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Civil Procedure - Collateral Estoppel - Affirmative Application in Multiple Litigant Situations - Hart v. American Airlines, Inc., 304 N.Y.S.2d 810, 61 Misc. 2d 41 (1969)

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CASE NOTES

CIVIL PROCEDURE—COLLATERAL ESTOPPEL—AFFIRMATIVE APPLICATION IN MULTIPLE LITIGANT SITUATIONS

On November 8, 1965, while attempting to land at the Greater Cincinnati Airport, Covington, Kentucky, an American Airlines' aircraft crashed, causing the death of fifty-eight of the sixty-two passengers. Among the deceased were Bruce F. Hart, a resident of New York, and Sammual Creasy of Texas. An action in behalf of Hart's estate was commenced in New York County alleging that the crash and resulting deaths were caused by American Airlines' negligent operation of the aircraft during the landing approach. Subsequently, an action involving the death of Creasy was commenced in the United States District Court in Texas. As in the New York case, the plaintiff in Texas alleged that the crash was due to American Airlines' negligence.[1] The *Creasy* case, brought under the Kentucky Wrongful Death Statute,[2] was the first cause of action to be tried to conclusion. After a nineteen-day trial, the jury found American Airlines liable for Creasy's death.[3] In light of the Texas decision, the plaintiff in New York moved for a summary judgment on the issue of American Airlines' negligence. The motion was denied.[4] On appeal, the judgment was reversed and summary judgment was granted to the plaintiff on the ground that under the doctrine of collateral estoppel the Texas court's determination of negligence was conclusive on the issue of the airline's liability for the crash, notwithstanding the fact that the plaintiff was not a party to the Texas law suit. *Hart v. American Airlines, Inc.*, 304 N.Y.S.2d 810, 61 Misc. 2d 41 (1969).

The significance of this decision is that it represents the first time a state jurisdiction has allowed the doctrine of collateral estoppel to be affirmatively applied in a multiple litigant situation, by a person neither a party to, nor deriving rights from a party to a previous law suit. The purpose

1. Creasy v. American Airlines, Inc. and the United States of America, 418 F.2d 180 (5th Cir. 1969).
2. KY. REV. STAT. § 411.130 (1962).
3. Brief for Appellant at 3, Hart v. American Airlines, Inc., 304 N.Y.S.2d 810, 61 Misc. 2d 41 (1969).
4. *Id.* at 4.

of this casenote is twofold: to examine the evolution of the doctrine of collateral estoppel from its traditional restrictions to its broadened application in recent decisions; and to evaluate the effect of the *Hart* rule in multiple litigant proceedings.

Collateral estoppel,[5] in traditional terms, is a doctrine under which a party to a lawsuit is estopped from asserting or denying a given issue of law or fact because the question has been determined in a previous lawsuit in which the estopped party, or someone in privity with him, was a participant.[6] The traditional definition of collateral estoppel also requires that "mutuality of estoppel" exist. Mutuality prohibits a party to a lawsuit from taking advantage of a previous judgment unless he would also be bound by that judgment.[7] The legal rationale supporting this doctrine is that a party to an action should risk the loss of rights, or the creation of liabilities, only with reference to his adversaries in that particular

5. The development of the doctrine of collateral estoppel has not been as rapid as otherwise possible because of the failure of judges and courts to distinguish collateral estoppel from res judicata. *See generally Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818 (1952). As an example of the confusion that occurs, *see* W.E. Hedger Transp. Corp. v. Ira S. Bushy & Sons, 92 F. Supp. 112, 114 (E.D.N.Y. 1950), *aff'd*, 186 F.2d 236 (2d Cir. 1951); and Phillips v. Oltarsh, 273 App. Div. 715, 717, 80 N.Y.S.2d 153, 155 (1968), *aff'd*, 298 N.Y. 835, 84 N.E.2d 146 (1949). The doctrine of res judicata requires that when one cause of action has been adjudicated on the merits, the *parties* to that cause of action are *bound* by the judgment rendered by the court and may not relitigate that same cause of action. *See* RESTATEMENT OF JUDGMENTS § 68 (1942). The doctrine of collateral estoppel is only applied when the cause of action in the subsequent suit is different from that asserted in the first proceeding, and it applies to issues of fact or law, rather than to causes of action. *See* Yates v. United States, 354 U.S. 298 (1957); The Evergreens v. Nunam, 141 F.2d 927 (2d Cir. 1944); Messing v. Barr Corp., 148 F. Supp. 58 (E.D.N.Y. 1957).

6. *Accord*, Cromwell v. County of Sac., 94 U.S. 351 (1876); Nichols v. Alker, 231 F.2d 68 (2d Cir. 1956), *cert. denied*, 352 U.S. 829 (1956); Neenan v. Woodside Astoria Trans. Co., 261 N.Y. 159, 184 N.E. 744 (1933); Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304, 165 N.E. 456 (1929); Westerfield v. Rogers, 174 N.Y. 230, 66 N.E. 813 (1903); Nelson v Brown, 144 N.Y. 384, 39 N.E. 355 (1895). *See* RESTATEMENT OF JUDGMENTS § 93 (1942); FREEMAN, JUDGMENTS § 407 (5th rev. ed. 1925).

