

**Collateral Estoppel: Texas Judgment Against Common Carrier
Given Collateral Estoppel Effect in Subsequent Action Brought by
Other Plaintiffs in New York**

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rence that his testimony was material, necessary, and possibly essential in aiding the parties in the preparation of their case.¹²⁴ Although the decision is one of first impression,¹²⁵ the reasoning is undeniably sound.

Previous cases dealing with disclosure of witnesses' names spoke only of those "present at the scene, who saw the accident,"¹²⁶ or "who were right there,"¹²⁷ or who were "present at the time of the accident" and were witnesses "of the event itself."¹²⁸ However, one notable authority analyzed the implications of these holdings and forecast that these phrases "can reasonably be regarded as embracing all of those who witnessed at first hand any element that reflects on the liability issue in the case."¹²⁹ As evidenced by the decision, Judge Boyers obviously concurs in this analysis. Moreover, federal practice would undoubtedly sanction the result reached.¹³⁰ *Beyer* is therefore a welcome addition to the other recent decisions which strive to make the test for disclosure one of usefulness and reason.¹³¹

ARTICLE 32 — ACCELERATED JUDGMENT

Collateral Estoppel: Texas judgment against common carrier given collateral estoppel effect in subsequent action brought by other plaintiffs in New York.

Although it is now well established in New York that a party need not be given a day in court against a *particular* litigant¹³² provided that there is an "identity of issue which has necessarily been

¹²⁴ *Id.* at 223, 305 N.Y.S.2d at 267.

¹²⁵ See Affidavit in Opposition to Defendant's Motion at 2, *Beyer v. New York Tel. Co.*, 61 Misc. 2d 222, 305 N.Y.S.2d 265 (N.Y.C. Civ. Ct. Queens County 1969).

¹²⁶ *Sanfilipo v. Baptist Temple, Inc.*, 52 Misc. 2d 767, 768, 276 N.Y.S.2d 936, 937 (Sup. Ct. Monroe County 1967).

¹²⁷ *Newton v. Board of Educ.*, 52 Misc. 2d 259, 262, 275 N.Y.S.2d 494, 497 (Sup. Ct. Suffolk County 1966).

¹²⁸ *Rios v. Donovan*, 21 App. Div. 2d 409, 414, 250 N.Y.S.2d 818, 823 (1st Dep't 1964).

¹²⁹ 7B MCKINNEY'S CPLR 3101, commentary 46-47 (1970). Accordingly, Professor Siegel would include among those whose identity is disclosable the "bartender or drinking companion who saw the party drunk" prior to the accident and "the witness around the corner or a few blocks away who did not see the accident but saw one of the parties driving out of control or at a high speed." *Id.* at 46.

¹³⁰ For example, in *Cannaday v. Cities Serv. Oil Co.*, 19 F.R.D. 261 (S.D.N.Y. 1956), interrogatories were permitted not only as to names and addresses of persons witnessing the accident, but also as to persons otherwise having knowledge of the circumstances of the accident, of plaintiff's injuries, and of the equipment used on the ship where the accident occurred.

¹³¹ See, e.g., *Peretz v. Blekicki*, 31 App. Div. 2d 934, 298 N.Y.S.2d 805 (2d Dep't 1969); *Hartley v. Ring*, 58 Misc. 2d 618, 296 N.Y.S.2d 394 (Sup. Ct. Queens County 1969).

¹³² See *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

decided in [a] prior action. . . and. . . a full and fair opportunity to contest the [prior] decision. . .,"¹³³ academicians questioned the propriety of further extending the doctrine of collateral estoppel¹³⁴ to cases involving a common carrier.¹³⁵ Nevertheless, a recent lower court case, *Hart v. American Airlines, Inc.*,¹³⁶ has done just that and has thereby provided an approach which avoids absurdity while discouraging forum shopping.

The causes of action in *Hart* arose from a crash of one of defendant's airlines in which 58 passengers were killed. The deceased were residents of many states; consequently, various actions were instituted throughout the nation. In the first case tried to conclusion, American Airlines was adjudged negligent, and a judgment was rendered against it.¹³⁷ The plaintiffs in the instant action moved for summary judgment on the ground that American Airlines was collaterally estopped from relitigating the issue of negligence by virtue of the first judgment in Texas. In opposition, the defendant's primary contention was that an earlier ruling in *Hart*,¹³⁸ which denied a similar motion for summary judgment, was decisive. However, the court distinguished that ruling: the controlling factor behind it was the nondomiciliary status of the plaintiffs. And, although its earlier decision might discourage forum shopping, it did not "preclude the application of the New York doctrine of collateral estoppel in an action brought by New York dependents of deceased New York residents."¹³⁹

The court concluded that the prerequisites to the application of the collateral estoppel doctrine were readily satisfied since the issue of liability was identical to that previously adjudicated,¹⁴⁰ and the defendant had not sustained the burden of proving that it had not been afforded a full and fair opportunity to contest the issue of its liability in the Texas action.

