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Collateral Estoppel: DeWitt Principle Extended to Fellow Passenger Situation

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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).

collateral estoppel to the perennial hypothetical train wreck situation.[137]

Recently, in *Quick v. O'Connell*,[138] plaintiff's decedent was killed and his fellow passenger was injured in a two-car collision in which both owner-operators were killed. The injured passenger recovered judgment against the estates of both owner-operators for negligence. Plaintiff, contending that his suit was derivative of the fellow passenger's suit, invoked *DeWitt* and moved for summary judgment. The court, while accepting this contention, denied the motion, but limited the issues for subsequent trial to those of the contributory negligence of plaintiff's decedent and damages.

Seemingly, the decision in the instant case carries *DeWitt* beyond the intent of the Court of Appeals. The majority in *DeWitt*, at the conclusion of its opinion, was careful to reiterate the specific facts upon which it was allowing recovery, *i.e.*, the succeeding plaintiff's right was derivative in nature.[139] It is difficult to conceive that plaintiff's decedent in *Quick* derived his right of recovery from his fellow passenger. Thus, the broad holding envisioned in the train wreck hypothetical has apparently become a reality.

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[137] One-hundred passengers are aboard a train that crashes. In separate suits for alleged negligence, the first fifty plaintiffs are unsuccessful. The fifty-first plaintiff, possibly because he is an infant, recovers 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 forty-nine plaintiffs to receive summary judgment on the issue of defendant's negligence, based upon the single recovery by the infant plaintiff, if it is shown that defendant vigorously litigated that case. *See generally* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

[138] 53 Misc. 2d 1091, 281 N.Y.S.2d 120 (Sup. Ct. Jefferson County 1967).

[139] "In this case, where the issues, as framed by the pleadings, 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, 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. . . ." 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).