Michigan Law Review

Volume 62 | Issue 3

1964

Civil Procedure-Judgements-Mutuauty as Requirement for Assertion of Collateral Estoppel Against Claimant Who Was Claimee in Prior Action

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CIVIL PROCEDURE—JUDGMENTS—MUTUALITY AS REQUIREMENT FOR ASSERTION OF COLLATERAL ESTOPPEL AGAINST CLAIMANT WHO WAS CLAIMEE IN PRIOR ACTION—Plaintiff corporations, the sole shareholder of which was their president, sued defendant insurers to recover for the alleged theft of the corporations' furs. In an earlier criminal action, the president (conceded by the corporations to be their mere alter ego for purposes of res judicata) had been convicted of attempted grand theft, conspiracy to commit grand theft, and the filing of fraudulent insurance claims for loss of the same furs; it was there determined that the president had staged the theft of the furs. In plaintiffs' civil action, the superior court rejected defendants' plea of collateral estoppel as to the non-occurrence of an actual theft, but, after verdict for plaintiffs, granted defendants a new trial. On appeal, *held*, reversed and entry of judgment for defendants directed. Even in the absence of mutuality of estoppel, a claimant which was claimee in a prior action may be collaterally estopped to assert the existence of a fact vital to its cause of action in a second suit if the non-existence of that fact was adjudicated in the prior action. *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 375 P.2d 439 (1962).

Unlike merger and bar, collateral estoppel is a form of res judicata which precludes the relitigation of factual issues actually determined in a prior action.[1] Traditionally, collateral estoppel could be applied only

[1] By contrast, in merger and bar the first judgment is conclusive both as to matters

where there was mutuality of estoppel; that is, unless both of the adverse parties to the subsequent action were subject to being estopped to contest factual issues already resolved in a prior action, neither party could be so estopped. An exception to the mutuality requirement developed in cases in which the liability of the defendant in the second suit would be dependent upon the culpability of a person who had been exonerated in a prior suit brought by the same plaintiff on the same facts as would be necessary to maintain the second action.[2] For example, if *A* sued a truck driver and lost, collateral estoppel would preclude *A*'s subsequent suit, based on *respondeat superior*, against the driver's employer.[3] In many jurisdictions, this exception has evolved into a partial rejection of the mutuality requirement.[4]

In the context of the question whether the party to be estopped was claimant in the first action, in the second action, in both actions, or in neither action, there are four possible exceptions to the mutuality requirement; while no court has abolished the mutuality requirement in all four situations, California has now specifically rejected the requirement in three of them. A number of courts have held that there is no mutuality requirement where the party against whom the estoppel is pleaded was claimant in both the first and second actions. This is attributable to the courts' reluctance to permit a plaintiff to retry his case each time a new defendant can be found.[5] In *Bernhard v. Bank of America*,[6] one such case, the California court stated by way of dictum that there were only three substantive requisites for the assertion of a collateral estoppel: (1) that there be identity of issue, (2) that the first action have proceeded to a final judgment on the merits, and (3) that the party against whom the estoppel is asserted have been a party, or in privity with a party, to the first action.[7] Obviously, this rule was much broader than was required by the facts of the *Bernhard* case, where the party estopped was claimant in both actions.

actually litigated, and as to those matters which might have been litigated. See RESTATEMENT, JUDGMENTS §§ 47, 48 (1942). But direct estoppel, a fourth form of res judicata, precludes the plaintiff from relitigating only those matters actually determined in a prior action on the same cause of action. See *id.* § 45(c).

2 Bigelow v. Old Dominion Copper Co., 225 U.S. 111, 127 (1912) (dictum). See also 57 HARV. L. REV. 98, 105 (1943).

3 Further illustrations of this exception are the relationships of principal and agent, and indemnitor and indemnitee.

4 In some cases courts have said that they no longer require mutuality of estoppel, even though those cases, on their facts, would fall within the master-servant or indemnitor-indemnitee exceptions. *E.g.*, Cohen v. Superior Oil Corp., 16 F. Supp. 221 (D. Del. 1936); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937).

