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# Collateral Estoppel—The Doctrine of Mutuality: A Dead Letter—*B. R. DeWitt, Inc. v. Hall*, 19 N.Y. 2d 141, 225 N.E. 2d 195, 278 N.Y.S. 2d 596 (1967), Its Implications on the Nebraska Position: *Vincent v. Peter Pan Bakers, Inc.* 182 Neb. 206, 153 N.W.2d 849 (1967)

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COLLATERAL ESTOPPEL—THE DOCTRINE OF MUTUALITY: A DEAD LETTER—*B.R. DeWitt, Inc. v. Hall*, 19 N.Y. 2d 141, 225 N.E. 2d 195, 278 N.Y.S. 2d 596 (1967), ITS IMPLICATIONS ON THE NEBRASKA POSITION —*Vincent v. Peter Pan Bakers Inc.*, 182 Neb. 206, 153 N.W.2d 849 (1967).

## I. INTRODUCTION

Collateral estoppel precludes a party from asserting or denying an issue of law or fact which has been previously determined in an earlier action to which the party, or his privity, participated.[1] It differs from true res judicata[2] in that it applies only where the subsequent action involves a different claim or cause of action.[3] Three requirements must be met before collateral estoppel can be invoked. The issue of law or fact must have been raised by the pleadings,[4] the issue must have been determined by the court, and this determination must have been necessary to the judgment. The doctrine seeks to minimize the expense and judicial effort of repetitious litigation, protect litigants from possible harassment, and facilitate reliance upon final judgments.[5]

Two questions concerning the parties affected by collateral estoppel arise when an attempt is made to classify the effect of a valid judgment: who is bound, and who may use the judgment? Due process prevents binding a party by a judgment unless he has had his day in court.[6] Consequently, a determination in a lawsuit

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[1] *See* Cromwell v. County of Sac, 94 U.S. 351, 353 (1876).

[2] The term res judicata is best defined in terms of its effect. A final determination of any litigation precludes a new suit on the same "cause of action." If the plaintiff won the prior action, all claims which he may subsequently raise "merge" in the judgment obtained, and any further action must be based on that judgment; if he lost, he is "barred" from suing anew on the same cause of action. Thus the effect of res judicata may be expressed in three different ways: (1) that the cause of action was barred by or merged in the first judgment; (2) that the plaintiff cannot split his cause of action; (3) that the matter might have been litigated in the first action.

[3] Cromwell v. County of Sac, 94 U.S. 351, 352-54 (1876); RESTATEMENT OF JUDGMENTS § 45, comment c at 175; § 68, comment *a* at 293 (1942).

[4] The issue of law or fact may also be raised by motion pursuant to Rule 15 (b) of the Federal Rules of Civil Procedure.

[5] *See* Note, *Res Judicata*, 1966 DUNE L.J. 283, 285 (1966). Note, *Collateral Estoppel in New York*, 36 N.Y.U.L. REV. 1158, 1158-59 (1961). The policies, of course, are equally applicable to true res judicata.

[6] Postal Tel. Cable Co. v. Newport, 247 U.S. 464, 476 (1918). However, under Rule 23 of the Federal Rules of Civil Procedure, class action judgments will bind all class members fitting the description in actions classified under Rules 23 (b) (1) and (2), and all named or described in (b) (3) actions except those who have specifically asked for exclusion.

is binding only on those who were either participants or in privity with such participants.[7] The rules of res judicata and collateral estoppel are concerned only with which persons are to be bound by a judgment. They do not provide an answer to the more important question, and the question for discussion: who may use the prior judgment? Traditionally the answer has been controlled by the doctrine of mutuality, i.e., for a litigant to use a prior judgment it must appear that he would have been bound had the prior judgment gone the other way.[8]

Strict application of the mutuality rule subverts the policy reasons upon which collateral estoppel is founded. This is because at times the mutuality rule, without affording any advantages, precludes use of collateral estoppel and thereby permits repetitious or harassing litigation. This subversion of policy grounds has led some jurisdictions to abolish the mutuality rule.[9] In New York, where many of the leading mutuality decisions have been decided, exceptions almost engulfed the rule itself. Finally during 1967, the court of appeals in *B.R. DeWitt, Inc. v. Hall*,[10] rang the death knell on the mutuality rule. The purpose of this Note is to analyze the status of mutuality in Nebraska as evidenced by the recent decision in *Vincent v. Peter Pan Bakers, Inc.*[11] in light of the *DeWitt* decision[12] and to propose a full-and-fair opportunity standard for Nebraska.

