

## Collateral Estoppel in Negligence Actions

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## COLLATERAL ESTOPPEL IN NEGLIGENCE ACTIONS

## I. INTRODUCTION

In the present era of the automobile with its accompanying accidents, questions have arisen regarding the conclusiveness of jury findings in one action upon a subsequent action arising out of the same accident.<sup>1</sup> The topic to be considered in this comment involves these questions. At the outset it is to be understood that a judgment in a particular action is effective in putting an end to the cause of action which was the basis of the proceeding in which the judgment is given.<sup>2</sup> But to be distinguished is the effect of the judgment upon a subsequent controversy based upon a different cause of action but involving some of the same questions litigated in the original action.<sup>3</sup> The leading American decision governing the distinction is *Cromwell v. Sac County*,<sup>4</sup> wherein Mr. Justice Field stated the following, which has clarified much confusion on the subject:

"[T]here is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

<sup>1</sup> See Street, *Estoppel and the Law of Negligence*, 73 L. Q. REV. 358 (1957). The present article is an attempt to reanalyze many of the conclusions reached by Mr. Street which admittedly are supported by case authority. It is the purpose of the writer to show that proper use of the doctrine of estoppel may change the result reached by the adjudicated decisions. For other recent discussions of the problems to be touched upon in this article, see Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 289 (1957); Thornton, *Mutuality in Res Adjudicata in New York*, 23 BROOKLYN L. REV. 267 (1956); Notes, 42 CORNELL L. Q. 290 (1956); 35 TEXAS L. REV. 137 (1956); 23 BROOKLYN L. REV. 149 (1956).

<sup>2</sup> Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942). This oft-cited leading article by the co-author of the RESTATEMENT OF JUDGMENTS contains the following at page 2: "If the judgment is for the defendant and is on the merits, the cause of action is extinguished; that is, the judgment operates as a bar. If the judgment is for the plaintiff, the cause of action is extinguished but something new is added, namely, rights based on the judgment; there is a merger of the cause of action in the judgment."

<sup>3</sup> Annot., 88 A.L.R. 574 (1934), Comment Note: *Distinction Between Judgment as a Bar to Cause of Action and as Estoppel as to Particular Fact*.

<sup>4</sup> 94 U.S. 351 (1877).

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."<sup>5</sup>

For the purposes of this article, any matter which was actually litigated in the prior action shall be labeled as a *collateral estoppel* in determining the effect in subsequent proceedings.<sup>6</sup>

## II. RATIONALE OF ESTOPPEL

This estoppel has long been declared to be operative in favor of or against those who were parties to the prior action, as Justice Field's statement above so carefully indicates. But the estoppel has been limited in that its invocation was permitted only where the party seeking to utilize its effect would have been himself estopped had the prior judgment been returned against him.<sup>7</sup> Limited exceptions to this requirement of mutuality of estoppel were recognized in cases of derivative liability,<sup>8</sup> particularly where a master-servant relationship existed.<sup>9</sup> The mutuality requirement has been criticized almost as long as it has existed.<sup>10</sup> When considered in the light of the rationale of the doctrine of *res judicata* from which collateral estoppel stems, such criticism seems warranted.

"The doctrine of *res judicata* may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice and public tranquility. Public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of *res judicata*, would be endless. . . . The doctrine of *res judicata* not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings."<sup>11</sup>

<sup>5</sup> *Id.* at 352, 353.

<sup>6</sup> This is the term used in the RESTATEMENT OF JUDGMENTS, *e.g.*, RESTATEMENT, JUDGMENTS §93, comment on clause (6) (1942). See Street, *Estoppel and the Law of Negligence*, *supra* note 1, where the writer used term "*res judicata*" comprehensively for both forms of estoppel, the Australian expression "issue estoppel" for the expression of *res judicata* in a subsequent suit on a different cause of action which involved some of the issues decided in the first proceeding, and "merger" and "bar" when the effect of a judgment on the same cause of action was discussed.

<sup>7</sup> 50 C.J.S., *Judgments* §765 (1947); 2 BLACK, *JUDGMENTS* 548 (2d ed. 1902); *Privity and Mutuality in Res Judicata*, 35 YALE L. J. 607 (1926).

<sup>8</sup> 1 FREEMAN, *JUDGMENTS* §469; *Res Judicata and the Automobile Accident*, 8 BROOKLYN L. REV. 224 (1938).

<sup>9</sup> *Davis v. Prettyman*, 286 S.W.2d 844 (1956), discussed in 10 ARK. L. REV. 506 (1956); *Blue Valley Creamery Co. v. Cronimus*, 270 Ky. 496, 110 S.W.2d 286 (1937), where the recovery of a judgment in a prior action against the creamery by defendant's servant operated as an estoppel in favor of the defendant in the subsequent action by the creamery; *Annots.*, 133 A.L.R. 181 (1941), 23 A.L.R.2d 710 (1952).

<sup>10</sup> Bentham, *Rationale of Judicial Evidence*, in 7 WORKS OF JEREMY BENTHAM, 171 (Bowering ed. 1843); *Notes*, 15 CINCINNATI L. REV. 349 (1941), 18 N.Y.U.L.O. REV. 565 (1941).

<sup>11</sup> 30 AM. JUR., *Judgments* §165 (1954).

The rule of *res judicata* in its operative forms of estoppel would appear to be primarily based on the public policy of diminishing litigation, and, secondarily, of private benefit to individual litigants. The primary principle early found expression in the maxim "*Interest reipublicae ut sit finis litium*," and the secondary or subordinate one in the form of "*Nemo debet bis vexari pro una et eadem causa*."<sup>12</sup> With these fundamental objectives of collateral estoppel in mind, the requirements of privity and its accompanying demand of mutuality truly seems unjustified and consequently outmoded. But, unfortunately, it can be stated as the general law in negligence actions that where a judgment has been rendered in an action growing out of an accident, in which action the question of negligence or contributory negligence was adjudicated, such judgment is not conclusive as to such issues of negligence in a subsequent action growing out of the same accident, but by or against one not a party to the prior action, in the absence of derivative responsibility.<sup>13</sup> Attempt will now be made to show that extension of the doctrine will effectuate a reduction in needless litigation and prevent the occurrence of anomalous results.