5 Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955). In Coca-Cola Co. v. Pepsi-Cola Co., 36 Del. (6 Harr.) 124, 172 Atl. 260 (1934), the court rejected the mutuality requirement on the ground that the plaintiff had selected his forum in a prior action, and, having had a full opportunity to present his proofs, he should not be permitted to relitigate the same issues against a second defendant.

6 19 Cal. 2d 807, 122 P.2d 892 (1942).

7 *Id.* at 813, 122 P.2d at 895.

In *Hardware Mut. Ins. Co. v. Valentine*, a California court went farther and, following *Bernhard*, implicitly rejected the mutuality requirement for the collateral estoppel of a claimee who had been the losing claimant in the prior action.[8] The principal case, going yet a step farther on the authority of the *Bernhard* dictum, was the first to hold mutuality unnecessary in the third situation[9]—where the party estopped is claimant in the second action but was claimee in the first action.[10] If the California court continues this trend and follows the *Bernhard* doctrine to its logical conclusion, it may eventually reject the mutuality requirement in the fourth possible situation. That situation involves the estoppel of a party who was the claimee in both the first and second actions. Suppose, for example, that an airplane disaster should take the lives of forty passengers. Under the broad language of the *Bernhard* dictum and the equally broad rule proposed by numerous commentators,[11] the judgment in the first wrongful death action against the airline, if successful, would collaterally estop the carrier to deny liability in the remaining thirty-nine suits. No court, however, has gone this far to date.[12]

Due process of law prohibits the collateral estoppel of one who has not had his day in court.[13] Where due process is not violated, the problem is simply one of fairness: to what extent should the mutuality requirement be discarded in order to estop one who has already had an opportunity to litigate the elements of his claim or defense? This determination should result from a balancing of the policy underlying res judicata—that there be

8 119 Cal. App. 2d 125, 259 P.2d 70 (1953).

9 In Eagle, Star & British Dominions Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927), plaintiff brought an action on a fire insurance policy. In an earlier action, plaintiff had been convicted of burning the same goods for the loss of which he now claimed. In a perplexing opinion, the court said that the judgment in the first action was not res judicata because of the lack of mutuality. However, inasmuch as plaintiff had previously had his day in court on the same issues, he was not permitted to re-open them in the subsequent action.

10 If a court applies collateral estoppel where the prior action was criminal, as in the principal case, it would most probably also apply it where the prior action was civil. The courts would be more hesitant to allow collateral estoppel where the prior action was criminal, since the privilege against self-incrimination would have permitted the defendant to keep much of his proof undisclosed. This would at least balance the fact that a greater burden of proof is required for a criminal conviction.

11 See, *e.g.*, Cox, *Res Adjudicata: Who Entitled To Plead*, 9 VA. L. REG. (n.s.) 241 (1923); 35 YALE L.J. 607, 611 (1926): "Assuming an identity of issue and a judgment on the merits, the only requirement should be that the one *against* whom the former judgment is invoked was a party, or a privy of a party, to it."

12 One court has permitted the former judgment to be "conclusive evidence" against one who was claimee in both the prior and the subsequent cases. United States v. Wexler, 8 F.2d 880 (E.D.N.Y. 1925). However, the case presented no possibility of multiple claimants. In the first action a divorce had been obtained against the defendant on grounds of adultery. The second action was brought to set aside the defendant's certificate of naturalization on the ground of immoral character.

13 United Banana Co. v. United Fruit Co., 172 F. Supp. 580, 588 (D. Conn. 1959). An exception to this rule is the case where a party has participated in the prior adjudication as a "secret defendant." Caterpillar Tractor Co. v. International Harvester Co., 120 F.2d 82 (3d Cir. 1941).

an end to litigation[14]—against the prejudice resulting to the litigant against whom the estoppel is asserted.[15]

One reason offered in justification of the mutuality requirement is that litigants do not always defend or prosecute to the utmost; thus, failure in the first suit should not preclude a more energetic subsequent contest.[16] However, the courts have already rejected this argument in the master-servant exception to the mutuality requirement, for a plaintiff's failure to succeed in an action against the servant is universally held to preclude the possibility of a more energetic subsequent contest against the master. Likewise, in the *Bernhard* and *Valentine* situations, the unsuccessful claimants in the prior actions were precluded from attempting more energetic contests against other adversaries in subsequent actions. In short, the failure of parties to prosecute or defend to the utmost on all occasions has apparently been of no moment to courts deciding cases which present the same policy considerations as the principal case; evidently, then, the possibility of a desultory prosecution or defense of the first case should not be entirely determinative of the solution to the problem.

