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Collateral Estoppel: Glaser v. Huette Overruled

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ARTICLE 32 — ACCELERATED JUDGMENT

CPLR 3213: Appellate division requires pleadings in appeal of action based upon an instrument for the payment of money.

The purpose of CPLR 3213 is to provide a speedy and effective means of securing judgments on claims presumptively meritorious, *i.e.*, actions based upon judgments or instruments for the payment of money only. CPLR 3213 provides that "the plaintiff may serve with the summons a notice of motion for summary judgment and supporting papers in lieu of a complaint. . . . If the motion is denied, the moving and answering papers shall be deemed the complaint and answer, respectively, unless the court orders otherwise." The "unless" clause in the last sentence of the statute was added to allow the court to require pleadings in the event that the moving and answering papers did not define the issues satisfactorily.[35]

In *Parkhurst v. Stockhausen*[36] the record on appeal was incomplete in that it did not contain the defendant's answering papers on the motion for summary judgment. The appellate division held, in reversing, that "in the absence of formal pleadings or all of the affidavits used on the application for summary judgment, there is no basis for ascertaining the 'issues'. . . ."[37]

The court determined, as an exercise of its proper discretion, that a complaint should be served and the action should proceed from that point in the usual course. This would have the effect of setting the issues to be adjudicated. It is an alternative available to the court under the section and, in this instance, was the only logical step in the progression of the controversy to final litigation. Without this procedure, the issues could not be crystallized, as the court would not see opposing papers. The court's action exemplifies the contingency allowed for by the inclusion of the "unless" clause in this section.

Collateral Estoppel: Glaser v. Huette *overruled.*

In an action arising out of an automobile collision, P1 (passenger in car number one) sued D1 (driver of car number one) and D2 (driver of car number two) for negligence, and recovered from both drivers. In a subsequent suit D1 sued D2 for personal injuries. In finding that the prior decision was dispositive on the issue of culpability, the New York Court of Appeals *held* that the doctrine of collateral estoppel precluded D1 from maintaining the second action since the control-

35 SIXTH REP. 339.
36 31 App. Div. 2d 622, 295 N.Y.S.2d 973 (1st Dep't 1968).
37 *Id.* at 622, 295 N.Y.S.2d at 974.

ling issue of negligence had been conclusively determined in the prior action. *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

At common law, the availability of collateral estoppel was subject to rather strict limitations. The major restriction was the deeply rooted requirement that the estoppel of judgment be mutual, *i.e.*, a party seeking to benefit from a prior action was precluded from invoking the doctrine unless such party would have been bound by the prior judgment had it gone the other way.[38]

This notion can best be exemplified by the landmark case of *Glaser v. Huette*,[39] which involved the applicability of collateral estoppel in motor vehicle litigation. In *Glaser*, co-defendant drivers were each found negligent in an action brought by one of the passengers. After this judgment one of the drivers sued the other for personal injuries, and the question to be decided was whether the defendant in this second action could set up the prior judgment as res judicata. While the defense pleaded was res judicata, it would be more precise to designate the defense as collateral estoppel, since the former bars subsequent suits on the same "cause of action" while collateral estoppel insures that once litigated "issues" will be conclusively determined.[40]

The Appellate Division, First Department, with the Court of Appeals affirming,[41] refused to grant such a defense, reasoning that the co-defendant drivers were not adversaries in the first action, and thus there was no duty *inter se* to litigate the issue of negligence[42] — in effect, the court asserted that the prior decision settled *nothing* between the drivers themselves[43] and hence, there was no mutuality of estoppel.

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38 *See* Bigelow v. Old Dominion Copper Mining and Smelting Co., 225 U.S. 111, 127 (1911); Note, *Res Judicata — Indemnitor — Creation of Relationship by Contract*, 4 VAND. L. REV. 926 (1951). *See also* WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 347-49 (2d ed. 1966).

39 232 App. Div. 119, 249 N.Y.S. 374 (1st Dep't), *aff'd mem.*, 256 N.Y. 686, 177 N.E. 193 (1931).

