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RECENT CASES

CIVIL PROCEDURE — IN WRONGFUL DEATH ACTION ADMINISTRATRIX NOT COLLATERALLY ESTOPPED BY PRIOR DECISION AGAINST ABSENTEE OWNER

Carol Ann Molino, the operator of an automobile owned by her father, was killed in a one car accident which occurred on a Putnam County highway. Prodoti, the only passenger, charged the decedent with negligent operation of the vehicle and recovered against her father, as absentee owner, in a federal district court. Thereafter, decedent's mother who was not a party to the federal action brought suit in her capacity as the administratrix of her daughter's estate against Prodoti and Putnam County for her daughter's wrongful death and conscious pain and suffering. In this action, commenced in New York supreme court, the administratrix charged Prodoti with negligent interference with the decedent's operation of the vehicle and Putnam County with negligent maintenance of the highway. Defendants moved to interpose an amended answer asserting an affirmative defense of collateral estoppel based on decedent's negligence as established in the federal action. Special term denied the motion as to the defendant County and granted it as to defendant Prodoti. Plaintiff, contesting the allowance of Prodoti's motion, appealed and the Appellate Division, Second Department, reversed the special term, holding that the defense of collateral estoppel was not available against this appellant since she was neither a party, nor in privity with a party, to the federal action.[1] After the Court of Appeals' decision in *Schwartz v. Public Administrator of the Bronx*,[2] the defendants renewed their motion for leave to plead the defense of collateral estoppel based on the findings of the federal action. Special term which had previously denied the motion to Putnam County now granted the defendants' motion. The Appellate Division, Second Department, which had previously denied the same motion, now affirmed without opinion.[3] On plaintiff administratrix's appeal to the Court of Appeals, *held:*

1. Molino v. County of Putnam, 30 App. Div. 2d 929, 294 N.Y.S.2d 158 (2d Dep't 1968).
2. 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).
3. Molino v. County of Putnam, 35 App. Div. 2d 578, 314 N.Y.S.2d 341 (2d Dep't 1970).

the defense of collateral estoppel is not available against a person who was neither a party to, nor in privity with a party to the first action. *Molino v. County of Putnam,* 29 N.Y.2d 44, 272 N.E.2d 323, 323 N.Y.S.2d 817 (1971).

Stability and consistency, fundamental policies of both legal and social order, demand that, at some point, litigation be finally and conclusively terminated.[4] To achieve this goal, the courts have traditionally looked to former adjudications to dictate, or at least influence, the outcome of subsequent litigations. The doctrine of stare decisis has an influential effect in that it gives the force of precedent to a prior ruling on a point of *law* which will have a universal application.[5] The doctrine of res judicata, which embraces the concepts of bar, merger, and collateral estoppel,[6] likewise seeks to effectuate these policies by prescribing the effects that an adjudication of *fact* in one action will have in a subsequent action.[7] When the cause of action is the same,[8] res judicata will fully preclude the relitigation of all issues which later arise either by bar, which prohibits a losing plaintiff from suing again,[9] or by merger, where a successful plaintiff's cause of action becomes merged and extinguished in the judgment which is supplanted by a right to sue on the judgment.[10] However, unlike bar and merger which operate whether or not the facts were actually litigated, collateral estoppel will only partially preclude relitigation in a subsequent and different

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4. A terse statement of this policy is that "the interest of the state requires that there be an end to litigation." Reed v. Allen, 286 U.S. 191, 198-99 (1932).

5. People *ex rel.* Watchtower Bible Soc'y v. Haring, 286 App. Div. 676, 683, 146 N.Y.S.2d 151, 159 (3d Dep't 1955); RESTATEMENT OF JUDGMENTS § 70, comment (a) (1942).

6. The New York courts, however, frequently fail to distinguish between its various aspects and refer to res judicata indiscriminately. *See, e.g.,* Goodman v. Goodman, 274 App. Div. 287, 83 N.Y.S.2d 62 (1st Dep't 1948) (collateral estoppel discussed as res judicata). For the purposes of this discussion, the term "res judicata" will be used to refer to bar and merger, and is treated separately from collateral estoppel.

