cir.), *cert. denied*, 382 U.S. 983 (1966), wherein it was held that an unappealed judgment rendered by a federal district court in California, upon a $35,000 verdict in favor of the estate of a passenger killed in a crash of defendant's airplane, did not estop the same airline from relitigating the question of liability for "wilful misconduct" in the present action by the estate of a different passenger killed in the same crash. The court felt that mutuality should not be discarded so quickly in multiple accident cases. The *United Air Lines* case was distinguished on the grounds that in that case the first judgment involved 24 of 31 pending actions; the gravity of the potential liability was shown by the fact that the ultimate judgments against the airline totalled $2,337,308; the airline would obviously have exerted its full efforts with that much at stake; moreover, the first judgment has been appealed, so that possible errors were not being overlooked.

See also Note, *Res Judicata: The Shield Becomes a Sword. Prior Adjudication of Negligence Bars Relitigation of that Issue by Other Plaintiffs in Subsequent Actions Based on Same Accident*, 1964 DUKE L.J. 402, wherein the author suggests that the problem be resolved by adopting a rule that unless there has been an *actual* inconsistency of verdicts collateral estoppel should be applied:

> To adopt a contrary position and not allow the plea where there is a mere *possibility* of inconsistent verdicts destroys the effectiveness of the principle. True, there is no guarantee that the first action was not the one wrongly decided, but by definition, a full and fair adjudication of the issue is prerequisite to entertaining a plea of res judicata. In any event, the objection here has no more merit than if it were raised against the accepted doctrine of res judicata generally. If the issue has been fully and fairly litigated, the paper tiger of inconsistent verdicts should not be a barrier to the rejection of the requirement of mutuality of estoppel.

Id. at 404.

A different solution to the problem is offered by another writer. *See* Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457 (1968) [hereinafter Semmel]. Various rules are presented by this commentary. Simply stated, the writer would entrust the court with the power to limit the effect of a judgment as to non-participants:

> The limitation on the effect of the judgment would be made by the court which tried the case and which is in the best position to determine the fairness of a limitation. Notice and opportunity to be heard would first be given to the interested non-parties. There would be no uncertainty as to the effect of the judgment—a party to the first action who desired a clarification before trial to

Where an identical issue is present and such issue has actually been determined against one who has had an opportunity to fully litigate it, a stranger to the first action can use the former determination against the party to estop him from relitigating the issue. The party who has been estopped, however, cannot use the first finding against the stranger. This anomaly arises as a result of the due process requirement that before being bound by a judgment, a litigant must have been given a full and fair opportunity to be heard in that action.[47] The mass tort presents the problem of how to prevent multiple suits by binding potential claimants even though they were not parties to the first action. Possible resolution of the problem can be found in the realization that a person may be given a full and fair opportunity to be heard without *actually* having been heard.[48]

For example, proceedings in rem permit final resolution of multiple interests by means of constructive notice despite lack of jurisdiction over the parties. Thus, registration of title to land,[49] perfection of title by adverse possession,[50] settlement of a trust,[51] or a life tenant's claim for fee damages[52] only require notice reasonably calculated to give known, living potential claimants[53] an opportunity to be heard[54] in order to conclude their rights and to cut off the possibility of future suits with respect to the res. Such adjudication is binding despite the lack of in personam jurisdiction over the potential claimants. The distinction between such proceedings and the mass tort is apparent in that the latter is an in personam action. Such a distinction, however, goes to the *power* of the court and not to the potential claimant's opportunity to be heard.

> determine what effort he should exert could move at an early stage for an order of limitation. If denied, he could then take the necessary steps to join the absent adverse persons.

Id. at 1478. *See also* Commissioner v. Sunnen, 333 U.S. 591 (1948); United States v. Stone & Downer Co., 274 U.S. 225, 235-36 (1927); The Evergreens v. Nunan, 141 F.2d 927 (2d Cir. 1944). *Cf.* RESTATEMENT OF JUDGMENTS § 96, comment *a*, at 294 (1942).

47 In Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937), the Court stated:

> Where a full opportunity has been afforded to a party to the prior action and he has failed to prove his freedom from liability or to establish liability or culpability on the part of another, there is no reason for permitting him to retry these issues.

Id. at 18, 9 N.E.2d at 759.

48 Class actions and default judgments readily come to mind.

49 American Land Co. v. Zeiss, 219 U.S. 47 (1911); Tyler v. Judges of the Ct. of Registration, 175 Mass. 174, 55 N.E. 812, *appeal dismissed*, 179 U.S. 405 (1900).