7. A number of exceptions to mutuality were allowed wherein derivative or secondary liability was involved: (1) *the indemnitor-indemnitee exception. See* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912); Elder v. New York & Pennsylvania Motor Express, Inc., 284 N.Y. 350, 31 N.E.2d 188 (1940), Annot., 133 A.L.R. 181 (1941); Brobston v. Burgess, 290 Pa. 331, 138 A. 849 (1927); (2) *the employer-employee exception. See* Davis v. Perryman, 225 Ark. 963, 286 S.W.2d 844 (1956); Giedrewicz v. Donovan, 277 Mass. 563, 179 N.E. 246 (1932); Taylor v. Denton Hatchery, Inc., 251 N.C. 689, 111 S.E.2d 864 (1960); (3) *the surety-principal debtor exception. See* Kramer v. Morgan, 85 F.2d 96 (2d Cir. 1936); Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765 (1904); Monmouth Lumber Co. v. Indemnity Ins. Co., 21 N.J. 439, 122 A.2d 604 (1956).

action.[8] Thus, by invoking "mutuality of estoppel," the courts limited the effect of an in personam judgment to the parties before the court, and to those nonparties in privity with them.[9]

The requirement of "mutuality of estoppel" has long been critized; as early as 1828, Jeremy Bentham stated:

> There is a reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he was a party, merely because his adversary was not. It is . . . the very height of absurdity.[10]

It should be noted that Bentham's characterization of "mutuality of estoppel" as the "very height of absurdity"[11] has generally not been accepted by the courts. Consequently, a significant number of jurisdictions still adhere to the traditional interpretation of collateral estoppel.[12]

However, in recent years a new definition of collateral estoppel has begun to emerge. The first step in formulating this new definition was taken by the California Supreme Court in *Bernhard v. Bank of America National Trust & Saving Association.*[13] In that case, the court held that a judgment settling an executor's account, which determined that the decedent had made a gift of a bank deposit to the executor, collaterally estopped one of decedent's heirs-at-law from relitigating the issue of the gift in a subsequent proceeding.[14] Justice Traynor, writing for the court, disposed of the requirement of "mutuality of estoppel" as follows:

> Many courts have stated the facile formula that the plea . . . is available only when there is privity and mutuality of estoppel . . . . No satisfactory rationalization has been advanced for the requirement of mutuality . . . . In the present

8. *See generally* Seavey, *Res Judicata with Reference to Persons neither Parties nor Privities—Two California Cases*, 57 HARV. L. REV. 98 (1943).

9. *See generally* Moore & Currier, *Mutuality and Conclusiveness of Judgments*, 35 TUL. L. REV. 301 (1961).

10. 7 WORKS OF JEREMY BENTHAM 171 (Bowring ed. 1843).

11. *Id.*

12. Illinois still adheres to the requirement of "mutuality of estoppel," requiring the one employing the estoppel to be a party or in privity with a party to the prior action. *See* Smith v. Bishop, 26 Ill. 2d 434, 187 N.E.2d 217 (1962); Bentley v. Teton, 19 Ill. App. 2d 284, 153 N.E.2d 495 (1958); Rose v. Dolejs, 7 Ill. App. 2d 267, 129 N.E.2d 281 (1955). However a recent appellate level case, Chidester v. Cagwin, 76 Ill. App. 2d 477, 222 N.E.2d 274 (1966), cited Bernhard v. Bank of American Nat'l Trust & Saving Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942) [hereinafter cited as *Bernhard*], favorably and indicated that the court felt that "mutuality of estoppel" was no longer needed for the application of collateral estoppel in Illinois; *See also* Suggs v. Alabama Power Co., 271 Ala. 168, 123 So. 2d 4 (1960); Raz v. Mills, 233 Ore. 452, 378 P.2d 959 (1963); Owens v. Kuro, 56 Wash. 2d 564, 354 P.2d 696 (1960).

13. *See supra* note 12.

14. Bernhard, *supra* note 12, at 810, 122 P.2d at 894.

case, therefore, the defendant is not precluded by lack of privity or mutuality of estoppel from asserting the plea . . . .[15]

Thus, Justice Traynor disposed of the most widely recognized limitation on the application of the doctrine of collateral estoppel—"mutuality of estoppel."