40 The leading case distinguishing these concepts is Cromwell v. County of Sac, 94 U.S. 351, 353 (1876). *See* RESTATEMENT OF JUDGMENTS §§ 68, 70; Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 4 (1942). *See generally* Polasky, *Collateral Estoppel — Effects of Prior Litigation*, 39 IOWA L. REV. 217 (1954).

41 232 App. Div. at 119, 249 N.Y.S. at 375, *aff'd mem.*, 256 N.Y. 686, 177 N.E. 193 (1931).

42 *But see* CPA §§ 211(a), 212 enacted just prior to *Glaser*. These sections provided for contribution among joint tortfeasors and permissive joinder of parties. They have been construed to mean that co-defendants are to be considered as true adversaries, though the impact of these sections had not been realized at the time *Glaser* was decided. *See also* Employer's Liability Assurance Corp. v. Post & McCord, 286 N.Y. 254, 36 N.E.2d 135 (1941).

43 *Contra*, Duignan v. Pawlikowski, 134 Misc. 22, 235 N.Y.S. 125 (Sup. Ct. Niagara County 1929). On identical facts as in *Glaser*, the supreme court permitted the defense of res judicata.

The decades following the *Glaser* case witnessed a gradual erosion in its precedential value.[44] The judicial outlook on res judicata underwent an evolutionary process, and concomitant with this developing process was gradual relaxation of the rules necessary for invoking collateral estoppel. Traditionally, as has been indicated, it has been a general principle of law that estoppel of judgment be mutual;[45] nevertheless, exceptions were made to this requirement in the interests of a fair and consistent judicial system.[46] Through the years, as the courts delved into the reasons underlying these exceptions, the *Glaser* doctrine gradually became more vulnerable. For example, in *Good Health Dairy Products Corp. v. Emery*,[47] where the defendant-owner was permitted to set up the successful judgment obtained by his driver in a previous suit as res judicata, the Court held that the car owner's liability was analogous to the master-servant relationship, in that the owner's liability arose when the driver was negligent. The *Good Health* Court categorized this driver-owner relationship as a clear case of derivative liability,[48] and with this affirmation, the fissure in the mutuality requirement widened.

Of greater significance was the Court's enunciation of the philosophy behind res judicata. Underlying the doctrine is a rule of reason and practical necessity: "One who has had his day in court should not be permitted to litigate the question anew."[49] It was observed that where the party *against* whom the plea is raised was a party to the prior action and had full opportunity to litigate the issue of its liability, collateral estoppel could be invoked.[50]

Subsequent to *Good Health*, the Court of Appeals placed more importance on the fact that the identical *issue* was being litigated in each action rather than on the jural relationship of the parties,[51] the

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44 For treatment on the points of adversarial status and the changes in judicial philosophy, see Justice Halpern's concurring opinion in Ordway v. White, 14 App. Div. 2d 498, 217 N.Y.S.2d 334 (4th Dep't 1961).

45 *See supra* note 38 and accompanying text for discussion on the requirement of mutuality of estoppel.

46 The exceptions to the mutuality requirement are those involving master-servant, principal-agent, and indemnitor-indemnitee relationships. These exceptions were made to avoid the absurd result of having the servant exonerated, while holding the master liable.

47 275 N.Y. 14, 9 N.E.2d 758 (1937).

48 In derivative liability, the liability of the defendant is altogether dependent upon another's culpability or exoneration which has been determined in a prior suit.

49 275 N.Y. at 18, 9 N.E.2d at 759. *See* Eissing Chem. Co. v. Peoples' National Bank, 237 N.Y. 532, 143 N.E. 731 (1923); Liberty Mutual Ins. Co. v. Colon, 260 N.Y. 305, 183 N.E. 506 (1932).

50 275 N.Y. at 18, 9 N.E.2d at 759.

51 *See, e.g.*, United Mutual Ins. Co. v. Saeli, 297 N.Y. 611, 75 N.E.2d 626 (1947); Cohen v. Dana, 300 N.Y. 608, 90 N.E.2d 65 (1949); Israel v. Wood Dolson Co., 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

latter consideration being the crucial element in the *Glaser* rationale. The nexus between *Glaser* and the decisions[52] handed down by the Court after *Glaser* is this: an *issue* already determined in a prior action, *e.g.*, a driver's negligence, was sought to be redetermined in a subsequent action.[53] It was held by the Court that such an attempt at relitigation vitiated the aim of res judicata, and to prevent such unnecessary relitigation, the Court expanded the scope of applicability of res judicata.[54] Despite the fact that some of these rulings did not involve motor vehicle litigation, they had a far reaching effect in undermining the *Glaser* rule.

