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Collateral Estoppel: Offensive Assertion of Collateral Estoppel Allowed

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Collateral Estoppel: Offensive assertion of collateral estoppel allowed.

In *B. R. DeWitt, Inc. v. Hall*,[88] the Court of Appeals was faced with the problem of whether to allow a party to use the doctrine of collateral estoppel offensively. The defendant's jeep had collided with a vehicle owned by plaintiff and driven by one Farnum. Farnum sued for personal injuries, and recovered a $5,000 verdict. Subsequently, plaintiff brought this cause of action for $8,250 in property damages and moved for summary judgment upon the ground that the judgment in Farnum's suit was res judicata of the issues (with the exception of damages). The Court held:

> [W]here the issues . . . were no broader and no different than those raised in the first lawsuit; where the defendant here offers no reason for not holding him to the determination in the first action; where it is unquestioned (and probably unquestionable) that the first action was defended with full vigor and opportunity to be heard; and where the plaintiff in the present action, the owner of the vehicle, derives his right to recovery from the plaintiff in the first action, the operator of said vehicle, although they do not technically stand in the relationship of privity, there is no reason either in policy or precedent to hold that the judgment in the *Farnum* case is not conclusive in the present action. . . .[89]

The use of collateral estoppel by a plaintiff on the issue of negligence has been permitted in prior cases.[90] However, two "requirements" for such use posited by the Court in *DeWitt* are worthy of consideration. First, the Court stated that it must be "unquestioned" that the first action had been vigorously defended. In the instant case, it is reasonable to assume that the defense offered in Farnum's $5,000 personal injury action was as vehement as that which the defendant would have offered had he been allowed to defend the present action for $8,250 (although this is necessarily conjectural). If, however, a case arose where the damages in the first action were substantially less

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[88] 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

[89] B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 148, 225 N.E.2d 195, 199, 278 N.Y.S.2d 596, 601-02 (1967).

[90] *E.g.*, United States v. United Air Lines, Inc., 216 F. Supp. 709 (D. Nev. 1962); Liberty Mut. Ins., Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 506 (1932); United Mut. Fire Ins. Co. v. Saeli, 272 App. Div. 951, 71 N.Y.S.2d 696 (4th Dep't), *aff'd mem.*, 297 N.Y. 611, 75 N.E.2d 626 (1947). *Contra*, Elder v. New York & Pa. Motor Exp., 284 N.Y. 350, 31 N.E.2d 188 (1940); Quatroche v. Consolidated Edison, 11 App. Div. 2d 665, 201 N.Y.S.2d 520 (1st Dep't 1960). See Note, *Collateral Estoppel in New York*, 36 N.Y.U.L. REV. 1158, 1166 (1961).

than in the subsequent action, it is probable that the defendant would have defended more vigorously had the two actions been tried together from the outset — *e.g.*, the first suit was for an amount that made it inconvenient and impractical for the defendant to have amassed all the evidence needed for an airtight defense.[91] This would usually arise where the first action was for a small amount of property damages and the second for substantial personal injuries (although this is not necessarily so, as evidenced by the facts in the main case).

In a similar vein, a court may face a situation wherein the two actions are against the same defendant, yet two separate liability carriers are involved. It would not seem fair to bind defendant's insurer for property damage claims with an unsuccessful defense directed by defendant's personal injury liability insurer. Both these problems are noted in the persuasive dissent of Judge Breitel in *DeWitt*.

The second problem in attempting to ascertain the impact of the instant case involves the Court's statement that the second cause of action must be "derivative" of the first action. A derivative cause of action has been defined as one "coming from another; . . . that which has not origin in itself but owes its existence to something foregoing." [92] It does not seem that the owner of a car "derives" his right to recover for property damages from the right of the driver to recover for personal injuries, in the above sense. Probably, the meaning of the statement "derives his right" is that there was a close relationship between the first and second plaintiffs, *i.e.*, driver — owner. The obvious question is whether the Court would have considered a passenger's relationship to the driver a sufficient nexus. If the Court were to answer this question in the affirmative, it would follow logically to extend the offensive use of collateral estoppel to situations like the perennial hypothetical train wreck. A train carrying one hundred passengers crashes. Fifty passengers sue separately for negligence, and, in each case, the defendant is absolved of guilt. The fifty-first passenger, possibly because he is an infant,[93] recovers a verdict against the defendant from a sympathetic jury. The defendant could not use the fifty adjudications of its innocence against the remaining forty-nine passengers, since they never had an opportunity to litigate the issue of defendant's negligence themselves. However, a broad interpretation of the instant case could allow the remaining forty-nine to receive summary judgment on the issue of defendant's negligence, based

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[91] See 32 BROOKLYN L. REV. 428, 431 (1966).
[92] BLACK, LAW DICTIONARY 530 (4th ed. 1951).
[93] See 32 BROOKLYN L. REV., *supra* note 91.

upon the single recovery by the infant passenger, if it is shown that defendant vigorously litigated that case. Such a result would be difficult to justify either in logic or in law.

The Court of Appeals cannot be charged with intending such a broad construction of its holding. What it intended, apparently, was to establish the principle that, given a proper situation, a plaintiff could have the benefit of collateral estoppel. What will constitute such a proper case must be left to the wisdom of the lower courts and to future decisions of the Court of Appeals.

Collateral Estoppel: Defensive assertion of collateral estoppel.

The question of when to allow the defense of collateral estoppel is still far from a definitive answer in New York, especially with regard to its use by joint tortfeasors. Two recent cases, *MacGilfrey v. Hotaling*[94] and *Terwilliger v. Terwilliger*,[95] turned upon this question.

Both cases involved automobile accidents and presented similar factual situations. In each, P_1 (passenger in car number one) sued D_1 (driver of car number one) and D_2 (driver of car number two) for negligence, and recovered against both drivers. In a subsequent suit, D_1 sued D_2, and D_2 sought to invoke the defense of collateral estoppel, *i.e.*, since D_1 was found negligent as to P_1 he should be estopped to deny his contributory negligence as to his own injuries arising from the same accident. In each case, the court refused to allow the defense.

Glaser v. Huette[96] established the rule in New York that prevented the defensive use of collateral estoppel in a subsequent action between parties who were codefendants in a prior action. The *Glaser* court reasoned that since the parties to the second action were not adversaries in the first action, there was no duty to defend *against each other* in the first action, and, therefore, they could relitigate the issue of negligence as between themselves.

Subsequent to the *Glaser* decision, the Court of Appeals abolished technical requirements as to the defensive use of collateral estoppel, and established the rule that it could be used when the issues were identical and when the party against whom the defense was being asserted had had his day in court on the issue.[97] However, in cases involving joint tortfeasors, New York courts, including the Court of Appeals, have continued to follow the *Glaser* rule without considering whether the "identity of issues plus opportunity

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[94] 26 App. Div. 2d 977, 274 N.Y.S.2d 850 (3d Dep't 1966).

[95] 52 Misc. 2d 404, 276 N.Y.S.2d 8 (Sup. Ct. Tompkins County 1966).

[96] 232 App. Div. 119, 249 N.Y. Supp. 374 (1st Dep't), *aff'd mem.*, 256 N.Y. 686, 177 N.E. 193 (1931).

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