



1-1-1988

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Recommended Citation

Elizabeth A. West, *Does an Adverse Judgment in a Personal Injury Action Bar a Subsequent Wrongful Death Action?*, 20 PAC. L. J. 221 (1988).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol20/iss1/12>

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Does an Adverse Judgment in a Personal Injury Action Bar a Subsequent Wrongful Death Action?

INTRODUCTION

The California wrongful death statute grants the heirs of an alleged tort victim an original cause of action upon the death of the victim.¹ This wrongful death action is not derived from any personal injury claim brought by the decedent.² Instead, the action provides the beneficiaries with a remedy for the damages resulting from the death of the decedent.³ When a tort victim prevails in a judgment or settlement of a claim for personal injuries, the heirs of the victim are still entitled to recover for injuries caused by the subsequent death of the personal injury plaintiff.⁴ California courts are divided, however, on whether the heirs of a tort victim have a right to bring a wrongful death action after an adverse judgment in the personal injury suit.⁵

In order to recover, both personal injury and wrongful death plaintiffs must prove the defendant is strictly liable or negligent, and that the conduct of the defendant was the proximate cause of their injury.⁶ If privity exists between the plaintiff-decedent in a personal injury action and the plaintiff in a subsequent wrongful death action,

1. See CAL. CIV. PROC. CODE § 377 (West Supp. 1988).

2. See *id.* (the action arises upon the death of the decedent and belongs to the heirs).

3. *Earley v. Pacific Elec. Ry.*, 176 Cal. 79, 81, 167 P. 513, 514 (1917).

4. See *id.* at 79, 167 P. at 513 (after settlement by the personal injury plaintiff, a subsequent wrongful death claim was allowed).

5. Compare *Blackwell v. American Film Co.*, 189 Cal. 689, 209 P. 999 (1922) (prior recovery in a personal injury action does not bar a subsequent wrongful death action) and *Kaiser Found. Hosp. v. Superior Court*, 254 Cal. App. 2d 327, 62 Cal. Rptr. 330 (1967) (allowing a subsequent wrongful death action) with *Evans v. Celotex Corp.*, 194 Cal. App. 3d 741, 238 Cal. Rptr. 259 (1987) (refusing to allow the subsequent wrongful death action).

6. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984) (hereinafter W. KEETON) § 30 at 164-68 (elements needed to recover in a personal injury cause of action), § 127 at 946-47 (elements of a wrongful death action); See also *Earley*, 176 Cal. at 81, 167 P. at 514. Personal injury damages include medical expenses, pain and suffering and compensatory damages. Wrongful death damages compensate injuries sustained by the heirs such as loss of support, society, comfort and protection. *Id.*

the doctrine of collateral estoppel bars relitigation of the issues of negligence, strict liability and proximate cause.⁷ Collateral estoppel effectively bars plaintiffs in privity with a decedent who received an adverse judgment in a personal injury case from recovering for their own injuries which arose from the death of the personal injury plaintiff.⁸ Privity exists between the heirs and the personal injury plaintiff only if the California wrongful death action is derivative of the personal injury action.⁹

Upon the death of the tort victim, the personal injury claim may be fully adjudicated, settled or otherwise non-actionable.¹⁰ The extent to which the status of the personal injury claim affects the right to bring a wrongful death action reflects the degree of independence of the wrongful death action.¹¹ The independence of the California wrongful death action is clarified by reviewing how the wrongful death action is affected by the following: (1) A prior adjudication;¹² (2) settlement by the decedent;¹³ (3) release by the decedent prior to injury;¹⁴ (4) the contributory negligence of the decedent;¹⁵ and (5) an adverse judgment against the decedent.¹⁶

This comment will outline the doctrine of res judicata and due process, and explain how these doctrines are balanced to allow relitigation of issues by persons who are parties to an action or in privity with the parties.¹⁷ California case law will next be reviewed to determine whether a wrongful death action is entirely independent of the personal injury action brought by the victim-decedent.¹⁸ This comment will then consider whether, under California law, the heirs

7. See W. KEETON, *supra* note 6, § 30 at 164-67 and § 127 946-47; 7 B.WITKIN, CALIFORNIA PROCEDURE § 287 (3d ed. 1985).

8. 7 WITKIN, *supra* note 7, § 288; Lynch v. Glass, 44 Cal. App. 3d 943, 947, 119 Cal. Rptr. 139, 141 (1975) (privity means that collateral estoppel applies). A party cannot assert a prior adjudication against another who is not a party or in privity with a party to prior adjudication. *Id.*

9. RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c (1982).

10. See *infra* notes 119-166 and accompanying text.

11. See *infra* notes 119-191 and accompanying text.

12. See Blackwell v. American Film Co., 189 Cal. 689, 209 P. 999 (1922).

13. See Earley v. Pacific Elec. Ry. Co., 176 Cal. 79, 167 P. 513 (1917); Robinson v. Leigh, 153 Cal. App. 2d 730, 315 P.2d 42 (1957).

14. See Coates v. Newhall Land & Farming, Inc., 191 Cal. App. 3d 1, 236 Cal. Rptr. 181 (1987).

15. See Buckley v. Chadwick, 45 Cal. 2d 183, 288 P.2d 12 (1955).

16. Secrest v. Pacific Elec. Ry. Co., 60 Cal. App. 2d 746, 141 P.2d 747 (1943); Kaiser Found. Hosp. v. Superior Court, 254 Cal. App. 2d 327, 62 Cal. Rptr. 330 (1967); Evans v. Celotex Corp., 194 Cal. App. 3d 741, 238 Cal. Rptr. 259 (1987).

17. See *infra* notes 21-91 and accompanying text.

18. See *infra* notes 119-191 and accompanying text.

of an injured decedent are actually in privity with the plaintiff in the personal injury action.¹⁹ Finally, this comment will assert that the heirs of a personal injury plaintiff-decedent have an independent wrongful death cause of action.²⁰ Since the heirs can sue in their own action, the heirs have no legal interest in the personal injury action of the decedent. Furthermore, since no interest of the heirs is represented in the personal injury action, no privity relationship exists with the personal injury plaintiff.

I. THE APPLICATION OF RES JUDICATA PRINCIPLES TO WRONGFUL DEATH CLAIMS

The doctrine of res judicata has two applications, res judicata and estoppel by judgment.²¹ Res judicata precludes parties to the original action or people in privity with those parties from relitigating causes of action that were fully adjudicated in the original action.²² Similarly, estoppel by judgment precludes relitigation of any issue decided in an earlier action involving the same parties or their privies, even if the subsequent claim is based on a different cause of action.²³

Res judicata is comprised of two closely related doctrines: merger and bar.²⁴ Merger applies when a plaintiff prevails on a claim, and bar applies when a claimant loses after full adjudication.²⁵ When a claimant receives a favorable judgment, all possible grounds for the cause of action merge into that judgment.²⁶ The plaintiff is thereby precluded from raising those claims in future litigation against the same defendants.²⁷ When a claimant loses a lawsuit, the claimant is

19. See *infra* notes 198-240 and accompanying text.

20. See *infra* notes 198-240 and accompanying text.

21. *Beverly Hills Nat'l Bank v. Glynn*, 16 Cal. App. 3d 274, 283, 93 Cal. Rptr. 907, 912 (1971).

22. *Id.*

23. *Id.*; *McGaffey v. Sudowitz*, 189 Cal. App. 2d 215, 217, 10 Cal. Rptr. 862, 864 (1961). The doctrine of res judicata means that when the rights of the parties have been litigated, the final resultant judgment conclusively establishes the rights of the parties respecting the matters litigated. *Id.* See *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 604, 25 Cal. Rptr. 559, 560, 375 P.2d 439, 440 (1963) (the requirement of mutuality of estoppel has been abolished in California).

24. J. FRIEDENTHAL, M. KANE AND A. MILLER, *CIVIL PROCEDURE* § 14.1 (1985) (hereinafter J. FRIEDENTHAL) (merger and bar prohibit claim splitting); 7 WITKIN *supra* note 7, §§ 243, 249.

25. 7 WITKIN, *supra* note 7, §§ 243, 249.

26. *Id.* § 243. A second suit can not be filed to recover additional damages because all claims are merged. *Restatement (Second) of Judgments* §§ 17, 18 (1982).

27. 7 WITKIN, *supra* note 7, §§ 243, 249.

barred from raising the same cause of action, even if new facts or legal theories are uncovered that warrant recovery.²⁸

Estoppel by judgment operates through the application of direct and collateral estoppel.²⁹ Direct estoppel precludes an issue from being relitigated if the prior judgment and the present suit are based on the same cause of action.³⁰ Similarly, collateral estoppel applies when a final judgment estops relitigation of an issue in a different cause of action.³¹

The two aspects of res judicata, res judicata and estoppel by judgment, may be distinguished in three ways.³² First, res judicata prevents relitigation of claims, and estoppel by judgment prevents relitigation of issues.³³ Second, res judicata bars litigation of all issues that were or could have been litigated prior to the final judgment on a claim, while estoppel by judgment operates only when an issue has been fully litigated.³⁴ Third, res judicata bars relitigation of the same cause of action, whereas estoppel by judgment merely bars relitigation of the same issues in later suits on any cause of action.³⁵ Since the causes of action for personal injury and wrongful death are different, collateral estoppel, not direct estoppel, bars relitigation of the defendant's liability when the wrongful death plaintiffs were parties in the personal injury action or are in privity with the decedent in the personal injury action.³⁶

28. *Eichman v. Fotomat Corp.*, 147 Cal. App. 3d 1170, 1174, 197 Cal. Rptr. 612, 614; 7 WITKIN, *supra* note 7, §§ 249.

