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In the Supreme Court

Before : Mr. Justice Melville

Suit No. C. L. 843 of 1971

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| Between | Delores Green | Plaintiff |
| And | O.E. Miller & Ronald Coke Executors of Estate - Claude Coke - deceased | Defendants |
| | Desnoes and Geddes Limited | |
| | Vincent Rowe | |
| | Clifton Rose | |

Mr. L. Cowan and Mr. Keith Brooks, instructed by Miss Daisy Chambers of Chambers and Bunny for the plaintiff.

Mr. Norman Hill, Q.C. and Mr. Arthur Scholefield of Livingston, Alexander and Levy for first and second defendants. Mr. David Muirhead, Q.C. and Dr. Adolph Edwards, instructed by A. E. Brandon and Company for the third and fourth defendants.

May 7 1976

JUDGMENT

Having already decided that all the defendants are liable to the plaintiff in this action, I now have to decide the question of contribution as between the defendants. It is common ground that the second defendant obtained a judgment in suit C.L. 860 of 1968 on 16th September, 1970, arising out of this very accident. Mr. Coke who was originally the 1st defendant died before this action was tried and his executors have been substituted as the first defendant.

At the time of the accident Mr. Coke was driving, admittedly, as servant or agent the second defendant's vehicle, whilst the third defendant was driving the fourth defendant's vehicle in a similar capacity so the contest is mainly between the first and second defendants as against the third and fourth defendants.

By reason of this previous judgment, so goes the argument of Mr. Hill for the first and second defendants, not only are the

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third and fourth defendants but the plaintiff also is estopped 'per rem judicatem' that is/that what is now generally known as "cause of action estoppel" applies. Succinctly put, he says that the issues raised in this action are the same as those decided in the former action. The duty of care that had to be determined in the former action is the same duty of care that would now have to be decided in this action and the real issue between the parties, is who was liable for the collision in both actions?

It is common ground that the records in the previous action could be examined for the purpose of ascertaining what was determined and having done so Mr. Hill says the causes of action in both claims are identical in substance. Because the parties may be different and the damage suffered may differ the nature of the relief granted may differ also. He puts it this way. The third and fourth defendants could not successfully bring an action for damages to their vehicle against the first and second defendants whilst the former judgment was still in force because they were bound by it. Therefore, any person in either of the vehicles who may have suffered injuries arising out of this collision could not seek to establish that the former judgment did not settle liability as between the first and second defendants on the one hand and the third and fourth defendants on the other, as the cause of action had been merged in the judgment. The legal position would be that after 16th September, 1970, when the former judgment was made final, any claim arising out of this collision would have to be satisfied by the third and fourth defendants only. Lastly, says Mr. Hill, even if an injured party could successfully maintain, contrary to his argument, an action against all the defendants, as between the defendants themselves the first and second defendants would be entitled to full contribution from the third

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and fourth defendants by reason of the former judgment.

Mr. Cowan for the plaintiff and also Dr. Edwards for the third and fourth defendants whilst admitting that a default judgment may in certain circumstances raise an estoppel submitted that in the particular circumstances that exist in this case there is no such estoppel.

I hope it will not be thought that I am being disrespectful if I do not advert to all the authorities which were so ably and forcefully argued before me in this matter. One may begin by asking, what must a party prove to establish an estoppel? Professor Cross in his work on Evidence, 4th edition at p. 290 states:

> " The general conditions for the establishment of an issue estoppel are the same as those governing cause of action estoppel. There must be a final judgment between the same parties, or their privies litigating in the same capacity on the same issue, and the estoppel must be pleaded. "

Dealing with the last point first, I gather it was part of Mr. Hill's contention that the first and second defendants having pleaded estoppel as part of their defence it was open to the plaintiff to apply to the Court to either have the defence of the third and fourth defendants struck out as being frivolous and vexatious; or to have the matter determined as a preliminary issue. Although Mr. Cowan did not make an issue of it and only mentioned the matter incidentally, it was his contention that the matter could only be properly raised by issuing third party proceedings. I agree with Mr. Cowan as all the authorities to which I have been able to refer seem to bear out his contention. See for example Randolph v. Tuck and others (1961) 1 AER. 814 and also Sec. 133 of the Judicature (Civil Procedure Code). It seems to me that where,as in this case, the first and second defendants are relying on an estoppel not only as against the plaintiff but also against the third and fourth defendants, then it is incumbent on them to not only plead as they have, but to go further and serve a

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third party notice on the third and fourth defendants. However, having decided that issue in that way, it does not help as the third and fourth defendants in particular have not relied on that point.