In the principal case, the court correctly rejected the argument that mutuality should always be required for the collateral estoppel of one who was the claimee in the prior action.[17] To require mutuality in all such cases would be unresponsive to the fundamental considerations of policy underlying the rejection of the mutuality requirement in other situations. The better view would be that mutuality should not be required for collateral estoppel where it is shown that the party estopped had an opportunity to present his full case in the prior action, and that he would not be prejudiced by the application of estoppel. In the principal case, for example, both of these requisites were fully met. The parties estopped had the fullest opportunity in the first action to present their case as to the occurrence of an actual theft,[18] and, being claimants in the subsequent action, they were able to choose the forum and set the bounds of the litigation.

More significant, perhaps, was the California court's uncritical willingness, in the principal case, to follow the *Bernhard* dictum without reconsidering the policy behind the principle of mutuality. The language of

14 *E.g.*, Marsh v. Pier, 4 Rawle 273, 288 (Pa. 1833). *But see* Atkinson v. White, 60 Me. 396 (1872).

15 See principal case at 604, 375 P.2d at 441.

16 See Von Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1929).

17 Professor Currie argues that, where the claimee in the prior action is the claimant in the subsequent action, mutuality should be required, because he did not have the initiative in the former adjudication. He argues that, without mutuality, there would be a danger of multiple claimants. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 312 (1957). However, in his example of a bus company being sued by one passenger and subsequently by others, the company is claimee in both instances. Should the bus company desire to become claimant in a suit against the operator of another vehicle, the multiple claimant problem would not be present in such subsequent suit.

18 See note 10 *supra*.

the opinion[19] makes it clear that the court did not recognize the danger that its reaffirmation of the *Bernhard* doctrine might precipitate the extension of that doctrine to instances where the party to be estopped is claimee in both actions and there is a possibility of multiple claimants, *e.g.*, the hypothetical airplane disaster.[20] Abolition of the mutuality requirement in this situation would prejudice the claimee in two distinct ways. First, the jury might compromise the liability question by finding for the first plaintiff and awarding proportionately lower damages. In all subsequent actions brought by other plaintiffs, the claimee would be estopped to deny liability, and only the question of damages would be submitted to the jury. In such subsequent actions, the juries would be likely to render verdicts for the full amounts of the respective claimants' damages.[21] The claimee would be prejudiced in a second way by having to withstand the probability that more claimants would recover. For example, where forty plaintiffs join in a class action or, without being able to benefit from res judicata, sue independently in separate actions, the claimee risks a full recovery by each plaintiff only once. However, without the mutuality requirement, were the plaintiffs to sue one at a time, the claimee in defending the first suit would actually be risking a full recovery by all forty. In the second suit he would be risking full recovery by thirty-nine, etc. While the claimee would be subject to the same maximum recovery, the chances of recovery would be greatly enhanced. Assuming that all plaintiffs sued and were unsuccessful, the last plaintiff to sue would have had forty opportunities for recovery. With forty plaintiffs, there would have been eight hundred and twenty opportunities for single-plaintiff recovery. The factor by which the opportunities for recovery are multiplied becomes larger as the number of possible plaintiffs grows. Such increased opportunities for single-plaintiff recovery would have a disruptive effect on insurance rates. In the final analysis, then, the requirement of mutuality should be retained only where the party to be estopped was unable, by reason of his opponent's initiative, to present his full case in the prior action, or where his status as claimee in both actions would expose him to a greater risk of recovery by reason of a possible procession of claimants.

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19 See principal case at 604, 605, 375 P.2d at 440, 441.

20 United States v. Wexler, 8 F.2d 880 (E.D.N.Y. 1925), illustrates that a claimee who was claimee in the prior action might not be prejudiced by his being collaterally estopped in the absence of mutuality. See note 12 *supra*.

21 See Currie, *supra* note 17, at 288.