29. J. FRIEDENTHAL, *supra* note 25, § 14.1.

30. *Smith v. Smith*, 127 Cal. App. 3d 207-08, 179 Cal. Rptr. 492, 494 (1981) See RESTATEMENT (SECOND) OF JUDGMENTS §§ 17 comment c, 20 comment b; 7 WITKIN, *supra* note 7, § 193. See also J. FRIEDENTHAL, *supra* note 25, § 14.1 (since subsequent suits are already decided and are usually extinguished entirely by res judicata, direct estoppel is rarely involved).

31. *Lockwood v. Superior Court*, 160 Cal. App. 3d 667, 672, 206 Cal. Rptr. 785, 788 (1984). See 7 WITKIN, *supra* note 7, § 253 (collateral estoppel is the equivalent of issue preclusion).

32. J. FRIEDENTHAL, *supra* note 25, § 14.2.

33. *Cromwell v. Sacramento*, 94 U.S. 351, 352-53 (1876) (discussion on distinction between res judicata and collateral estoppel); 7 WITKIN, *supra* note 7, §§ 190, 246, 249, 253.

34. *Cromwell*, 94 U.S. at 352-53 (A judgment on a claim results in a final determination of all matters potentially or actually offered and received in the litigation of the claim); 7 WITKIN, *supra* note 7, § 190; *Derish v. San Mateo-Burlingame Bd. of Realtors*, 724 F.2d 1347, 1351 (1983).

35. *Cromwell*, 94 U.S. at 352-53; *Montana v. United States*, 440 U.S. 147, 153-54 (1979). See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) (under collateral estoppel, a determined issue is final whether raised in the same or a different claim).

36. Comment, *Wrongful Death Recoveries: Is the Decedent's Negligence Still a Defense After Li?*, 11 Pac. L.J. 775, 779 (1980). *Blackwell v. American Film Co.*, 189 Cal. 689, 693-94, 209 P. 999, 1000 (1922); *Blake v. Midland Ry.*, 118 Eng. Rep. 35, 41 (Q.B. 1852) (interpreting the wrongful death action as a new cause of action even if the right to bring the

Three general policies exist behind the doctrine of res judicata and collateral estoppel. First, no person should be burdened with the expense and annoyance of defending the same claim more than once.³⁷ Parties engage in litigation to resolve, not to perpetuate, legal disputes.³⁸ Therefore, once a final judgment³⁹ is rendered, the prevailing party should be able to rely on that resolution.⁴⁰ The appeals process corrects judicial error; therefore, relitigation of the same issues after an appeal is pointless.⁴¹

In addition, the doctrines of res judicata and collateral estoppel conserve judicial resources.⁴² The demand for judicial resolution of controversies far exceeds the capacity of the court system to resolve controversies.⁴³ The relitigation of one dispute may result in the delay of another case. Therefore, preventing the relitigation of claims and issues enables the court system to resolve conflicts more quickly.⁴⁴

Finally, the ability to rely on a final judgment maintains the integrity of the judicial system.⁴⁵ The outcome of a lawsuit may be altered when a claim or an issue is relitigated. This inconsistency serves to weaken the public's faith in the efficiency and fairness of the judicial system. Thus, the doctrines of res judicata and collateral estoppel facilitate reliance on judicial action by reducing the number of inconsistent decisions.⁴⁶

Section 1908 of the California Code of Civil Procedure provides that judgment by a court with proper jurisdiction is conclusive

wrongful death action is contingent on whether the decedent could have brought the action); 7 WITKIN, *supra* note 7, § 193 (designating collateral estoppel as the proper approach for precluding relitigation of issues in two distinct causes of action).

37. *Montana*, 440 U. S. at 153-54; *DeWeese v. Unick*, 102 Cal. App. 3d 100, 105, 162 Cal. Rptr. 259, 261-62 (1980); *Gill v. Peppin*, 41 Cal. App. 487, 491 (1919) (a person should not be twice vexed for the same cause); 7 WITKIN, *supra* note 7, § 188.

38. *Montana*, 440 U.S. at 153-54; *DeWeese*, 102 Cal. App. at 105, 162 Cal. Rptr. at 261-62.

39. *See Carney v. Simmonds*, 49 Cal. 2d 84, 315 P. 2d 305 (1957) (a judgment is not final while an appeal is pending on the judgment); *Howard v. Howard*, 67 Cal. App. 56, 226 P. 984 (1924) (A judgment is final when the time for an appeal has passed and no appeal was taken).

40. *Montana*, 440 U.S. at 153-54; *DeWeese*, 102 Cal. App. 3d. at 105, 162 Cal. Rptr. at 261-62. *See Bernard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 811, 122 P.2d 892, 894 (1922) (res judicata keeps a losing party from again drawing an issue into controversy).

41. *Montana*, 440 U.S. at 153-54.

42. *Id.*; *DeWeese*, 102 Cal. App. 3d at 105, 162 Cal. Rptr. at 261-62.

43. *Montana*, 440 U.S. at 153-54; *DeWeese*, 102 Cal. App. 3d at 105, 162 Cal. Rptr. at 261-62.

44. *Montana*, 440 U.S. at 153-54.

45. *Id.*

46. *Id.*

between the parties and their successors in interest.⁴⁷ Therefore, litigation of an issue or claim precludes relitigation of the same issue or cause of action by parties bringing an action under the same title⁴⁸ or parties who are bringing the action in the same capacity as parties who already litigated the issue or claim.⁴⁹ In *Bernhard v. Bank of America National Trust & Savings Association*,⁵⁰ the California Supreme Court identified three requirements for applying collateral estoppel to preclude relitigation of an issue.⁵¹ The issue decided in the prior adjudication must be identical to the issue presented in the present action.⁵² Next, the court must determine whether there was a final judgment on the merits.⁵³ Finally, the party against whom the plea is asserted in the present action must have been a party, or in privity with a party, to the prior adjudication.⁵⁴ The determination of whether a party is in privity with a party to a prior adjudication often creates problems because of the confusion about the definition of privity.⁵⁵

II. THE SIGNIFICANCE OF PRIVITY

Privity is a relationship or connection between a party to an action and a non-party that binds the actual party to the action.⁵⁶ Traditionally, privity was an interest in the subject matter of litigation which arose after judgment by inheritance, succession or purchase from one of the parties.⁵⁷ In *Zaragosa v. Craven*,⁵⁸ the California

47. See CAL. CIV. PROC. CODE § 1908 (West 1983).

48. For example, if two plaintiffs bring a wrongful death action as heirs, they are asserting the right to recover under the common title of heir.

49. CAL. CIV. PROC. CODE § 1908 (West 1983).

50. 19 Cal. 2d 807, 122 P.2d 892 (1942).

51. *Bernhard*, 19 Cal. 2d at 813, 122 P.2d at 895.

52. *Id.* See *Zaragosa v. Craven*, 33 Cal. 2d 315, 317, 202 P.2d 73 (1949) (the first requirement for a valid res judicata plea). *In re Estate of Clark*, 190 Cal. 354, 360-61, 212 P. 625.

53. *Bernhard*, 19 Cal. 2d at 813, 122 P.2d at 895. See *Zaragosa*, 33 Cal. 2d at 317, 202 P.2d at 74 (1949) (second res judicata requirement).

54. *Bernhard*, 19 Cal. 2d at 813, 122 P.2d at 895. See *Zaragosa*, 33 Cal. 2d at 317, 202 P.2d at 74-75 (third res judicata requirement); *Estate of Clark*, 190 Cal. at 360-61, 212 P. at 625.

55. Compare *Kaiser Found. Hosp. v. Superior Court*, 254 Cal. App. 2d 327, 62 Cal. Rptr. 330 (1967) (holding that heirs are *not* in privity with personal injury plaintiffs) with *Evans v. Celotex Corp.*, 194 Cal. App. 3d 741, 238 Cal. Rptr. 259 (1987) (holding that heirs are in privity with personal injury plaintiffs).

56. 7 WITKIN, *supra* note 7, § 287.

57. *Bernhard*, 19 Cal. 2d at 811, 122 P.2d at 894 (privity denotes mutual or successive interests to the same rights or property).

58. 33 Cal. 2d 315, 202 P.2d 73 (1949).

Supreme Court expanded the concept of privity to include a mutual or successive interest with another in the same legal right.⁵⁹ The *Zaragoza* court held that privity exists between spouses in a suit by one spouse for personal injuries.⁶⁰ In *Zaragoza*, the husband brought a personal injury action after both the husband and the wife were injured in an automobile accident.⁶¹ The husband, who was driving when the accident occurred, lost the personal injury action.⁶² The wife in *Zaragoza* had a legal right to share the judgment proceeds of the husband-plaintiff.⁶³ Therefore, the wife was in privity with the husband and collateral estoppel precluded the wife from relitigating the negligence of the defendant in a separate personal injury suit.⁶⁴

In *Cortez v. Los Angeles*,⁶⁵ the Ninth Circuit Court of Appeals applied the *Zaragoza* definition of privity.⁶⁶ The *Cortez* court held that a child bringing a personal injury action was not in privity with the child's parents in an action by the parents to recover the cost of medical care for the child.⁶⁷ The court reasoned that a child has a distinct legal right to recover for personal injuries since the damages are different than those in the parents' cause of action. While a child clearly has an economic interest in the outcome of the parental suit, the child has no legal interest in the outcome of that suit.⁶⁸

In *Clemmer v. Hartford Insurance Co.*,⁶⁹ the California Supreme Court expanded the privity concept to include relationships that are "sufficiently close" to justify the application of collateral estoppel.⁷⁰

59. *Zaragoza*, 33 Cal. 2d at 318, 202 P.2d at 75. See *State Farm Mutual Auto. Ins. Co. v. Salazar*, 155 Cal. App. 2d Supp. 861, 865, 318 P.2d 210, 212 (1957); *Margolis v. Superior Court*, 151 Cal. App. 2d 333, 334, 311 P.2d 167, 168 (1957).