The ruling in *Bernhard* has been adopted in an increasing number of jurisdictions.[16] Most recently, in *Sanderson v. Balfour*, [17] the New Hampshire Supreme Court, in abandoning the requirement of "mutuality of estoppel," stated: "The *Bernhard* decision initially caused hardly a ripple in the sea of mutuality . . . . [C]ommentators and courts have now embraced its reasoning."[18]

Following the announcement of the "*Bernhard* Doctrine," the courts adopted several limitations upon its use. The first limitation imposed on the "*Bernhard* Doctrine" was that of "initiative;"[19] that is, a party could not be collaterally estopped from relitigating an issue in the present action unless he had taken the initiative in bringing the prior law suit, irrespective of the circumstances of the individual case.[20] The rationale behind this limitation was that "an allowance of the plea should not result in a situation in which a number of initial plaintiffs lose, then one wins, and the remainder win on the coattails of the first winner."[21]

This limitation was soon abandoned. In *Teitelbaum Furs, Inc. v. Dominion Ins. Co., Ltd.*,[22] for example, the plaintiff fur company sought to recover on policies insuring against losses due to theft. The insurance company invoked a prior judgment convicting Teitelbaum of staging the robbery himself. Reversing the trial court, the Supreme Court of California held that the defendant could use the judgment in the prior criminal case.[23] The plaintiffs had specifically urged upon the court the argument that one not a party to the prior action should be prohibited from invoking the doctrine of collateral estoppel against a party who did not have the initiative in the prior proceeding. Justice Traynor rejected this argument:

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15. Bernhard, *supra* note 12, at 811-12, 122 P.2d at 894-95.
16. *See generally* Curie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965).
17. 109 N.H. 213, 247 A.2d 185 (1968).
18. *Id.* at —, 247 A.2d at 187.
19. *See* Curie, *Mutuality of Collateral Estoppel: Limits of the* "Bernhard" *Doctrine*, 9 STAN. L. REV. 281 (1957).
20. *Id.* at 286.
21. Comment, *Mutuality of Collateral Estoppel*, 63 NW. L. REV. 209, 218 (1969).
22. 58 Cal. 2d 601, 375 P.2d 439 (1962).
23. *Id.* at 604, 375 P.2d at 440.

> Although plaintiff's president did not have the initiative in his criminal trial, he was afforded a full opportunity to litigate the issue of his guilt with all the safeguards afforded the criminal defendant, and since he was charged with felonies punishable in the state prison . . . he had every motive to make as vigorous and effective a defense as possible.[24]

Hence, *Teitelbaum* establishes the proposition that a non-party to a prior action may, in a subsequent proceeding, collaterally estop a party to the former action from relitigating an issue decided therein, even though the party to the prior action did not have the initiative in that suit.

The most significant limitation adopted by the courts in applying the doctrine of collateral estoppel is that of limiting it to a *defensive* use. This limitation is based on the proposition that an unsuccessful claimant in a prior action, who has had his day in court, should not be able to relitigate the same issues in subsequent proceedings by merely switching adversaries.[25] Additionally, the courts rationalize the use of the doctrine defensively, since allowing the plea by a non-party defendant removes any possible advantage to claimants in not joining additional and obvious defendants in the original action. The theory is that if the courts forbid the use of the doctrine defensively, then the claimant would have a tendency, especially in a doubtful case, to purposely avoid joining potentially liable defendants. This proposition is based on the assumption that a failure by a plaintiff to succeed against one defendant will not prevent him from retrying his case against another.[26] Hence, by allowing the doctrine to be applied defensively, it would encourage an initial consolidation of the litigation and thereby reduce the number of cases pending before the courts.

The defensive use of collateral estoppel by a non-party to a prior action has been adopted in a significant number of jurisdictions.[27] In *Mackey v. Frazier*,[28] the South Carolina Supreme Court allowed the de-

24. *Id.* at 606-07, 375 P.2d at 441.

25. Bernhard, *supra* note 12; Coca-Cola Co. v. Pepsi Cola Co., 6 W.W. Harr. 124, 36 Del. 124 (1934).

26. "In appropriate cases collateral estoppel might be applied against a party who fails to take steps to unite litigation whenever jurisdictional boundaries and other conditions permit." Reardon v. Allen, 88 N.J. Super. 560, 571, 213 A.2d 26, 32 (1965).

27. Woodcock v. Udell, 48 Del. 69, 97 A.2d 878 (1953); De Polo v. Greig, 338 Mich. 703, 62 N.W.2d 441 (1954); Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955); Crosland-Cullen Co. v. Crosland, 249 N.C. 167, 105 S.E. 2d 655 (1958); Sanderson v. Balfour, *supra* note 17; Cover v. Platte Valley Pub. Power & Irrigation Dist., 162 Neb. 146, 75 N.W.2d 661 (1956); Shimke v. Earley, 173 Ohio St. 521, 184 N.E.2d 209 (1962); Helmig v. Rockwell Mfg. Co., 389 Pa. 21, 131 A.2d 622 (1957); Harding v. Carr, 79 R.I. 32, 83 A.2d 79 (1951); Mackey v. Frazier, 234 S.C. 81, 106 S.E.2d 895 (1959).