Although I have already decided for the plaintiff against all the defendants I think I should, in deference to Mr. Hill's argument, state very briefly why I think there is no estoppel against the plaintiff. Assuming for the moment that the prior judgment was a final one then certainly I cannot see how it could be said to be a judgment between "the same parties." The plaintiff in the present action was in no way a party to the prior action and I have heard nothing to indicate that she was a privy to any of the parties. No arguments were addressed to me; and indeed I think none could be so addressed, that the prior judgment was other than one in personam and which as I understand it binds only the parties thereto and their privies. For that reason I had no hesitation in finding for the plaintiff against all the defendants on the evidence I had heard.

A much more difficult question is, whether as between the defendants, the first and second defendants are entitled to full contribution against the third and fourth defendants by reason of the former judgment. In other words, would the former judgment create an "issue estoppel" in favour of the first and second defendants against the third and fourth defendants? In cases of this type there are some authorities which seem to favour what has been referred to as a "narrow approach" while others prefer the "broad approach."

Marginson v. Blackburn Borrough Council (1939) 1 A.E.R.273: Bell v. Holmes (1956) 3 A.E.R. 449: Wood v. Luscombe (1964) 3 A.E.R. 972, are cases in which the "broad approach" was followed and accordingly it was held that there was an estoppel. In Johnson v. Cartledge and Matthews (1939) 3 A.E.R. 654: Randolph v. Tuck

(1961) 1 All E.R. 814: Ramsay v. Pigram (1968) 42 A.L.J. 89, the narrow approach was preferred. It is not just of passing interest to note that in all the above cases all the parties engaged in the various proceedings appeared and contested the action.

The circumstances surrounding the former action are that the third and fourth defendants entered an appearance but never filed a defence and so allowed judgment to go by default.

In the former action, the second defendant alleged negligence against the third and fourth defendants giving particulars of the negligence and claiming damages to their motor car. In the present action the plaintiff who was a passenger in the second defendant's vehicle claims damages for personal injuries alleging negligence against all the defendants. By their defence the first and second defendants, in addition to their plea of estoppel, put the blame on the third and fourth defendants. The third and fourth defendants say it is the fault of the first and second defendants or alternatively, they contributed to the collision.

On examining the pleadings in both actions, it seems to me that the issue of the contributory negligence of the first and second defendants was never in issue in the former action. Putting it at its highest, the former action seemed to have decided no more than that the third and fourth defendants had been guilty of negligence vis-a-vis the second defendant, but the question of whether the first and second defendants themselves were also at fault for the collision was never raised. In this regard the words of Viscount Radcliffe in Kok Hoong v. Leong Cheong Kweng Mines Limited (1964) 1 All E.R. 300 at 306 seem apposite when he said:

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> " In their Lordships' opinion the New Brunwick Ry Co. case can be taken as containing an authorative reinterpretation of the principle of Howlett v. Tarte in simpler and less specialised terms. This reinterpretation amounts to saying that default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham, L.C. they can estop only for what must 'necessarily, and with complete precision' have been thereby determined. "

For the reasons I have endeavoured to state I am of the view that this plea of estoppel must fail. However, if I am wrong in coming to that conclusion, I am persuaded by the views expressed in what has been referred to as the "narrow approach" and here again estoppel cannot prevail. Apart from the cogency of the arguments advanced in support of the narrow approach one ought not to be unmindful of conditions as they exist in this Country today. It is a fact that insurers of motor vehicles have become insolvent and that a number of persons operating motor vehicles in this Country are persons of straw. As between a blameless plaintiff therefore and tortfeasors in these "running down" cases, I can see no valid reason why a plaintiff should not be allowed the widest options.

I am therefore of the view that the first and second defendants' claim to full contribution from the third and fourth defendants cannot succeed. As I had earlier indicated the contributions of the first and second defendants should be 40% and that of the third and fourth defendants 60% as between themselves. Costs to ~~follow the event~~ be in the same proportions.

Dated this 7th day of May, 1976

V. C. Melville
Puisne Judge