60. *Zaragoza*, 33 Cal.2d at 321, 202 P.2d at 77.

61. *Id.*

62. *Id.* The adverse personal injury judgment was due to a jury finding that the defendant was not negligent or the husband was contributorily negligent. The wife brought an action for personal injuries. *Id.* The wife conceded that unless the personal injury would be separate property, the contributory negligence of her husband would bar her personal injury action. *Id.* at 317, 202 P.2d at 74.

63. *Id.* at 321, 202 P.2d at 77. The court based the decision on California community property law which deems that money recovered for damages during the marriage is community property of both spouses. This rule applies to property that was not owned by the spouse before marriage or acquired afterward by gift, devise, bequest or descent. *Id.*

64. *Id.*

65. 96 F.R.D. 427 (1983).

66. *Cortez*, 96 F.R.D. at 427.

67. *Id.* at 429.

68. *Id.*

69. 22 Cal. 3d 865, 587 P.2d 1098, 151 Cal. Rptr. 285 (1979).

70. *Clemmer*, 22 Cal. 3d at 875, 587 P.2d at 1102, 151 Cal. Rptr. at 289. See *Lynch v.*

The *Clemmer* court also considered the due process right to be heard in court before being deprived of life, liberty or property without just compensation.⁷¹ Under *Clemmer*, even if a court is justified in applying collateral estoppel in light of public policy interests, the due process rights of the claimant must be satisfied before parties will be considered in privity.⁷²

III. DUE PROCESS REQUIREMENTS AS A GUIDELINE IN DEFINING PRIVACY

Before applying collateral estoppel, due process requires that the person to be estopped have an "identity or community of interest with the party to the first action."⁷³ Additionally, the person must have been adequately represented by the party in the prior action.⁷⁴ Finally, due process requires that the person should reasonably expect to be bound by the prior adjudication.⁷⁵

Glass, 44 Cal. App. 3d 943, 948, 119 Cal. Rptr. 139, 142 (1975). See also *People v. One 1964 Chevrolet Corvette Convertible*, 274 Cal. App. 2d 720, 731, 79 Cal. Rptr. 447, 454 (1969) (the emphasis in determining whether a relationship is "sufficiently close" to apply the principles of preclusion, is on the policy of ending litigation, where there has been a fair trial of the claimant's interests); *People ex rel. State of Calif. v. Drinkhouse*, 4 Cal. App. 3d 931, 937, 84 Cal. Rptr. 773, 776 (1970) (also using the sufficiently close standard to define privity).

71. *Clemmer*, 22 Cal. 3d at 875, 587 P.2d at 1102, 151 Cal. Rptr. at 289. See *Lynch*, 44 Cal. App. 3d at 948, 119 Cal. Rptr. at 142. See also *Coca Cola Co. v. Pepsi Cola Co.*, 172 A. 260 (Del. 1934) (due process mandates that no person be deprived of personal property rights by a judgment with out notice and an opportunity to be heard); U.S. CONST. amend. V, XIV § 1 (before deprivation of life, liberty or property all people have the right to be heard in a court of law).

72. *Clemmer*, 22 Cal. 3d at 875, 587 P.2d at 1102-03, 151 Cal. Rptr. at 289-90; *Blonder-Tongue v. University Found.*, 402 U.S. 313, 329 (1971); *Dillard v. McKnight*, 34 Cal. 2d 209, 214-15, 209 P.2d 387 (1949); *Bernard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 122 P.2d 892 (1942). See *Lynch*, 44 Cal. App. 3d at 948, 119 Cal. Rptr. at 142.

73. *Clemmer*, 22 Cal. 3d at 875, 587 P.2d at 1102-03, 151 Cal. Rptr. at 289-90. See *Blonder-Tongue*, 402 U.S. at 329; *Dillard*, 34 Cal. 2d 209, 214-15, 209 P.2d 387; *Bernard*, 19 Cal. 2d 807, 122 P.2d 892; *Lynch*, 44 Cal. App. 3d at 948, 119 Cal. Rptr. at 142.

74. *Clemmer*, 22 Cal. 3d at 875, 587 P.2d at 1102-03, 151 Cal. Rptr. at 289-90. *Blonder-Tongue*, 402 U.S. at 329; *Dillard*, 34 Cal. 2d at 214-15, 209 P.2d at 393; *Bernard*, 19 Cal. 2d 807, 122 P.2d 892; *Lynch*, 44 Cal. App. 3d at 948, 119 Cal. Rptr. at 142.

75. *Clemmer*, 22 Cal. 3d at 875, 587 P.2d at 1102, 151 Cal. Rptr. at 289 (citing *Lynch*, 44 Cal. App. 3d at 948, 119 Cal. Rptr. 139 at 142). This expectation would be present where the non-party had a proprietary or financial interest, in and control of, a prior action, or where the unsuccessful party in the first action acted in a representative capacity for a non-party. *Lynch* 44 Cal. App. 3d at 948, 119 Cal. Rptr. at 142. In *Lynch* the plaintiffs had an identity in interest with the plaintiffs in the prior action, and were aware of the prior litigation. However, the plaintiffs had no control over the earlier case, and did not stand in any relationship with the prior plaintiffs that would put them on reasonable notice of the binding effect of litigation. *Id.* at 949, 119 Cal. Rptr. at 143.

The California Supreme Court in *Clemmer* utilized a due process analysis and did not find privity.⁷⁶ The defendant in *Clemmer*, an insurance company, insured a doctor under a personal comprehensive policy.⁷⁷ The doctor killed a co-worker and was convicted of second degree murder.⁷⁸ The doctor withdrew his insanity plea prior to the rendering of the verdict, which precluded a conclusion that the act was not willful.⁷⁹ The family of the victim brought a successful wrongful death action against the doctor and a subsequent action against the insurance company to satisfy the judgment.⁸⁰ The insurance company argued that the policy excluded willful acts of the insured.⁸¹ The insurance company claimed that since the issue of willfulness had been determined in the criminal proceedings by virtue of the second degree murder conviction, collateral estoppel barred the plaintiffs from relitigating the issue of willfulness.⁸² The *Clemmer* court held that the insurance company and the doctor were not in privity and thus the plaintiffs were not collaterally estopped from litigating the issue of willfulness.⁸³ The court reasoned that the doctor's withdrawal of his insanity plea was contrary to the interests of the plaintiff in establishing an unintentional act.⁸⁴ The decision not to litigate the issue of willfulness demonstrates that the doctor had interests different from those of the plaintiffs.⁸⁵ Since the interests of the parties were distinct, no privity existed.⁸⁶

A court must review all the circumstances of a case before determining whether the due process rights of an individual have been fully protected.⁸⁷ The importance of protecting the rights of a party seeking to litigate an issue varies depending upon the substantive right at issue. If the right being asserted was adequately represented in a previous action, then the importance of reasserting that right

76. *Clemmer*, 22 Cal. 3d at 875-76, 587 P.2d 1102-03, 151 Cal. Rptr. 289-90.

77. *Id.* at 872, 587 P.2d at 1100, 151 Cal. Rptr. at 287.

78. *Id.* The defendant killed the co-worker by shooting him three times. The shooting occurred the day after the decedent, also a doctor, terminated the employment relationship. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 877, 587 P.2d at 1103, 151 Cal. Rptr. at 290.

83. *Id.* at 877, 587 P.2d at 1103-04, 151 Cal. Rptr. at 290-91.

84. *Id.* at 877, 587 P.2d at 1103, 151 Cal. Rptr. at 290.

85. *Id.* The court noted that the doctor's decision to withdraw the insanity plea might have been motivated by a desire to go to jail rather than to the state mental hospital. *Id.*

86. *Id.* at 874, 587 P.2d at 1102, 151 Cal. Rptr. at 289.

87. *Id.* at 875, 587 P.2d at 1102-03, 151 Cal. Rptr. at 289-90.

decreases.⁸⁸ Thus, due process requires that before a wrongful death plaintiff can be collaterally estopped from relitigating issues determined in a prior personal injury action, the rights of the wrongful death plaintiff must have been adequately represented in the personal injury action.⁸⁹ The right of a wrongful death plaintiff can only be represented by the personal injury plaintiff if the wrongful death action is derivative of the personal injury action.⁹⁰ Due process requires that when the wrongful death cause of action is independent of the personal injury action, the wrongful death plaintiff must have an opportunity to litigate the rights granted to that plaintiff.⁹¹

IV. WRONGFUL DEATH STATUTES

The wrongful death action is a statutorily created cause of action.⁹² State statutes vary in the degree of independence granted to the heirs' cause of action.⁹³ In states where a wrongful death action is derivative of the personal injury action, the right to bring the action is contingent upon whether the decedent, if alive, would have the right to bring a personal injury claim against the same defendant.⁹⁴ A full adjudication⁹⁵ or out-of-court settlement of the personal injury claim extinguishes the derivative right of the heirs since, the personal injury plaintiff will no longer have a valid claim against the defendant.⁹⁶

88. See 7 WITKIN, *supra* note 7, § 289.

89. See *Clemmer*, 22 Cal. 3d at 875, 587 P.2d at 1102, 151 Cal. Rptr. at 289 (requiring a consideration of due process rights in determining whether collateral estoppel applies); RESTATEMENT (SECOND) OF JUDGMENTS § 46 (1982) (discussing when issue preclusion bars a wrongful death action following a personal injury action).

90. RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment b (1982).

91. *Id.* If the wrongful death action is wholly independent, the beneficiaries would have a separate interest in the decedent's life. *Id.* See *Lynch*, 44 Cal. App. 3d at 948, 119 Cal. Rptr. at 142. (due process must be satisfied before privity attaches); 7 WITKIN, *supra* note 7, § 289 (the underlying theme is that the interest represented in the second action was represented in the first action).

92. See RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment a (1982) (common law of the 18th and early 19th centuries did not recognize any cause of action for the death of a tort victim).

93. See *id.* reporter's note. (discussion of approaches taken by different states).

94. *Id.* comment b (1982); See *Mason v. Gerin Corp.*, 231 Kan. 718, 647 P.2d 1340 (1982) (requiring that a right of action exist in the decedent at the time of death as a condition precedent to the existence of a right to bring a wrongful death action).

95. See *Perkins v. Variety Children's Hosp.*, 445 So. 2d 1010, 1011 (Fla. 1983) (a judgment for personal injuries bars a subsequent wrongful death action).

96. RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c (1982). If the wrongful death action is derivative, the injured person and the wrongful death plaintiffs are successively eligible representatives. *Id.* Thus, the heirs in a jurisdiction with a derivative wrongful death statute are successive in interest and thus, satisfy even the traditional, conservative definition of privity. J. FREIDENTHAL, *supra* note 25 at 684.

Thus, a defense which would be effective against the decedent due to the prior settlement or adjudication is equally effective in barring the wrongful death claim of the heirs of the decedent.⁹⁷ A different result is reached in those states where wrongful death statutes provide an independent claim to the beneficiaries. In these states, the disposition of the personal injury claim, by settlement or adjudication, has no effect on the later wrongful death action.⁹⁸

Although several states have adopted wrongful death statutes that provide for an independent cause of action in favor of the heirs of the decedent, considerable variation exists in the degree of independence attributed to the personal injury and wrongful death claims.⁹⁹ In most independent wrongful death statute jurisdictions, the wrongful death claim is independent to the extent that recovery by the decedent does not preclude recovery by the heirs for their separate injuries.¹⁰⁰ The decedent, however, is treated as a representative of the heirs in determining the liability of the alleged tortfeasor.¹⁰¹ The decedent's role as representative creates a privity relationship between the decedent and the heirs.¹⁰² Thus, in these jurisdictions, after a judgment against the personal injury plaintiff, the defendant may collaterally estop the heirs from relitigating the issue of liability.¹⁰³

In a few states, including California, a wrongful death action is completely unaffected by the personal injury action of the decedent.¹⁰⁴ Under this view, the legal interests of the wrongful death heirs are entirely distinct from those interests represented in the personal injury

97. RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c (1982).

98. *Id.* See *id.* § 46 comments b, c (1982); *Alfone v. Sarno*, 87 N.J. 99, 103-04, 110, 432 A.2d 857, 864-65, 872 (1981) (damages for personal injury to the decedent cannot be recovered in the wrongful death action; however, the heirs may recover for losses caused by the death of the decedent). See also RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c (1982) (wrongful death plaintiffs have a legal interest in the life of the victim that is separate from the legal interest of the victim).

99. See RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c (1982).

100. See *id.* (double recovery is not allowed).

101. *Id.* See *Alfone*, 87 N.J. at 99, 432 A.2d at 857 (exemplifying the view that personal injury plaintiffs and wrongful death plaintiffs have identical interests).

102. RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c (1982); *Alfone*, 87 N.J. at 101, 432 A.2d at 859.

103. RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c (1982). Res judicata precludes the heirs of the decedent from relitigating essential issues of liability already determined and bars litigation of issues that decedent failed to raise. *Alfone*, 87 N.J. at 101, 432 A.2d at 859.

104. RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c (1982); *Alfone*, 87 N.J. at 99, 432 A.2d at 857. See *De Hart v. Ohio Fuel Gas Co.*, 84 Ohio App. 62, 85 N.E. 2d 586 (1948) (supporting the proposition that death action beneficiaries can sue after the decedent lost the personal injury action); *Kaiser Found. Hosp. v. Superior Court*, 254 Cal. App. 2d 327, 62 Cal. Rptr. 330 (1967) (decision allowing wrongful death action after a previous personal injury action).

action brought by the decedent and, therefore, no privity exists.¹⁰⁵ The heirs cannot be collaterally estopped from relitigating the issue of liability after the decedent litigates the personal injury action.¹⁰⁶ Even an adverse judgment in the personal injury action does not bar the wrongful death action.¹⁰⁷

V. THE CALIFORNIA WRONGFUL DEATH STATUTE

A. Historical Development

The wrongful death cause of action originated from an English statute known as the Lord Campbell Act.¹⁰⁸ The right to bring a wrongful death action under the act depended upon whether the decedent would have had the right to bring a personal injury claim against the defendant if the decedent had survived.¹⁰⁹ At early common law, the heirs could not bring a wrongful death action if the decedent settled or fully adjudicated a claim, regardless of the result.¹¹⁰ In 1862, the California legislature passed a wrongful death statute patterned after the Lord Campbell Act.¹¹¹ California repealed this statute and enacted California Code of Civil Procedure section 377.¹¹²

California Code of Civil Procedure section 377 allows the heirs of a decedent to sue a defendant for wrongful death.¹¹³ California courts interpret section 377 to provide an original cause of action for

105. RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c; *Alfone*, 87 N.J. at 99, 432 A.2d at 857. See *DeHart*, 84 Ohio App. at 62, 85 N.E.2d at 586 (the rights of the heirs begin where those of the injured person end and are rights over which the injured person has no control).

106. RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c (1982).

107. *Id.*

108. Fatal Accidents Act of 1846, 9 & 10 Vict., ch. 93, at 531-32. See Comment, *supra* note 37, at 779 (the statute was called the Fatal Accidents Act). The statute did not create an exception to the common law rule that tort claims died with the person. *Id.* See also *Blake v. Midland Ry.*, 118 Eng. Rep. 35, 41 (Q.B. 1852) (The Act does not transfer the right of decedent's cause of action to his representatives, but gives representatives a totally new cause of action based on different principles).

109. Fatal Accidents Act of 1946, 9 & 10 Vict., ch. 93 at 531-32. See Comment, *supra* note 37, at 779.

110. See Comment, *supra* note 37, at 779.

111. 1862 Cal. Stat. ch. 330, sec. 1, at 447. See Comment, *supra* note 37, at 780.

112. See *Buckley v. Chadwick*, 45 Cal. 2d 183, 197, 288 P.2d 12, 20 (1955) (providing the history of the enactment of Civil Procedure section 377).

113. *Id.*

wrongful death.¹¹⁴ The damages recoverable by the heirs may redress expenses and suffering¹¹⁵ resulting from the death of the decedent.¹¹⁶ The wrongful death cause of action is independent of the personal injury action.¹¹⁷ Yet, the California Supreme Court declined to determine whether an adverse personal injury judgment precludes the heirs from bringing the wrongful death action.¹¹⁸

B. The Independence of the California Wrongful Death Action

The independent right of the heirs to bring an action for wrongful death can be illustrated by examining the right to bring a wrongful death action after settlement, prior successful adjudication, or release prior to injury by the personal injury plaintiff.¹¹⁹ Some California case law refers to the wrongful death action as completely independent of the personal injury cause of action.¹²⁰ For example, in *Earley v. Pacific Electric Railway Co.*,¹²¹ the California Supreme Court held that the settlement of a personal injury suit by the decedent does not bar the heirs of the decedent from bringing a wrongful death action.¹²² In *Earley*, the plaintiff sued for the wrongful death of her husband who was injured while a passenger on the defendant's railroad car.¹²³ Prior to his death, the husband released the defendant from future liability in consideration for the defendant's payment of the hospital bill and \$5200 in cash.¹²⁴ The *Earley* court stated that

114. See *Earley v. Pacific Elec. Ry.*, 176 Cal. 79, 167 P. 513 (1917); *Blackwell v. American Film Co.*, 189 Cal. 689, 209 P. 999 (1922) (holding that the wrongful death action is independent).

115. *Earley*, 176 Cal. at 81, 167 P. at 514 (suffering includes deprivation of support, society, comfort and protection).

116. *Early*, 176 Cal. at 79, 167 P. at 513. See *Curry v. Fred Olson Line*, 367 F.2d 921 (1966); *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981); *Kaiser Found. Hosp. v. Superior Court*, 254 Cal. App. 2d 327, 62 Cal. Rptr. 330; *Garcia v. State*, 247 Cal. 2d 814, 56 Cal. Rptr. 80 (1967); CAL. CIV. PROC. CODE § 377 (West Supp. 1988) (a wrongful death action is not a continuation or a derivative of the personal injury cause of action of the decedent but is an original distinct cause of action in the heirs of the decedent).