50 Wheeler v. Jackson, 137 U.S. 245 (1890).

51 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

52 Rogers v. Atlantic, Gulf & Pac. Co., 213 N.Y. 246, 107 N.E. 661 (1915); Drogen Wholesale Elec. Supply, Inc. v. State, 47 Misc. 2d 882, 263 N.Y.S.2d 409 (Ct. Claims 1965), *aff'd mem.*, 27 App. Div. 2d 763, 276 N.Y.S.2d 1015 (3d Dep't 1967).

53 *See, e.g.*, RPAPL § 833.

54 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

Indeed, the United States Supreme Court, construing New York law, regarded the in rem-in personam distinction as irrelevant with respect to a state's power to finally conclude a trust and, in the interest of repose and judicial economy, to bind potential claimants to the trust through constructive notice.[55]

The case for such an approach is stronger in the mass tort problem as each injured party is immediately put on notice by virtue of the accident itself; he knows some action will be commenced. Whether we deal with a downed 747 with a full passenger manifest, or a car accident where the several passengers are probably known to each other, the common defendant is in the best position to give actual or constructive notice that an action has been commenced. This is clearly the approach taken in federal class actions and in derivative suits.

It is not intended, however, to sweep jurisdictional predicates aside. Where all potential plaintiffs are domiciliaries of the state where the first action is commenced, the defendant could move to have them joined.[56] Where, however, potential plaintiffs are domiciliaries of various jurisdictions, a court could neither compel joinder, nor validly adjudicate their rights. Nevertheless, if mutuality of collateral estoppel is said to depend on a full and fair opportunity to litigate the issue, there would appear to be no reason for affording the benefits of the rule to one who has actual or constructive notice of litigation in which he failed to intervene.[57] Failure to intervene could not bar a claimant's subsequent litigation of the issue, but on equitable grounds courts could prevent his reliance on the former adjudication as determinative of the merits against the defendant.[58]

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55 *Id.* at 312-13.

56 CPLR 1001. Tort actions have been considered cases for permissive joinder only. Hastings v. Chrysler Corp., 3 F.R.D. 274 (E.D.N.Y. 1943). Nevertheless, a claimant with a separate cause of action has been held a necessary party and has been joined in the interests of preventing a multiplicity of suits. Millington v. Southeastern Elevator Co., 22 N.Y.2d 498, 239 N.E.2d 897, 293 N.Y.S.2d 305 (1968); In Weingast v. State, 44 Misc. 2d 824, 254 N.Y.S.2d 952 (Ct. Claims 1964), the plaintiff brought an action for mental anguish arising from unauthorized burial of his deceased sister. Another sister was deemed to have her own cause of action and was held a proper party. If she failed to join, however, her claim would have been barred in the interest of avoiding multiple suits. Under FED. R. CIV. P. 19, a party not bound by res judicata is only a proper party. *See* Provident Tradesmans Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

57 CPLR 1013. Intervention in such a case would be permissive as there is merely an identity of issues rather than an identity of interest. Unitarian Universalist Church v. Shorten, 64 Misc. 2d 851, 315 N.Y.S.2d 506 (Sup. Ct. Nassau County 1971). In the federal system, however, the effect of stare decisis may be sufficient to bring a potential claimant within the ambit of FED. R. CIV. P. 24(a). *See* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Atlantis Dev. Corp. v. United States, 379 F.2d 818 (5th Cir. 1967); Henry v. First Nat'l Bank, 50 F.R.D. 251 (N.D. Miss. 1970); General Motors Corp. v. Burns, 50 F.R.D. 401 (D. Hawaii 1970); *contra*, Ionian Shipping Co. v. British Law Ins. Co., Ltd., 426 F.2d 186 (2d Cir. 1970).

58 This approach has already been suggested by one author. *See* Semmel, *supra* note 46.

There is only one action whereby courts conclude the rights of all claimants in an in personam action despite lack of jurisdiction over all parties. This is the class action.[59] Where a court has jurisdiction over the parties, it can force joinder. The New York view with regard to compulsory joinder, however, requires more than a common question resulting from a single transaction; an identity of interest is necessary.[60] The New York approach to class actions has followed the same rule as that applicable to compulsory joinder, so that only where the court could compel joinder, had all the potential claimants been subject to its jurisdiction, will the court countenance a class action.[61] Tort actions, as they involve separate interests in separate causes of action, have been held improper for class suit.[62] Nevertheless, this rigid approach has been relaxed where the several interests are bound up into some type of relationship, *e.g.*, a trust or corporate fiction.[63] The analogy is apparent as the several actions of the various tort victims involve a common question of both law and fact and their interests are bound up in a very real, physical relationship as passengers in a common vehicle. Certainly the equities that recognize the fictional corporate relationship should not be blind to the relationship among the mass tort victims. Recent cases indicate a more liberalized approach toward class actions in the interest of judicial economy.[64]

In conclusion, the problem of the mass tort anomaly is not beyond resolution. The doctrine of collateral estoppel is an expression of social policy directed toward eliminating relitigation of common issues. The demise of mutuality encourages the victims of a mass tort to sue *seriatim*; the doctrine of collateral estoppel then becomes counterproductive and the reason for the rule ceases.