The most salient case in this evolutionary growth of collateral estoppel was *Israel v. Wood Dolson Co.*[55] While *Israel* involved a contract action, the test it derived for the invocation of collateral estoppel was of great consequence. To illustrate the principle enunciated, a brief look at the facts is necessary. Israel sued Wood Dolson for breach of contract and was unsuccessful, having failed to prove the existence of a contract. Israel also sued one Gross for inducing the breach of contract. The Court of Appeals held that the question of the existence of a contract had already been adjudicated, and it would be incongruous to allow Israel a second chance to establish what he had failed to demonstrate in the first action.[56] Thus, following the lead of *Good Health*, *Israel* permitted the use of collateral estoppel where full opportunity had been afforded to a party in a prior action who had failed to prove his case.[57] This holding fulfilled the primary purpose of res judicata — that there be an end to the litigation.[58]

The *Israel* approach focused on the *issue* to be determined: "It will be seen, therefore, that the fact that a party has not had his day in court on an issue as *against a particular litigant* is not decisive in determining whether the defense of *res judicata* is applicable."[59] This ratiocination formed the solid foundation for the downfall of mutuality, and the jural relationship of the parties was no longer deemed

52 While these cases impaired the viability of *Glaser*, it is interesting to note that they never expressly referred to *Glaser*.

53 For an excellent schematic diagram of the factual pattern of these leading cases, see King, *Collateral Estoppel and Motor Vehicle Accident Litigation in New York*, 36 FORDHAM L. REV. 1, 48-50 (1967).

54 *See generally* 42 CORNELL L.Q. 290 (1957).

55 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956). For further discussion of this case, see *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 148, 149 (1966).

56 1 N.Y.2d at 120, 134 N.E.2d at 99, 151 N.Y.S.2d at 5.

57 *Id.*

58 *See* Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. 124, 131, 172 A. 260, 262 (1934). The principle of res judicata is well summed up in the maxim *interest republicae ut sit finis litium*.

59 1 N.Y.2d at 119, 134 N.E.2d at 99, 151 N.Y.S.2d at 4.

relevant.[60] In this manner, the *Israel* Court fashioned the test to be applied when the defense of res judicata is pleaded: identity of issues with full opportunity to be heard on the controlling issue in the prior action.[61]

Despite this change of emphasis by the courts, *Glaser* was never expressly overruled. The combination of the *Israel* approach and the uncertain status of the *Glaser* doctrine inevitably led to conflicting results. Some New York courts continued to follow *Glaser* in cases involving joint tortfeasors,[62] while others disavowed the doctrine, favoring the *Israel* approach.[63]

More recently, decisions by the Court of Appeals involving automobile accident litigation have continued the onslaught on the *Glaser* rule without decisively putting it to rest.[64] Nevertheless, these decisions indicated that the ratio decidendi of *Glaser* was in dire need of clarification, and presaged its eventual overruling.

In *Dresher v. Cummings*,[65] both a passenger and his driver sued the other operator for personal injuries in a federal court. The passenger was successful, but D1 was not because the jury found him guilty of contributory negligence. However, the jury also made a *gratuitous* finding that D2 was negligent. In a subsequent action initiated by D2 against D1 in a state court, the defense of collateral estoppel was permitted. Conceding that the parties were adversaries in the federal court action, the New York Court of Appeals significantly noted that there was no reason to decide the negligence of these two drivers *all over again*, their negligence having been settled in the prior trial where the same issues had been tried and decided.[66]

Only a year later, in *B. R. DeWitt, Inc. v. Hall*,[67] the Court offi-

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[60] *Accord*, Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942). *See also* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L.Q. 724 (1967).

[61] 1 N.Y.2d at 120, 134 N.E.2d at 99-100, 151 N.Y.S.2d at 5.