7. Cromwell v. County of Sac, 94 U.S. 351 (1876).

8. The determination that a cause of action in a present suit is identical to a former is one of the most elusive distinctions in the area of res judicata. The decision may ultimately turn on some delicate questions of policy. *See, e.g.,* Spilker v. Hankin, 188 F.2d 35 (D.C. Cir. 1951); White v. Alder, 289 N.Y. 34, 43 N.E.2d 798 (1942).

9. Cromwell v. County of Sac. 94 U.S. 351, 352 (1876). (Bar occurs when the defendant prevails on the merits and the plaintiff is thereafter barred from suing again on the same cause of action.)

10. RESTATEMENT OF JUDGMENTS § 47 (a) (1942). (Merger occurs when a plaintiff prevails on the merits, his original cause of action is terminated by the judgment and is replaced by a cause of action on the judgment.)

cause of action by giving a conclusive effect to those facts actually litigated and determined in the former suit.[11]

In distinguishing between the availability of total claim preclusion by way of res judicata, or partial issue preclusion by way of collateral estoppel, it therefore becomes necessary to determine precisely what constitutes the "same cause of action."[12] The traditional tests have included: the impairment of "rights or interests established in the first action";[13] proof which is based on the use of the same evidence in the latter action as in the former;[14] and election of remedies which are so inconsistent that resort to one precludes resort to the other.[15] There is general agreement that none of these tests are very helpful in determining, in a particular case, whether the requisite identity of issues exists for an application of total preclusion, via bar or merger.[16] This has apparently led to an increased reliance on collateral estoppel. The doctrine's limited effect of issue preclusion, based on actual litigation, serves to eliminate the hardship of total claim preclusion, while also avoiding most of the injustice which may result from a relitigation of the same dispute.[17]

However, the availability of collateral estoppel has oftentimes been circumscribed by the injection of the coterminous notions of mutuality and privity. The former operates to prevent a stranger to a prior action from using collateral estoppel to preclude relitigation of those findings which are favorable to him because the newcomer would not have been bound to the determination of those issues had they been against him,[18] while the latter determines who, in addition to the parties of record,

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11. However, the New York courts may not always require "actual litigation." *See* J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE § 5011.27 (1963).

12. RESTATEMENT OF JUDGMENTS §§ 61-67 (1942); *see supra*, note 8.

13. Schuykill Fuel Corp. v. B & C Neiberg Realty Corp., 250 N.Y. 304, 307, 165 N.E. 456, 457 (1929).

14. Cook v. Conners, 215 N.Y. 175, 109 N.E. 78 (1915); Fox v. Employers' Liab. Assurance Corp., 239 App. Div. 671, 268 N.Y.S. 536 (4th Dep't 1934).

15. Smith v. Kirkpatrick, 305 N.Y. 66, 111 N.E.2d 209 (1953).

16. *See, e.g.*, J. WEINSTEIN, H. KORN & A. MILLER, NEW YORK CIVIL PRACTICE § 5011.14 (1963).

17. *Id.*

18. F. JAMES, CIVIL PROCEDURE § 11.23 (1965). The rule is based on the traditional due process precept that a person cannot assert a favorable judgment unless his right to recover was placed in jeopardy in the former litigation vis-à-vis the losing party.

will be bound to a judgment.[19] While mutuality acts as a limitation on those who can assert collateral estoppel,[20] privity operates to restrict the class of persons against whom it can be invoked.[21] The cumulative effect of these two concepts has been to limit the applicability of collateral estoppel to instances where successive litigations arise between the same parties or their privies.[22] Thus, since due process of law requires that one not in privity with a party to the former suit shall not be bound,[23] he is similarly precluded, by mutuality, from using that prior determination affirmatively.[24]

However, in New York, the doctrine of mutuality has seemingly proved too restrictive to endure. Its demise began in *Good Health Dairy Products Corp. v. Emery*,[25] where the courts began carving out a series of exceptions which so undermined the mutuality rule, that the Court of Apeals in *B. R. DeWitt, Inc. v. Hall* pronounced it "dead" and "inoperative."[26] New York law now provides that where the issues in the second cause of action are identical with those in the first action, collateral estoppel may

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19. The term "privity" denominates a rule to the effect that under certain circumstances a person may be bound to a prior judgment to which he was not a party of record. Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970).