### III. ESTOPPEL OPERATION IN TWO-PARTY ACCIDENTS

In the following hypothetical actions, the result under an ordinary contributory negligence jurisdiction will be considered first,<sup>14</sup> followed by an analysis of the effect of Wisconsin's comparative negligence statute.<sup>15</sup>

*Case 1:* *A* sues *B* alleging injuries caused by *B*'s negligence. Jury determines that *B* is negligent and that *A* is free from negligence. In a subsequent action by *B* against *A*, *A* may effectively rely upon the earlier judgment to defeat *B*'s claim.<sup>16</sup>

*Case 2:* Assume that in the above situation *A* is found contributorily negligent and thus is defeated in his action, despite a finding of negligence on the part of *B* by the jury. It is held generally that, in the absence of original counterclaim, *B* is not estopped by the findings in

<sup>12</sup> See Von Moschzisker, *Res Judicata*, 38 YALE L. J. 299 (1929). For those whose Latin is long behind them, the primary principle is translated: "It concerns the state that there be an end of lawsuits"; and the secondary: "No one should be twice harassed for the same cause."

<sup>13</sup> Annot., 23 A.L.R.2d 710 (1952).

<sup>14</sup> Under the typical contributory negligence jurisdiction, contributory negligence on the part of the plaintiff will defeat his recovery. PROFESSOR, HORNBOOK ON TORTS, p. 283 (2d ed. 1955).

<sup>15</sup> WIS. STATS. §331.045 (1955): Comparative negligence, when bars recovery. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering.

<sup>16</sup> RESTATEMENT, JUDGMENTS §68, comment *c*, at 298 (1942); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 27 (0000). Apparently Street in his article in 73 L. Q. REV. 358 (1957) has no quarrel with this result as he fails to include it in his summary of existing rules where no estoppel exists.

the first action, should he seek recovery in a subsequent proceeding.<sup>17</sup> The explanation relied upon is that the finding of negligence on the part of *B* is immaterial to the judgment.<sup>18</sup> But this argument would appear to beg the question concerning materiality of *B*'s negligence, for if such negligence is truly immaterial then there should be no issue of *A*'s contributory negligence, as the absence of material negligence on *B*'s part forecloses a finding regarding contributory negligence. This is clearly shown in the well-known case of *Kuchenruether v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*,<sup>19</sup> where the court stated:

"We are not unmindful of the contention of plaintiff that in the former action the trial court did not necessarily determine . . . that the defendant was guilty of negligence, but the court may have only determined that, if he was, the plaintiff was guilty of contributory negligence which barred him from recovery, and have made no finding respecting the plaintiff's negligence. *But contributory negligence is a defense. The question whether the plaintiff was guilty of it does not arise at all until after the defendant has been found guilty of negligence.* [Emphasis added.] If we assume that the trial judge considered the case in orderly sequence, as we perhaps should, we would assume that he passed upon the question of the defendant's negligence."<sup>20</sup>

Thus it can be seen that if *B* were exonerated because of absence of

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It should be noted that Street predicates his conclusions on the difference between contributory negligence and the negligence of a defendant. This distinction is academically sound according to the RESTATEMENT OF TORTS, §463 (1934): "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, co-operating with the negligence of the defendant in bringing about the plaintiff's harm." [Emphasis added.] Negligence, on the other hand, is defined as: ". . . any conduct, except conduct recklessly disregarding of an interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm." RESTATEMENT, TORTS §282 (1934). But query whether this concept of duty owed to oneself is recognized in actual practice. In cases decided in Wisconsin before the advent of §331.045, WIS. STATS. (1955), it was held that, in an instruction on the subject of contributory negligence, it was erroneous to confine the element of reasonable anticipation of injury to the plaintiff alone. It was held requisite only that some injury to some person might reasonably be anticipated as the probable result. *Vollmer v. Town of Fairbanks*, 146 Wis. 630, 132 N.W. 543 (1911), citing *Meyer v. Milwaukee Electric Ry. and Light Co.*, 116 Wis. 336 93 N.W. 6 (1903).

<sup>17</sup> RESTATEMENT, JUDGMENTS §68, comment *o*, at 310 (1942); SCOTT, COLLATERAL ESTOPPEL BY JUDGMENT, 1, 23 (1942), relying on *Cambria v. Jeffrey*, 307 Mass. 49, 29 N.E.2d 555 (1940).

<sup>18</sup> In *Cambria v. Jeffrey*, *supra* note 17, the court held: "A fact merely found in a case becomes adjudicated only when it is shown to have been a basis of the relief, denial of relief, or other ultimate right established by the judgment." [FREEMAN, JUDGMENTS, §697,698 (5th ed. 1925) cited among other authorities.] "The earlier judgment was in effect that Jeffrey could not recover against Cambria. The sole basis for that judgment was the finding that Jeffrey was guilty of contributory negligence. The further finding that Cambria's servant was negligent had no effect, and could have none, in producing that judgment. Therefore, that judgment did not adjudicate that Cambria's servant was negligent."

<sup>19</sup> 225 Wis. 61, 275 N.W. 457 (1937).

<sup>20</sup> 225 Wis. at 617, 275 N.W. at 458.

negligence on his part, *A*'s contributory negligence would not be the basis of the judgment. The conclusion must be that *B*'s negligence is not immaterial to the judgment, but is in fact the motivating factor in raising the issue of contributory negligence.<sup>21</sup>

It should be noted that should the *A v. B* fact situation arise in a court of federal jurisdiction, the relevancy of *B*'s negligence should be undisputed, because of the compulsory counterclaim provision of the Federal Rules of Civil Procedure.<sup>22</sup> If a counterclaim be interposed in fact, a fortiori, the same result must obtain.<sup>23</sup>

*Case 3:* If *A* sues *B* in a comparative negligence jurisdiction, such as Wisconsin, and the jury returns a verdict in which the negligence of each is found to have caused 50% of the accident for which the action is brought, not only is *A* barred from a recovery,<sup>24</sup> but under the arguments outlined in case 2, *B* should be estopped from suing *A* in a subsequent action, regardless of whether or not *B* originally counterclaimed. The finding as to his proportion of the negligence involved should be as material as the finding of his negligence in a contributory negligence jurisdiction.<sup>25</sup>

