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Res Judicata Redux

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Abstract

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Keywords

Res judicata; Estoppel

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> Those who cannot remember the past are condemned to repeat it.
> – George Santayana, *The Life of Reason*, Vol. II, Reason in Society.

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I. INTRODUCTION

The Motorcycle Accident:[1] An accident occurred between a motorcycle driven by A and a car driven by P and owned by Q. B, a passenger in the motorcycle sidecar (pillion), was injured. In the first action, Q sued A in negligence for damages to his car and was successful. Later, B sued P and Q in negligence for damages for personal injury arising out of the accident. P and Q issued a third-party notice against A, claiming to be indemnified on the ground of A's negligence. Can P and Q rely upon the judgment in the first case to repel the suit of B? If not, can they rely upon the judgment to prevent A from disputing liability on the third-party claim?

The Flood Case:[2] The plaintiff commenced an action for damages for flooding to his land which took place in the years 1967 and 1968. It was alleged that a dam erected by the defendant caused the river it was controlling to overflow and flood. The action was dismissed. Subsequently, he brought a second action in respect of damage alleged to have occurred from 1969 to 1972. In this second action he alleged that the damage was not due to flooding, but to the creation of an aquifer below the surface of the

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[1] *Shaw* v. *Sloan* (1982), [1982] N.I. 393 (C.A.) [hereinafter *Shaw*].

[2] *Town of Grandview* v. *Doering* (1975), [1976] 2 S.C.R. 621, 61 D.L.R. (3d) 455 [hereinafter *Doering* cited to D.L.R.].

lands, for which the defendant's dam was alleged to be responsible. Is this second action precluded by the first proceeding?

The Solicitor-Client Controversy:[3] C retained S, a solicitor, in regard to a dispute with C's employer over sick-pay. On the advice of his solicitor, an action was commenced, but was ultimately dismissed. C then commenced proceedings against the solicitor alleging negligent handling of the case and claiming return of money paid on account of fees and damages. C was successful against S and was awarded the return of the money paid on account of fees and damages. S then commenced an action against C for money owing for professional services rendered in respect of the initial case. Can C rely upon his successful prior claim against S to defend this latest suit?

It should be a simple question: to what extent will we allow litigants to bring the same or similar matters before the courts over and over again? At its most complex, the question might also involve whether the system should worry more when it is done through a direct challenge on a previous decision on the same point, or when it is done by dividing the claims arising out of a single incident among a series of lawsuits. The question is certainly basic to the structure and operation of the litigation system. Yet the answer, such that it exists, is embedded in a series of obscure doctrines masquerading under a number of different names and proclaiming widely divergent approaches. What is even more disheartening is that these "rules" appear to sanction conflicting results in cases that appear to be factually similar, all while neatly avoiding such elementary questions as the objectives of the rules and standards for their application.

This paper attempts a reassessment of the core of these rules, which go under such informative titles as *res judicata*, *issue estoppel*, *cause of action estoppel*, *collateral estoppel*, *estoppel per rem judicatam*, *abuse of process*, *et cetera*. The core issues to be discussed are the rationale for objectives of the law, how the objectives are to be implemented in the primary legal approaches, and how wide the net of legal rules should be cast. Existing judicial

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[3] *Cachia* v. *Isaacs* (1985), [1985] 3 N.S.W.L.R. 366 (C.A.).

performance is assessed, and an alternative approach to the basic issues is suggested.

A note on terminology is in order. The *res judicata* in the title refers to all the techniques and rules which the courts have used to prevent the re-litigation and division of claims, regardless of whether they have their traditional origin in estoppel, abuse of process, or other notions of public policy. The current terminology of the traditional rules will be introduced later.