The decision in *Hart* provides a well-reasoned approach to com-

¹³³ *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969). See *The Quarterly Survey*, 44 ST. JOHN'S L. REV. 144 (1969).

¹³⁴ For a review of significant aspects in the New York law of collateral estoppel, see Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969).

¹³⁵ See, e.g., Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

¹³⁶ 61 Misc. 2d 41, 304 N.Y.S.2d 810 (Sup. Ct. N.Y. County 1969).

¹³⁷ *Creasy v. American Airlines, Inc.*, — F. Supp. — (N.D. Tex. —), *aff'd sub. nom. American Airlines, Inc. v. United States*, 418 F.2d 180 (5th Cir. 1969).

¹³⁸ 31 App. Div. 2d 896, 297 N.Y.S.2d 587 (1st Dep't 1969).

¹³⁹ 61 Misc. 2d at 43, 304 N.Y.S.2d at 813.

¹⁴⁰ Indeed, in an airplane crash there are absent any of the problems with respect to "identity of issue" on liability which might arise in other types of accidents involving multiple participants such as automobile accident cases. *Id.*, 304 N.Y.S.2d at 812.

mon-carrier liability in situations such as these. It recognizes the state's interest in protecting its domiciliaries¹⁴¹ from an archaic application of the doctrine of mutuality of estoppel in other forums.¹⁴² Furthermore, it accentuates judicial aversion to inconsistent results.¹⁴³ Finally, it safeguards against "forum shopping." However, there is a paucity of case law in New York concerning the offensive use of a judgment by one not a party to the prior action,¹⁴⁴ and it is conceivable that under slightly altered circumstances an opposite conclusion will be reached.¹⁴⁵ Nevertheless, *Hart* should provide guidance to the courts in their continuing venture away from the doctrinaire of *Glaser v. Huette*.¹⁴⁶

CPLR 3213: Judgment obtained against insured cannot serve as the basis for a 3213 motion against the insurer.

CPLR 3213, as recently amended, permits the service of a summons and motion for summary judgment in lieu of a complaint in actions based upon "an instrument for the payment of money only or upon any judgment." The addition of the word "any" was intended to avoid a construction which would limit the section's operation to money judgments only.¹⁴⁷ However, as illustrated in *Holmes v. Allstate Insurance Co.*,¹⁴⁸ this clarification may, in turn, present new problems of interpretation.¹⁴⁹

¹⁴¹ Cf. *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 211 N.Y.S.2d 133, 172 N.E.2d 526 (1961).

¹⁴² The court noted that most jurisdictions continue to observe the mutuality doctrine despite the fact that it is a "dead letter" in New York by virtue of *B. R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

¹⁴³ See, e.g., *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

¹⁴⁴ Nevertheless, the offensive use of a judgment was undoubtedly sanctioned in *B. R. DeWitt, Inc. v. Hall*, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

Valid precedent for *Hart* can be found in *United States v. United Air Lines*, 216 F. Supp. 709, 725-29 (E.D. Wash. 1962), *aff'd sub nom. United Air Lines v. Wiener*, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964).

¹⁴⁵ In *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 72, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 961 (1969), the following factors were listed as determinant of whether a party had had his day in court: 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. See also Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L.Q. 724, 728-29 (1967).

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

¹⁴⁷ "It is the purpose of the proposed amendment to enable a judgment creditor who holds a foreign judgment . . . to utilize a motion under 3213 regardless of whether it awards a sum of money or any other relief." BENDER'S CPLR 3213, at 32-11 (pamphlet ed. 1969).

¹⁴⁸ 33 App. Div. 2d 96, 305 N.Y.S.2d 563 (1st Dep't 1969).

¹⁴⁹ Cf. *Seaman-Andwall Corp. v. Wright Mach. Corp.*, 31 App. Div. 2d 136, 295 N.Y.S.2d 752 (1st Dep't 1968); *Orenstein v. Orenstein*, 59 Misc. 2d 565, 299 N.Y.S.2d 648