*Case 4:* Remaining in a comparative negligence jurisdiction, assume that in the *A v. B* trial, the jury returns a verdict finding *A* responsible for 75% of the negligence causing the collision. The question arises whether the sole issue in a second trial brought by *B* against *A* is the amount of *B*'s gross damages. The answer should be in the affirmative, relying on the comparatively recent case of *Kirchen v. Tisler*.<sup>26</sup> The Wisconsin Supreme Court held that where the negligence of each of the motorists involved was the proximate cause of the collisions, and the defendants were counterclaiming against the plaintiff, since their causal negligence was less than that of the plaintiff, (determined by a *single* jury question on proportions of negligence), they were entitled to recover their respective damages from him, properly diminished by their own negligence.<sup>27</sup>

<sup>21</sup> It is perhaps significant that *Cambra v. Jeffrey*, 307 Mass. 49, 29 N.E.2d 555 (1940), has not been cited, in the same fact situation, since it was decided.

<sup>22</sup> FED. R. CIV. P. 13(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

<sup>23</sup> *Zeitlow v. Sweger*, 179 Wis. 462, 192 N.W. 47 (1923).

<sup>24</sup> WIS. STATS. §331.045 (1955).

<sup>25</sup> See form of special verdict in *Derge v. Carter*, 248 Wis. 500, at 503, 22 N.W.2d 506 (1946). Question is asked regarding negligence of the defendant before question concerning plaintiff's negligence.

<sup>26</sup> 255 Wis. 208, 38 N.W.2d 514 (1949); see short discussion of case in *Campbell, Law of Negligence in Wisconsin*, 56 WIS. L. REV. 4, at 22 (1956).

<sup>27</sup> Cases of this type are considered in Snow, *Comparative Negligence*, 1953 INS. L. J. 235, the author making the statement at p. 240: "Wisconsin permits a

It would seem only consistent to hold that where *B* had not counter-claimed in the first action and brings a subsequent action against *A*, he may rely on the previous judgment to estop *A*.<sup>28</sup>

An apparent exception to such estoppel will arise in the comparatively rare case where an element of negligence is productive solely of *A*'s (or *B*'s) injuries, and not of the entire accident.<sup>29</sup> It should be noted that this concept of "unidirectional" negligence is not to be confused with the negligence problem normally encountered in an injured passenger case. In a situation where two cars collide and a passenger in one of the cars is injured, very often the passenger can be charged with causing more than merely his own injuries, as where he has distracted his driver, failed to give warning at an intersection, neglected to keep a lookout, and the like. Also to be distinguished is the case where a party has aggravated his injuries following the accident, as by failing to obtain immediate treatment.

The type of negligence that the writer should like to term as "unidirectional" is negligence which can clearly be said to have caused *only* the injuries of the negligent actor. A familiar example is found in the case of the motorist driving with one arm extended out the car window. This dangerous, but all-too-popular habit can seldom be responsible for the collision, but may be responsible for increasing a claimant's injuries. Clearly, *B* should not be able to rely upon such a costly mistake of *A* in asserting estoppel against *A* to deny his negligence, nor should *A*, in a subsequent action by *B*, be foreclosed from the possibility of proving that *B* contributed in larger measure to his own injury, by reason of such specially-causal negligence, than to *A*'s. A proposed solution to the problem in cases involving such "unidirectional" negligence is for the trial court to require a separate finding of the causation of such negligence on the part of *A*, permitting the remaining findings to control the future litigation on a proportional basis.<sup>30</sup> Immediately an additional problem arises in the comparative

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defendant to cross complain [sic., counterclaim?] against a plaintiff in the same cause of action; if it is determined that the defendant's negligence was in fact less than plaintiff's negligence, he can recover from the plaintiff, the judgment being diminished by the percentage of negligence which the defendant contributed to the whole."

<sup>28</sup> Should the trial courts become versed in the utilization of collateral estoppel, the same results may be reached as if a compulsory counterclaim requirement were present, since *B* would have only to prove his damages to recover. To accomplish the purpose of the estoppel doctrine, i.e. avoidance of needless litigation, the courts might require *B* to make his claim in the original action, without statutory authorization for such requirement.

<sup>29</sup> That the effect of "unidirectional" negligence is appreciated by the courts can be seen by the cautious phraseology in *Kirchen v. Tisler*, 255 Wis. 208, at 213, 38 N.W.2d 514, at 516 (1949): "As the collisions between Tisler's and Kirchen's cars and the collision between the Kirchen and Lahey cars were *almost instantaneous*, . . ." [Emphasis added.]

<sup>30</sup> I.e., if *A*'s unidirectional negligence was responsible for 5% of a total of 55% negligence apportioned by the jury to him; in the subsequent action, it

negligence jurisdiction. Assume that *B* also can be found to have been guilty of such "indirectional" negligence causing his own harm. In a suit by *A* against *B*, presumably, no finding will be made by the jury regarding *B*'s "unidirectional" negligence. And when *B* attempts to estop *A* in the subsequent suit, *A* should be permitted to raise the issue of *B*'s unidirectional negligence, no finding having been made regarding it in the previous action. There appears to be no possibility of litigating such question in the early action, in the absence of counterclaim. To estop *A*, on the basis of the original comparison of negligence, the case must be one in which *A* is unable to plead or prove any such "unidirectional" negligence of *B*. Cases of this type are, however, exceptional, and should not prevent judicious employment of estoppel in the other far more frequent cases.

#### IV. ESTOPPEL OPERATION IN TRI-PARTY ACCIDENTS

The above problems treated the operation of estoppel in accidents involving but one plaintiff and one defendant, disregarding the liability insurance carriers and persons having derivative claims or liabilities. Analysis shall now be made of situations involving more than one plaintiff or more than one defendant. The dichotomy is assumed, by hypothesis, to be complete; so that, in all cases heretofore discussed, there is assumed to be no possibility of introducing additional non-derivative claims or liabilities. Because of the warped doctrines of privity and mutuality, above discussed, cases of this factual type are far more difficult to consider. Hypotheticals in which all possible parties to the accident are joined in the first trial shall first be considered, followed by the effect of absence of one of the parties in the first lawsuit.