28. 234 S.C. 81, 106 S.E.2d 895 (1959).

fendant to defensively apply the doctrine of collateral estoppel to prevent the plaintiff, who had been found negligent in a prior suit, from relitigating the issue of negligence in the present action. In *Shimke v. Earley*,[29] the Supreme Court of Ohio allowed the defendant to assert the doctrine although in a prior action the plaintiff in the present suit was found negligent in the operation of his vehicle. As a result, he was collaterally estopped from relitigating the issue of his negligence in the present action. One of the most recent jurisdictions to allow the defensive use of the doctrine was New Hampshire in the decision of *Sanderson v. Balfour*.[30] In a prior action, the owner of an auto, which had been parked by his wife on a highway, successfully recovered for property damage against a tractor driver who had struck the auto. In *Balfour*, the tractor driver brought a suit for personal injury against the owner's wife. The court, relying on the prior action, allowed the wife to assert collateral estoppel as to the tractor driver's negligence.[31]

While a number of state courts have allowed the doctrine to be applied defensively, they have rejected its use in an affirmative manner. This appears to be the view of the vast majority of jurisdictions in the United States.[32] The most noteworthy example of a state's reluctance to apply the doctrine affirmatively in a multiple claimant situation can be found in California—the same jurisdiction which decided *Bernhard*. In *Nevarov v. Caldwell*,[33] the court was squarely presented with the issue of whether the literal language of *Bernhard* was intended to be applied affirmatively to multiple litigant situations.[34] In a prior suit by an infant, the defendant in *Nevarov* had been found negligent in causing a multi-vehicle accident. In *Nevarov*, the infant's parents sued the defendant and claimed that the prior judgment conclusively established, in their favor, the issue of defendant's negligence. The court rejected this plea:

> [T]he application of the rule . . . to multiple claims . . . against a single defendant

29. 173 Ohio St. 521, 184 N.E.2d 209 (1962).

30. *Supra* note 17.

31. New Hampshire is the most recent jurisdiction to abandon the requirement of "mutuality of estoppel" and adopt the *Bernhard* rule.

32. *See generally The Impacts of Defensive and Offensive Assertion of Collateral Estoppel by a Nonparty*, 35 GEO. WASH. L. REV. 1010 (1967); Mutuality of *Estoppel: McCourt v. Algiers in Context*, 1967 WIS. L. REV. —.

33. 327 P.2d 111 (Cal. App. 1958).

34. Justice Traynor replaced the requirement of "mutuality of estoppel" with a three-fold test: (1) the issue decided in the prior adjudication must be identical with the issue presented in the action in question; (2) there must have been a final judgment on the merits in the prior action; and (3) the party against whom the plea is asserted must have been a party or in privity with a party to the prior adjudication. This test has become known as the "*Bernhard* Doctrine." Bernhard, *supra* note 12, at 813, 122 P.2d at 895.

or set of defendants growing out of a single accident . . . does not apply. . . . [S]uch an extension of the doctrine would be promotive of litigation and subversion of sound principles of judicial administration looking to equal justice for all.[35]

The Arizona decision of *Spettigue v. Mahoney*[36] is another example of a court's reluctance to allow collateral estoppel to be applied affirmatively in a multiple litigant situation. In a prior action, the court determined that the state was negligent in the construction and maintenance of a bridge on a public highway.[37] The plaintiff in *Spettigue* sought to collaterally estop the state from relitigating the question of its negligence. In rejecting the affirmative application of the doctrine, the court stated:

We are reluctant to adopt a rule which would incline a plaintiff to maneuver to advance on the calendar another plaintiff's case with more jury-appeal rather than to seek consolidation with other plaintiffs to determine liability.[38]

Although state courts have refused to allow a non-party to the prior action to affirmatively assert the doctrine of collateral estoppel, a number of federal courts have allowed its application in this situation. One of the most important decisions is *United States v. United Air Lines, Inc.*[39] That case involved the collision over Nevada of a United Air Lines passenger plane with a U.S.A.F. jet, killing all forty-two passengers and five crew members of the private plane and the two Air Force pilots. Suits by survivors of the deceased passengers were brought in eleven different jurisdictions.[40] The first suit to be tried to a conclusion was in a California Federal District Court and resulted in a verdict for plaintiffs on the issue of the airline's negligence. The plaintiffs in Washington at first contemplated a transfer of their case to the California District Court. However, they later decided to move for summary judgment on the theory that the California judgment was conclusive on the issue of liability and defendant was collaterally estopped from denying its negligence.[41] District Judge Hall granted the plaintiff's motion, rejecting the

35. *Supra* note 33, at 119. *Accord*, McDougall v. Palo Alto Unified School District, 212 Cal. App. 2d 422, 28 Cal. Rptr. 37 (1963); Price v. Atchison, T. & S.F. R.R., 164 Cal. App. 2d 400, 330 P.2d 933 (1958); *see* WEST'S ANN. CALIF. CODE CIV. PROC. § 1908 subd. 2 (West 1955).

36. 8 Ariz. App. 281, 445 P.2d 557 (1968).

37. *Id.* at —, 445 P.2d at 558.