## II. MUTUALITY IN NEW YORK: A DEAD LETTER

A jeep owned and operated by defendant Hall collided with a cement truck driven by one Farnum, and owned by plaintiff B. R. DeWitt, Inc. Farnum, the driver of the cement truck, in an earlier action had sued the driver-owner of the jeep for damages for personal injuries. Farnum prevailed in his suit and recovered a sub-

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[7] Examples of a "privity" relationship are successors in interest in property, party controlling the litigation, and fiduciaries. The most typical case is that between an insured tort-feasor and his insurer, the indemnitor-indemnitee relationship.

[8] *See* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912). Underlying this rule is the notion that it would be manifestly unfair to allow a person to benefit from an adjudication which he could not have been bound by. It is important to keep in mind that it is for the states to apply or not to apply the mutuality rule as they may determine whereas the due process limitation is imposed upon states by the federal constitution.

[9] *E.g.*, California; Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942); Delaware: Coca Cola Co. v. Pepsi-Cola, 36 Del. 124, 172 A. 260 (1934); Wisconsin: McCourt v. Algiers, 4 Wis. 2d 607, 91 N.W.2d 194 (1956).

[10] 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (Ct. App. 1967).

[11] 182 Neb. 206, 153 N.W.2d 849 (1967).

stantial jury verdict. Thereafter B. R. DeWitt, Inc., the owner of the cement truck, sued the driver-owner of the jeep for property damages to its truck. B. R. DeWitt, Inc. moved for summary judgment on the ground that the judgment in the prior action was res judicata on the issue of liability. The special term granted the motion but on appeal, the appellate division reversed.[13] Upon certification of the question to the New York Court of Appeals, the order of the appellate division was reversed and the special term's order for summary judgment was reinstated.[14]

The court in reaching the conclusion that the doctrine of mutuality is "a dead letter"[15] in New York expressly overruled *Haverhill v. International Ry.*,[16] on the ground that "there seems to be no reason in policy or precedent to prevent the offensive use of a prior judgment."[17] The reasoning of the court placed primary reliance

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[12] For a general discussion of collateral estoppel and the problems of mutuality, *see* F. JAMES, CIVIL PROCEDURE §§ 11.31-.34 (1965); Currie, *Mutality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965); Editorial Note, 35 GEO. WASH. L. REV. 1010 (1967). For a discussion of the Nebraska position, *see* Comment, *Mutuality of Estoppel: Its Status in Nebraska*, 45 NEB. L. REV. 613 (1966).

[13] B. R. DeWitt, Inc. v. Hall, 24 App. Div.2d 831, 264 N.Y.S.2d 68 (4th Dep't 1965).

[14] B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (Ct. App. 1967).

[15] *Id.* at 148, 225 N.E.2d at 198, 278 N.Y.S.2d at 601. As a further point of interest see the dissent. *Id.* at 148, 225 N.E.2d at 199, 278 N.Y.S.2d at 602. The dissenters felt that while mutuality of estoppel is no longer an absolute requirement care should be used in allowing the offensive use of a prior judgment. The dissenters emphasized the distinction between the offensive and the defensive use of a prior judgment, the differences in the practical risks of litigation in the separate actions, the possibility that there will be an unequal commitment of time, money, and talent in the preparation of the two defenses, the fact that there has been no great amount of duplication of litigation under the prior rule, and that questions of policy and questions of practicality were controlling, not formal relationships between parties and findings of identical issues.

[16] 217 App. Div. 521, 217 N.Y.S. 522 (4th Dep't 1926), *aff'd*, 244 N.Y. 528, 155 N.E. 905 (Ct. App. 1927).

[17] B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 143, 225 N.E.2d 195, 196, 278 N.Y.S.2d 596, 598 (Ct. App. 1967). The court in the principal case cited two New York cases allowing offensive use of a prior judgment. The effect was to answer contentions that only defensive use of a prior judgment was allowed in New York. These cases were United Mut. Fire Ins. Co. v. Saeli, 272 App. Div. 951, 71 N.Y.S.2d 696 (4th Dep't 1947), *aff'd*, 297 N.Y. 611, 75 N.E.2d 626 (1947); Liberty Mut. Ins. Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 506 (Ct. App. 1932). "The precedent value of the latter is weakened by its disposition under a

on the proposition that "one who has had his day in court should not be permitted to litigate the question anew,"[18] and that the criteria established in *Bernhard v. Bank of America*,[19] have been absorbed into the law of New York. *Bernhard* stated:

