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Collateral Estoppel: Defensive Use of Doctrine in Derivative Liability Case

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subject to attack either directly or collaterally[125] in a subsequent action even though res judicata would otherwise be a defense. While this is true as a general rule, if the lack of jurisdiction is specifically put into issue in the first action, the court's determination of its own jurisdiction is conclusive. In this case, the court's finding can be attacked by direct appeal, but not by collateral attack.[126]

Friedman v. State[127] is an illustration of this proposition. In *Friedman*, the claimant, a removed supreme court justice, sought to recover back salary, contending that the Court on the Judiciary was incompetent to remove him because it lacked subject matter jurisdiction. The Court of Claims held that while the claim was ostensibly an action at law for accrued salary, it was, in actuality, a collateral attack upon the jurisdiction of the Court on the Judiciary. Since Friedman had litigated the issue of that court's jurisdiction while before it, his proper remedy was by direct appeal to the Court of Appeals. No direct appeal having been taken, the doctrine of res judicata precluded an exercise of jurisdiction by the Court of Claims, thus forcing a dismissal of the claim.

Collateral estoppel: Defensive use of doctrine in derivative liability case.

The doctrine of mutuality of estoppel provides that since nonparties and non-privies are not bound by a judgment, normally they cannot attempt to benefit therefrom.[128] Recent years have seen a gradual erosion of the doctrine. Frequently, persons who were not parties or privies to a prior litigation have been permitted to assert the prior judgment as res judicata against an adversary, even though they would not have been bound had the prior result been to the contrary.[129] The original exceptions to the doctrine of mutuality were found in derivative liability cases involving suits brought against the absentee owners of automobiles to recover for the alleged negligence of their operators.[130] At first, these owners, whose liability was derived from their operator's conduct, were allowed to rely on the doctrine of collateral estoppel defensively.[131] More recently, the Court of Appeals has allowed the offensive use of collateral estoppel in these derivative

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[125] *Id.* ¶ 301.02.
[126] 5 *id.* ¶¶ 5011.16, 5011.43.
[127] 53 Misc. 2d 955, 278 N.Y.S.2d 999 (Ct. Cl. 1967).
[128] WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 347 (2d ed. 1966).
[129] *See, e.g.*, Israel v. Wood Dolson Co., 1 N.Y.2d 116, 118-120, 134 N.E.2d 97, 98-100, 151 N.Y.S.2d 1, 3-5 (1956).
[130] WACHTELL, *supra* note 128, at 348.
[131] *See, e.g.*, Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937).

liability cases, and has taken the occasion to declare that the doctrine of mutuality is a "dead letter." [132]

The recent case of *Planty v. Potter-DeWitt Corp.*[133] illustrates the use of defensive collateral estoppel in a derivative liability case. The plaintiff was injured when his automobile left a road being re-constructed by the defendant under contract with the State. Plaintiff instituted suit against the State, but his action was dismissed for failure to prove negligence and for failure to establish his own freedom from contributory negligence. In plaintiff's subsequent action against the defendant contractor, his complaint was dismissed on the ground that "since the State's liability was derived from its nondelegable responsibility to maintain its highway in a safe condition . . . [plaintiff] has had his day in court on the very issue he seeks to litigate in the present suit and is thus precluded by *res judicata* to litigate the question anew. . . ." [134]

Collateral estoppel: DeWitt *principle extended to fellow passenger situation.*

In *B.R. DeWitt, Inc. v. Hall*,[135] discussed in a recent edition of the *Survey*,[136] the Court of Appeals allowed the offensive use of collateral estoppel. The Court posited two requirements. First, it must be unquestioned that the original action had been vigorously defended, and second, the later cause of action must be derivative of the first cause of action. Although the Court did not explicitly define what it meant by a derivative action, it was assumed by the editors of the *Survey* that a close relationship between the initial and succeeding plaintiff, such as the owner-operator relationship, was meant. However, the question was posed as to whether the Court would have considered a passenger's relationship to the driver as a sufficient nexus. It was felt that to answer in the affirmative would be, logically, to extend the offensive use of

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[132] B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 147, 225 N.E.2d 195, 198, 278 N.Y.S.2d 596, 601 (1967).

[133] 27 App. Div. 2d 401, 279 N.Y.S.2d 938 (3d Dep't 1967).

[134] Planty v. Potter-DeWitt Corp., 27 App. Div. 2d at 402, 279 N.Y.S.2d at 939.

[135] 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). In *DeWitt* the defendant's jeep had collided with a vehicle owned by the plaintiff and driven by one Farnum. Farnum was successful in a suit for personal injuries and recovered $5,000. Subsequently, plaintiff sued for property damages of $8,500 and was granted summary judgment upon the ground that the judgment in Farnum's suit was res judicata of the issues, with the exception of damages.

[136] *The Quarterly Survey of New York Practice*, 42 ST. JOHN'S L. REV. 128, 150 (1967).