*Case 5:* In an accident involving *A*, *B*, and *C*, *A* is injured and brings suit against *B* and *C*. If the jury determines that *B* and *C* are negligent and *A* is free from negligence, it is obvious that *B* and *C* are estopped from suing *A* for the same reason that *B* was estopped in the two-party action discussed in case 1, and on the same authority,<sup>31</sup> in a contributory negligence jurisdiction.

*Case 6:* On the same facts discussed in case 5, the jury returns a verdict finding *B* and *C* negligent and finding *A* guilty of contributory negligence. Again, the arguments advanced above to refute the weight of authority,<sup>32</sup> under case 2, should be of equal persuasion in this situation to show the necessity of employing estoppel against *B* and *C* in their subsequent suit against *A*. The presence of *C* should in no way change the result here.

*Case 7:* The effect of Wisconsin's comparative negligence statute is

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would be merely mechanical to find that the negligence relied upon for estoppel was 50/95 of 100% toward *A*, and 45/95 of 100% toward *B*.

<sup>31</sup> See note 16 *supra*.

<sup>32</sup> See note 17 *supra*.



again considered. Assuming that the jury returned a verdict finding *A* 33-1/3% contributorily negligent and *B* and *C* each 33-1/3% negligent, the same result should obtain as in case 3 above, if *B* and *C* bring a subsequent action against *A*.

*Case 8*: If, in the case above, *A* is found 40% contributorily negligent and *B* and *C* each 30% negligent, the result on a suit by *B* and *C* against *A* is the same as in case 4 above, with the reservations therein illustrated.

*Case 9*: In the event the jury found *A* completely free from negligence, all should concede that estoppel will work in his favor upon a subsequent suit by *B* and *C* against him, as the situation is the same as in case 5.

*Case 10*: Again *A* sues *B* and *C* and the jury finds both *B* and *C* negligent toward *A*. *B* brings a subsequent suit against *C*, in which *C* raises the issue of collateral estoppel. The area of anomalous results has been reached.

"The general rule as to the conclusiveness of judgment as between coparties in all kinds of actions at law is, as stated in 30 AM. JUR. 233, 234, Interpleader, that parties to a judgment are not bound by it in subsequent controversies between each other, unless they were adversaries in the action wherein the judgment was entered, and this is true whether the judgment is rendered in favor of the plaintiff or the defendants, the theory of the many decisions supporting the general rule being that the judgment merely adjudicates the right of the plaintiff as against each defendant, and leaves unadjudicated the rights of the defendants as among themselves."<sup>33</sup>

Perhaps no case following the above rule has reached more questionable results than the Minnesota decision of *Bunge v. Yager*.<sup>34</sup> The facts were that one Dose sued Yager and Bunge for injuries caused by the collision of Yager's car, in which Dose was riding, and Bunge's car. Each defendant filed a separate answer, denying his own negligence and alleging that the other was responsible. The case resulted in a verdict for the plaintiff Dose against both defendants. But, prior to the suit by Dose, Bunge had instituted suit against Yager for damages caused by the collision. Yager had answered, denying his negligence and asserting contributory negligence on the part of Bunge. At the conclusion of the action brought by Dose, Yager served an amended answer, setting up as an additional defense the judgment rendered in the Dose case as a bar to the present action and also alleging that the

<sup>33</sup> Annot., 152 A.L.R. 1066 (1944): *Judgment in action against codefendants for injury or death of person, or for damage to property, as res judicata, on question of negligence or contributory negligence, in subsequent action by one defendant against the other growing out of the same accident.* See, in particular, *Snyder v. Marken*, 116 Wash. 270, 119 Pac. 302 (1921). Also see Annot., 101 A.L.R. 104 (1936), 142 A.L.R. 727 (1943).

<sup>34</sup> 236 Minn. 245, 52 N.W.2d 446 (1952).

verdict was an estoppel. Bunge demurred to these defenses and was sustained by the trial court. The appeal by Yager followed. The Minnesota Supreme Court first distinguished many cases involving suits for contribution in which the non-liability of a co-defendant in the original action was *res judicata* in the subsequent suit because of the absence of common liability. Then the court stated:

"Liability here does not depend upon a common liability toward a third party, but the action is based upon the rights of one co-defendant against the other to recover for his own damages or injuries. Defendant argues *quite logically* [Emphasis supplied.] that it is impossible for Bunge to have been negligent toward Dose, who was riding as a guest in defendant's car without having been guilty of negligence which proximately contributed toward his own damages in the suit now brought by him against the defendant, and that for that reason recovery is barred in this action by virtue of the establishment of Bunge's own contributory negligence in the former action. While this argument seems plausible, it ignores the fact that Bunge and Yager were not adversaries in the action brought by Dose against both of them."<sup>35</sup>

The court concluded its decision by citing the various practice statutes of Minnesota which would have alleviated the situation had they been invoked.<sup>36</sup> It is particularly significant that it suggested joinder in one action, a solution that has long been advocated.<sup>37</sup> This shall be given further consideration below. But the query is raised here as to whether the court was justified in refusing to assert estoppel against the party found negligent in an action in which he was a co-defendant. The "absence of adversity" argument should lose efficacy where the co-defendant defends by asserting negligence of the other defendant in his answer, or by establishing it by his proofs.

Fortunately, not all courts have so limited the operation of collateral estoppel and so stultified the policy supporting it. As perhaps might be expected, the courts of New York are leading the way. In *Moran v. Lehman*,<sup>38</sup> the plaintiff, Moran, sought recovery for injuries suffered in a collision, against the trustees of a transportation company. The suit was originally commenced in the Supreme Court, but was transferred to the Municipal Court of the City of New York. It appeared that the guest of the plaintiff had brought a previous action, against the present defendants and the present plaintiff, which had resulted in dismissal at the end of the plaintiff's case as to the trustees,

<sup>35</sup> 52 N.W.2d at 450.

<sup>36</sup> M.S.A. §548.02; M.S.A. §540.16, MINNESOTA RULES OF CIVIL PROCEDURE 13.07.