> In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?[20]

The standard followed by the *DeWitt* court in determining that a party not bound by a previous action could assert a plea of collateral estoppel against a party bound by a previous action was not explicitly enumerated. However, the court apparently considered the standard to be whether a full-and-fair opportunity was afforded to the party in the prior action to litigate the question of his liability. This is further apparent in light of *Cummings v. Dresher*,[21]

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workmen's compensation statute, the affirmative (offensive) use being ascribed to legislative intent. The former ruling countenanced affirmative (offensive) use in fact but its brief exposition of the subject was sufficiently opaque to permit its dismissal by the lower courts." Note, *Mutuality of Estoppel—Affirmative Use of Collateral Estoppel—Conflicting Judgments Affecting Similarity Situated Claimants*, 43 IND. L.J. 155 (1967).

[18] B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 144, 225 N.E.2d 195, 197, 278 N.Y.S.2d 596, 599 (Ct. App. 1967), quoting Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 18, 9 N.E.2d 758, 759 (Ct. App. 1937).

[19] 19 Cal. 2d 807, 122 P.2d 892 (1942).

[20] Id. at 813, 122 P.2d at 894-95.

[21] 18 N.Y.2d 105, 218 N.E.2d 688, 271 N.Y.S.2d 976 (Ct. App. 1966), The case resulted from a collision between two cars. We can denominate these two cars 1 and 2. The drivers we will call D and owners O. P will stand for passenger. In the first action, in federal court,

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| D1 (driver of car one) | | O2 |
| and | sued | and |
| P1 (passenger in care one) | | D2. |

The passenger, P, had judgment against both O2 and D2. But D1 lost because the jury found him guilty of contributory negligence. Note that O1 (owner of car one) was not a party to that action. The second action, afterwards, was in the New York court, where

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| O2 | | O1 |
| and | sue | and |
| D2 | | D1. |

The question is whether, in the second action, O1 can use as a defense anything that emanated from the first action. At first blush, there would appear to be nothing novel in the holding. We have cases on the books now where one who was not a party to a prior litigation is nonetheless able to use collateral estoppel, defensively, against one who was a party to the prior litigation. The theory is that it is accept-

the court's most recent pronouncement before *DeWitt* in the area of mutuality. The *Cummings* court said: "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."[22]

It is also important to notice that in *DeWitt* the court particularly emphasized the facts of the case and the fairness of the result as evidence of this apparent adoption of a full-and-fair opportunity standard.

> In this case, where the issues, as framed by the pleadings, were no broader and no different than those raised in the first lawsuit; where the defendant offers no reason for not holding him to the determination in the first action; where it is unquestioned that the first action was defended with full vigor and opportunity to be heard; and where the plaintiff in the present action, the owner of the vehicle, derives his right to recovery from the plaintiff in the first action, the operator of said vehicle, although they do not technically stand in the relationship of privity, there is no reason either in policy or precedent to hold that the judgment in the [first action] ... is not conclusive in the present action....[23]

*DeWitt* represents adoption of a full-and-fair opportunity standard in determining whether a party will be prejudiced by collateral estoppel; and it presages a movement towards greater adoption by

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able as long as the one *against* whom it is being used had his day in court, as O2 and D2 surely did in the first action. But upon further probing, it will be found that whenever, in a negligence context, a person not a party to the first action seeks (in a second action) to use collateral estoppel against one who was a party to the first action, the one seeking its use at least had some kind of privity with the one to whom, in the first action, the findings accrued. Now here, O1 did have privity with D1, who was a party to the first action. But no finding of negligence on the part of O2 and D2 accrued to D1 in the first action. Since D1 was found contributorily negligent there, the case never reached a determination of the negligence of O2 or D2 as against D1. Thus O1, in the second action, was not relying on findings made in favor of anyone in the first action with whom O1 had privity. But P1 in the first action did have the benefit of findings of negligence against O2 and D2, and it is apparently those findings of action #1 which O1 is permitted by the *Cummings* case to make defensive use of in action #2. And there was no privity, in the usual sense of a link-up of liability such as binds an owner and his driver, between O1 and P1.

22 18 N.Y.2d 105, 108, 218 N.E.2d 688, 689, 271 N.Y.S.2d 976, 977, quoting Israel v. Wood Dolson Co., 1 N.Y.2d 116, 119, 134 N.E.2d 97, 99, 151 N.Y.S.2d 1, 4 (Ct. App. 1956).