38. *Id.* at —, 445 P.2d at 564. In support of the court's position, *see* 1B MOORE'S FEDERAL PRACTICE § 0.412, at 1803-14 (1965); Annots., 133 A.L.R. 181, 185 (1941), 23 A.L.R.2d 710, 717 (1952); 30a AM. JUR. *Judgments* § 392m (1958); 50 C.J.S. *Judgments* § 765 (1947).

39. 216 F. Supp. 709 (E.D. Wash. 1962), *aff'd sub. nom.* as to res judicata and mutuality, United Air Lines v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. dismissed*, 379 U.S. 951 (1964).

40. Suits were filed in United States District Courts in California, Colorado, Florida, Iowa, Massachusetts, Missouri, Nebraska, New Jersey, Nevada, New York, and Washington.

41. *Supra* note 16, at 35.

argument of defendant that the doctrine could not be asserted in cases where there was not privity of both parties to the prior action. He stated:

> [I]t is true that the general rule requires that there be identity of parties . . . nevertheless, the Court, increasingly so in the last 20 years, have not adhered to that doctrine, and have held that no constitutional right is violated where the thing to be

nd the party against whom the litigate the matter and actually had full opportunity to de- en, and that many hundreds ourt concluded that the de- rsary proceeding" and had a

nited Air Lines, at least four tion of collateral estoppel,[45] dicta.[46] In *Gorski v. Com-* eld that the drivers of two rior lawsuit were collaterally negligence in a subsequent the prior suit. In *Zdanok v.* rom introducing evidence re- ct which the court had con- there was no valid reason to ion to be placed on the con- fair opportunity" to contest

Airlines, Inc.,[49] the United s to the passengers on the plane competence in their field, in the t would be a travesty upon jus- the survivors of passengers for gate the issue of liability after it l in the trial court in . . . Los Angeles . . . . The defendant has had its day in court on the issue of liability . . . ." *Supra* note 39, at 728.

45. *Accord*, Haddad v. Border Express, Inc., 300 F.2d 885 (1st Cir. 1962); Gibson v. United States, 211 F.2d 425 (3d Cir. 1954); Davis v. McKinnon, 266 F.2d 870 (6th Cir. 1959); Colorado v. Ohio Casualty Ins. Co., 232 F.2d 474 (10th Cir. 1956).

46. Hurly v. Southern California Edison Co., 183 F.2d 125, 134 (9th Cir. 1950).

47. 206 F. Supp. 11 (E.D. Wis. 1962).

48. 327 F.2d 944 (2d Cir. 1964).

49. 267 F. Supp. 298 (D. Md. 1967).

States District Court in Maryland, relying on the doctrine of collateral estoppel, granted a motion for summary judgment in an airplane crash case. The first action resulting from this crash to be tried to a conclusion was in the District of Columbia.[50] In that action, the United States was held liable for the negligence of tower controllers in failing to warn a Capital Airlines Viscount of the proximity of another aircraft with which it ultimately collided. The court in *Gliedman* allowed the plaintiff to affirmatively apply the doctrine of collateral estoppel to prevent the airline from relitigating the issue of negligence. The plaintiff in the *Gliedman* case was careful to point out that the Government had had its "day in court." There had been extensive depositions, interrogatories, and a complete trial on the issue, with witnesses presented on both sides under conditions of full examination and cross-examination. Consequently, there was no reason for that issue to be tried again.[51] The court agreed with plaintiff's contention:

> There seem to be no compelling reasons for requiring that the party asserting the plea of collateral estoppel, even affirmatively as in this case, must have been a party, or in privity with a party, to the earlier litigation . . . . Indeed, the philosophical basis for the doctrine of collateral estoppel is that a party . . . should not be able to litigate that issue ad nauseam . . . .[52]

Thus, *Gliedman* establishes the proposition that where a defendant has had a "full and fair opportunity" to litigate the issues in a prior action, there is no reason for allowing him to relitigate them in a subsequent proceeding.[53]

The "federal rule" of "full and fair opportunity" encompasses the following criteria: (1) that the party sought to be estopped has had an adequate opportunity to gather and present depositions and interrogatories in the prior action;[54] (2) that the party sought to be estopped has had the opportunity to call witnesses and to cross-examine his adversaries' witnesses;[55] (3) that the prior action was a fair adversary proceeding free from prejudice;[56] and (4) that there was a final determination on the issue which the party is estopped from relitigating in the subsequent action.[57]