<sup>37</sup> *E.g.*, Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, at 33 (1953): "The only completely satisfactory method of dealing with the situation is to bring all the parties into court in a single action, to determine the damages sustained by each and to require that each bear a proportion of the total loss according to his fault."

<sup>38</sup> 157 N.Y.S.2d 684 (1956).

and a verdict against the present plaintiff. The defendants in the present action moved for leave to amend their answers to plead *res judicata* and also for summary judgment on the pleadings. The plaintiff argued that the defense of *res judicata* was inapplicable unless the parties were adversary in the prior suit,<sup>39</sup> but the court held:

"The rule of *res judicata* is one deeply rooted in the common law. It is based upon public policy that demands an end to litigation. . . . [T]he recent decision in *Israel v. Wood Dolson Co.*,<sup>40</sup> . . . overrules the efficacy of *Glaser v. Huette*. . . ."<sup>41</sup>

"As in the *Israel* case, this action turns on identical issues of negligence decided in the prior trial against the plaintiff Moran, co-defendant in that action, who as a litigant had a full opportunity in the prior action to establish his freedom from liability or the liability or culpability of another. Therefore he will not be permitted to retry that issue. See also *Bennett v. Mitchell*. . . ."<sup>42</sup>

The favorable comments which this case has received should be indicative of its logic.<sup>43</sup> Referring back to our fact example, the negligence of *B* found in the prior action to which he was a party should validly estop him from suing *C*, and *C*'s negligence should estop him from suing *B*, as well. And should the jury have exonerated *A* from negligence, estoppel should still be operative between *B* and *C* in any subsequent action between them.

*Case 11*: Placing our fact example of case 10 in Wisconsin, assume that each of the three parties in *A*'s original action are found responsible for 33 1/3% of the negligence involved. Should either of the two defendants, *B* or *C*, attempt to sue the other as well as *A*, (the sole defendant in case 7 above), estoppel should be as strongly operative here as in case 10.

*Case 12*: Changing the percentages involved to 40% attributable to *A*, and 30% each to *B* and *C*, recovery should be had against *A*, though

<sup>39</sup> Citing *Glaser v. Huette*, 232 App. Div. 119, 249 N.Y. Supp. 374 (1931), *aff'd*, 256 N.Y. 686, 177 N.E. 193 (1931).

<sup>40</sup> 285 App. Div. 719, 140 N.Y.S.2d 663 (1955) *aff'd*, 1 N.Y.2d 16, 143 N.E.2d 97 (1956). The Court of Appeals in this case significantly stated, 134 N.E.2d at 99: "Our holding here is not to be treated as adding another general class of cases to the list of 'exceptions' to the rule requiring mutuality of estoppel. It is merely the announcement of the underlying principle which is found in the cases classed as 'exceptions' to the mutuality rule."

<sup>41</sup> 232 App. Div. 119, 249 N.Y. Supp. 374 (1931).

<sup>42</sup> 2 Misc.2d 116, 151 N.Y.S.2d 574 (1956). In this case the plaintiff suing in negligence had also been a co-defendant with the present defendant in an action brought by the present plaintiff's guests. In that earlier action, present plaintiff was found guilty of negligence and present defendant had received a verdict holding no cause of action existed against him. The court held present plaintiff estopped to deny his negligence.

<sup>43</sup> See Thornton, *Mutuality in Res Judicata in New York*, 23 BROOKLYN L. REV. 267 (1956). And see favorable treatment of *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 134 N.E. 297 (1956) in 42 CORNELL L. Q. 290 (1956); 35 TEXAS L. REV. 137 (1956); 23 BROOKLYN L. REV. 149 (1956).

not against either *B* or *C* should the other bring suit, subject to the general qualification suggested at case 4, *supra*.

#### V. COLLATERAL ESTOPPEL WHERE THERE IS FAILURE TO JOIN

*Case 13*: Consideration is now given to the situation where *A*, *B* and *C* were involved in an accident, *A* sues *B* without joining *C* in his complaint. The jury returns a verdict finding *B* negligent and *A* contributorily negligent in a contributory negligence jurisdiction. *B* then brings suit against *A* and *C*. Under the argument advanced in case 2, we are assured that *B* is estopped toward *A*, but now the all-important query is raised. May *C* defend against *B*, relying on the finding of negligence against *B* in the *A v. B* action? Note that the mutuality rule is directly encountered, since due process would prohibit use of a judgment to which he was not a party, against *C*.<sup>44</sup> Needless to say, the weight of authority<sup>45</sup> throughout the country would deny the defense. But isolated cases may be construed as indicating a departure from the ancient rigidity of mutuality.

In the oft-cited, but unfortunately, too-in-frequently-followed case of *Coca Cola v. Pepsi-Cola Co.*,<sup>46</sup> decided by the Superior Court of Delaware, the Coca Cola Company had sued on a reward which defendant Pepsi-Cola Company had offered for information leading to the detection of any dealer substituting Pepsi for any other five-cent drink. The defendant pleaded *actio non* in that the plaintiff had brought an earlier action against the dealers alleged to have made the substitution and that the complaints had been dismissed after a hearing on the merits. The plaintiff denied the validity of the plea of *res judicata* because of lack of mutuality of estoppel. The court said:

"A careful examination of all the authorities cited to us, or disclosed by independent research, does not disclose any case supporting the claim of the defendant where no connection is shown between the successful party to the first proceeding and the party to the second proceeding seeking to rely upon the plea of *res judicata*.

"Unanswered by the authorities cited, the question remains, however, as to the necessity of mutuality of estoppel under the facts here present.

<sup>44</sup> 42 CORNELL L. Q. 290, at 296 (1956); 15 CINN. L. REV. 249 (1941). In the latter note, the writer states: "The only concrete basis for the [mutuality] rule is found in the fundamental principle that no man should be deprived of his property except by due process of law. This reason is clearly applicable when the estoppel is invoked *against* one who was not a party to the former action, but it clearly fails when applied to one who was a party to the former action, for he has not been deprived of any due process in the presentation of his rights or claims. . . . To invoke the rule in this type of case is to repudiate the very basis of the doctrine of *res judicata* which rests upon the principle of public policy which gives every man an opportunity to prove his case, and limits every man to one such opportunity." [Emphasis supplied.]

