St. John's Law Review

Volume 43
Number 3 *Volume 43, January 1969, Number 3*

Article 31

Collateral Estoppel: DeWitt Principle Held Inapplicable in Driver Passenger Situation

St. John's Law Review

of a co-defendant against the plaintiff.[108] However, it was held that D-3 and D-4 were aggrieved parties and did have standing to question the merits of the affirmative defense because:

1. A holding that the defense is valid, as a matter of law, would mean that D-1 and D-2 were free from negligence, and, therefore, D-3 and D-4 alone were negligent.
2. Such a holding might be detrimental to plaintiff, depending on his injuries, the financial standing of D-3 and D-4, and the extent of their insurance coverage. Thus, the motion to strike out the defense was granted.

As additional authority, the court cited the holdings in *Glaser* and *Bartalone v. Niagara Car & Truck Rentals, Inc.*,[109] for the proposition that res judicata is not a valid defense. Thus, a conflict has developed with the first department's recent holding that *Glaser* no longer has any precedential value and can no longer be followed.[110]

Collateral Estoppel: DeWitt *principle held inapplicable in driver-passenger situation.*

In *B.R. DeWitt, Inc. v. Hall*,[111] the Court of Appeals posited two requirements for the offensive utilization of collateral estoppel. First, it must be unquestioned that the initial action has been vigorously defended and second, the later cause of action must be derivative of the first.[112]

While the derivative relationship necessary for use of the doctrine was not defined by the Court, the editors of the *Survey* have assumed that the owner-operator relationship was intended.[113]

---

[108] *See generally* 7 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶5511.08 (1966).

[109] 29 App. Div. 2d 689, 288 N.Y.S.2d 312 (2d Dep't 1968). For a further discussion of this case, see *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 334 (1968).

[110] Schwartz v. Public Administrator, 30 App. Div. 2d 193, 291 N.Y.S.2d 151 (1st Dep't 1968).

[111] 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

[112] The *DeWitt* holding, its requirements, and its effect on litigation is discussed in *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 150 (1967); 43 ST. JOHN'S L. REV. 436, 463 (1968); 43 ST. JOHN'S L. REV. 302, 336 (1968). *See also* 5 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶5011.27 (1967).

[113] Case law, however, manifests a conflict as to what relationship is requisite to a "derivative" action. *Compare* Cobbs v. Thomas, 55 Misc. 2d 800, 286 N.Y.S.2d 943 (Sup. Ct. Dutchess County 1968) (discussed in *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 336-38 (1968)) *with* Quick v. O'Connell, 53 Misc. 2d 1091, 281 N.Y.S.2d 120 (Sup. Ct. Jefferson County 1967). (Criticized in *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 436, 463-64 (1968)).

To hold that a driver-passenger relationship between initial and succeeding plaintiffs satisfies the "derivative" requirement of *DeWitt* would be to extend offensive collateral estoppel to the hypothetical train-wreck situation.[114]

In a recent case, *Camaioni v. Caruso*,[115] the owner and operator of car 1 had been successful in a negligence action against the owner of car 2. Plaintiffs, passengers in car 1, then sought summary judgment in a personal injury action against the owner of car 2, relying on *DeWitt*.

It was held that the plaintiffs (passengers) *do not* derive their right to recovery in the sense that DeWitt (owner) derived his right to recovery from his driver. Moreover, under the *DeWitt* test, a paramount question continues to be whether the issues are identical, and whether they have been actually litigated and determined in the prior action. Here, neither movants' affidavits nor the record presented, showed what issues were tried or on what cause of action the prior judgment was granted. To that extent, movants did not sustain their burden of establishing an identity of issues.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3403: Court adds new criterion for determining whether a special trial preference should be granted.

CPLR 3403(a) provides:

> Civil cases shall be tried in the order in which notes of issue have been filed, but the following shall be entitled to a preference . . .
> 3. An action in which the interests of justice will be served by an early trial.[116]

It is now well-settled that the mere old age of a plaintiff will not warrant the granting of a trial preference.[117] Moreover, where

---

[114] One hundred passengers are injured in a train wreck. The first fifty to institute suits are unsuccessful. The fifty-first (possibly an infant) recovers judgment. The remaining passengers could recover on the basis of the fifty-first suit, while the defendant could not take advantage of the fifty adjudications of its innocence. *See* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernard Doctrine*, 9 STAN. L. REV. 281 (1957); *The Quarterly Survey of New York Practice*, 43 ST. JOHN'S L. REV. 302, 336 (1968).

[115] 57 Misc. 2d 107, 290 N.Y.S.2d 325 (N.Y.C. Civ. Ct. 1968).

[116] The trial preference available under this Rule, should be distinguished from the "preferences" available under the rules in the first and second departments; *e.g.*, Rule IX, Rules for New York and Bronx County Supreme Court. The local rule merely entitles plaintiff to stay on the general calendar, rather than being placed on the deferred calendar. Where a trial preference is granted under Rule 3404, however, the case will generally be advanced to the ready calendar. *See* 7B MCKINNEY'S CPLR 3403, supp. commentary 13, 14 (1964).

[117] Bitterman v. 2007 Davidson Ave., 278 App. Div. 759, 104 N.Y.S.2d 81 (1st Dep't 1951).