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## Civil Procedure—Direct Estoppel of Wrongful Death Action

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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).

in which plaintiff's husband was killed in a collision involving his car, owned jointly with plaintiff, and a tractor trailer owned by defendants. A property damage action was commenced in Virginia by the present defendant against the present plaintiff, who appeared in that suit both individually and as administratrix of her husband's estate. Judgment in the Virginia action was rendered against the present plaintiff.

Plaintiff then commenced the instant wrongful death action in New York, and was awarded a jury verdict in the trial court. That Court held the Virginia action was not *res judicata* because the judgment roll in the Virginia action was entered against plaintiff individually and neglected to name her as her husband's administratrix.

The Appellate Division reversed,<sup>28</sup> and dismissed on the grounds that the absence of the designation of plaintiff's capacity as administratrix was a mere clerical error, and since the record shows she had her day in court in both capacities, the former judgment was binding.<sup>29</sup> It might also be noted that since plaintiff controlled the defense of, and the appeal from, the judgment in the Virginia action, she is estopped from prosecuting the present action.<sup>30</sup>

On appeal to the Court of Appeals, plaintiff contended two points against the defense of *res judicata*.

The first point was that she was conducting this wrongful death action in her own right and as her own cause of action as widow of the decedent, and was therefore suing as a different party than a mere representative of decedent's estate as she was in the Virginia action. The second point was that her appearance as administratrix in the Virginia action was without authority, and therefore the trial of an issue purporting to be against the estate was of no avail and a nullity. She bases this argument on the fact that she was administering decedent's estate under limited letters of administration issued in New York under authority of the Surrogates Court Act,<sup>31</sup> and that the powers vested in her as administratrix were confined to commencing this wrongful death action in New York State.

As to her first argument, the Court calls attention to the Virginia wrongful death statute,<sup>32</sup> which is controlling here.<sup>33</sup> That statute differs from the New York statute,<sup>34</sup> in that, unlike the latter which creates a new and original cause of action, the Virginia statute will "simply continue, transmit, or substitute the right to sue which the decedent had until his death, . . ."<sup>35</sup> Therefore, the Court holds that regardless of how the Virginia action is viewed, plaintiff's appearance in this Court is of necessity in a representative capacity. Thus, the

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28. 7 A.D.2d 303, 182 N.Y.S.2d 878 (1st Dep't 1959).

29. See 49 C.J.S. Judgments § 75(a) (1947).

30. *Fish v. Vanderlip*, 218 N.Y. 29, 112 N.E. 425 (1916).

31. N.Y. Surrogate's Court Act § 122.

32. Code Va. 1950, § 8-633.

33. *Baldwin v. Powell*, 294 N.Y. 130, 61 N.E.2d 412 (1945).

34. N.Y. Dec. Est. Law §§ 130-134.

35. *Street v. Consumers Mining Corporation*, 185 Va. 561, 570, 39 S.E.2d 271, 274 (1946).

same issue determined in the Virginia property action, specifically that plaintiff's husband was negligent, was a common and vital element in a wrongful death action. And, since plaintiff is only being substituted into her husband's right, the finding in the property action must resultingly be binding on her action for wrongful death.

As to the second argument, the Court holds that the letters of administration issued to plaintiff expressly authorized her to administer the estate of the deceased. The only limitation on the authority granted to her was that she could not compromise the wrongful death action or enforce a judgment obtained therein until further court order. She had every right and in fact every reason to appear in the Virginia action in order to protect her claim for wrongful death.

By a unanimous decision the Court affirms, holding plaintiff had her day in court and is barred from relitigating the issues decided adversely to her in the Virginia action.

#### ATTORNEY-CLIENT PRIVILEGE AND NECESSITY OF SUBPOENA UNDER CIVIL PRACTICE ACT SECTION 406

Section 353 of the Civil Practice Act establishes the privileged relationship of attorney and client and prohibits the attorney from disclosing communications between them. Since the purpose of this statute is to secure the orderly administration of justice, by encouraging frank disclosures to attorneys by their clients, it is permissible for a client to waive the privilege. However, an attorney may never disclose privileged communications unless authorized to do so by his client.<sup>36</sup>

In *In re Kaplan*,<sup>37</sup> an attorney who represented a trade association voluntarily appeared before the Municipal Commissioner of Investigation and gave information concerning illegal parking of trailer trucks on the waterfront. The attorney indicated that this condition was allowed to exist because of the influence of two powerful politicians. In answer to questions of the Commissioner the attorney revealed that he obtained his information from a member of the trade association but declined to give the name of the member, claiming the attorney-client privilege.

The Commissioner moved for an order for the arrest of the attorney, pursuant to Section 406 of the Civil Practice Act, for refusal to answer the question. The Special Term granted the order stating, "Until there is a client, there is no attorney-client relationship. So in order to establish it the name must be revealed."<sup>38</sup> The Appellate Division affirmed the order with two justices dissenting.<sup>39</sup> The Court of Appeals unanimously reversed the lower courts on the ground that the imprisonment of a witness, under Section 406

36. *People v. Farmer*, 194 N.Y. 251, 87 N.E. 457 (1909). *Matter of Reinhardt*, 95 Misc. 413, 160 N.Y. Supp. 828 (Surr. Ct. 1915).

37. 8 N.Y.2d 214, 203 N.Y.S.2d 836 (1960).

38. *In re Blumenfeld*, 22 Misc. 2d 839, 840, 200 N.Y.S.2d 836, 837 (County Ct. 1960).

39. *In re Blumenfeld*, 10 A.D.2d 909, 202 N.Y.S.2d 198 (1st Dep't 1960).