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'[w]here 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.' [155]

Clearly, claimant was not afforded the opportunity to show that it was the State's negligence which forced his car to skid. Moreover, the State could not be made a party to the former action since its liability can only be determined by the court of claims, which has exclusive jurisdiction thereof.

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

In *B. R. DeWitt, Inc. v. Hall*,[156] the Court of Appeals, for the first time, allowed the offensive use of collateral estoppel. Two requirements were posited:

1. it must be unquestioned that the original action had been vigorously defended, and;
2. the second cause of action must be derivative of the first.[157]

While the Court did not explicitly define "derivative action," the editors of the *Survey* have assumed it to encompass the owner-operator relationship.

The question left unanswered by *DeWitt* was whether a passenger-driver relationship would be sufficiently derivative to invoke collateral estoppel. An affirmative answer to this question logically extends the offensive use of the doctrine to the train wreck hypothetical.[158]

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[155] 19 N.Y.2d at 146, 225 N.E.2d at 198, 278 N.Y.S.2d at 600, *quoting* Cummings v. Dresher, 18 N.Y.2d 105, 107-08, 218 N.E.2d 688, 689, 271 N.Y.S.2d 976, 977 (1966).

[156] 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

[157] For a ufrther discussion of the *DeWitt* holding, see *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 150 (1967).

[158] A rain crashes with 100 passengers aboard. 50 passengers in separate negligence actions are denied recovery. The fifty-first passenger, possibly because he is an infant, is awarded a verdict from a sympathetic jury. The defendant could not use the fifty adjudications of its innocence against the remaining forty-nine plaintiffs, since they had not litigated the issue of defendant's negligence themselves. However, a broad interpretation of the doctrine of collateral estoppel could allow these 49 plaintiffs to receive summary judgment on the issue of defendant's negligence, based upon the single recovery by the infant plaintiff. *See* 32 BROOKLYN L. REV. 428, 431 (1966); Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

In *Quick v. O'Connell*,[159] a case criticized in a recent *Survey*,[160] plaintiff contended that his suit was derivative of his fellow passenger's suit, under *DeWitt*, and moved for summary judgment. The court accepted plaintiff's contention thereby giving reality to the train wreck hypothetical.

Recently, in a case similar to *Quick*, *Cobbs v. Thomas*,[161] the rear seat passenger had recovered damages in a negligence action. Plaintiff, the front seat passenger, moved for summary judgment contending that her fellow passenger's recovery was *res judicata* as to defendant's negligence. The court, in distinguishing this case from *DeWitt*, emphasized that plaintiff, here, did not *derive* her right to recover from her fellow passenger.

In light of the controversy presently existing as to the interpretation of the *DeWitt* requirements, the Court of Appeals might be prompted to shed additional light on them.

ARTICLE 34 — CALENDAR PRACTICE; TRIAL PREFERENCES

CPLR 3403: Defendant's offer of financial assistance used to block "destitution" preference.

CPLR 3403(a) (3) provides that a preference may be granted in actions "in which the interests of justice will be served by an early trial." Under this section a motion may be granted in cases where waiting for a trial would cause an unusual hardship.[162] Thus, for example, a preference may be granted where a party is in danger of death before trial,[163] or is destitute.[164]

In *Martinkovic v. Chrysler Leasing Corp.*,[165] plaintiff had medical bills outstanding of $25,000 and predicted future medical expenses of from $12,000 to $15,000 as the result of an automobile accident. Plaintiff claimed that she was unable to meet expenses

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[159] 53 Misc. 2d 1091, 281 N.Y.S.2d 120 (Sup. Ct. Jefferson County 1967).

[160] *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 436, 463 (1968).

[161] 55 Misc. 2d 800, 286 N.Y.S.2d 943 (Sup. Ct. Dutchess County 1968).

[162] 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3403.10 (1966).

[163] Rosenbaum v. Dornhage Realty Corp., 22 App. Div. 2d 772, 254 N.Y.S.2d 78 (1st Dep't 1964) (danger of death); Dodumoff v. Lyons, 4 App. Div. 2d 626, 168 N.Y.S.2d 183 (1st Dep't 1957) (danger of death). *But see* Kerry v. American Warm Air Heating Co., 32 Misc. 2d 935, 223 N.Y.S.2d 946 (Sup. Ct. Monroe County 1961) (mere old age is insufficient where there is no danger of death before trial).

[164] 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3403.11 (1965).

[165] 29 App. Div. 2d 636, 286 N.Y.S.2d 195 (1st Dep't 1968).