23 B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 148, 225 N.E.2d 195, 198, 278 N.Y.S.2d 596, 601-02 (Ct. App. 1967).

the courts of such a standard.[24] Such a development is desirable to best effectuate the policy reasons underlying collateral estoppel while still rendering substantial fairness to the individual litigants.

The viability of this standard as a means of best effectuating the policy reasons underlying collateral estoppel, while still rendering substantial fairness to the individual litigants, is clear in light of the history of mutuality in New York prior to *DeWitt*. It is helpful in discussing the history of mutuality in New York, and later in analyzing the Nebraska position, to think in terms of the following three variables: (1) Whether the party invoking collateral estoppel is using it offensively[25] or defensively;[26] (2) whether the party against whom it is being invoked was the plaintiff or the defendant in the prior action; and (3) the relationship or lack of it between the party invoking the judgment and the victorious party in the earlier suit.

Before *DeWitt* the rule in New York clearly seemed established that only defensive use of a prior judgment was allowed.[27] In *Good Health Dairy Prods. Corp. v. Emery*,[28] the litigation was the consequence of a car-truck collision with actions being brought by both sides for damages resulting from the collision. Emery, the driver of the car owned by his mother, successfully sued both the driver and the owner of the truck. The truck owner and his driver then sued the mother who asked leave to amend her answer to assert the judgment in the prior action as a defense. The court held that the mother (who could not be bound in the first action where her son was the plaintiff) was entitled to plead the former judgment in favor of her son as a defense, thus precluding the truck owner and his driver from relitigating, as plaintiffs, the issue of negli-

[24] In applying the full-and-fair opportunity standard the courts should be concerned with the following factors: "... the size of the claim; the forum of the prior litigation, the use of initiative; the extent of the litigation; the competence and experience of counsel; the availability of new evidence; indications of a compromise verdict; differences in the applicable law; and the foreseeability of future litigation." Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L. REV. 724, 728-29 (1967).

[25] For example, B sues A. B wins. C sues A and establishes A's liability with the former judgment.

[26] For example, A sues B and loses on the grounds of his own contributory negligence. A sues C. C bars A's suit with the former judgment.

[27] *See* Elder v. New York and Penn. Motor Express, Inc., 284 N.Y. 350, 31 N.E.2d 188 (Ct. App. 1940). *But see* United Mut. Fire Ins. Co. v. Saeli, 272 App. Div. 951, 71 N.Y.S.2d 696 (4th Dep't 1947), *aff'd*, 297 N.Y. 611, 75 N.E.2d 626 (1947), which permits the offensive use of collateral estoppel despite a lack of mutuality.

[28] 275 N.Y. 14, 9 N.E.2d 758 (Ct. App. 1937).

gence against her. This was necessary to avoid an anomalous result in an indemnitor-indemnitee[29] relationship, since the indemnitor (driver) had been exonerated.

The exception has developed because of the following possibility: If a suit is brought against the indemnitor (an employee, for example) for his tortious act, and the indemnitor is found not to have committed the tort, it is not in keeping with the policy reason underlying collateral estoppel (that of minimizing repetitious litigation) to allow the unsuccessful plaintiff to bring suit against the indemnitee (the employer) raising the same issues. Consider the further possibility that should the indemnitee (employer) lose in the second suit, he would have a right of indemnity against the indemnitor (employee) who has already successfully defended himself. Consequently to avoid such an anomaly the indemnitor-indemnitee exception to the mutuality rule arose and it is particular prevalent in the employer-employee situation.

Whenever a stranger or non-party to a prior action sought to use the first judgment offensively in a subsequent proceeding, the New York courts generally followed the traditional mutuality rule. This is attributable to the fact that the anomalous results occurring in the indemnitor-indemnitee situation do not arise where a party uses collateral estoppel offensively. An illustration of adherence to the mutuality rule is seen in *Elder v. New York & Penn. Motors Express Inc.*,[30] a case reaffirming the rule originally established in *Haverhill v. International Ry.*[31] This rule is that where mutuality is lacking, a prior judgment cannot be used offensively. In *Elder*, a truck driver was unable to plead a former judgment rendered in favor of the truck owner against a common defendant, because use of the first judgment in the second suit would "overturn fundamental concepts and overrule authorities."[32] The *Elder* court attempted to distinguish *Good Health* by emphasizing that in *Good Health* "the plea of res judicata . . . was considered solely as a defense since no attempt was made to . . . use it to establish liability affirmatively [offensively]."[33] However, the *Elder* court failed to effectively distinguish *Good Health*. As the rather strong dissenting opinion in *Elder* points out, there is little distinction in principle between the two cases since in both cases "[t]he party

[29] RESTATEMENT OF JUDGMENTS § 96 & comment *a* at 97 (1942).

