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Collateral Estoppel: Defensive Assertion of Collateral Estoppel

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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).

to be heard" test had been satisfied.[98] A recent decision by the Court of Appeals, *Cummings v. Dresher*,[99] has been seen by some as changing the *Glaser* doctrine in this area.

Cummings presented a slightly different situation than that in *Glaser*, *MacGilfrey*, and *Terwilliger*. In *Cummings*, the first action involved a suit by P_1 and D_1 against D_2. P_1 recovered, but D_1 lost, as the jury found him guilty of contributory negligence. However, the jury also made a gratuitous finding that D_2 was guilty of negligence to D_1. In a subsequent action by D_2 against D_1, the Court allowed D_1 to interpose the defense of collateral estoppel, *i.e.*, that the finding, in the prior action, that D_2 was negligent established his contributory negligence in this action. The Court reasoned that where the issues are the same and *both litigants were parties* to the first action, there is no reason to relitigate the issues.

The decision does not indicate why the Court concluded that the issue of D_2's contributory negligence had been settled in the suit by P_1. However, there are two possible reasons. One reason could be the gratuitous finding of the jury in the first action that D_2 was negligent as to D_1. However, there are several reasons for rejecting this possibility: (1) if a jury returned a general verdict, without volunteering to tell the court why it reached its verdict, D_2 would not have been foreclosed from bringing suit. Such a consequence should "not be left to hang on this kind of fortuity;" [100] (2) a jury might not put as much time and thought into deliberating an issue, D_2's negligence for example, when the result would have no practical effect due to a prior determination that plaintiff was contributorily negligent; (3) precedent weighs against giving such conclusiveness to a voluntary finding by a jury.[101]

If the gratuitous finding in the prior case is eliminated, the ratio decidendi in *Cummings* must be the finding of the jury that D_2 was negligent as to P_1 and therefore was negligent as to D_1 as well. This seems a more cogent argument, since it is hard (or impossible) to visualize a situation where a person could drive negligently in relation to a passenger in another car, and be non-

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[98] *E.g.*, Minkoff v. Brenner, 10 N.Y.2d 1030, 180 N.E.2d 434, 225 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. Salvati, 11 App. Div. 2d 104, 201 N.Y.S.2d 709 (1st Dep't 1960).

[99] 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

[100] Cummings v. Dresher, *id.* at 113, 218 N.E.2d at 693, 271 N.Y.S.2d at 982 (dissenting opinion).

[101] Purpora v. Coney Island Dairy Prods. Corp., 262 App. Div. 908, 28 N.Y.S.2d 1008 (2d Dep't 1941). See *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 121, 150 (1966).

negligent as to its driver. The issues are identical, and D_2 had his day in court on the issue in his defense against P_1. If this is so, of what necessity is it to the decision that D_1 was also involved as a plaintiff in the prior action? It would seem to be completely extraneous. Therefore, it is reasonable to conclude that even if the first action were merely P_1 against D_2, or even P_1 against D_2 and D_1, the Court would have been correct in allowing the defense of collateral estoppel to D_1—in logical effect an overruling of *Glaser*.

In light of the above, it becomes necessary to examine the more recent *MacGilfrey* and *Terwilliger* decisions to see if they shed any light on the effect of *Cummings* upon the *Glaser* rule. In the *Terwilliger* case, P_1's estate had brought an action against D_1 and D_2 and recovered against both. The facts showed that D_2 was D_1's uncle. Upon seeing D_1 and P_1, her girl friend, riding in a car with two boys, he followed them. When the boys got out to talk to D_2, D_1, frightened, drove off with P_1 still in the car. D_2 got in his car and chased them. When their car crashed, P_1 was killed and D_1 injured. In the subsequent action by D_1 against D_2, the court refused to allow D_2 to use collateral estoppel, since it found that the issue of whether D_1 was negligent to P_1 was not necessarily identical with the issue of D_1's negligence to D_2. For example, D_1 might have been found negligent in the first action for failing to warn P_1 that she would drive off and for not giving P_1 a chance to leave the car.

The *MacGilfrey* case presented the same situation in which P_1 recovered against D_1 and D_2, and then D_1 sued D_2. In this case, however, the court predicated its refusal to allow D_2 to use collateral estoppel upon the authority of *Glaser v. Huette*, *i.e.*, D_1 and D_2 were not adversaries in the prior action. The court noted that while *Cummings* "may presage the end of the *Glaser* rule," [102] that doctrine is still viable.

Upon analysis, it seems that the *MacGilfrey* court had no need to decide whether *Cummings* established the "identity of issues plus opportunity to be heard" test, even in typical *Glaser* situations, since the issue in the prior action may not have been the same as in the subsequent action; *e.g.*, D_2 could be found not to have been within D_1's foreseeable, *i.e.*, *Palsgraf*, zone of danger. It thus appears that the *MacGilfrey* court could have based its holding upon the same rationale as the *Terwilliger* court, *i.e.*, lack of identity of issues. While the *MacGilfrey* case is not as clear cut as *Terwilliger*, especially since many facts are not given, it would seem that the cases are essentially the same.

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[102] MacGilfrey v. Hotaling, 26 App. Div. 2d 977, 978, 276 N.Y.S.2d 850, 852 (3d Dep't 1966).

Since neither case presented an "identity of issues," the question of the effect of *Cummings* on the *Glaser* rule would seem to remain unresolved.

ARTICLE 42 — TRIAL BY THE COURT

CPLR 4213(c): Section deemed precatory.

In *Allied Scrap & Salvage Corp. v. State*,[103] the defendant moved to vacate an award on the ground that the decision was not rendered within sixty days after the cause was finally submitted, as provided for in CPLR 4213(c). The court, however, noted that the provision of CPA § 442,[104] providing for a new trial if the decision were not rendered within sixty days, was deleted from CPLR 4213(c) "because under the old rule courts customarily denied the new trial on condition that the decision be rendered within an additional specified time." [105] This deletion, the court surmised, made CPLR 4213(c) precatory.

Two arguments are advanced for the proposition that 4213 *must* be precatory: (1) there is no method of enforcement; and (2) assuming a means of enforcement, a judge forced to render a decision will be prone to decide against the moving party. Both arguments may be answered.

With respect to enforcement, the duty of a judge to render an opinion is unquestionably a ministerial one. It would seem, therefore, that a writ of mandamus could issue against a judge who failed to render a decision within the sixty days provided for in 4213.[106] The court in *Allied* did not discount such a course of action. As to the second argument, a decision which smacks of abuse of discretion can always be appealed.

Thus, it would seem that there is still logical justification for an interpretation of CPLR 4213 which would find that provision more than a pious wish.

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[103] 26 App. Div. 2d 880, 274 N.Y.S.2d 317 (3d Dep't 1966).

[104] Under CPA § 442, a court trying a case without a jury had to render its decision "within sixty days after the final adjournment of the term where the issue was tried." Upon failure of the court to do so, either party could move for a new trial and the court would be obliged to order a new trial absolutely or order a new trial conditionally upon a decision not being rendered within a specified time. In practice the section was merely precatory, since the motion for new trial was rarely granted and, instead, the time for the court's decision was generally extended. 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4213.11 (1966).

[105] Allied Scrap & Salvage Corp. v. State, 26 App. Div. 2d 880, 274 N.Y.S.2d 317, 319 (3d Dep't 1966).

[106] "[Mandamus] is a proper remedy to compel the performance of a specific act where the act is ministerial in its character. . . ." 2 BOUVIER, LAW DICTIONARY 2075 (9th ed. 1914). Seemingly, under CPLR 4213 the duty would not be subject to mandamus until the sixty days had passed.