20. *See, e.g.*, Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 19 Cal. 2d 807, 122 P.2d 892 (1942).

21. The standard dogma holds that strangers to a judgment cannot be bound to their disadvantage. Postal Tel. Cable Co. v. Newport, 247 U.S. 464 (1918); Neenan v. Woodside Astoria Transp. Co., 261 N.Y. 159, 184 N.E. 744 (1933).

22. RESTATEMENT OF JUDGMENTS § 96, comment (a) (1942). (The presence of an indemnity situation is often the decisive factor in deciding who is bound.)

23. Commissioners of State Ins. Fund v. Low, 3 N.Y.2d 590, 148 N.E.2d 136, 170 N.Y.S.2d 795 (1958). (State Insurance Fund was not bound by a prior finding that an agent of the state was negligent.)

24. Kessler v. Fligel, 266 N.Y. 508, 195 N.E. 176 (1935); Atlantic Dock Co. v. Mayor of New York, 53 N.Y. 64 (1873). *But see* Zdanok v. Glidden, 327 F.2d 944 (2d Cir.), *cert. denied*, 377 U.S. 934 (1964).

25. 275 N.Y. 14, 9 N.E.2d 758 (1937). (Mutuality does not apply where liability is wholly derivative.) For a thorough analysis of the fall of mutuality see, Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165, 188-95 (1969).

26. 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967). The court suggests that there are only three avenues of defense open to a loser in the first suit if he intends to avoid the effects of collateral estoppel in the second:

(1) the issues are not identical;
(2) there was not a full and fair hearing on them; or
(3) the plaintiff lacks a "derivative" right.

Of these the first and third are of questionable value and the second is clearly the most efficacious.

be asserted either defensively or offensively by one who was neither a party nor a privy to the first litigation.[27]

Considerations separate and distinct from those of mutuality occur when new parties appear as defendants in the second action. Here, fundamental notions of due process preclude the assertion of collateral estoppel against the newcomer, who was neither a party to the first action, nor had an opportunity to be heard.[28] An exception to the general rule that "[a] judgment is a determination of the rights of the parties in an action,"[29] provides that persons in "privity" with parties in the first action will also be bound in the second action, without a violation of due process, even though they were not physically before the court.[30] Originally, privity was defined in terms of a relationship to property.[31] More recently, it has been described as "merely a word used to say that the relationship between . . . one who is a party on the record and another is close enough to include . . . [the] other within the res judicata."[32] Although time has amplified the language of the privity definition, the concept's facility in creating a jural relationship and the legal consequences flowing therefrom has not enjoyed a corresponding expansion. Thus, New York courts have continued to define privity in terms of classic legalistic relationships, holding that: bailor and bailee are in privity with respect to the subject of the bailment;[33] beneficiaries of a trust are bound by a suit brought by the trustee;[34] principal and agent are in privity where liability is purely de-

27. *See, e.g.,* Guarino v. Mine Safety Appliance Co., 31 App. Div. 2d 255, 297 N.Y.S.2d 639 (2d Dep't), *aff'd,* 25 N.Y.2d 460, 255 N.E.2d 173, 306 N.Y.S.2d 942 (1969). (In an action for wrongful death by city employees, a manufacturer was collaterally estopped from denying negligence in later suit brought by decedent's rescuers.); Albero v. State, 31 App. Div. 2d 674, 295 N.Y.S.2d 965 (3d Dep't 1968), *aff'd,* 26 N.Y.2d 630, 255 N.E.2d 724, 307 N.Y.S.2d 469 (1970). (Issue of plaintiff's negligence established in a federal action was defensively asserted by defendant State, although the State was not a party to prior action.)