117. *Blackwell*, 189 Cal. at 689, 209 P. at 999. See *Pacific Employ. Ins. Co. v. Hartford Steam Boiler Inspect. & Ins. Co.*, 143 Cal. App. 2d 646, 299 P.2d 928 (1956) (applying worker's compensation law to a wrongful death action under the labor code).

118. See *Kaiser*, 254 Cal. App. 2d at 327, 62 Cal. Rptr. at 339; *Evans v. Celotex Corp.*, 194 Cal. App. 741, 28 Cal. Rptr. 259 (1987).

119. See *infra* notes 126-174 & accompanying text.

120. See *Earley*, 176 Cal. at 79, 167 P. at 513; *Blackwell*, 189 Cal. at 689, 209 P. at 999.

121. 176 Cal. 79, 167 P. 513 (1917).

122. *Earley*, 176 Cal. at 82, 167 P. at 514.

123. *Id.* at 80, 167 P. at 513.

124. *Id.* The written contract between the decedent and the defendant released "the Pacific

the right to bring a wrongful death action is completely independent of the decedent's right to recover for an injury.¹²⁵ The fact that the two claims arose from the same tort has no bearing on the independence of those claims.¹²⁶ According to the court, a settlement by the decedent releasing the defendants from further liability does not absolve the defendant of liability in the wrongful death action brought by the heirs.¹²⁷

Similarly, in *Blackwell v. American Film Co.*,¹²⁸ the California Supreme Court held that although the decedent recovered for injuries prior to his death, the heirs of the decedent would not be precluded from bringing a wrongful death action against the same defendant.¹²⁹ In *Blackwell*, the plaintiff brought an action for the wrongful death of her husband.¹³⁰ Prior to the wrongful death action, the plaintiff, as administratrix of the estate, represented the husband in the personal injury action initiated by the decedent before his death.¹³¹ The court held that recovery of damages for personal injury by the decedent does not prevent a recovery in a subsequent wrongful death action.¹³² The court relied on the holding in *Earley*, and on section 377 which creates a new cause of action.¹³³ The *Blackwell* court stated that the California wrongful death statute provides the heirs with an independent right to compensation for damages sustained due to the death of the decedent despite a successful judgment for the decedent's estate.¹³⁴

In *Coates v. Newhall Land and Farming, Inc.*,¹³⁵ the California Court of Appeal for the Second Appellate District held that when a decedent releases a defendant from liability prior to the occurrence of an injury, the heirs are not entitled to bring a wrongful death

Electric Railway Company from any and all claims and *causes of action* on account of any and all personal injuries . . . suffered by me . . . and due to the collision of a car upon which I was a passenger." *Id.* (emphasis added).

125. *Id.*

126. *Id.*

127. *Id.* See *Robinson v. Leigh*, 153 Cal. App. 2d 730, 733, 315 P.2d 40, 44-45 (1957) (allowing the wrongful death action after settlement by the personal injury plaintiff).

128. 189 Cal. 689, 209 P. 999 (1922).

129. *Blackwell*; 189 Cal. at 693-94, 209 P. at 1001.

130. *Id.* at 692, 209 P. at 1000.

131. *Id.* at 693, 209 P. at 1001.

132. *Id.* at 693-94, 209 P. at 1001.

133. *Earley v. Pacific Electric Ry. Co.*, 176 Cal. 79, 81, 167 P. 513, 513-14 (1917) (damages in wrongful death generally include compensation for deprivation of society, comfort and protection).

134. *Blackwell*, 189 Cal. at 694, 209 P. at 1001.

135. 191 Cal. App. 3d 1, 236 Cal. Rptr. 181 (1987).

action against that defendant.¹³⁶ In *Coates* the decedent was killed in a dirt bike accident in the defendant's park. Before the injury, the decedent signed a contract which expressly waived liability for any future injuries or death which might result from the ordinary negligence of the park owner.¹³⁷ Additionally, the decedent assumed all risk of injury from dangers inherent in dirt bike riding on the premises of the defendants.¹³⁸ The heirs of the decedent brought an action for wrongful death against the defendant-land owner.¹³⁹ The court distinguished *Coates* from *Earley* because in *Coates* the release was signed before the accident, while in *Earley* the release was not signed until after the injuries had occurred.¹⁴⁰ When an advance waiver of liability is given, a potential plaintiff expressly waives all claims against a particular, potential tortfeasor.¹⁴¹ Furthermore, by an express assumption of the risk, the potential plaintiff eliminates the duty of care owed by the potential defendant by personally assuming the duty of care.¹⁴² The *Coates* court held that by removing this duty of care, the contract signed by the decedent effectively authorized the negligent behavior of the defendant-landowner.¹⁴³ The court concluded that this authorized behavior was not wrongful, and therefore, failed to provide the basis for a wrongful death action.¹⁴⁴ The court in *Coates* further stressed that an express assumption of the risk by a plaintiff is actually more effective in authorizing the tortious behavior of a defendant than a contractual waiver of the potential remedy.¹⁴⁵ Unlike an express assumption of the risk, an express waiver of liability does not transfer the potential defendant's duty.¹⁴⁶ Instead, when a decedent expressly releases the potential defendant from liability, the potential defendant still owes a general duty, and the heirs are unaffected by a decedent's release.¹⁴⁷ Therefore, the court

136. *Coates*, 191 Cal. App. 3d at 1, 236 Cal. Rptr. at 181.

137. *Id.* at 7, 236 Cal. Rptr. at 184.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.* at 8, 236 Cal. Rptr. at 184. The recreational park/dirtbike rider contract is a private, voluntary transaction and does not violate public policy. *Id.* See *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, 101, 383 P.2d 441, 446-47, 32 Cal. Rptr. 33, 36-38 (1963) (providing guidelines for determining whether a contract releasing a person from future liability violates public policy).

144. *Coates*, 191 Cal. App. 3d at 8, 236 Cal. Rptr. at 184.

145. *Id.*

146. *Id.* at 7, 236 Cal. Rptr. at 184.

147. *Id.* at 7 n.3, 226 Cal. Rptr. at 184 n.3. The *Earley* rule applies to contractual release of liability not to contractual assumption of the risk before injury. *Id.*

noted that if the contract contained a release, but did not provide for an express assumption of risk, the wrongful death action would have survived.¹⁴⁸

In *Rovegno v. San Jose Knights of Columbus Hall Association*,¹⁴⁹ the California Court of Appeal for the First Appellate District held that the inability of the decedent to recover in a personal injury action did not bar his heirs from bringing a wrongful death action.¹⁵⁰ In *Rovegno*, the nineteen-year-old decedent drowned in a swimming pool at a private club.¹⁵¹ The mother of the decedent brought a wrongful death action against the club based on negligence in failing to provide a pool lifeguard.¹⁵² The defendants claimed that assumption of the risk by the decedent barred the mother from bringing an action.¹⁵³ The *Rovegno* court held that the right of the mother to bring a wrongful death action is independent of the ability of the decedent to recover in a personal injury action.¹⁵⁴ Although the decedent would probably have been unsuccessful in bringing a personal injury action had he lived, the court refused to consider assumption of the risk by the decedent as a defense in the wrongful death action.¹⁵⁵

The *Coates* and *Rovegno* cases can be reconciled by distinguishing between express and implied assumption of the risk.¹⁵⁶ In *Coates*, the heirs have no cause of action because the decedent expressly assumed the duty of the potential defendant, not because the cause of action is dependent on the decedent.¹⁵⁷ *Rovegno*, however, illustrates that unless the decedent expressly assumed all responsibility,

148. *Id.* (*Earley* applies only to true contractual releases of liability and not to contractual assumption of risk before injury). See generally *Earley v. Pacific Elec. Ry. Co.*, 176 Cal. 79, 167 P. 513 (1917) (contractual releases by an injured decedent do not bar a wrongful death action).

149. 108 Cal. App. 591, 291 P. 848 (1930).

150. *Rovegno*, 108 Cal. App. at 598, 291 P. at 850-51.

151. *Id.* at 593, 291 P. at 849.

152. *Id.*

153. *Id.* at 594, 291 P. at 849. The assumption of the risk argument was based on the fact that the club notified the members by mail that swimming in the pool was only allowed at the risk of the bather. *Id.* In addition, the club posted a sign near the pool, stating "bathers use pool at their own risk." *Id.* Therefore, the decedent impliedly assumed the risk by virtue of being a member of the club and using the pool. *Id.* See *Coates v. Newhall Land & Farming, Inc.*, 191 Cal. App. 3d 1, 7 n.3, 236 Cal. Rptr. 181 n.3.

154. *Rovegno*, 108 Cal. App. at 598, 291 P. at 850.

155. *Id.*

156. *Coates*, 191 Cal. App. 3d at 7 n.3, 236 Cal. Rptr. at 184 n.3 (citing *Rovegno*, 108 Cal. App. at 591, 291 P. at 848) (even though the defense might have been available against the decedent the defense may not operate to defeat the independent statutory right of the mother).