In *DeWitt v. Hall*,[58] the New York Court of Appeals took the initial

50. Maryland *ex rel.* Meyer v. United States, 322 F.2d 1009, *aff'd on the issue of agency and remanded*, United States v. Maryland *ex rel.* Meyer, 382 U.S. 158 (1965).
51. *Supra* note 49, at 301.
52. *Supra* note 49, at 303-04.
53. *See supra* note 49, at 303.
54. *See supra* note 39, at 725-26; *supra* note 49, at 303.
55. *See supra* note 39, at 728; *supra* note 49, at 303.
56. *See supra* note 39, at 728; *supra* note 49, at 303-04.
57. *See supra* note 39, at 717; *supra* note 49, at 303.
58. 19 N.W.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

step necessary for the adoption of the "federal rule." The plaintiff's truck, while driven by an employee, collided with defendant Hall's car. In a prior lawsuit, the employee sued Hall and obtained a judgment for personal injuries. In *DeWitt*, the employer sued for property damages and asserted that his employee's prior judgment estopped Hall from relitigating the issue of negligence. The court permitted DeWitt to affirmatively use the prior judgment,[59] even though he was not a party to that action and would not have been estopped by that judgment. The court's view was that DeWitt was entitled to collaterally estop Hall because there was no policy or precedent to prevent the affirmative use of a prior judgment to bar a defendant from relitigating the issue of negligence.[60]

DeWitt is often cited as authorizing the affirmative use of collateral estoppel in a multiple litigant situation by a non-party to the prior action. This is only partially correct. While allowing the doctrine to be applied affirmatively, the *DeWitt* case restricts the application to the very limited fact situation

> Where the plaintiff in the present action, the owner of the vehicle, *derives* his right to recovery from the plaintiff in the first action, [and] the operator of said vehicle . . . [does] not technically stand in the relationship of privity. . . .[61]

Thus, the court requires that the cause of action of the party asserting the plea of collateral estoppel be derivative from the right of the party who successfully recovered the prior judgment.

Having allowed the affirmative use of collateral estoppel in *DeWitt*, the New York courts proceeded to develop a new test for the application of collateral estoppel. In *Schwartz v. Public Administrator of County of Bronx*,[62] the New York Court of Appeals formulated a new criterion as to when the doctrine can be asserted. In a prior action by a passenger, both parties in *Schwartz* were found negligent in the operation of their trucks. In *Schwartz*, the driver of one of the trucks brought an action against the other driver to recover damages to his vehicle.[63] The defendant in *Schwartz* sought a summary judgment based on the theory that the plaintiff was collaterally estopped from denying his own negli-

59. *Id.* at 147, 225 N.E.2d at 198, 278 N.Y.S.2d at 601.
60. *Id.* at 147, 225 N.E.2d at 198, 278 N.Y.S.2d at 602. The court disposed of defendant's contention that the application of the doctrine of collateral estoppel required "mutuality of estoppel" by stating that "the doctrine of mutuality is a dead letter." *Id.* at 147, 225 N.E.2d at 198, 278 N.Y.S.2d at 601.
61. *Id.* at 148, 225 N.E.2d at 199, 278 N.Y.S.2d at 602 (emphasis added).
62. 24 N.Y.2d 65, 246 N.E.2d 725 (1969).
63. Id. at 69, 246 N.E.2d at 730.

gence.[64] The court granted the motion[65] and stated that the only requirements necessary to assert the doctrine of collateral estoppel are:

> [A]n identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.[66]

Thus, *Schwartz* adopts the "federal rule" of "full and fair opportunity."

Therefore, at the time the *Hart* decision was reached, the New York courts had allowed the doctrine of collateral estoppel to be applied affirmatively where the party asserting the doctrine had derived his rights from a party to the prior action. Furthermore, the Court of Appeals announced a new test for the application of the doctrine, which can be stated as follows:

> Where a full opportunity has been afforded to a party to the prior action and he has failed to prove his freedom from liability or to establish liability or culpability on the part of another, there is no reason for permitting him to retry these issues.[67]

The decision in *Hart* applied the test formulated in *Schwartz*[68] and allowed the doctrine of collateral estoppel to be affirmatively applied in a multiple litigant situation by a person neither a party to, nor deriving rights from a party to the prior action. The effect of this decision is similar to that of a compulsory joinder, in that from defendant's point of view, once the issue is decided against him, he is prohibited from relitigating it in a subsequent action.

In *Hart* the defendant argued that allowing the plaintiff to invoke collateral estoppel on the basis of the Texas judgment was in violation of the "full faith and credit" clause of the United States Constitution[69] because it allows one state to give a greater effect to the judgment rendered by a court of a sister state. The purpose of the "full faith and credit" clause is to prevent a party in another state from collaterally attacking and at-

64. The plaintiff's attorney, in attempting to prevent the defendant from asserting the doctrine, raised the issue that the parties to the present action were not adversaries in the prior action. Plaintiff relied on Galser v. Huette, 232 App. Div. 119, 249 N.Y.S. 374, *aff'd* 256 N.Y. 686, 177 N.E. 193 (1931), which held that a judgment in favor of a passenger in an action against the operators of two colliding vehicles does not give rise to an estoppel which would bar a subsequent action by one of the drivers against the action by one of the drivers against the other for his own personal injuries or property damage. The court dismissed the plaintiff's argument by stating that decisions in recent years have made this distinction, "an insignificant if not irrelevant one." *Supra* note 62, at 71, 246 N.E.2d at 729.

65. *Supra* note 62, at 76, 246 N.E.2d at 732.