28. Postal Tel. Cable Co. v. Newport, 247 U.S. 464 (1918); Neenan v. Woodside Astoria Transp. Co., 261 N.Y. 159, 184 N.E. 744 (1933).

29. N.Y. Civ. Prac. § 5011 (McKinney 1963).

30. Watts v. Swiss Bank Corp., 27 N.Y.2d 270, 265 N.E.2d 739, 317 N.Y.S.2d 315 (1970).

31. Haverhill v. International Ry., 217 App. Div. 521, 522, 217 N.Y.S. 522, 523 (4th Dep't 1926), *aff'd,* 244 N.Y. 582, 155 N.E. 905 (1927) (privity defined as a "mutual or successive relationship to the same rights of property").

32. Bruszewski v. United States, 181 F.2d 419, 423 (3rd Cir. 1950).

33. Lanite Sales Co. v. Klevens Corp., 205 Misc. 303, 128 N.Y.S.2d 182 (Sup. Ct. 1954).

34. Stissing Nat'l Bank v. Kaplan, 28 App Div. 2d 1159, 284 N.Y.S.2d 320 (3d Dep't 1967); *In re* Clemen's Estate, 198 Misc. 1049, 101 N.Y.S.2d 367 (Sur. Ct. 1950).

rivative;[35] successors in interest to land are bound by a prior determination of property rights thereto;[36] control of litigation is sufficient connection to bind a nonparty;[37] and a right to control a litigation is sufficient to bind a party who was properly vouched in.[38] Conversely, the courts have found that privity does not exist in such mundane relationships as those between: husband and wife;[39] parent and child;[40] or the same person's individual and fiduciary capacities.[41]

In New York, the application of these traditional privity relationships, which determine who, in addition to the parties, will be bound by an unfavorable determination, has remained virtually unaffected in the closely related areas of class actions[42] and of indispensable parties[43] despite other procedural modifications in these areas. Similarly with respect to collateral estoppel, the strength of the privity doctrine has remained virtually unaffected by the demise of mutuality, its counterpart.[44]

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35. B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

36. *In re* Potter's Will, 307 N.Y. 504, 121 N.E.2d 522 (1954); *In re* Baker's Will, 189 Misc. 159, 69 N.Y.S.2d 626 (Sur. Ct. 1947).

37. New York State Labor Relations Bd. v. Holland Laundry, 294 N.Y. 480, 63 N.E.2d 68 (1945).

38. Willsey v. Strawway, 44 Misc. 2d 601, 255 N.Y.S.2d 224 (Sup. Ct. 1963), *aff'd mem.*, 22 App. Div. 2d 973, 254 N.Y.S.2d 830 (3d Dep't 1964).

39. Stamp v. Franklin, 144 N.Y. 607, 39 N.E. 634 (1895); Jetter v. Brown, 200 Misc. 718, 107 N.Y.S.2d 856 (Sup. Ct. 1951).

40. Willsey v. Strawway, 44 Misc. 2d 601, 255 N.Y.S.2d 224 (Sup. Ct. 1963), *aff'd mem.*, 22 App. Div. 2d 973, 254 N.Y.S.2d 830 (3d Dep't 1964); Salay v. Ross, 155 N.Y.S.2d 841 (Sup. Ct. 1956).

41. City Bank Farmers Trust Co. v. Silberberg, 280 N.Y. 424, 21 N.E.2d 493 (1939).

42. In Hansberry v. Lee, 311 U.S. 32 (1940) the Supreme Court dispensed with the privity requirement for federal class actions by merely requiring notice and adequate representation. The New York courts, however, continue to cling tenaciously to the privity requirement, thereby seriously impairing the potential of the class action device. *See* Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970) (privity requirement retained). *See also*, Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971).

43. In Provident Tradesmens Bank v. Patterson, 390 U.S. 102 (1968), a case involving dismissal for failure to join an indispensable party, the Supreme Court seemingly reaffirmed the principle by saying:

> [T]here is the interest of the outsider whom it would have been desirable to join. Of course, since the outsider is not before the court, he cannot be bound by the judgment rendered.