[30] 284 N.Y. 350, 31 N.E.2d 188 (Ct. App. 1940).

[31] 217 App. Div. 521, 217 N.Y.S. 522 (4th Dep't 1926), *aff'd*, 224 N.Y. 528, 155 N.E. 905 (Ct. App. 1927).

[32] Elder v. N.Y. & Pa. Motors Express, Inc., 284 N.Y. 350, 353, 31 N.E.2d 188, 190 (Ct. App. 1940).

[33] *Id.* at 354, 31 N.E.2d at 189.

against whom the plea . . . is raised was a party to the prior action and 'had full opportunity to litigate the issue of its responsibility.' "[34] At this point it seems apparent that though the use of collateral estoppel was generally allowed where invoked defensively against a party to the prior action it was more likely to be invoked against the plaintiff to the prior action than the defendant, and only where the issues were identical.

Even though *DeWitt* expressly overruled only *Haverhill*, by implication it also overruled *Elder*. This is indicated since refusing to allow the plaintiff employee in *Elder* to assert a favorable judgment offensively is hardly distinguishable from the facts in *DeWitt*, and *Elder's* reasoning in refusing the offensive use of the prior judgment was based on mutuality.

To what extent does the relationship or lack of it between the party attempting to invoke the judgment and the victorious party in the earlier suit play in determining whether to allow the judgment in the prior action to be asserted in a subsequent action? In New York, there has been no case in which collateral estoppel has been asserted by an absolute stranger to the prior action. The courts of New York have steadily held that there must be some privity between the party attempting to invoke the judgment and the victorious party. For instance, in *Israel v. Wood Dolson Co.*,[35] A sued B for breach of contract and was unsuccessful; in a subsequent action A sued C for maliciously inducing B to breach the contract. The former judgment was held binding as against the plaintiff, although defendant C was a non-party to the former action. *Israel* has been cited as holding that "a stranger to an action may assert the determinations of that action. . . ."[36] However, a closer reading of the case reveals that the court did not intend that its holding be treated as adding any new exception to the mutuality rule as expressed above. "It is merely the announcement of the underlying principle which is found in cases classed as 'exceptions' to the mutuality rule."[37] Consequently, the courts will not allow the assertion of a prior judgment unless there is found a significant relationship or privity existing between the invoker and the party who was the prior victor in the earlier suit.

The rule in New York prior to *DeWitt* limiting collateral estoppel to defensive use was grounded upon the development of the

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[34] *Id.* at 356, 31 N.E.2d at 190.

[35] 1 N.Y.2d 116, 134 N.E.2d 97, 151 N.Y.S. 2d 1 (Ct. App. 1956).

[36] Note, *Collateral Estoppel in New York*, 36 N.Y.U. L. REV. 1158, 1168 (1961).

[37] Israel v. Wood Dolson Co., 1 N.Y.2d 116, 120, 134 N.E.2d 97, 99-100, 151 N.Y.S.2d 1, 5 (Ct. App. 1956).

indemnitor-indemnitee exception to avoid incongruent results and upon the policy consideration that a party who has had his day in court should not again be permitted to litigate the same issue of liability. It is important that these exceptions to the mutuality rule were grounded upon the assumption that there had been a full-and-fair opportunity to litigate. In addition, the fear that irregular results would occur in multiple-claimant litigation undoubtedly made the New York courts most reluctant to summarily abandon the mutuality rule.[38]

## III. AFTER DEWITT: FULL-AND-FAIR OPPORTUNITY

*DeWitt* has changed the mutuality rule significantly in New York. This becomes apparent when the result is analyzed in terms of the three variables enumerated earlier. Since the plaintiff in *DeWitt* was allowed to invoke a prior judgment offensively, the generally followed rule allowing only defensive use of collateral estoppel is definitely changed. The rule in *Israel* which required some significant relationship between the party attempting to invoke the judgment and the prior victor also is modified. In *DeWitt* there was a potentially significant relationship of indemnitor-indemnitee. This relationship, however, was rendered insignificant and problems of reaching an anomalous result as discussed earlier were avoided once offensive use of the prior judgment was permitted.