<sup>45</sup> 60 C.J.S., *Judgments* §765 (1947); 2 BLACK, *JUDGMENTS* §548 (2d ed. 1902); Annot., 133 A.L.R. 181 (1941), 23 A.L.R. 2d 710 (1952).

<sup>46</sup> 36 Del. 124, 172 Atl. 260 (1934).

"... assuming the identity of the issues, we are of the opinion that a plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs, is bound by such adverse judgment in a second suit involving all the identical issues already decided. The requirement of mutuality must yield to the public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one."<sup>47</sup>

This somewhat revolutionary decision was cited in a California case<sup>48</sup> which appears to have gone the limit in attempting to cast aside the shackles of privity and mutuality. The case featured a judgment settling an executor's account, which had been objected to by the heirs at law. The judgment determined that the decedent had made a gift of the bank deposit to the executor and discharged him. The present action was brought by one of the heirs at law as administratrix with the will annexed against the successor to the bank of deposit, claiming that the decedent had never authorized the withdrawal. The defendant bank pleaded that the finding in the probate proceeding to settle the executor's account was *res judicata* on this action. The court agreed:

"The criteria for determining who may assert a plea of *res judicata* differ fundamentally from the criteria for determining against whom a plea of *res judicata* may be asserted. The requirements of due process of law forbid the assertion of a plea of *res judicata* unless he was bound by the earlier litigation in which the matter was decided. *Coca Cola v. Pepsi-Cola Co.*, . . .<sup>49</sup> He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. . . . There is no compelling reason, however, for requiring that the party asserting the plea of *res judicata* must have been a party, or in privity with a party, to the earlier litigation.

"In determining the validity of a plea of *res judicata* three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

"... The plea of *res judicata* is therefore available against plaintiff as a party to the former proceeding, despite her formal change of capacity."<sup>50</sup>

<sup>47</sup> 172 Atl. at 263,264. The case was directly followed in *Bruszewski v. U.S.*, 181 F.2d 419 (3rd Cir. 1950) where the Court of Appeals held that a plaintiff's failure to recover against a steamship company on a negligence claim stopped it from suing the United States. The concurring opinion would have based the decision on the relationship between the steamship company and the U.S., citing the RESTATEMENT, JUDGEMENTS §93 (1942).

<sup>48</sup> *Bernard v. Bank of America Nat. Trust and Savings Ass'n.*, 19 Cal. 2d 778, 122 P.2d 892 (1942).

<sup>49</sup> 36 Del. 124, 172 Atl. 260 (1934).

<sup>50</sup> *Bernhard v. Bank of America Nat. Trust and Savings Ass'n.*, 19 Cal. 2d 778, 122 P.2d 892, at 894,895 (1942).

It is surprising that the case has not provoked much discussion. Recently it received extended consideration in an article<sup>51</sup> in which the writer sanctioned the use of collateral estoppel only where the party to be estopped had a "full, fair and effective opportunity to contest the issue." In all fact situations considered in this discussion it has been assumed that such a condition existed, by hypothesis. Therefore, it is submitted that the doctrine handed down in the Bernhard case can be effectively used in the negligence situation here considered. Though *C* was not a party to the *A v. B* decision, there appears to be no logical reason why he cannot use the judgment in the prior action defensively against *B*, assuming *B* received a fair hearing in such action. Had *A* brought the subsequent suit against *C*, of course, the same result should be reached.<sup>52</sup>

*Case 14:* To be consistent in analysis, it is proper to consider the situation where, though *C* was not a party to the *A v. B* action wherein both parties were found negligent, he now sues them for injuries received in the same accident. Obviously, it should be competent for *B* and *A* to prove the contributory negligence of *C* in the present action. But consistent application of the estoppel doctrine should result in an estoppel toward *A* and *B* to prevent them from denying their negligence.<sup>23</sup> Critics have argued that an adversary system requires that

<sup>51</sup> Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957). It should be observed that the writer considers the effect of repeated negligence actions against the same defendant, as in a railroad accident, which doubtless explains his guarded approach to the doctrine of collateral estoppel.

<sup>52</sup> See *Israel v. Wood Dolson Co.*, 1 N.Y. 2d 116,134 N.E. 2d 97 (1956). Unfortunately, this case was the fulcrum of the decision in *Moran v. Lehman*, 157 N.Y.S. 2d 684 (1956), discussed above, does not involve issues of negligence either. It featured an action against one defendant for breach of contract and against another for wrongful inducement of the breach. The causes were severed, and trial of the cause for breach resulted in dismissal on the ground that no breach had been shown. The Supreme Court, Special Term, denied the second defendant's motion for summary judgment dismissing the complaint for inducement of breach on the ground of estoppel. The second defendant appealed. The Supreme Court, Appellate Division, reversed and granted the motion. Plaintiff appealed. The Court of Appeals held the plaintiff could not relitigate the issue as to existence of a breach, though such issue had not been litigated against the particular defendant. The writer must rely on analogy to *A's* position as plaintiff in the original action to argue estoppel against him in the event he bring suit against *C*. A case which is possibly analogous on this issue is that of *Bongo v. Ward*, 12 N.J. 415, 97 A. 2d 147 (1953). Plaintiff brought action against unincorporated service club, which conducted soap box derby, for injuries sustained when plaintiff was struck by vehicle of contestant therein. Action resulted in judgment for service club. Plaintiff then brought action against club member who acted as general chairman of derby, based upon same alleged negligence. *Held:* Such action was barred by doctrine of res judicata. But the case is weak, as privity between club and individual member is stressed.