Id. at 110.

44. Willsey v. Strawway, 44 Misc. 2d 601, 603, 255 N.Y.S.2d 224, 227 (Sup. Ct. 1963), *aff'd mem.*, 22 App. Div. 2d 973, 254 N.Y.S.2d 830 (3d Dep't 1964): "Rules involving mutuality apply only to the party asserting *res judicata*. The rules regarding compliance with the tests of identity or privity have been unchanged by recent law, as regards the party *against* whom the estoppel is asserted."

In *Schwartz v. Public Administrator of the Bronx*[45] the Court of Appeals apparently sought to introduce a functional approach to the application of collateral estoppel which would look to the realities of each situation rather than to the traditional requirements of privity and mutuality. There the court held that the drivers of two cars, codefendants when sued by a passenger in the first action, were collaterally estopped in the second suit *inter se*, even though they were not in the traditional adversarial posture in the first action. The court announced that the only requirements for the assertion of collateral estoppel were an identity of interests and an opportunity to be heard.[46] This decision apparently confirmed the death of mutuality previously announced in *B. R. DeWitt, Inc. v. Hall*[47] and sought to introduce pragmatic requirements for the assertion of collateral estoppel. It did not, however, deal specifically with a privity problem.[48] Therefore, although *DeWitt* and *Schwartz* have succeeded in replacing the mutuality doctrine with more flexible criteria for determining who may *assert* collateral estoppel,[49] subsequent cases have found the concept of privity, which delimits the class of persons *against* whom the rule can be invoked, unaffected and have continued to follow the traditional notions in deciding who, in addition to parties of record, will be bound.[50]

The majority opinion in the instant case described the progressive expansion of the availability of collateral estoppel in New York as a device to preclude the relitigation of a previously determined issue. The court then noted that the abrogation of mutuality now permits a judgment to be used either offensively or defensively based on " 'the sound principle that, where it can be fairly said that a party has had a full opportunity to litigate a particular issue, he cannot reasonably demand a second one.' "[51] The court, however, found the instant case to be one of first impression in that it was the first instance in which a party in

45. 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

46. *Id.* at 71, 246 N.E.2d at 729, 298 N.Y.S.2d at 960.

47. 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

48. The two drivers who faced each other as plaintiff and defendant in the second action had both been parties, as codefendants, in the first action.

49. *See, e.g., supra* note 27.

50. Herbert Rosenthal Jewelry Corp. v. Zale Corp., 323 F. Supp. 1234 (S.D.N.Y. 1971). (Collateral estoppel does not apply against a person not represented in the first action.)

51. Molino v. County of Putnam, 29 N.Y.2d 44, 48, 272 N.E.2d 323, 325, 323 N.Y.S.2d 817, 820 (1971) [hereinafter cited as instant case].

the second action sought to apply collateral estoppel to preclude the relitigation of previously determined facts to defeat a person who had not been a *party* to the prior action. The majority opined collateral estoppel to hold that a prior determination of fact is binding only on parties to the first action, or their privies. The court then proceeded to examine the various relationships between the parties to the former and current actions to determine whether or not a sufficient jural relationship existed to bind the administratrix to the prior, and adverse, determination. By adhering to the traditional conceptions of privity,[52] the court found the facts that the absentee owner in action one and the plaintiff administratrix in action two were husband and wife, the decedent's parents, as well as the sole distributees, were of no "compelling legal significance."[53] The court was not impressed by the defendants' attempts to show the existence of a jural relationship because of the fact that the administratrix and husband had identical interests in proving the decedent free from negligence, and both would have benefitted from a death action recovery.[54] Nor, would the court find that privity had been created by section 388 of the Vehicle and Traffic Law.[55] In the absence of the required privity, the court was compelled to grant Mrs. Molino her day in court. A failure to do so, said the majority, would have been a denial of due process, for, in her capacity as administratrix, she was a stranger to the prior judgment and, not having had an opportunity to litigate the issues involved, she could not be bound by its adverse findings.[56] The majority based its holding on firm legal precedent. With few exceptions,[57] the New York courts have consistently adhered to the traditional formulations of privity, and have refused to allow collateral estoppel to be used to defeat a person who was not a party, or in the

52. *See* text accompanying *supra* notes 33-41.