What is not clear from the opinion in *DeWitt* is the extent that the relationship variable rule has been modified. Consequently, it is open to conjecture whether there needs to be any significant relationship or privity between the invoker and the prior victor.[39] Under the standard adopted by the *DeWitt* court the uncertainty of the status of the relationship variable represents no problem. By placing the emphasis on a determination of whether a party has had a full-and-fair opportunity to litigate, the court avoids clouding the issue with a determination of whether there is any relationship existing between the invoker and the prior victor. The full-and-fair opportunity standard as announced by the court in *DeWitt* is sound and viable. It is viable because the standard is capable of application on a case-by-case approach. In each individual case the court's inquiry and attention will be directed to the question whether the party against whom collateral estoppel is invoked has had a full-and-fair opportunity to litigate.

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[38] Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25, 27 (1965).

[39] Yet, in the instant case the invoking party could be said to have derivative rights and liabilities arising solely from the accident involving his truck driver.

The full-and-fair opportunity standard provides courts a means of overcoming their reluctance to apply collateral estoppel in the multiple-claimant situation and their fear of irregular results which might occur.[40] In multiple-claimant situations there is no need to retain the mutuality rule as the full-and-fair opportunity standard protects defendants. Invoking collateral estoppel should be allowed only in the multiple-claimant situations where there has been a clear showing that the defendant had a full-and-fair opportunity to litigate the issue of liability. The overwhelming advantage gained in adopting this standard rather than adhering to the mutuality rule is that it enables the individual court to give particularized treatment to each case. If, from an investigation of the facts and the circumstances, it appears that a party would be prejudiced by allowing collateral estoppel to be invoked, then the court should refuse to allow the prior judgment to be asserted.

Collateral estoppel has been applied in multiple-claimant situations by other courts.[41] In *United States v. United Air Lines, Inc.*,[42] a mid-air collision between a passenger plane and a jet fighter resulted in the death of everyone aboard the two planes. Twenty-four heirs and representatives of the deceased passengers on the United plane brought separate suits in the United States District Court for the Southern District of California against the airline. The suits were consolidated for trial and resulted in a jury verdict for the plaintiffs on the issue of negligence. Still pending were other filed cases in the United States District Court for the Eastern District of Washington and the United States District Court for the District

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[40] This is illustrated by the following problem. Fifty persons are injured in a train wreck. Each initiates an action to recover for personal injuries, alleging negligence on the part of the railroad. Each of the first twenty-five plaintiffs, unable to establish negligence, lose after separate trials, but the twenty-sixth plaintiff wins. The remaining twenty-four litigants then invoke collateral estoppel. This is an effort to prevent the railroad from further litigating the question of its liability. The argument made is that if the mutuality rule were not followed the railroad would find itself bound by one loss but unable to take advantage of its earlier victories, because of the due process limitation which requires that one have his day in court. Thus it is argued that the mutuality rule must be retained in the multiple-claimant situation or great injustice will be done to the defendant. This problem was first posed in Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

[41] United States v. United Air Lines, Inc., 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), *aff'd on opinion below sub nom.* United Air Lines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. denied*, 379 U.S. 951 (1964). Zdanok v. Glidden Co., 327 F.2d 944 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964), which permitted the offensive use of a prior judgment rendered in favor of one group of employees to be asserted by a second group of employees against the same defendant employer.

of Nevada. The plaintiffs in these cases moved to transfer to the southern district of California, in contemplation of trying the issue of liability before the same jury which had heard the consolidated cases.[43] Later, they moved for summary judgment on the issue of liability asserting that the defendant airline's liability had been conclusively established by the consolidated cases.[44] The court in *United Air Lines* adopted the full-and-fair opportunity standard, rejected the mutuality rule and specifically held that the defendant had had a full-and-fair opportunity to litigate the question of its liability; consequently, the court allowed the prior judgment to be invoked offensively by non-parties to the first suit against the defendant.[45]

*United* indicates that the full-and-fair opportunity standard announced in *B.R. DeWitt, Inc. v. Hall*,[46] if adopted by the courts, can provide a rationale and a persuasive means of achieving the goals of collateral estoppel in the multiple-claimant situation. The standard will have the effect of directing the courts toward more particularized treatment of the individual case. This particularized treatment is not found in the cases where the courts have stubbornly adhered to the mutuality rule. By becoming more particular in the treatment of the individual case the court's attention will be directed more to the issues and the merits of the case than at distinctions between offensive and defensive use of prior judgments and concern with the party to be estopped.

