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CPLR 3212: Summary Judgment Granted Despite Plaintiff's Failure To Allege Freedom from Contributory Negligence

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dealing with wrongful death. But, as pointed out by Professor Siegel, this is not an area for literal interpretation.[86] It is incongruous not to adopt the "limited to negligence" language in wrongful death actions where the plaintiff is also suing for personal injuries; the claims can be joined and, if the death is traceable to the injury, liability "would rest on the same foundation that supports the liability for the personal injury."[87]

ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3212: Summary judgment granted despite plaintiff's failure to allege freedom from contributory negligence.

In *DePaul v. George*,[88] plaintiff, a passenger in a car driven by defendant, moved for summary judgment on the ground that defendant was collaterally estopped from relitigating the issue of his negligence as a result of a prior judgment against him.[89] On appeal from an order granting summary judgment, defendant contended that plaintiff's freedom from contributory negligence had been neither alleged nor proved in the lower court. A majority of the First Department was, nonetheless, of the opinion that in a passenger versus driver situation, the driver should be aware of whether his passenger was contributorily negligent. Thus, the driver, on his own initiative, should come forward with any evidence regarding plaintiff's misconduct without requiring the plaintiff "to institute the first movement of a ritualistic dance"[90] by alleging freedom from contributory negligence.

Normally, of course, freedom from contributory negligence is an intricate part of plaintiff's cause of action which must be pleaded and proved.[91] However, appellate courts have generally adopted a permissive attitude toward granting summary judgment where, as in *DePaul*, a passenger is suing his host driver.[92] In this instance, plaintiff's conduct is rarely an actual issue in the case.[93] Thus, although good practice dictates an exculpatory affidavit by plaintiff, the failure to insert what is essentially a pro forma allegation should not prejudice his claim.

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86 *Id.*

87 *Id.*

88 34 App. Div. 2d 620, 309 N.Y.S.2d 90 (1st Dep't 1970).

89 *Cf.* B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

90 34 App. Div. 2d at 620, 309 N.Y.S.2d at 92.

91 Weston v. City of Troy, 139 N.Y. 281, 34 N.E. 780 (1893).

92 *See, e.g.*, Gerard v. Inglese, 11 App. Div. 2d 381, 206 N.Y.S.2d 879 (2d Dep't 1960); *see also* 4 WK&M ¶ 3212.03.

93 *See, e.g.*, Schembri v. Burke, 57 Misc. 2d 703, 293 N.Y.S.2d 487 (Sup. Ct. Queens County 1968); Dillon v. Humphreys, 56 Misc. 2d 211, 288 N.Y.S.2d 14 (Sup. Ct. Suffolk County 1968).