<sup>53</sup> See *Kinney v. State* 191 Misc. 128, 75 N.Y.S. 2d 784 (1947). Action by motorist and passenger against the state for injuries sustained when their automobile struck another at intersection where traffic signals were defective. State's negligence on this count had been established in prior action by other

a party to the first action should risk the loss of rights or the creation of liabilities only with reference to his adversaries, or that, if a party does not press his defenses with vigor in one suit, he should not be penalized for his laxity in favor of a stranger to that suit.<sup>54</sup> But this argument would seem as applicable to the use of a former judgment by a stranger as a defense, as was the situation in case 13, as to its use affirmatively. And since the policy of collateral estoppel has been shown to allow a person but one "day in court" on a given issue, there seems to be no compelling reason for the distinction made between affirmative as opposed to defensive use of a former judgment by a person not a party to it.<sup>55</sup> The argument, that a party to the first action may not press his claim or defend his rights with as much zeal as he might in a subsequent action, can be dispelled by the counter-argument that, if the party knew he would be precluded from a successful defense by a failure to take advantage of his facilities in the first action, his zeal in such earlier action would be maximum.<sup>56</sup>

Thus, it can be concluded that, in contributory negligence jurisdictions, collateral estoppel should be allowed to work in favor of one not a party to the original action, both as an offensive and as a defensive device in the interests of clearing the cluttered court calendars throughout the country.

*Case 15:* The final hypothetical situation to be considered arises under the comparative negligence statute of Wisconsin. Assume that, in a suit arising out of a tri-party accident, *A* sues *B*, failing to join *C*. The most famous case decided under 331.045, is that of *Walker v. Kroger Grocery and Baking Company*,<sup>57</sup> in which all the participants to the accident were made parties. But the case is here discussed because of the enigmatic language of the court. It first concluded that there were two terms to the proportion set up by the comparative negligence statute, and that the statute was quite clear as to one of the terms, *i.e.* "the amount of negligence attributable to the person recovering."<sup>58</sup> But the court had the following to say about the second term of the proportion:

"However, inasmuch as that provision does clearly limit the one term of the proportion to the negligence attributable to the

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driver. *Held:* Prior judgment was *res judicata* as to liability of state. Also see *Barbour v. Great Atlantic and Pacific Tea Co.*, 143 F. Supp. 506 (E. D. Ill. 1956), where husband sued for loss of services and consortium caused by the defendants' negligence which hurt wife. Wife had earlier sued for her injuries against defendant and recovered. *Held:* Defendants were estopped from contesting their negligence.

<sup>54</sup> See Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

<sup>55</sup> See Note, 35 TEXAS L. REV. 137 (1956).

<sup>56</sup> See 18 N.Y.U. L.Q. REV. 565 (1941).

<sup>57</sup> 215 Wis. 519, 252 N.W. 721 (1934).

<sup>58</sup> WIS. STATS. §331.045 (1955).

person recovering, the language of the statute does not admit of including in that term of the proportion causal negligence which is attributable solely to some other participant, and not to the person recovering. As a result, the causal negligence of all the other participants in the transaction must be deemed to constitute the other term of the proposition."<sup>59</sup>

This statement has been interpreted to mean that the causal negligence of all of the other participants in the accident constitutes the other term of the proportion,<sup>60</sup> whether parties to the action or not. In *Ross v. Koberstein*,<sup>61</sup> the court held that failure to consider the negligence of one not a party to the action in determining the proportion of negligence attributable to the plaintiff was error, but not prejudicial to the defendant. The court presumed, perhaps quite liberally, that the jury would proportionately attribute the negligence of the non-joined party to the plaintiff and the defendant, thus increasing plaintiff's proportion and diminishing his recovery. Though admittedly no prejudice worked to the defendant in this case, it is submitted that prejudice could readily work to the plaintiff, by converse reasoning.

Despite the fame which the *Kroger* case has acquired in Wisconsin, as well as nationally, the writer has been unable to discover a case wherein an express finding was made, in percentage figures, as to the negligence of one not a party to the action. Apparently, the jury must merely "consider"<sup>62</sup> the negligence of the non-joined party in reaching their finding as to plaintiff's negligence. Thus, the only legally reliable term of the proportion determined under the *Kroger* rule is that respecting plaintiff's negligence. The other term will merely be such percentage as to total 100% when coupled with plaintiff's negligence.<sup>63</sup>

Thus, where *A* sues *B* and the jury returns a finding of 40% negligence attributable to *A* and 60% negligence attributable to *B*, no estoppel should be operative if *B* should attempt to sue *C*, or vice-versa, since the jury has not determined the exact division of this 60% finding

<sup>59</sup> *Walker v. Kroger Grocery and Baking Co.*, 214 Wis. 519, 252 N.W. 721 (1934).

<sup>60</sup> *Ross v. Koberstein*, 220 Wis. 73, 264 N.W. 642 (1936); *Patterson v. Edgerton Sand and Gravel Co.*, 227 Wis. 11, 277 N.W. 636 (1938); *Bohlman v. Penn. Electric Corp.*, 232 Wis. 232, 286 N.W. 552 (1939); *Katila v. Baltimore and Ohio R.R.*, 104 F.2d 842 (6th Cir. 1939); 38 AM. JUR., *Negligence* §233 (1954).

<sup>61</sup> 220 Wis. 73, 264 N.W. 642 (1936).

<sup>62</sup> See *Katila v. Baltimore and Ohio R.R.*, 104 F.2d 842 (6th Cir. 1939), where the Court of Appeals, after citing the *Walker* case stated: "But once there is introduced into the law, as here, the doctrine of comparative negligence, then there may not be adequate assay of total negligence unless all negligence supported by evidence is given *consideration*." [Emphasis supplied.] Though the case involves the FEDERAL EMPLOYERS' LIABILITY ACT §3, it is significant since Wisconsin has framed §331.045 on the basis of federal law. See Padway, *Comparative Negligence*, 16 MARQ. L. REV. 3 (1931).

<sup>63</sup> When a comparison of negligence is made and expressed in percentages, the total aggregate negligence must always equal 100%. *Callan v. Wick*, 269 Wis. 68, at 75, 68 N.W.2d 438, at 441 (1955).



between *B* and *C*. As outlined above, to avoid prejudicial error toward *A*, the jury must consider *C*'s negligence in arriving at *A*'s proportion. But the other term is definitely unreliable and prevents the operation of estoppel. That anomalous results can arise from the failure to join *C* in the original action can be readily observed. Theoretically, though the jury returned a finding of 60% negligence toward *B* in the original action, they might conceivably absolve him from all responsibility in his suit against *C*.<sup>64</sup> Of course, no finding toward either *A* or *B* is *binding* on *C*, because of the due process requirement, where he was not a party to the original action.