66. *Supra* note 62, at 71, 246 N.E.2d at 729.

67. Hart v. American Airlines Inc., *supra* note 3, at 814, 61 Misc. 2d at —.

68. Hart v. American Airlines Inc., *supra* note 3, at 812, 61 Misc. 2d at —.

69. U.S. CONST. art. IV, § 1.

tempting to impeach a valid judgment of a court which had jurisdiction over all parties.[70] There is, however, no constitutional requirement that the effect given to a prior judgment by the forum must always accord with the effect given in the state rendering the judgment. The "full faith and credit" clause does not require such a rigid test. As long as the effect of the judgment, as between the parties, is accorded equal respect, the constitutional requirement is fulfilled.[71] The court in *Hart* rejected defendant's contention on the ground that the Texas judgment was not sought to be enforced, but was only sought to be used in an evidentiary manner in relation to a particular issue. The court stated:

> What is here involved is a policy determination by our courts that "one who has had his day in court should not be permitted to litigate the question anew" . . . , and, further, refused, "to tolerate a condition where, on relatively the same set of facts, one fact-finder, be it court or jury" may find a party liable while another exonerates him leading to the "inconsistent results which are always a blemish on a judicial system."[72]

Hence, the court dismissed defendant's argument that the affirmative application of collateral estoppel in multiple litigant situations, would violate the "full faith and credit" clause of the United States Constitution.[73]

Defendant, having failed in attempting to convince the court that the application of collateral estoppel would violate the "full faith and credit" clause, advanced the argument that determination of liability in Texas "may be an aberration stemming from local prejudice against corporate defendants or from sympathy considerations."[74] The court rejected this argument, viewing it as "conjectural musings" which were not supported by the evidence.[75] Had the defendant supported his charges with proper evidence of prejudice, the court would have had to deny the application of collateral estoppel. This denial would be a logical application of the test formulated in *Schwartz* because the requirement of "fairness" would not be met. However, the party objecting to the application of the doctrine has the burden of proving that he did not have a "full and

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70. U.S. CONST. art. IV, § 1.

71 Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943). In support of this argument defendant cited United States v. Silliman, 167 F.2d 607 (3d Cir. 1948) *cert. denied*, 335 U.S. 825 (1948), and Everett v. Everett, 215 U.S. 203 (1909); these actions, unlike the situation in *Hart*, involved an issue litigated by the *same* parties in both actions. The court, therefore, precluded plaintiff from reasserting its cause of action. These cases were res judicata situations. In support of the court's position, *see* Hinchey v. Sellers, 7 N.Y.2d 287, 197 N.Y.S.2d 129 (1959).

72. *Supra* note 68, at 814, 61 Misc. 2d at —.

73. *Supra* note 69.

74. *Supra* note 68, at 814, 61 Misc. 2d at —.

75. *Supra* note 68, at 814, 61 Misc. 2d at —.

fair opportunity" to defend in the prior action.[76] The defendant in *Hart* failed to meet this burden, and hence, the court allowed the plea of collateral estoppel.

The defendant in *Hart* also contended that the law of Texas, which required mutuality,[77] should be applied in the case. The court rejected defendant's argument stating:

> The state of Texas has no legitimate interest in imposing its rules on collateral estoppel upon these New York residents and a holding that permits such result would, . . . constitute . . . 'anachronistic treatment' . . . .[78]

Thus, the court felt that in order for Texas law to govern, Texas would have to have an interest in the litigation, which it did not have in the *Hart* case.

The defendant also argued that estoppel should not be applied because the jury in Texas did not know that its verdict would affect parties other than those to the suit.[79] If the defendant's contention were upheld, the defendant would be entitled to a jury instruction that the determination of the jury on a given issue of fact might be binding, as against defendant, in subsequent actions brought by plaintiffs not parties to the present suit. The court dismissed this argument as "grasping at straws,"[80] since in the court's view the issue was the same in both actions and the number of parties was not relevant to the airline's negligence.[81]

The remainder of this case note will examine possible future applications of the *Hart* rule and discuss some of the problems created by this decision.

The doctrine of collateral estoppel is particularly adaptable to airline crashes.[82] Every passenger on an aircraft is in the same legal position as his fellow passengers. He is a passive rider and, therefore, no issue of contributory negligence can arise. The evidence and the defense to the merits utilized by the defendant arise out of the same set of facts. Once the defendant has had a full opportunity to defend against the claim of one passenger and has been found liable, the remaining passengers will

76. *Supra* note 68, at 812-13, 61 Misc. 2d at —. *Supra* note 62, at 73, 246 N.E.2d at 731.

77. "After a question of law or an issue of fact has been litigated and adjudicated in a court of competent jurisdiction, the *same* natter cannot be relitigated in a subsequent suit between the same parties or those in privity with them." Swilley v. McCain, 374 S.W.2d 871, 874 (Tex. Sup. Ct. 1964) (emphasis added).

78. *Supra* note 68, at 813, 61 Misc. at —.