As far as the object of these rules is concerned, I distinguish between cases where a party seeks to have re-litigated a claim or issue which has been determined in a prior proceeding, and cases where a party in a subsequent proceeding seeks to litigate an issue or claim which has not been decided in a prior proceeding, but could have been joined in a prior case. The former is referred to as *re-litigation* and the latter, *division of claims*. Together they are called *multiplicity*.[4]

II. RATIONALE

It has been repeatedly stated that the overarching aim of the law of *res judicata* and related doctrines is to limit the extent to which parties to a lawsuit may re-litigate claims or issues determined in the lawsuit. Two basic rationales have been advanced:[5]

a) It is in the interests of the State, and therefore a matter of public policy, that there be an end to litigation; and,

b) hardship is caused to individuals who are made to re-litigate a point twice as a result of the actions of another party.

No guidance is given as to why it is in the interests of the state to have an end to litigation, nor is discussion offered as to how

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[4]In more general usage, multiplicity connotes not only proceedings resulting from the failure to join claims in a prior proceeding, but also proceedings arising out of the non-joinder of parties. This issue has only tangential relevance to the questions addressed in this paper.

[5]See, for example, *Carl-Zeiss-Stiftung* v. *Rayner and Keeler Ltd (No. 2)* (1966), [1967] A.C. 853, [1966] 2 All E.R. 536 at 549, Reid L.J.; *New Brunswick Railway Co.* v. *British and French Trust Corp.* (1938), [1938] 4 All E.R. 747, [1939] A.C. 1 at 19-20, Maugham L.J. [hereinafter *New Brunswick Railway* cited to A.C.]; *Lockyer* v. *Ferryman* (1877), 2 App. Cas. 519 at 530, Blackburn L.J.

re-litigation causes hardship to any party. The vague objection of preventing the re-litigation of issues must be assessed with reference to the interests served by its pursuit. The importance of those interests, and the extent to which they conflict with other value objectives, will determine the desirable mix of rules adopted by a court or legislature. The interests protected by a rule restricting re-litigation of claims or of issues may be assessed on the basis of those factors which impinge upon the desirable operation of the administration of justice.

The court system has an interest in ensuring that proceedings are tried so that the appropriate level of justice is attained at a minimum of cost. The multiplicity of claims has the effect of increasing the amount of wasteful litigation. Both the re-litigation of claims and the division of claims into multiple lawsuits will impose extra demands upon scarce court facilities. This is self-evident with respect to re-litigation. Even if division does not involve re-litigation in a strict legal sense, there are the additional costs of commencing and maintaining an additional proceeding, and inevitably, some substantial duplication of effort with respect to investigation and proof. A rule restricting the division of claims makes a judgment that it is more efficient for a number of claims arising out of or relating to an incident or series of related incidents to be tried together. A rule preventing multiplicity therefore generally mandates a certain economy on the part of litigants that goes to the benefit of the court system as a whole.

Although the legal literature is full of global condemnation of re-litigation,[6] it may not be such an obviously bad thing. Might not the ability to re-litigate result in better decisions?[7] First, there is nothing to indicate that the second lawsuit will be more likely to be a correct decision than the first. Assuming that each court considering the same claim will do so afresh, the likelihood of error would probably be the same.

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[6]See *supra*, note 2 and the collection in G.S. Bower, *The Doctrine of Res Judicata*, 2d ed. by A.K. Turner (London: Butterworths, 1969) at 10-15.

[7]See the discussion in Richard A. Posner, *Economic Analysis of Law*, 3d ed. (Boston and Toronto: Little, Brown and Company, 1986) at 542-44.

If anything, the likelihood of error would be greater in the case of the re-litigated claim, although not for reasons associated with the performance of the court. The quality of decisions in an adversary system depends in large part upon the efforts taken by the parties to present their respective cases.[8] Multiplicity may reduce the incentive of a party to make the utmost effort in the first lawsuit, because there is always the prospect of *trying again* by a party disappointed with the result, either on the same issue (re-litigation), or another (division). Preventing multiplicity increases the incentive on the parties to present their best cases, thus increasing the quality of judicial decision making.

A variation of these arguments applies specifically to the division of claims. First, it is highly unlikely that a divided claim will not entail the likelihood of substantial re-litigation. Even if one grants the possibility that there may be some lawsuits involving divided claims that do not entail substantial re-litigation, a further objection to divided claims may be mounted. It does not take a very deep insight to realize that a judge will be better equipped to effect *justice* between the parties where the whole controversy between the parties is before the judge, rather than one isolated aspect.