## IV. THE NEBRASKA POSITION

At the present time Nebraska has no defined or established formula which clearly sets out the status of mutuality.[47] A rule of

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[42] 216 F. Supp. 709 (E.D. Wash., D. Nev. 1962), *aff'd on opinion below sub nom.* United Airlines, Inc. v. Wiener, 335 F.2d 379 (9th Cir. 1964), *cert. denied*, 379 U.S. 951 (1964).

[43] 216 F. Supp. at 714.

[44] *Id.* at 717.

[45] The court stressed the facts and the circumstances of the particular case in determining that a full-and-fair opportunity to litigate had been had by the defendant. "The issue of liability of United Air Lines to the passengers on the plane was litigated to the hilt, by lawyers of the highest competence in their field, in the trial of the 24 cases in Los Angeles.... It would be a travesty upon [justice] ... to now require these plaintiffs to again re-litigate the issue of liability after it has been so thoroughly and consummately litigated in the trial court in ... Los Angeles.... The defendant has had its day in court on the issue of liability...." *Id.* at 728-29.

[46] 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (Ct. App. 1967).

[47] *See* Comment, *Mutuality of Estoppel: Its Status in Nebraska*, 45 NEB. L. REV. 613 (1966).

law which is worthy of discussion because to some extent it indicates the present status of mutuality in Nebraska is:

> Where cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in former proceedings involving one of the parties now before it, the court has the right to examine its own records and take judicial notice of its own proceedings and judgments in the former action.[48]

*Cover v. Platte Valley Pub. Power & Irr. Dist.*[49] illustrates application of this rule. In the first suit the plaintiff obtained judgment that a certain irrigation drain had been negligently constructed so as to entitle the plaintiff to an injunction requiring the drain to be corrected. The drain was not corrected and as a result Cover, who was not involved in the first proceedings, suffered damages from flooding. An action to recover these damages was brought against the same defendant as in the prior suit. The court held that the judgment in the first action was conclusive as to the defendant's negligence when pled by Cover in his suit. In reaching this result, the court pronounced the "interdependent" rule stated above saying that: "to hold otherwise would be a travesty upon justice and permit a trifling with judgments duly rendered according to law."[50] While this decision involved a problem of mutuality the court did not analyze it in those terms. It is noteworthy in that "a comparison of the *Cover* case and those abolishing mutuality leads to the conclusion that the interdependent rule was used merely as a different means to the same end."[51]

The soundness of this conclusion has been weakened in light of the recent decision in *Vincent v. Peter Pan Bakers, Inc.*,[52] which reversed a lower court's decision permitting collateral estoppel to be invoked against the administratrix of employee B, who had been found negligent in a prior action. The case grew out of a collision between two bakery trucks in which both drivers were killed. Thereafter, the administratrix of employee A brought an action for wrongful death against employer B, the employer of employee B. Employer A was impleaded because of its right of subrogation for workmen's compensation paid for the death of its employee A. Soon after this suit had been filed a second suit was filed. In the second suit the administratrix of employee B brought an action for wrongful death against employer A and employer B

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[48] Johnson v. Marsh, 146 Neb. 257, 262, 19 N.W.2d 366, 369 (1945).
[49] 162 Neb. 146, 75 N.W.2d 661 (1956).
[50] *Id.* at 153, 75 N.W.2d at 668.
[51] *See* Comment, *Mutuality of Estoppel: Its Status in Nebraska*, 45 NEB. L. REV. 613, 620 (1966).
[52] 182 Neb. 206, 153 N.W.2d 849 (1967).

was joined as a defendant to have its rights of subrogation determined. While both suits were pending in the district court at the same time, the suit brought by the administratrix of employee A was tried first. In this case, the jury found that employee A was not negligent and that employee B was negligent. This finding was affirmed on appeal.[53] Employer A, a defendant in the second suit, then filed a motion to dismiss the plaintiff's petition asserting that the judgment in the first suit was collateral estoppel in the second suit. This motion to dismiss was granted. On appeal the decision by the lower court was reversed. The court in a short opinion indicated that collateral estoppel is generally asserted against a person who " '(1) . . . has had the opportunity to litigate the matter or (2) his interests have been adequately represented in the litigation of the matter . . . .' "[54] However, the court does indicate an awareness of the offensive use of a prior judgment[55] but because the court feels that " '. . . the whole area is in a state of flux, it is difficult to chart the development of the future . . . .' "[56] This leads the court to conclude that collateral estoppel against the plaintiff in the instant case would be prejudicial to her rights.