53. Instant case at 48, 272 N.E.2d at 325, 323 N.Y.S.2d at 820.

54. *Id.* at 49, 272 N.E.2d at 325, 323 N.Y.S.2d at 820.

55. N.Y. VEH. & TRAF. LAW § 388 (McKinney 1960). The statute creates a basis of civil liability by imputing the negligence of the driver to the absentee owner in order to give a third party a direct cause of action against the owner of the vehicle which injured him. However, the statute does not operate to impute contributory negligence to the absentee owner, nor does it create privity for the purpose of binding the absentee owner to an adverse decision. *See, e.g.,* Willsey v. Strawway, 44 Misc. 2d 601, 255 N.Y.S.2d 224 (Sup. Ct. 1963), *aff'd mem.,* 22 App. Div. 2d 973, 254 N.Y.S.2d 830 (3d Dep't 1964).

56. *See supra* note 21.

57. *In re* Shea's Will, 309 N.Y. 605, 132 N.E.2d 864 (1956) (judgment against family corporation also binding on stockholders).

classic jural relationship with a party, to a prior action.[58] Although the recent Court of Appeals' decision in *Schwartz*[59] announced that the only two requirements for the assertion of collateral estoppel were an identity of interests and an opportunity to be heard, the facts of that case were concerned solely with a problem of mutuality. Therefore, in deciding a question which was essentially one of privity, the court in the instant case did not feel compelled to follow its previous holding.

Speaking for the three dissenters, Mr. Justice Burke would have granted the defendants' motion to assert an affirmative defense of collateral estoppel. The dissent felt that the sole issue involved was that of decedent's negligence, which had been firmly established in the federal action.[60] The dissenters' rationale for denying the administratrix a separate day in court rested on two concurrent considerations: the public interest in preventing repetitious litigation and the desire to prevent inconsistent verdicts.[61] To effectuate these policies the dissent would have ignored the traditional, technical notions of privity which the majority found so conclusive. Finding that "[a] resort to abstract notions and generalities relating to privity" was inappropriate,[62] the dissent would have looked to a more functional approach to privity such as that established in *Bruszewski v. United States*.[63] Even though the facts of *Schwartz* dealt with a mutuality issue, the dissent implied that the case sought to introduce a practical and functional approach, which looked to the realities of each situation, to all aspects of res judicata. Therefore, the dissenters felt that because the prior federal action had conclusively established that "the Molinos had a 'full and fair opportunity' in a trial on issues that are identical,"[64] the sole prerequisites of *Schwartz* had been satisfied and the decision of the appellate division should have been affirmed.

The New York law of collateral estoppel gave the Molino family a unique strategic option when sued in the federal action. Their first alternative was to bring a countersuit in federal court.

58. Neenan v. Woodside Astoria Trans. Co., 261 N.Y. 159, 184 N.E. 744 (1933); Rathbone v. Hooney, 58 N.Y. 463 (1874).

59. 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969). *See supra* note 48.

60. Instant case at 54, 272 N.E.2d at 328, 323 N.Y.S.2d at 825.

61. *Id.* at 50, 54, 272 N.E.2d at 326, 328, 323 N.Y.S.2d at 821, 825.

62. *Id.* at 51, 272 N.E.2d at 327, 323 N.Y.S.2d at 822.

63. 181 F.2d 419, 423 (3d Cir. 1950). *See* text at *supra* note 32.