157. *Id.*

thereby absolving the potential defendant of a duty, the heirs of that decedent may pursue a wrongful death action.¹⁵⁸ This right survives the inability of the decedent to prevail in a personal injury action because of implied assumption of the risk.¹⁵⁹

The California wrongful death statute grants the heirs the right to bring a wrongful death action regardless of whether the decedent, if alive, could bring a personal injury cause of action.¹⁶⁰ The California Supreme Court stated that the wrongful death action is a completely independent cause of action.¹⁶¹ Therefore, a prior judgment for or a settlement by the personal injury plaintiff does not affect the wrongful death action.¹⁶² In addition, neither an implied assumption of the risk or a prior express waiver of liability by the decedent affects the wrongful death action.¹⁶³ Finally, an express assumption of the risk precludes a potential defendant's actions from being wrongful by removing a duty of care.¹⁶⁴ Thus, the fact that a wrongful death action may not be brought after an express assumption of the risk does not indicate that the wrongful death action is independent.¹⁶⁵ Furthermore, the wrongful death action is still independent because an express release of liability prior to the injury is not enough to affect the heirs' action.¹⁶⁶

C. *The Effect of Comparative Negligence on a Wrongful Death Claim*

In *Buckley v. Chadwick*,¹⁶⁷ the California Supreme Court held that if a decedent was found to be contributorily negligent, the heirs of

158. *Id.*

159. *Rovegno v. San Jose Knights of Columbus Hall Ass'n*, 108 Cal. App. 591, 598, 291 P. 848, 850-51 (1930).

160. CAL. CIV. PROC. CODE § 377 (West Supp. 1988).

161. *Earley v. Pacific Elec. Ry. Co.*, 176 Cal. 79, 80, 167 P. 513, 513 (1917).

162. *See Earley*, 176 Cal. at 80, 167 P. at 513 (wrongful death action allowed after settlement of the personal injury claim); *Blackwell v. American Film Co.*, 189 Cal. 689, 693, 209 P. 999, 1001 (1922) (wrongful death action allowed after recovery in the personal injury action).

163. *See Earley*, 176 Cal. at 80, 167 P. at 513 (contractual release by the decedent does not affect the personal injury claim); *Coates v. Newhall Land & Farming, Inc.*, 191 Cal. App. 3d 1, 8, 236 Cal. Rptr. 181, 184 (prior contractual release by the decedent alone is not enough to bar wrongful death action). *Rovegno*, 108 Cal. App. at 593, 291 P. at 849 (implied assumption of the risk by the decedent does not bar the wrongful death action).

164. *Coates*, 191 Cal. App. 3d at 7, 236 Cal. Rptr. at 184.

165. *Id.*

166. *Earley*, 176 Cal. 79, 167 P. 513; *Coates*, 191 Cal. App. 3d at 8, 236 Cal. Rptr. at 184.

167. 45 Cal. 2d 183, 288 P.2d 12 (1945).

that decedent would be barred from bringing a wrongful death action against the defendant.¹⁶⁸ In *Li v. Yellow Cab Co.*,¹⁶⁹ the law of contributory negligence was overruled and replaced by comparative negligence.¹⁷⁰ The overruling of contributory negligence in California abrogates the *Buckley* holding.¹⁷¹ Since *Li*, the heirs of a tort victim have a cause of action despite the negligence of the decedent.¹⁷² However, the recoverable damages of these heirs decline in proportion to the negligence of the decedent.¹⁷³ This reduction in the wrongful death recovery reflects the *Li* policy of assigning the defendant's liability in accordance with the defendant's fault.¹⁷⁴ Thus, the reduction in a defendant's liability to the wrongful death plaintiffs exemplifies *Li* policies, not the interdependence between the personal injury and wrongful death actions.

Since *Li*, the *Buckley* holding, imputing the negligence of the decedent to the heirs, remains as an obstacle for wrongful death plaintiffs.¹⁷⁵ The decedent's negligence no longer bars the wrongful death claim but is instead imputed to assess damages recoverable by the heirs.¹⁷⁶ The *Buckley* rule imputing the decedent's negligence to the heirs has been used to argue that the wrongful death action is dependent on the personal injury action.¹⁷⁷

The *Buckley* opinion was questionable when written and under current law should no longer be controlling.¹⁷⁸ The *Buckley* decision followed English common law which arose under the Lord Campbell Act and the common law of California interpreting the original Lord Campbell-like statute.¹⁷⁹ However, *Buckley* overlooked the significance of the enactment of the new wrongful death statute in 1872 which deleted the requirement that the decedent, if alive, could have brought an action.¹⁸⁰

168. *Buckley*, 45 Cal. 2d at 201, 288 P.2d at 22.

169. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

170. *Li*, 13 Cal. 3d at 804, 532 P.2d at 1226, 119 Cal. Rptr. at 858.

171. *Id.* See generally Comment, *supra* note 37, at 775 (discussing the implications of *Li*).

172. See *Li*, 13 Cal. 3d at 804, 532 P.2d at 1226, 119 Cal. Rptr. at 858.

173. *Id.* at 829, 532 P.2d at 1251, 119 Cal. Rptr. at 875.

174. *Id.*

175. See generally *id.* at 804, 532 P.2d at 1226, 119 Cal. Rptr. at 858 (overruling contributory negligence in favor of comparative negligence).

176. *Id.* at 810-11, 532 P.2d at 1230, 119 Cal. Rptr. at 862.

177. See *Evans v. Celotex Corp.*, 194 Cal. App. 741, 746, 238 Cal. Rptr. 259, 261 (1987) (citing *Buckley v. Chadwick*, 45 Cal. 2d at 183, 288 P.2d 12 (1955)).

178. See *infra* note 190 and accompanying text.

179. *Buckley v. Chadwick*, 45 Cal. 2d 183, 199, 288 P.2d 12, 21 (1955). The court found the rule of contributory negligence progenerate. It stated the holding should follow precedent regardless of whether or not the common law ruling was sound in law and reason. *Id.*

180. *Id.* at 197, 288 P.2d at 20.

The *Buckley* court stated that a specific legislative amendment was required to overcome the rule imputing the negligence of the decedent to the heirs.¹⁸¹ However, the imputation of negligence was implied from statutory language designating the wrongful death plaintiffs as successors to the personal injury action.¹⁸² The independent wrongful death statute removed the language implying that the rights and liabilities of the decedent should be imputed to the heirs.¹⁸³ Therefore, the *Buckley* court should have overruled common law as dictated by the enactment of the new wrongful death statute.¹⁸⁴

Although *Buckley* has not been officially overruled, the current trend in some states, including California, is to move away from the imputation of the decedent's negligence.¹⁸⁵ For example, in the analogous situation of a spouse's claim for loss of consortium, some jurisdictions, including California, reject the imputation of the negligence of the injured spouse to the plaintiff.¹⁸⁶ In *Lantis v. Condon*,¹⁸⁷

181. *Id.* at 201, 288 P.2d at 22. The perceived need for legislative rather than judicial action stemmed from the pervasiveness of the rule that contributory negligence bars the wrongful death action. *Id.* at 199, 288 P.2d at 21.

182. *Id.* at 204, 288 P.2d at 24 (Carter, J., dissenting). The first California wrongful death statute logically called for imputing the negligence to the heirs, yet the legislature repealed the derivative elements which required imputation of negligence. Under the original California statute, the heirs inherited the right of action from the decedent and had only rights which the decedent would have in the personal injury action. *Id.* at 197, 288 P.2d at 20. Consequently, the heirs inherited the negligence of the decedent and the statute implied that the decedent's contributory negligence barred the claim. *Id.* at 198, 288 P.2d at 20.

183. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 13.3 (2d ed. 1986) (no basis for imputing negligence of the decedent to the heirs). See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 24.4 at 1289-90 (1956); Wettach, *Wrongful Death and Contributory Negligence*, 16 N.C.L. REV. 211 (1938) (arguing that the wrongful death statute creates a separate and independent cause of action for the heirs and that the negligence of the decedent is irrelevant to the wrongful death action). See also CAL. CIV. PROC. CODE § 377 (West Supp. 1988) (The statute precludes imputation of negligence because the action belongs only to the heirs and arises on the death of the ancestor).

184. *Buckley*, 45 Cal. 2d at 183, 288 at P.2d 12.

185. V. SCHWARTZ, *supra* note 183 § 13.3 n.22. See 4 B. WITKIN, *SUMMARY OF CALIFORNIA LAW* (8th ed. 1974) § 711 (negligence will be imputed only where the plaintiff would have been liable for the negligence of that person), § 713 (relationships of parent and child or husband and wife in themselves furnish no basis for imputation of contributory negligence). See also *Harpst v. Kirkpatrick*, 26 Cal. App. 3d 482, 486, 102 Cal. Rptr. 621, 624 (1972) (existence of a family relationship was insufficient to establish agency for the imputation of negligence); *RESTATEMENT (SECOND) OF TORTS* §§ 487, 488 (1965), W. KEETON *supra* note 6, § 30.