The concurring opinion points out that one of the weaknesses of the majority opinion is that it creates a situation which could lead to an anomalous result. The concurring opinion states that:

> In the instant case, the result could well be calamitous from the standpoint of reason, law, and justice. In the first case, the jury found that Vincent[B] was negligent and Lorenzen [A] was not.... In the second case, the jury could find that Lorenzen [A] was negligent and Vincent [B] was not negligent and result in verdicts and judgments for each against the other's employer on the identical evidence. That an injustice would have been done to one of the employers is self-evident. The law cannot tolerate such a result.[57]

The concurring opinion further indicates that if the issues are the same and there is no new evidence that could possibly be introduced by the party to be estopped then the notion that every person is entitled to his day in court is not present and collateral estoppel should be allowed to be asserted. However, the concurring opinion

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[53] *See* Lorenzen v. Continental Baking Co., 180 Neb. 23, 141 N.W.2d 163 (1966). The findings were affirmed on the issue of liability, but the case was reversed and remanded for new trial on the issue of damages only, because the verdict was excessive under the law of Iowa where the accident occurred.

[54] Vincent v. Peter Pan Bakers, Inc., 182 Neb. 206, 207-08, 153 N.W.2d 849 (1967), quoting Vestal, *Preclusion Res Judicata: Variables*, 50 IOWA L. REV. 27, 75 (1964).

[55] *Id.* at 208, 153 N.W.2d at 850.

[56] *Id.* at 208, 153 N.W.2d at 850.

[57] *Id.* at 209-10, 153 N.W.2d at 851.

goes too far. The opinion concurs in the result stating that ". . . the motion to dismiss on the theory of collateral estoppel . . . was prematurely made."[58] The basis for the opinion's concurrence with the result is that only after the plaintiff has submitted his evidence to the court can a determination be made as to the applicability of collateral estoppel. Then if the court determines that the issues are the same and that the evidence is the same under the two actions collateral estoppel will be available, and the motion to dismiss should be sustained.

The procedure to be followed as proposed by the concurring opinion is unusual because it supposedly has as its purpose the minimizing of repetitious suits by determining that collateral estoppel is or is not available. Instead the procedure proposed by the concurring opinion will serve only to prolong litigation. The procedure which best serves to effectuate the ends to be achieved by the use of collateral estoppel is one in which the determination is made by the court prior to trial for a second time. Only in this way can the policy goal of minimizing repetitious litigation be achieved.

A great difficulty with the result in *Vincent* is—what happens on remand if it is found that employee A was negligent? Is employer A entitled to indemnification from the estate of employee A, who originally was found not negligent? The majority of the court has rejected the indemnitor-indemnitee exception and consequently has made possible the happening of anomalous results. The greatest difficulty with the result in *Vincent* is the arguments and reasoning espoused. The court had before it the opportunity to define and establish a formula or a procedure that could be followed in future litigation. "It is the duty of this court, that it should not shirk, to provide a procedure that will properly dispose of the litigation without doing an injustice to anyone."[59] The court has by its decision in the instant case indicated it adheres to a strict requirement of mutuality, a requirement which is ". . . unnecessary, undesirable, and against the trend of authority."[60] This is particularly true in light of the logic and persuasiveness of *B.R. DeWitt, Inc. v. Hall.*[61]

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[58] *Id.* at 210, 153 N.W.2d at 851.

[59] *Id.* at 211, 153 N.W.2d at 852.

[60] *See* Comment, *Mutuality of Estoppel: Its Status in Nebraska*, 45 NEB. L. REV. 613, 623 (1966)

[61] 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (Ct. App. 1967).

## V. CONCLUSION: THE SHADOW DEWITT CASTS ON THE NEBRASKA POSITION

The full-and-fair opportunity standard announced and adopted by the court in *DeWitt* represents the formulation of a sound procedure by which to determine whether collateral estoppel is or is not available. It is a standard which provides the means of achieving the purposive goals of collateral estoppel. It is submitted that in future litigation dealing with the applicability of collateral estoppel to a particular fact situation the court should adopt and pursue a full-and-fair opportunity standard. The adoption of this standard would serve to meet the challenge that comes with any formulation of sound principles which are definite enough to be followed in future litigation and at the same time fulfill the court's duty to provide a procedure that will properly dispose of litigation.

*Michael L. Jeffrey '69*