[62] *See, e.g.*, Minkoff v. Brenner, 10 N.Y.2d 1030, 180 N.E.2d 434, 222 N.Y.S.2d 47 (1962); Grande v. Torello, 12 App. Div. 2d 937, 210 N.Y.S.2d 562 (2d Dep't 1961); Friedman v. Salvatti, 11 App. Div. 2d 104, 201 N.Y.S.2d 709 (1st Dep't 1960).

[63] *See, e.g.*, James v. Saul, 17 Misc. 2d 371, 184 N.Y.S.2d 934 (Mun. Ct. 1958); Moran v. Lehman, 7 Misc. 2d 994, 157 N.Y.S.2d 684 (Mun. Ct. 1956). For further treatment on the conflict in New York courts, see Thornton, *Further Comment on Collateral Estoppel*, 28 BROOKLYN L. REV. 250 (1962).

[64] Cummings v. Dresher, 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). For further discussion of these cases, see *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 150, 153 (1967).

[65] Civil No. 8635 (N.D.N.Y., June 13, 1961).

[66] Cummings v. Dresher, 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

[67] 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

cially dispensed with the requirement of mutuality, calling it a "dead letter."[68] In *DeWitt,* an owner was allowed to use his driver's previous successful judgment offensively in a subsequent action against the other owner. Admittedly, this case can also be factually distinguished from *Glaser,* but the important point to be culled from the series of decisions culminating in *DeWitt* is this: the modern trend in the area of collateral estoppel no longer considered *Glaser* as controlling since the basis upon which it was decided (the adversarial status of the parties) has ceased to be an integral factor in the applicability of the res judicata doctrine.[69] As this precarious position of *Glaser* persisted, the anomalous situation of its being retained in the second department[70] and rejected in the first department[71] also developed. This anomaly has, however, since been rectified by the latest New York Court of Appeals ruling in the area.

In the instant case, a consolidation of three similar actions, Judge Keating, writing for the majority, classified the overruling of *Glaser* as a mere formality. Quoting from *Good Health Dairy Products* the Court stated that "[b]ehind the phrase res judicata lies a rule of reason and practical necessity. One who has had his day in court [on a particular question] should not be permitted to litigate the question anew."[72] The only requirements necessary for the invocation of collateral estoppel are first, there must be an identity of issues which has necessarily been decided in the prior action and is decisive of the present action, and secondly, there must have been a full and fair opportunity to contest the decision now said to be controlling.[73] The argument raised by *Glaser* that the present parties were not true adversaries in the prior action can be answered by this statement of reality: each defendant driver seeks complete exoneration from liability to the passenger, but also desires to hold the other defendant to some degree of liability if the passenger is victorious. "In fact, it may be rightly said that in many cases the battle between the co-defendants is more strenuous than is their attack against their supposedly main adversary, the

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68 *Id.*

69 *Id.*

70 Higginbotham v. Roth, 30 App. Div. 2d 93, 289 N.Y.S.2d 899 (2d Dep't 1968).

71 Schwartz v. Public Administrator, 30 App. Div. 2d 193, 291 N.Y.S.2d 151 (1st Dep't 1968). Justice Rabin dissented on the grounds that *Glaser* had never been overruled and the appellate division, therefore, was bound by its holding. For criticism of the *Higginbotham* and *Schwartz* decisions, see *The Quarterly Survey of New York Practice,* 43 ST. JOHN'S L. REV. 520-22 (1969).

72 Schwartz v. Public Administrator, 24 N.Y.2d 65, 70, 246 N.E.2d 725, 728, 298 N.Y.S.2d 955, 959 (1969).

73 *Id.* at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960.

plaintiff."[74] However, the Court was quick to point out the fact that collateral estoppel should not be applied rigidly, and listed a number of factors determinative of whether the party had had his day in court. These factors are: the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law, and foreseeability of future litigation.[75] The supposed harshness of the rule that might be forthcoming, when applied in some cases, is supposedly outweighed by both the reduction in the number of inconsistent results and a more speedy judicial system where all related claims are consolidated in one action. Underlying the previous reasoning is the difficulty the Court had in conceiving a situation where negligence vis-á-vis the passenger is not negligence towards the driver.