64. Instant case at 54, 272 N.E.2d at 328, 323 N.Y.S.2d at 825.

The sole method in which this choice could be effected was for the mother, as administratrix, to initiate a separate action against Prodoti and Putnam County which would probably have been consolidated.[65] Practically speaking, however, the injection of a countersuit, which often invites the jury to balance the fault of the litigants, would have been tactically unwise for the Molinos. Given the present state of New York law, the most advantageous course for the Molinos was their second alternative—to await the outcome of the federal litigation. If Prodoti lost, they could rely on *Schwartz* to assert collateral estoppel offensively. If he won, the absent administratrix's cause of action would be protected by the privity doctrine. The latter contingency became the situation of the instant case. By allowing the Molinos to relitigate the question of their daughter's negligence which had been conclusively established in the federal action, the court created a situation where a most paradoxical result could occur. That is, in the very possible event that the administratrix prevailed in the second action against Prodoti, each party, litigating the very same facts in two separate actions, would have been found negligent in one suit and free from negligence in the other. To open the door for a situation in which even one negligent person may, by legal stratagem, recover would clearly seem offensive to New York public policy. Such an outrageous situation is certainly exacerbated where two negligent parties may be allowed to recover in separate actions.

While the privity requirement of collateral estoppel is well grounded on New York law,[66] its application to the instant case is especially dubious in view of the fact that the decedent's mother and father, who were also the decedent's sole distributees, sought to prove the same thing in both actions—their daughter's freedom from negligence. Despite their awareness of these realities,[67] the majority of the Court of Appeals in the instant case nevertheless felt compelled to apply the traditional categorical conceptions of the privity doctrine which mechanically dictated the result: the Molino family was entitled to a second opportunity to litigate

65. FED. R. CIV. P. 42 (a). (Cases pending before the court may be consolidated when they contain "a common question of law or fact.")

66. First Nat'l Bank v. Shuler, 153 N.Y. 163, 47 N.E. 262 (1897); Collins v. Hydorn, 135 N.Y. 320, 32 N.E. 69 (1892); Rathbone v. Hooney, 58 N.Y. 463 (1874).

67. Instant case at 48, 272 N.E.2d at 325, 323 N.Y.S.2d at 820.

the question of their daughter's negligence. The majority was of the opinion that because the decedent's mother and father stood in different legal capacities, the actions of the father in the federal action *could not* adequately represent the interests of the absent mother who was therefore entitled to a separate suit as administratrix. It is interesting to note that while the court has often defined privity so narrowly that one individual was held to be two legal persons, each with a separate cause of action,[68] it has also seen fit to expand the jural relation to include parties who were not physically before the court when it was felt that privity was being used as a subterfuge to escape the effects of an unfavorable judgment.[69] Yet, even in view of these widely divergent conceptions of privity, the majority in the instant case chose to rely on an especially narrow formulation of the doctrine to reach the conclusion that, despite the various legal relationships in which they stood, the husband and wife failed to satisfy its requirements. Certainly to suggest the abandonment of privity would be folly. However, since its mechanical application may often work an injustice by overlooking the realities of a situation, it is suggested that its implementation be based on a realistic and practical standard which is shaped to the unique contours of each case.

A corresponding solution to this problem which often results in repetitious litigation, with the concomitant possibility of inconsistent verdicts, is couched in terms of the adoption of a compulsory counter-claim rule.[70] However, notwithstanding its utility in certain contexts, such a coercive rule is not a panacea for problems such as those which are exemplified in the instant case. The federal rule will compel a "pleader," the legal equivalent of a "party," to bring all of his claims arising out of a "single

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68. In City Bank Farmers Trust Co. v. Silberberg, 280 N.Y. 424, 429-30, 21 N.E.2d 493, 494 (1939) the court held that "an adjudication for or against a person litigating an issue solely in his individual right or interest does not conclude him in a subsequent prosecution . . . to which he is a party only in his representative capacity." (The guarantor of mortgage certificates was not bound in a suit undertaken in his capacity as trustee when suing the same defendant, in a second action, as representative of the certificate holders.)

69. *In re* Shea's Will, 309 N.Y. 605, 132 N.E.2d 864 (1956). (A judgment against a family corporation also held binding on stockholders.)

