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Article 34

CPLR 4102: Motion to Frame Issues for Jury Trial Abolished

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tionally distinct,[133] are substantially the same. Practically speaking, *B*'s negligence in the first action would most assuredly be his contributory negligence in the second. Since the issue in the two cases is essentially the same, it would seem that the court should have allowed *A* to assert the defense of collateral estoppel. In addition, this view might be further supported by taking into account the jury's gratuitous holding as to *B*'s negligence. Although as the cases indicate, this would not, in and of itself, be a basis for the employment of collateral estoppel, it does lend support for the use of estoppel in this case. Since the modern liberal procedures on counterclaims will assure a day in court, the use of collateral estoppel in situations such as the one described might have the benefit of consolidating suits and reducing congested court calendars.

On the other hand, it is important to note certain practical considerations which might have adversely motivated the court. If the defense of collateral estoppel had been permitted herein, it is quite possible that injustices might result in numerous other situations. For example, if a bus containing forty passengers were to crash, injuring them, a suit by one passenger which was decided in favor of the bus company would automatically preclude the other thirty-nine. Thus, it is possible to envision the possibility of collusive suits. Moreover, an unreasonable burden might be placed upon those who decided to wait and to investigate the nature and extent of their injuries. Although these practical considerations probably influenced the court, the alternative conclusion, viz., the application of collateral estoppel and the prevention of repetitious litigation, seems preferable.

The practitioner should note, however, that although this case does not apply the mutuality requirement that was abolished in *Israel,* it does reveal that the courts will probably closely scrutinize and investigate the issues involved in light of the practical consequences of permitting collateral estoppel.

ARTICLE 41 — TRIAL BY A JURY

CPLR 4102: Motion to frame issues for jury trial abolished.

In *Brown v. Brown,*[134] a divorce action, petitioner utilized CPA procedure in an attempt to obtain a jury trial by applying to the court for an order framing the issues.[135] In refusing to grant petitioner's application, the court noted that application for an order formulating the issues to be tried by a jury was a cumbersome procedure which has been abolished in the CPLR.

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[133] See PROSSER, TORTS § 64, at 427-30 (3d ed. 1964).
[134] 47 Misc. 2d 1046, 263 N.Y.S.2d 717 (Sup. Ct. N.Y. County 1965).
[135] CPA § 429.

Under CPLR 4102(a), a demand for a jury trial must be contained in the note of issue or in a written demand served upon the parties within ten days after service of the note of issue.[136] If a special verdict is required, the trial judge, under CPLR 4111, frames the issue for the jury's verdict. "No longer are motions for framing issues to be made," [137] said the court, except under CPLR 4212, regarding the advisory jury.

ARTICLE 44 — TRIAL MOTIONS

CPLR 4402: Inadvertent reference to insurance in action involving automobile registered in New York not sufficient ground upon which to declare a mistrial.

Upon the trial of the action in *Halstead v. Sanky*,[138] a passenger in plaintiff's auto revealed, upon cross examination, that he had given a statement to someone concerning the accident and that he received $2000.00 in settlement of his own claim. On re-direct, he was asked whether the person with whom he had settled was a representative of the defendant. The witness answered, " 'he was from the insurance company.' " [139] The defendant's motion for a mistrial was denied after a poll of the jury revealed that the reference to insurance did not affect the jurors' determination of the case.[140]

The court refused to declare a mistrial based merely upon the single inadvertent reference to insurance, especially since the auto was registered in New York. The court stated that New York has a compulsory insurance law [141] and the jurors were questioned, on *voir dire*, concerning their relationship to insurance companies;[142] therefore, to attribute to the jury ignorance of the existence of insurance in this case would be tantamount to a condemnation of the jury system.

The CPLR revisors have commented that in light of compulsory insurance, the matter of insurance will be of limited importance in

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[136] Such a demand must specify the issues to be determined by the jury unless a general demand for a jury trial is made. See 4 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 4102.08 (1965).

[137] Brown v. Brown, 47 Misc. 2d 1046, 263 N.Y.S.2d 717, 718 (Sup. Ct. N.Y. County 1965).

[138] 48 Misc. 2d 586, 265 N.Y.S.2d 426 (Sup. Ct. Kings County 1965).

[139] *Id.* at 587, 265 N.Y.S.2d at 427.

[140] This court polled the jury under the procedure sanctioned by the Court of Appeals in Weisgerber v. Ancona, 284 N.Y. 665, 30 N.E.2d 608 (1940).

[141] N.Y. VEHICLE & TRAFFIC LAW § 312(1). This section makes proof of insurance coverage a condition precedent to registering a motor vehicle.

[142] CPLR 4110 allows a prospective juror to be asked whether he is a "shareholder, stockholder, director, officer or employee or in any manner interested, in any insurance company issuing policies for protection against liability for damages for injury to persons or property. . . ."