186. *Lantis v. Condon*, 95 Cal. App. 3d 152, 159, 157 Cal. Rptr. 22, 25-26 (1975). V. SCHWARTZ, *supra* note 191, § 13.3; In *Li v. Yellow Cab Co.*, 13 Cal. 3d at 822, 532 P.2d at 1239, 119 Cal. Rptr. at 871, the California Supreme Court summarized two fundamental precepts of Civil Code section 1714. The first is that one whose negligence has caused damage to another should be liable therefor. The second is that one whose negligence has contributed to his own injury should not be permitted to cast the burden of liability on another. *Li*, 13 Cal. 3d at 822, 532 P.2d at 1239, 119 Cal. Rptr. at 871. A holding that a wife's damages for

for example, the California Court of Appeal for the First Appellate District refused to impute the negligence of the husband to reduce the damages in the loss of consortium action brought by the wife.¹⁸⁸ The court reasoned that the rule of imputed negligence had been abolished in California.¹⁸⁹ This trend away from imputation may lead to a reconsideration of the rule in wrongful death cases especially since California has adopted comparative fault.¹⁹⁰ Since the overruling of contributory negligence and the trend towards abolishing the imputation of negligence, *Buckley* is not controlling law.¹⁹¹

VI. THE RIGHT TO BRING A WRONGFUL DEATH ACTION AFTER AN ADVERSE PERSONAL INJURY JUDGMENT

The controversy in California regarding the right of an heir to bring a wrongful death action following an adverse personal injury judgment arose in *Secrest v. Pacific Electric Railway Co.*¹⁹² In *Secrest*, the California Court of Appeals for the Second Appellate District held that where a decedent and his wife received an adverse judgment in their personal injuries claim against the defendant, the wife of the decedent was barred from relitigating the identical issues in a wrongful death claim against the same defendant.¹⁹³ The court limited the holding to situations where the wrongful death plaintiff was also a party in the unsuccessful personal injury action. Since both claims

loss of consortium are reduced in proportion to the husband's contributory negligence violates these principles. *Lantis*, 95 Cal. App. 3d at 156, 159, 157 Cal. Rptr. at 23, 26. See *Fuller v. Buthrow*, 292 N.W.2d 672 (Iowa 1980) (refusing to impute negligence of injured spouse to the plaintiff in a loss of consortium case).

187. 95 Cal. App. 3d 152, 157 Cal. Rptr. 22 (1975).

188. *Lantis*, 95 Cal. App. 3d at 156, 159, 157 Cal. Rptr. at 23, 25 (criticizing *Buckley* and questioning its life expectancy given the trend in California law).

189. *Lantis*, 95 Cal. App. 3d at 156, 157 Cal. Rptr. at 23. The court rejects the contention that Civil Code section 5112 does not prevent the imputation of negligence to reduce damages only. *Id.* at 155. The purpose of section 5112 is to abolish the antiquated notion of imputed negligence.

190. V. SCHWARTZ, *supra* note 183, § 13.3 n.22. See *Willis v. Gordon*, 20 Cal. 3d 629, 636, 574 P.2d 794, 798, 143 Cal. Rptr. 723, 727 (1978) (Mosk, J., concurring); Nourse, *Is Contributory Negligence of Deceased a Defense to a Wrongful Death Action?*, 42 Calif. L. Rev. 310, 313 (1954) (recommending reconsideration of imputation of contributory negligence in California wrongful death actions).

191. See *Willis*, 20 Cal. 3d at 636-38, 574 P.2d at 798-800, 143 Cal. Rptr. at 727-29 (Mosk, J., concurring); *Buckley*, 45 Cal. 2d at 206, 288 P.2d at 25-26 (Carter, J., dissenting); Nourse, *supra* note 198, at 313 (questioning the logic of imputing the personal injury plaintiff's negligence to the heirs).

192. 60 Cal. App. 2d 746, 141 P.2d 747 (1943).

193. *Secrest*, 60 Cal. App. 2d at 751, 141 P.2d at 750.

involved the same issues, the wrongful death plaintiff was collaterally estopped from relitigating the issue of negligence.¹⁹⁴

The *Secrest* holding has no bearing on the independent status of the wrongful death action.¹⁹⁵ The court barred the wrongful death action because the plaintiff was a party to the previous action, not because she was in privity with a party to that earlier action.¹⁹⁶ Regardless of whether the wrongful death action is completely independent, collateral estoppel bars relitigation of issues resolved in a personal injury action by people who were parties to the personal injury action.¹⁹⁷ In *Kaiser Foundation Hospitals v. Superior Court*,¹⁹⁸ the California Court of Appeal for the Second Appellate District decided whether collateral estoppel bars wrongful death actions brought by plaintiffs who were not parties to the personal injury action.¹⁹⁹ The *Kaiser* court reasserted the position that a wrongful death action is a wholly independent cause of action.²⁰⁰ In *Kaiser*, a husband and wife brought an unsuccessful personal injury action against a hospital for negligent medical treatment.²⁰¹ After the wife died, her husband and daughter brought a wrongful death action against Kaiser Foundation Hospital.²⁰² The court allowed the defendant to collaterally estop the husband's claim since the husband had been a party to the prior action.²⁰³ A motion to collaterally estop the action by the daughter failed however, since the daughter was not a party, or in privity with a party, to the personal injury action.²⁰⁴ On appeal, the court of appeals held that the daughter, as a wrongful death plaintiff,

194. *Id.*

195. *Id.* at 748, 141 P.2d at 748. The right to bring a wrongful death action is wholly independent of the right of the decedent to bring an action and is no less independent because the action originated in the same tort. *Id.*

196. *Id.* at 747, 141 P.2d at 749-50.

197. *Beverly Hills Nat'l Bank v. Glynn*, 16 Cal. App. 3d 274, 283, 93 Cal. Rptr. 907, 912 (1971). If the wrongful death plaintiff is a party to the personal injury action, privity is not an issue in applying collateral estoppel. *Id.* The independence of the wrongful death action is only relevant in determining whether the people are in privity. RESTATEMENT (SECOND) OF JUDGMENTS § 46 comment c (1982).

198. 254 Cal. App. 2d 327, 62 Cal. Rptr. 339 (1967).

199. *Kaiser*, 254 Cal. App. 2d 327, 62 Cal. Rptr. 330.

200. *Id.* at 333, 62 Cal. Rptr. at 333. See *Secrest v. Pacific Elec. Ry. Co.*, 60 Cal. App. 2d 746, 748, 141 P.2d 747, 748 (1943) (asserting the independence of the California wrongful death statute).

201. *Kaiser*, 254 Cal. App. 2d at 330, 62 Cal. Rptr. at 331.

202. *Id.* (the jury rendered a judgment in favor of defendants and the judgment became final).

203. *Id.* (the husband was a party to the personal injury action and thus, in the same position as the wife in *Secrest*).

204. Compare *id.* (plaintiff was not a party in the personal injury action) with *Secrest*, 60 Cal. App. 2d at 746, 141 P.2d at 717 (where plaintiff was a party to the personal action).

lacked privity with the personal injury plaintiff.²⁰⁵ The court reasoned that the wrongful death action is not derivative of the cause of action brought by the decedent.²⁰⁶ Instead, the wrongful death action is a separate and distinct cause of action which may be brought by the plaintiff.²⁰⁷ Under the facts of *Kaiser*, no legal identity in interest existed, thus, no privity existed between the personal injury plaintiff and the wrongful death plaintiff.²⁰⁸ Although the daughter, as a future heir and dependent of her mother, had a strong financial interest in the outcome of the personal injury suit,²⁰⁹ no identity of interest existed.²¹⁰ The due process right of the daughter to have her day in court before losing her personal or property rights prevailed because the right was not represented by the personal injury plaintiff.²¹¹

In 1987, the California Court of Appeal for the First Appellate District reached a decision which sharply conflicts with the holding in *Kaiser*.²¹² In *Evans v. Celotex Corp.*,²¹³ the wife and daughter of a deceased tort victim brought a wrongful death action.²¹⁴ Prior to his death, the decedent brought an unsuccessful personal injury claim against the defendant.²¹⁵ In the subsequent wrongful death action brought by the decedent's family, the trial court collaterally estopped the claim because of the adverse judgment in the prior personal injury action.²¹⁶ On appeal, this grant of collateral estoppel was affirmed.²¹⁷ The *Evans* court applied the rule from *Secrest* that a prior adverse judgment in a personal injury action bars a subsequent wrongful death action through the application of collateral estoppel.²¹⁸ The *Evans* court, however, failed to adopt the important distinction required by *Secrest* that the wrongful death plaintiff be a party to the losing personal injury action.²¹⁹ Since the wrongful death

205. *Kaiser*, 254 Cal. App. 2d at 333, 62 Cal. Rptr. at 333.

206. *Id.*

207. *Id.*

208. *Id.* (nor was the action a continuation or revival of the personal injury action).

209. *Id.* (the interest arose by virtue of being an heir).

210. *Id.* (identity of interest is a legal interest).

211. *Id.*

212. See *Evans v. Celotex Corp.*, 194 Cal. App. 3d 741, 747 238 Cal. Rptr. 259, 262 (1987) (declining to follow *Kaiser*).

213. *Id.*

214. *Id.* at 746, 238 Cal. Rptr. at 260.

215. *Id.*

216. *Id.* (none of the wrongful death plaintiffs were parties in the personal injury action brought by the decedent).

217. *Id.*

218. *Id.* at 746, 238 Cal. Rptr. at 261.