79. *Supra* note 68, at 815, 61 Misc. 2d at —.

80. *Supra* note 68, at 815, 61 Misc. 2d at —.

81. *Supra* note 68, at 815, 61 Misc. 2d at —.

82. *See generally* Wolcott, *Collateral Estoppel and other Practical Approaches to Commercial Air Crash Claims*, 13 N.Y.L.F. 509 (1967).

have no difficulty in showing an identity of issue.

Admittedly, the application of the doctrine is more complex when dealing with auto accidents because of the question of contributory negligence. However, this problem can be avoided by allowing the application of estoppel as to defendant's negligence and having the question of contributory negligence subsequently litigated.

The doctrine of collateral estoppel can also be applied to multiple litigant situations in products liability litigation. For example, if in the initial action it can be shown that the defective component was an undersized bolt, and the same size bolt was used in manufacturing all of the products in question, there would be no reason to require subsequent plaintiffs to relitigate the issue of whether or not the bolt used was the proper size for the use intended.

The court in *Hart* felt that the exoneration of the defendant in a subsequent suit would be a "blemish on a judicial system."[83] For the most part, inconsistent decisions by different courts on the same facts are a "blemish" on a court system. However, there are times when the "blemish" is the "just" decision. Consider, for example, the fact that the defendant might have been represented in the prior suit by an incompetent attorney, or the attorney, based on incompetency or mistaken judgment, failed to properly preserve a question for appeal. Are these sufficient reasons for defendant to lose all subsequent actions involving the same facts? This is a disadvantage to the doctrine which must be considered by the courts when deciding whether or not to allow the application of the doctrine affirmatively by non-parties in multiple litigant situations.

However, the defendant is not left entirely without "safeguards" for his protection. The defendant can defeat plaintiff's motion for summary judgment based on collateral estoppel, by employing either or both of two methods. The first method open to defendant is to collaterally attack the judgment in the prior action, thereby destroying its validity as a basis for the estoppel. Secondly, the defendant may prove in the subsequent action that he did not receive a "full and fair opportunity" in the prior litigation. The only disadvantage to the defendant in the second method is that he must maintain the burden of proof.[84]

A possible alternative to applying the doctrine of collateral estoppel in a multiple litigant situation was suggested by an Illinois Appellate Court in *Smith v. Andrews*.[85] In that case, the court permitted the plaintiffs

83. *Supra* note 72.
84. *Supra* note 76.
85. 54 Ill. App. 2d 51, 203 N.E.2d 160 (1965).

to introduce as *prima facie* evidence court records pertaining to defendant's past criminal convictions to show his unfitness as a parent in an adoption proceeding. The courts, therefore, as an alternative to precluding re-litigation of the issue, could allow the prior adjudication to be admitted as *prima facie* evidence and thereby shift the burden to defendant, rather than the more severe consequence of preclusion involved in collateral estoppel.

Another alternative to the affirmative use of collateral estoppel would be a compulsory joinder of all claimants in multiple litigant situations. The compulsory joinder would make all claimants "necessary" parties and the court would not proceed until all were joined.[86]

The greatest benefit from the affirmative application of collateral estoppel in multiple litigant situations will be derived by the general public. The *Creasy* case took nineteen days to try; no doubt it would have taken at least another nineteen days to try the *Hart* case. By applying the doctrine of collateral estoppel, the only trial time necessary would be to determine damages. In an age where a six year wait for a jury trial is a rule rather than an exception, the courts should adopt a liberal attitude toward the use of collateral estoppel.

In conclusion, the rationale behind the doctrine of collateral estoppel is a "rule of reason and practical necessity."[87] The reasons for allowing the doctrine to be applied affirmatively do not differ substantially from those put forward in justifing the defensive use of the doctrine. Both the affirmative and defensive application of collateral estoppel in multiple litigant situations are based on the rationale that a party should not be able to re-litigate issues by merely switching adversaries. Both lead to a policy of joining all parties in one action.

The *Hart* case is but a logical extension of the "*Bernhard* Doctrine" and, more particularly, case law in New York. The "*Bernhard* Doctrine" as announced by Justice Traynor, did not limit itself to a defensive use, but the courts saw fit to interpret it in that light. In *DeWitt*, the New York courts allowed the affirmative application of collateral estoppel in limited fact situations, and in *Schwartz* they adopted the "full and fair opportunity" test. The *Hart* case merely extended the decisions of *DeWitt* and *Schwartz* to further the objective of our court system: to give the parties a "full and fair opportunity" to present their case and not to allow a party to relitigate an issue "ad nauseam." Does the affirmative application of collateral estoppel in multiple litigant situations

86. *See* FED. R. CIV. P. 19.

87. Good Health Dairy Prod. v. Emery, 275 N.Y. 14, 18, 9 N.E.2d 758, 759 (1937).

achieve this objective or does the ultimate solution lie in compulsory joinder? Although this question remains unanswered, the *Hart* decision is a step toward finding an adequate solution.

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