To avoid anomalies as above supposed, joinder of actions has been advocated by no less renowned an authority than Dean Prosser.<sup>65</sup> Wisconsin is blessed with the necessary statutory authorization for consolidation of actions by Wis. Stats. sec. 269.05 (1955):

"When two or more actions are pending in the same court, which might have been joined, the court or judge, on motion, shall, if no sufficient cause be shown to the contrary, consolidate them into one by order."

An order which consolidates two or more actions merges them into one new action which must be entitled and prosecuted as the court shall direct, terminating the original actions.<sup>66</sup> But it is not necessary that the parties to each of the actions consolidated be the same. If the actions arose out of transactions common to them all, as would be the case in the typical multiple party accident, consolidation is proper.<sup>67</sup> Whether it is to be granted under sec. 269.05, above, is discretionary with the trial court.<sup>68</sup> But the Wisconsin Supreme Court has mentioned that it is very much to be desired that where consolidation is possible, it should be ordered in the interest of expediting litigation and decreasing the expense thereof.<sup>69</sup> It was held that where actions pending in

<sup>64</sup> See, *e.g.*, *Reardon v. Terrien*, 214 Wis. 267, 252 N.W. 691 (1934). It was held that in action for death of driver of automobile in collision tried separately from actions by injured guests in other car, the fact that under substantially like evidence the jury in the first case found the deceased not negligent and another jury in the second case found him negligent, did not require conclusion that jury's findings in second case were not supported by evidence. The Wisconsin Supreme Court stating: "Had the court, as appellant requested followed the approved practice of trying the two cases together, of which practice the diverse results of these two trials afford ample justification, the inconsistency between the judgments would have been avoided, but the matter rested in the discretion of the court and we cannot say that there was an abuse of discretion." But shortly thereafter, the Supreme Court decided *Hein v. Huber*, 14 Wis. 230, 252 N.W. 692 (1934), where consolidation was allowed, and said of *Reardon v. Terrien*. "It must be anticipated that when a controversy is submitted to two different tribunals—in this case, juries—that different and even inconsistent results may be reached. Such an outcome seems to prove beyond controversy that justice has miscarried."

<sup>65</sup> Prosser, *Comparative Negligence*, 41 CALIF. L. REV. 1, at 33 (1953).

<sup>66</sup> *1st Trust Co. v. Holden*, 168 Wis. 1, 168 N.W. 402 (1918).

<sup>67</sup> *Biron v. Edwards*, 77 Wis. 477, 46 N.W. 813 (1890).

<sup>68</sup> *Tupitza v. Tupitza*, 51 Wis. 257, 29 N.W.2d 54 (1947).

<sup>69</sup> *Whalen v. Eagle Line Products Co.*, 155 Wis. 26, 143 N.W. 689 (1913).

the same court grow out of the same transaction and depend upon substantially the same evidence, consolidation should ordinarily be granted.<sup>70</sup> This form of statutory consolidation should not, however, be confused with the ancient chancery practice of consolidating actions merely for trial<sup>71</sup> which does not generally permit the entry of a consolidated judgment.<sup>72</sup>

It would appear that the Federal Rules of Civil Procedure<sup>73</sup> are paving the way for avoidance of endless litigation and contradictory results. The following statement is of significance:

"The trend of the new rules and courts in general is to discourage separate actions tending toward multiplicity of actions and favors combining in one litigation, wherever possible, for determination, the rights of all parties in one subject matter or arising out of one transaction, this being not only the spirit of Rule 13, but also the spirit and intention of Rule 14. The adjustment of defendant's demand by counterclaims in plaintiff's action rather than by independent action is favored and encouraged by the law. That practice serves to avoid circuitry of action, inconvenience, expense, consumption of the court's time and injustice."<sup>74</sup>

It is suggested that judicious adherence to a philosophy of this type coupled with discretionary utilization of the statutory provisions for consolidation,<sup>75</sup> will be of magnitudinous assistance in solving the problems which arise under Wisconsin's comparative negligence statute. The utility and operation of the doctrine of collateral estoppel can only be appreciated and enjoyed where all parties to the accident are present in the initial lawsuit.

## VI. CONCLUSION

Attempt has been made to review the various exceptions which have arisen in the requirements of mutuality and privity in collateral estoppel, requisites which have long hampered extensions of this doctrine which the writer feels to be both logical and of extreme value in the present period of trial saturation. Apology is made for the absence of persuasive authority in support of some of the arguments advanced for the utilization of estoppel. But, in defense, it is suggested that responsibility might properly rest with the appellate courts which have long been oblivious to the merits of the doctrine. It is hoped that the

<sup>70</sup> *Winnick v. Moore*, 164 Wis. 53, 159 N.W. 558 (1916); *Allen v. McRae*, 122 Wis. 246, 100 N.W. 12 (1904).

<sup>71</sup> See discussion in *Biron v. Edwards*, 77 Wis. 477, 46 N.W. 362 (1890).

<sup>72</sup> An extended discussion of this form of "consolidation" is given in 4 *CALLAGHAN'S WISCONSIN PLEADING AND PRACTICE* §30.07 (3d ed. 1954).

<sup>73</sup> *FED. R. CIV. P.* 13,14.

<sup>74</sup> 6 *CYCLOPEDIA OF FEDERAL PROCEDURE* §16.02 (1951). For a discussion of the operation of *FED. R. CIV. P.* 42 (a), relating to consolidation in the federal courts, see 2 *BARRON AND HOLTZAFF, FED. PRACTICE AND PROCEDURE* §941 (1950).

<sup>75</sup> Besides *WIS. STATS.* §269.05 (1955), see §261.04 (4) and §269.59.

discussion above will be of some impetus in curing this unfortunate circumstance. The writer feels the purpose of the article is best condensed in the following quotation:

“It is with a degree of gratification that the court observes that this latest application of the *res judicata* rule, meeting the test of practical necessity and justice, will to some extent help ameliorate the over-burdened court calendar condition due to the ever mounting automobile accident cases.”<sup>76</sup>

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<sup>76</sup> *Moran v. Lehman*, 157 N.Y.S. 2d 684 (1956).