219. *Id.*

plaintiff in *Secrest* was a party to the previous action, the doctrine of collateral estoppel was invoked.²²⁰ However, the *Secrest* court never addressed the issue of whether privity existed between wrongful death and personal injury plaintiffs.²²¹ Therefore, the *Evans* court was misguided in relying on *Secrest* as authority for a finding of privity between a personal injury plaintiff and a wrongful death plaintiff who was not a party to the personal injury action.²²²

The *Evans* court then addressed the issue of whether privity existed between the personal injury and wrongful death plaintiffs.²²³ The court did not follow the traditional notion of privity, which requires that a legal interest of a non-party be represented in an action.²²⁴ The *Evans* court instead applied the modern definition of privity which requires that the parties to the two actions be sufficiently close to justify invoking collateral estoppel when considering the due process rights of the claimant.²²⁵

The *Evans* court concluded that the interests of the wrongful death plaintiffs were "inextricably linked" with the rights of the decedent in the prior action.²²⁶ The court explained that the injury suffered by a wrongful death plaintiff arises from the earlier injury to the decedent.²²⁷ The court cites only the outdated²²⁸ Buckley rule that contributory negligence of the decedent bars a claim by the heirs for wrongful death to support the holding that the wrongful death action is dependent upon the personal injury action.²²⁹ The *Evans* court was

220. *Secrest v. Pacific Elec. Ry. Co.*, 60 Cal. App. 746, 749, 751, 141 P.2d 747, 748, 750 (1943).

221. See *Secrest*, 60 Cal. App. 2d 746, 141 P.2d 747. *Secrest* is not authority for the assertion that the heirs of a personal injury plaintiff are in privity with that plaintiff. The wrongful death plaintiff was a party to the personal injury action, so no privity was required for collateral estoppel to bar relitigation. Privity was not an issue in *Secrest*. *Id.*

222. *Evans*, 194 Cal. App. 3d at 746, 238 Cal. Rptr. at 261.

223. *Id.*

224. *Id.* (citing *Zaragosa v. Cravert*, 33 Cal. App. 2d 315, 318, 202 P.2d 73, 74-75 (1949)).

225. *Evans*, 194 Cal. App. 3d at 746, 238 Cal. Rptr. at 261 (citing *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 875, 587 P.2d 1098, 1104, 151 Cal. Rptr. 285, 289 (1949)).

226. *Evans*, 194 Cal. App. at 746, 238 Cal. Rptr. at 261.

227. *Id.*

228. The *Buckley* holding applies the law of contributory negligence to wrongful death plaintiffs but contributory negligence has been overruled in California and therefore *Buckley* is not the law in California. *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

229. *Evans*, 194 Cal. App. 3d at 746, 238 Cal. Rptr. at 261, (citing *Buckley v. Chadwick*, 45 Cal. 2d 183, 288 P.2d 12 (1955)). The court relied on *Buckley* as authority for the assertion that the rights of the heirs are dependent on the rights of the personal injury victim. *Id.* *Buckley* held that the contributory negligence of the deceased is a complete bar to a wrongful death suit. *Buckley v. Chadwick*, 45 Cal. 2d at 183, 201, 288 P.2d 12, 22 (1955). See *Li*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (overruling contributory negligence).

misguided in relying on *Buckley* since both contributory negligence and the imputation of negligence have been abolished.²³⁰

The holding in *Kaiser*, that no privity exists between the personal injury and wrongful death plaintiffs, will survive the modern privity test.²³¹ The parties in the personal injury and wrongful death actions have no legal interests in common because each action represents a distinct and independent right.²³² Thus, the relationship between the personal injury and wrongful death plaintiffs is not sufficiently close to justify the application of collateral estoppel.²³³

Even if the heirs are found to be sufficiently close to the decedent, due process requires that three criteria be met before a privity relationship exists.²³⁴ Since most California courts support the complete independence of a wrongful death action, wrongful death plaintiffs have no "identity or community of interest" with personal injury plaintiffs.²³⁵ Furthermore, since the wrongful death action is independent, the plaintiff-heirs should not reasonably expect to be bound by prior adjudication of the personal injury claim.²³⁶ The final due process requirement of adequate representation by the personal injury plaintiff must be decided on a case by case basis.²³⁷ Adequate representation alone will not suffice to invoke privity to collaterally estop without also meeting the other requirements.²³⁸ Therefore, the

But see Rovegno v. San Jose Knights of Columbus Ass'n, 108 Cal. App. 591, 291 P. 848 (1930) (implied assumption of the risk by decedent is not a bar).

230. See *Buckley*, 45 Cal. 3d at 199, 203-06, 288 P.2d at 21, 24-25; *Li*, 13 Cal. 3d 804, 532 P.2d 1226, 19 Cal. Rptr. 858 (overruling contributory negligence); *Lantis v. Condon*, 95 Cal. App. 3d 152, 157 Cal. Rptr. 22 (1975) (holding that imputation of negligence is abolished). See also *Willis v. Gordon*, 20 Cal. 3d 629, 636, 574 P.2d 794, 798, 143 Cal. Rptr. 723, 729 (Mosk, J., concurring) *Nourse*, *supra* note 190, at 313 (questioning the logic of the imputation of negligence in a wrongful death actions). See generally V. SCHWARTZ, *supra* note 183, § 13.3 n.22.

231. *Evans*, 194 Cal. App. 3d at 746, 238 Cal. Rptr. at 261.

232. Compare *Evans v. Celotex Corp.*, 194 Cal. App. 3d 741, 745-46, 238 Cal. Rptr. 259, 261 (1987) (requiring an identity or community of interest with and adequate representation by the losing party and a reasonable expectation that the judgment against the losing partner would bind a non-party) with *Kaiser Found. Hosp. v. Superior Court*, 254 Cal. App. 2d 327, 333, 62 Cal. Rptr. 330, 333 (1967) (no privity exists between the personal injury plaintiff and the wrongful death plaintiff because there is no identity in the causes of action and the wrongful death plaintiff is not a successor in interest).

233. *Clemmer v. Hartford Ins. Co.*, 22 Cal. 3d 865, 872, 587 P.2d 1098, 1100, 151 Cal. Rptr. 285, 287 (1979) (no privity relationship existed since the interests in the first action were different than the interests of the wrongful death plaintiffs); See *Kaiser*, 254 Cal. App. 2d at 334, 62 Cal. Rptr. at 333, (holding there is no identity of interest).

234. See *Clemmer*, 22 Cal. 3d at 875, 587 P.2d at 1102-03, 151 Cal. Rptr. at 289-90 (providing the modern due process guidelines for determining privity).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* (All three due process criteria must be met to establish a privity relationship).

three due process requirements necessary to invoke privity between wrongful death plaintiffs and personal injury plaintiffs are not satisfied.²³⁹ Since no privity exists, an adverse personal injury judgment should not bar a subsequent wrongful death action.²⁴⁰

VII. PROPOSAL

The California Supreme Court should hold that the wrongful death action is unaffected by an adverse personal injury judgment and reject the view that the personal injury and wrongful death actions are linked.²⁴¹ This holding would be consistent with the court's view that the wrongful death cause of action is wholly independent.²⁴² The court should expressly overrule *Buckley* and follow legal authority interpreting the current wrongful death statute²⁴³ and the view that statutory law abolishes imputed negligence.²⁴⁴

Once *Buckley* is formally overruled, no basis exists for the holding in *Evans*, that the personal injury and wrongful death claims are interdependent.²⁴⁵ However, even without the specific overruling, the *Buckley* rule is not pervasive enough to justify the view that the California wrongful death action is dependent of the personal injury action.²⁴⁶ This view conflicts with the clear meaning of the wrongful death statute and the predominant legal interpretation holding the statute completely independent. Since *Buckley* is outdated and conflicts with the newest trend towards doing away with imputed negligence the *Buckley* rule is not good authority for finding privity between the personal injury and wrongful death plaintiffs.²⁴⁷

CONCLUSION

Collateral estoppel bars relitigation of an issue by the parties to the prior action or people in privity with the parties. Personal injury

239. See *supra* notes 73-75 and accompanying text.

240. See *Kaiser Found. Hosp. v. Superior Court*, 254 Cal. App. 2d 327, 333, 62 Cal. Rptr. 330, 333 (1967).

241. See *supra* notes 198-240 and accompanying text.

242. See *supra* note 125 and accompanying text.

243. See *supra* notes 119-166 and accompanying text.

244. See *supra* notes 185-91 and accompanying text.

245. See *supra* notes 226-229 and accompanying text.

246. See *supra* notes 167-191 and accompanying text.

247. See *supra* notes 119-166 and accompanying text.

and wrongful death actions involve the same issues. Thus, collateral estoppel bars the wrongful death plaintiffs from relitigating the issues decided in a personal injury action, if the wrongful death plaintiffs were parties to the personal injury action or in privity with the personal injury plaintiffs. Privity connotes a relationship that is sufficiently close to justify the application of collateral estoppel. Additionally, a finding of privity is precluded if the due process rights of the claimant were not adequately represented in the previous cause of action. The determination of whether a privity relationship exists turns on whether the wrongful death action is derivative, or independent of the personal injury action.

In California, the wrongful death cause of action is independent of the personal injury action at least to the extent that recovery by the personal injury plaintiff-decedent does not bar the wrongful death cause of action. This independence, additionally, prevents an implied assumption of the risk and a prior express release of liability by the decedent from affecting the wrongful death action. Since the California Supreme Court held that the wrongful death statute is independent, the heirs have no link to the personal injury action that is sufficiently close to justify the application of collateral estoppel. Furthermore, the rights of the heirs to recover damages for the death of the decedent are not represented by the personal injury plaintiff. Due process requires that the heirs be given an opportunity to directly litigate the wrongful death claim. Consequently, if a personal injury plaintiff brings an action and loses, the right of the heirs to bring a cause of action should be completely unaffected.

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