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Collateral Estoppel: Available Where Issues Identical and Parties All Before Court in Prior Action

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of finance of the City of New York in accordance with CPLR 2601. Any subsequent withdrawal of the amount must be made in accordance with the provisions of CPLR 2607 less any applicable fees as provided for in CPLR 8010.

Collateral Estoppel: Available where issues identical and parties all before court in prior action.

In *Cummings v. Dresher*,[81] *A*, *B*, and *X* were involved in an automobile accident. *X*, a passenger in the car *A* was driving, and *A* brought separate suits which were tried jointly against *B* in federal court. *A* was denied recovery because of his contributory negligence. The jury also concluded, albeit gratuitously, that *B* was negligent. *X* recovered in his action against *B* when the jury found *B* negligent. Subsequently, *B* commenced an action against *A* in the New York Supreme Court on facts arising from the same accident.

In denying *A*'s motion for summary judgment, the appellate division, third department,[82] held that *A* could not assert the defense of collateral estoppel against *B* since, in the action of *A* against *B*, the jury's finding as to *B*'s negligence was "gratuitous." Also, *A* could not assert the finding of *B*'s negligence in the action by *X* against *B* since, presumably under the test established in *Israel v. Wood Dolson Co.*,[83] the issues must be identical for the defensive assertion of collateral estoppel. In the court's opinion, the issue of *B*'s contributory negligence toward *A* was different from the issue of *B*'s negligence toward *X*. The Court of Appeals,[84] in reversing the appellate division, stated that it could find no reason for requiring the issue of negligence to be relitigated since it was already decided in a jury trial where both parties were present.

The doctrine of collateral estoppel has been a changing concept in the New York courts. Traditionally, a defendant would be allowed to assert collateral estoppel only where the plaintiff would have the same right defensively.[85] This necessitated that the defendant be a party or privy in the previous suit,[86] for otherwise the plaintiff would not be able to assert that suit's finding against

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[81] 43 Misc. 2d 556, 251 N.Y.S.2d 598 (Sup. Ct. Schenectady County 1964).

[82] Cummings v. Dresher, 24 App. Div. 2d 912, 264 N.Y.S.2d 430 (3d Dep't 1965), *affirming*, 43 Misc. 2d 556, 251 N.Y.S.2d 598 (Sup. Ct. Schenectady County 1964).

[83] 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

[84] Cummings v. Dresher, 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (1966).

[85] Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912).

[86] See 1B MOORE, FEDERAL PRACTICE ¶ 0.412(1), at 1801 (2d ed. 1965).

the defendant in a subsequent suit. However, in *Israel v. Wood Dolson Co.*,[87] the Court of Appeals held that where the doctrine of collateral estoppel is asserted defensively, "the test to be applied is that of 'identity of issues.' " [88] In such a case the mutuality requirement is abandoned.

While *Israel* only required that the issues in the subsequent action be identical, the Court in *Cummings* not only noted an identity of issues, but also an identity of parties. It seems, therefore, that the Court was reluctant to apply the "identity of issues" test as the *sole* criterion for the defensive assertion of collateral estoppel in negligence cases. There is a fundamental policy consideration behind this reluctance by the Court, which can be illustrated by a situation wherein there is more than one possible plaintiff. In such an instance, there is always the possibility of a collusive suit, wherein a favorable judgment obtained by the defendant could be used to collaterally estop subsequent plaintiffs.

While *Cummings* does not overrule *Israel*,[89] it evidences an apparent reluctance on the part of the Court of Appeals to apply the "identity of issues" test as the sole criterion for the defensive assertion of collateral estoppel. It appears that future cases will be decided on their own merits, within the guidelines set up by *Israel* and *Cummings*. The test may very well now be "identity of issues plus . . . ."

ARTICLE 45 — EVIDENCE

CPLR 4504: Amendment.

The section, as amended, declares that a person authorized "to practice medicine, registered professional nursing, licensed practical nursing or dentistry" cannot disclose confidential information acquired from a patient while acting within his professional capacity.

CPLR 4533-a: Amendment.

As a result of this new rule, an itemized repair bill—which is receipted and marked paid—for property damage to a motor vehicle in an amount of *less than three hundred dollars* is now *prima facie evidence* of the reasonable value of the repairs itemized in an action or counterclaim for such damages.

The repair bill must be verified by a proper party. It must state (1) that no refund has or will be made to the claimant,

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[87] 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S.2d 1 (1956).

[88] *Id.* at 120, 134 N.E.2d at 100, 151 N.Y.S.2d at 5. See *The Quarterly Survey of New York Practice*, 41 ST. JOHN'S L. REV. 121, 148 (1966).

[89] It is to be noted that Chief Judge Desmond, who wrote the majority opinion in *Cummings*, concurred in the majority opinion in *Israel*.