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## Civil Procedure—Who is an Aggrieved Party Under Civil Practice Act Section 557

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tion of fact (the ultimate fact) to which legal consequences attach."<sup>21</sup> Statements concerning to whom the defendant gave the keys to the car are evidentiary leading up to the ultimate fact, that the defendant forbade O'Rourke's presence in the car, to which legal consequences attach. In order to avoid inconsistent and incongruous results, findings of ultimate fact must be conclusive in a subsequent action.

It is possible that the *Hinchey* case represents an example of judicial evasion of a difficult problem in the doctrine of collateral estoppel—namely, what constitutes an ultimate or evidentiary fact. Definitions may be expounded, but their application to a specific fact situation is not automatic. In the present case, the Appellate Division found the lack of permission by the owner in regard to O'Rourke's presence in the car to be an "underlying evidentiary question"; the Court of Appeals found the same fact to be "a finding essential to judgment." Neither court, however, states any substantial reasons in arriving at a conclusion nor attempts to clarify the difference between an evidentiary and ultimate fact.

WHO IS AN AGGRIEVED PARTY UNDER CIVIL PRACTICE ACT SECTION 557.

A patient's action for malpractice against a doctor and a private hospital, in *Baidach v. Togut*,<sup>22</sup> occasioned a consideration of the relationship between Sections 557 and 211-a of the New York Civil Practice Act. The former concerns the meaning of "aggrieved party" for appeal purposes while Section 211-a grants the right to contribution among joint tort-feasors.

The plaintiff obtained a jury verdict and judgment against the doctor and hospital owner, but the Appellate Division dismissed the claim against the doctor and reduced the amount of the judgment.<sup>23</sup> The hospital owner paid the reduced judgment and attempted to appeal the dismissal of the doctor claiming that since he lost the right of contribution against the doctor he was an aggrieved party under Section 557(2) and thus qualified to appeal.<sup>24</sup>

The Court of Appeals held that the hospital owner was not a party aggrieved by the Appellate Division ruling because he has no right of contribution against the doctor at the time he paid the judgment, and thus he had no right to appeal.

There was no right of contribution at common law. An injured person could sue any one of several joint tort-feasors and recover full damages, the paying defendant having no recourse against the other tort-feasors. In deroga-

21. *Morris*, Law and Fact, 55 Harv. L. Rev. 1303, 1326 (1942). See also, *The Evergreens v. Nunan*, 141 F.2d 927 (2d Cir. 1944).

22. 7 N.Y.2d 128, 196 N.Y.S.2d 67 (1959).

23. 8 A.D.2d 838, 190 N.Y.S.2d 120 (2d Dep't 1959) as amended 9 A.D.2d 628, 191 N.Y.S.2d 365 (2d Dep't 1959).

24. N.Y. Civ. Prac. Act § 557(2):

A person aggrieved who . . . has acquired since the making of the order or the rendering of the judgment appealed from an interest which would have entitled him to be so substituted if it had been previously acquired, may also appeal; . . .

tion of the common law, Section 211-a allows a right of contribution if two conditions exist: (1) a joint money judgment against the tort-feasors, and (2) the payment by one tort-feasor of more than his pro-rata share.<sup>25</sup>

The appellant felt these two conditions were met in this case. The trial court issued a joint judgment and the appellant paid the entire modified judgment of the Appellate Division. This, the appellant felt, established a right to appeal based on the holding of *Epstein v. National Transportation Co.*<sup>26</sup> In that case a joint judgment was rendered against two defendants. One defendant paid the entire judgment and received a default judgment against the other defendant for contribution. The non-paying defendant then appealed the original judgment rendered in favor of the plaintiff. The defendant who had paid was granted permission to be a respondent to this appeal in place of the plaintiff, because he was a party aggrieved by the appeal within the meaning of Section 557.

The respondent in the instant case argued that the hospital was not a party aggrieved under Section 557 because no rights under Section 211-a ever arose. There must be payment of a joint judgment by one defendant before the rights under Section 211-a arise. Here the appellant paid when the only outstanding judgment was one against him alone, the other defendant having been dismissed by the Appellate Division. Although there once was a joint judgment, there never was a payment of a joint judgment. As a result the right of contribution never arose and there was no way in which the appellant was "aggrieved" by the Appellate Division decision. Appellant, therefore, had no right to appeal.

The *Epstein* case is distinguishable. The defendant paid the entire judgment in that case when the joint judgment was outstanding.

The majority accepted the respondent's contention in finding no right to appeal. The dissent felt the hospital owner was a party aggrieved because the potential right of contribution was lost by the Appellate Division determination.

The majority opinion demonstrates that in order for Section 211-a to operate there must not only be a joint money judgment against two or more tort-feasors and payment by one tort-feasor of more than his pro-rata share, but the payment must be made while the joint judgment is outstanding. Any further deviation from the practice at common law must be clearly stipulated by the Legislature.

#### DIRECT ESTOPPEL OF WRONGFUL DEATH ACTION

The Court of Appeals, in *Peare v. Griggs*,<sup>27</sup> held a previous Virginia property damage action was res judicata as to the present wrongful death action litigated in the New York courts.

The controversy arose out of an automobile accident occurring in Virginia

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25. *Ward v. Iroquois Gas Corp.*, 258 N.Y. 124, 179 N.E. 317 (1932).

26. 287 N.Y. 456, 40 N.E.2d 632 (1942).

27. 8 N.Y.2d 44, 201 N.Y.S.2d 326 (1960).