These comments, arising out of consideration of the wastefulness of multiplicity, are also relevant to another basic factor, the quality of justice. Whatever one might say about its other functions, one of the primary products of the system of justice is the resolution of disputes. The resolution of disputes cannot take place if it is possible that disputes will be re-litigated or divided into multiple lawsuits. Further, if one is to grant other justice aims as compensation, deterrence, or rule making, it is equally clear that these objectives cannot be attained in an environment of uncertainty. The final resolution of disputes therefore can be considered to be central to the effective functioning of the system of justice.

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[8] See, for example (and the literature is much more voluminous), Sir Richard Eggleston, "What is Wrong With the Adversary System?" (1975) 49 Aust. L.J. 428; Neil Brooks, "The Judge and the Adversary System" in Allen M. Linden, ed., *The Canadian Judiciary* (North York, Ont.: Osgoode Hall Law School, 1976); and John Thibaut & Laurens Walker, "A Theory of Procedure" (1978) 66 Cal. L. Rev. 541.

As part of this goal, courts have an interest in reducing the risk of inconsistent decisions created by the division or re-litigation of claims. This may be seen cynically as the desire to eliminate the potential embarrassment that inconsistency might occasion, but the consistency and credibility of the adjudication system is important not only as to the achievement of its goals, but also to its legitimacy as a social institution.

Rules against re-litigation and division must be viewed together. A rule which prohibited only re-litigation of claims already decided, could paradoxically increase the possibility of subsequent lawsuits on a divided claim. To make operational a rule which prohibited only re-litigation, the parties to a subsequent proceeding could not take a position which contradicted the finding in the prior proceeding. This would enable a party succeeding on the earlier finding to make further claims on its coattails with little risk of failure on this issue, and make it easier to divide claims. In order to prevent such a side-effect from a rule prohibiting re-litigation, it would be necessary to require that all claims relating to the subject-matter of the earlier finding be dealt with at one proceeding.

Many of the rationales discussed above also serve to protect the private interests of the parties. Litigants have a strong general interest in the certainty and finality of judicial resolution of disputes. Uncertainty from the threat of re-litigation, or the creation of inconsistent decisions, undermines the usefulness of dispute resolution to the parties.

In most cases, the rules against multiplicity act to prevent a party from imposing additional costs on another. This occurs in a few cases where the party creating the litigation *harasses* with *vexatious* litigation, to use the conventional terminology. In other cases, the operation of the indemnity rule as to costs may reduce the incentive for a party anticipating success to avoid the division of claims. In these cases, a rule against division of claims would force a party to economize upon the costs which may be imposed on the opposite party.

This correspondence between the interests of the justice system and private litigants may be a happy one, but should not be viewed as an acceptance that the subjective interests of the parties should control the application of the rule. Thus, discussion of the *fairness* of the operation of any rule against multiplicity should be

assessed according to its consistent achievement of the objectives set out above.

A. *Conflicting Rationales*

Rules governing multiplicity must be viewed in context with the various elements of the civil procedural system that channel and structure the flow of litigation. Finality and prevention of multiplicity are highly valued, but not at all costs. The right to obtain review of an otherwise final decision results in channelling challenges to the decision through the appellate process,[9] rather than through re-litigation of the point. This coincides with the view of litigation as a single episode ending in judgment,[10] with the appeal being litigated as an epilogue to that episode rather than as a new proceeding.

It has been suggested that the rules to prevent re-litigation and division of claims conflict with other values important to the dispute resolution system, namely, permitting "full development of the contentions and evidentiary possibilities of the various parties, with the aim of deciding the case upon the merits."[11] It is further suggested that such values would indicate a permissive approach to re-litigation and division.