70. *See, e.g.,* Comment, *Nonparties and Preclusion by Judgment: The Privity Rule Reconsidered,* 56 CALIF. L. REV. 1098, 1122 (1968).

transaction or occurrence."[71] Therefore, unless the plaintiff administratrix is defined as being in privity with the party, her husband, she would remain outside the purview of the rule, free in a subsequent action to assert any claim—even one arising from the same occurrence. Any viable solution to a problem of repetitious litigation, such as the instant case illustrates, must therefore be found within an expansion of the scope and content of the privity doctrine. The dissent in the instant case attempted to introduce such a solution by endeavoring to formulate a functional and pragmatic approach to "privity," just as the Court of Appeals in *Schwartz* introduced a functional and pragmatic approach to "mutuality." The result of the instant case indicates that the majority of the Court of Appeals is ready to adopt a flexible and functional approach when dealing with mutuality, but prefers to adhere to a more formalistic, conceptualistic approach when dealing with privity. In order to fulfill its perception of due process of law, which apparently mandates a strict adherence to traditional notions of privity, the court is willing to pay the price of repetitious litigations and inconsistent verdicts. It is submitted that such a price is extremely high and, in the light of related procedural developments,[72] the genus of privity which the court currently demands to fulfill due process, may be archaic as well as unnecessary. The Federal Rules of Civil Procedure have, subject to carefully measured procedural safeguards, dispensed with the privity requirement for class actions.[73] This detachment from the classical prerequisite of an intraclass jural relationship can be seen as a penumberal refutation of the traditional standards required to fulfill due process of law. However, despite the bold steps taken in the federal system, the New York Court of Appeals has continued to cling tenaciously to the privity requirement, thereby seriously impairing the utility of the New York class action device.[74] Similarly, by demanding a rigid, conceptualistic genus of privity in the application of collateral estoppel, the court has likewise impaired that doctrine's usefulness in terminating litigation.

71. FED. R. CIV. P. 13 (a).
72. *See supra* note 42.
73. FED. R. CIV. P. 23 (b) (3). *See* Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971).
74. *See supra* note 42.

It is submitted that the spirit of pragmatism and functionalism which pervade the federal system should similarly be introduced by the Court of Appeals into the New York law of collateral estoppel. The court should abandon its archaic and impractical standards and should recognize, in dealing with privity, as it has in dealing with mutuality, that due process of law and reality are not incompatible.

JAMES W. GRESENS

CONSTITUTIONAL LAW—A DRIVER INVOLVED IN AN ACCIDENT RESULTING IN PROPERTY DAMAGE CAN BE REQUIRED BY STATUTE TO STOP AND IDENTIFY HIMSELF TO THE OTHER DRIVER

On August 20, 1960, defendant Byers was involved in an automobile accident which resulted in damage to another car. Two days later he was charged in a two-count indictment with two misdemeanor violations of the California Vehicle Code. The first count charged him with passing another vehicle without maintaining the "safe distance" required by law[1] and the second count with a violation of California's "hit and run" statute. This statute requires the driver of any vehicle involved in an accident resulting in damage to any property, including vehicles, to stop at the scene of the accident and give his name and address to the other driver.[2] Byers demurred to the second count on the ground that it violated his privilege against compulsory self-incrimination. His demurrer was sustained by the California Supreme Court, which held that compliance confronted him with "substantial hazards of self-incrimination," but upheld the statute by inserting a use restriction on the information disclosed. The California court found Byers not liable because he could not have anticipated the imposition of a use restriction.[3] The United States Supreme Court granted certiorari.[4] *Held,* the constitutional privilege against self-incrimination is not infringed by a state statute which requires a motorist involved in an accident to stop at the scene and give his name and address. *California v. Byers,* 402 U.S. 424 (1971).

1. CAL. VEHICLE CODE § 21750 (West Supp. 1971).
2. *Id.* § 20002 (a) (1).
3. Byers v. Justice Court for Ukiah Judicial Dist., 71 Cal. 2d 1039, 1057, 458 P.2d 465, 478, 80 Cal. Rptr. 553, 566 (1969).
4. 397 U.S. 1035 (1970).