The use of class suits and compulsory joinder where possible will resolve the common issues economically. As the present New York law stands, this will require either legislative attention or a more liberal judicial interpretation of the identity of interests to be adjudicated. On

59 CPLR 1005; FED. R. CIV. P. 23.

60 CPLR 1001; FED. R. CIV. P. 19(a); *see* note 56 *supra*.

61 Society Milion Athena, Inc. v. National Bank of Greece, 281 N.Y. 282, 22 N.E.2d 374 (1939). *See generally* 3 H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 89-90 (1970).

62 Onofrio v. Playboy Club of New York, Inc., 15 N.Y.2d 740, 205 N.E.2d 308, 251 N.Y.S.2d 171 (1965); Gaynor v. Rockefeller, 15 N.Y.2d 120, 204 N.E.2d 627, 256 N.Y.S.2d 584 (1965); Brenner v. Title Guar. & Trust Co., 276 N.Y. 230, 11 N.E.2d 890 (1937); *compare* Contract Buyers League v. F & F Investment, 48 F.R.D. 7 (N.D. Ill. 1969).

63 Witherbee v. Bowles, 201 N.Y. 427, 95 N.E. 27 (1911); *see also* 7B MCKINNEY'S CPLR 1005, supp. commentary at 66-67 (1971).

64 Alpert v. Haimes, 64 Misc. 2d 608, 315 N.Y.S.2d 332 (Sup. Ct. Queens County 1970); Guarino v. Mine Safety Appliances Co., 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969); Lychtyger v. Franchard Corp., 18 N.Y.2d 528, 223 N.E.2d 869, 277 N.Y.S.2d 377 (1966); *cf.* Kovasky v. Brooklyn Union Gas Co., 279 N.Y. 304, 18 N.E.2d 287 (1938).

the other hand, adoption of the in rem technique of constructive notice will at least put potential claimants to the choice of litigating their claims in one action, or waiving the right to assert collateral estoppel against the common defendant in a subsequent action. In any event, the temptation to sit on the sidelines in hopes of reaping a windfall by way of a prior trial would be gone.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3403(a)(4): Right to a general preference held prerequisite to right to a special preference.

CPLR 3403(a)(4) enables a seventy-five-year-old plaintiff to apply for a special preference in any action. The purposes of this device are to afford an elderly party a measure of financial comfort in his remaining years and to further insure his ability to personally testify in the action.[65] Must the requirements for a general preference be satisfied before a party becomes entitled to a special preference?

In *Rab v. Colon*,[66] the Appellate Division, First Department, answered this question in the affirmative. It affirmed a decision holding that a seventy-five year old plaintiff could not be granted a special preference once his application for a general preference had been denied.[67] One judge dissented, on the ground that the special preference was mandatory by legislative fiat.[68]

The court's inherent right[69] to control its calendar would be restricted if the right to a special preference constituted satisfaction of the requirements for a general preference. CPLR 3403(a)(4) was intended to grant an individual a prompt trial in the proper court. The dissent is contradictory to the appellate division's purpose in instituting a general preference.[70]

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65 7B MCKINNEY'S CPLR 3403, supp. commentary at 13 (1970).

66 37 App. Div. 2d 813, 324 N.Y.S.2d 809 (1st Dep't 1970).

67 Article VI, section 7, of the state constitution grants the New York Supreme Court general original jurisdiction in all actions regardless of monetary value. CPLR 3401 allows the appellate division to adopt rules to regulate the supreme court's calendar. The court's refusal to grant a general preference, in effect, "place[s] cases which [it] believe[s] should [be] brought in a lower court in an inferior calendar status, making it virtually impossible to obtain a trial in the supreme court. . . ." 4 WK&M ¶ 3401.04.

68 The dissent cited 4 WK&M ¶ 3403.19(a) and Professor Siegel's statement in 7B MCKINNEY'S CPLR 3403, supp. commentary at 13 (1970). However, the determination of whether the supreme court will consider the case should be determined by the cause of action and not the age of the plaintiff. Professor Siegel has stated that the eligibility for a special preference does not waive the necessity of obtaining a general preference. 4 WK&M ¶ 3403.06 states that *"once a civil action is placed on a calendar . . .* a special preference may be granted by placing the action . . . in an advanced position . . . ." (Emphasis supplied).

69 Plachte v. Bancroft, Inc., 3 App. Div. 2d 437, 161 N.Y.S.2d 892 (1st Dep't 1957).

70 *See* 4 WK&M ¶ 3403.04.