The majority's preoccupation with logical consistency of verdicts is injurious to the philosophy, adopted and fostered by the Court, which permitted recovery for victims of automobile accidents at the expense of national insurance companies. In *Seider v. Roth*,[76] the Court dispensed with considerations of logic and consistency in order to provide a forum for an injured plaintiff. Now, by the fortuitous presence of a passenger who recovers in an action wherein the host-driver is found to be negligent, to the slightest degree, this forum is, for all intents and purposes, closed to the host-driver. Moreover, as Judge Bergan notes, for a passenger in such a situation, "barring some odd miscarriage, it is next to impossible to lose."[77] Judge Bergan is obviously mindful of the Court's prior philosophy and is frankly and honestly anxious to continue it. A perplexing aspect of *Schwartz* is that Chief Judge Fuld and Judge Keating are in the majority, whereas in *Seider* they also espoused the majority view. Thus, consistency of verdicts is attained at the expense of inconsistency of philosophies. However, inconsistency of verdicts would seem but a small price to pay when there is assurance that the person most needing recovery will obtain it, and, as the dissent suggests, the brunt of this alleged inconsistency would be borne by those most able to do so — the insurance companies.[78]

Though the decision is subject to criticism on the aforementioned

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74 *Id.* at 72, 246 N.E.2d at 729, 298 N.Y.S.2d at 960.

75 *Id.* at 72, 246 N.E.2d at 729, 298 N.Y.S.2d at 961; *see* Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L.Q. 724, 728-29 (1967).

76 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 39 (1966).

77 24 N.Y.2d at 77, 246 N.E.2d at 732, 298 N.Y.S.2d at 965 (dissenting opinion).

78 *Id.* at 79, 246 N.E.2d at 734, 298 N.Y.S.2d at 967.

grounds, its future effects are not so readily ascertainable. New York apparently has adopted a case-by-case approach that seeks to remove all the inconsistencies and unfairness of collateral estoppel, while retaining its viability. The case-by-case approach has been adopted elsewhere and appears at the present time to be the "ideal standard."[79] The full-and-fair opportunity, applied on a case-by-case basis, appears to be the most practicable way of achieving Judge Keating's aim of eliminating repetitious litigation, while avoiding the prejudicing of the litigant's rights. If the "standard of fairness test" is applied consistently by the courts, without recourse to the rule of thumb approaches of the past,[80] the factors determinative of fairness mentioned by Judge Keating are definitive enough to be viable. However, the question arises whether the lack of certainty inherent in the imposition of the case-by-case approach might cause the opposite result hoped for, namely, that a number of parties would seek to show that they would be prejudiced by the invocation of the doctrine of collateral estoppel. While this might be true initially, this type of litigation would not be as extensive as a trial on the merits. As case law developed explaining what constitutes a fair opportunity the total of litigations would diminish. When viewed in this light, the overruling of *Glaser* becomes secondary to the Court's espousal and hoped for adoption of a "full-and-fair standard." The indecisiveness of the lower courts as to the applicability of *Glaser* as precedent has been settled. However, the discretion left to the courts in determining a "full-and-fair opportunity" can result in even more confusion than existed prior to *Schwartz.*

In any event, the practitioner representing a person in the position of D1 must now ensure that his client initiates the negligence action as soon as possible after the accident so that the client appears to be the primary plaintiff and will therefore be in a better position to control the litigation.

CPLR 3216: Departments divided on rule's constitutionality.

The constitutional validity of CPLR 3216[81] has been denied in *Cohn v. Borchard Affiliations,*[82] where by a 3-2 decision the majority

79 Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281 (1957).

80 These past approaches have been: mutuality, defensive use only, and use allowed only when the party it is being invoked against was the plaintiff in the prior suit.

81 CPLR 3216 sets forth the requirements for a motion to dismiss. There are three conditions precedent which must be met before a party may seek such a motion: (1) issue must be joined; (2) one year must elapse from the joinder of issue; and, (3) a forty-five day demand must be served upon the complainant, and a default in compliance with that demand must occur.

82 30 App. Div. 2d 74, 289 N.Y.S.2d 771 (1st Dep't 1968). For a detailed discussion of