There is no necessary conflict between a desire to bring litigation to an end, and a wish to allow parties a full opportunity to develop their claims and contentions. If a full opportunity to present and develop all claims is provided, it is difficult to discern

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[9]Civil justice in the Commonwealth is characterized by a right to at least one level of appeal from, or review of, a final trial decision in a civil case: for example, see the Ontario *Courts of Justice Act, 1984*, S.O. 1984, c. 11, ss 13, 15, and 17; Victoria *Supreme Court Act 1986*, s. 10(2); *Supreme Court Act (U.K.), 1981*, c. 54, s. 16.

[10]Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281 at 1282-83.

[11]Fleming James, Jr. & Geoffrey C. Hazard, Jr., *Civil Procedure*, 2d ed. (Toronto and Boston: Little, Brown and Company, 1977) at 530. The point also has been described as a contrast in approach between the *termination of disputes* and the *just resolution of disputes*: Allan C. Hutchinson, "The Formal and Informal Schemes of the Civil Justice System: A Legal Symbiosis Explored" (1981) 19 Osgoode Hall L.J. 473 at 476.

any adverse impact from rules preventing re-litigation and division. On the contrary, the goal of deciding a case upon the merits would seem to be well served by the provision of effective rules to ensure a full airing of the issues within a single lawsuit, and not via multiple lawsuits. Restrictive, rather than permissive, rules respecting re-litigation and division may better assist fuller litigation by providing an incentive for the parties to take the utmost steps to present their case (through a prohibition on re-litigation), and through having the court adjudicate upon the whole of a legal dispute (through a prohibition on division). The one limitation this may pose for the application of rules regarding multiplicity is the obvious one that the party to the prior proceeding must have had a full and fair opportunity to litigate the issue.

Can any other adverse impact be anticipated from rules preventing re-litigation or division? There may be some cases where finality works hardship. These may include cases where there is difficulty in ascertaining the plaintiff's damages, where there has been fraud, or in family law cases.[12] In assessing these particular cases, however, one should be wary of attributing the cause to re-litigation or division rules, where the real cause may be an injustice or inconsistency in a particular area of law.

Could a rule designed to prevent division result in cases of undue complexity and length, and thus exceed the court's ability to deal with the case efficiently? It is conceded that there may be limits to a court's ability to deal with multi-issue cases. This does not provide an argument against an effective rule requiring the joinder of claims in the first instance; rather, it is an argument for the court to make active use of its wide powers under the rules governing civil proceedings to manage the conduct of the proceeding in an efficient manner.[13]

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[12]In certain cases, exceptions may be grafted to deal with factors that interfere with the assumptions made respecting the conduct of litigants, as in the case of fraud, or where the standard model of civil litigation may be less applicable, as in some family law cases. See generally G.S. Bower & A.K. Turner, *supra*, note 6 at 303-26.

[13]Typically, where the joinder

> ... may unduly complicate or delay the hearing or cause undue prejudice to a party, the court may, (a) order separate hearings; (b) require one or more of the claims to be asserted, if at all, in another proceeding; (c) order that a party be

B. *Alternative Tools*

A rule which precludes multiplicity absolutely may be viewed as a harsh way in which to achieve the desired goals. The first question is the extent to which the existing rules in this area of the law have a reasonable chance of attaining these goals, and, if they are found wanting, whether appropriate variations can achieve them. This is the subject of the remainder of this article. It is also necessary to determine whether any other kind of rules may be more appropriate instruments to achieve the desired objectives. Although final conclusions on their appropriateness are not possible before evaluating the operation of the current rules, a preliminary assessment of the most likely alternatives may be attempted.

1. No rule

It may be argued that rules respecting multiplicity are not required – that there are sufficient deterrents to prevent multiplicity. Are there sufficient incentives in the litigation system to make common law or statutory rules on re-litigation and division of claims redundant? In particular, the cost of multiple lawsuits, and any likelihood that the same result would be obtained in the case of re-litigation, may deter such multiple proceedings.

This would be a tenable argument if one could be certain that all the costs occasioned by the re-litigation are borne by the party causing them. This is not the case. Massive costs may be imposed (1) upon the administration of justice by a litigant's use of court time and facilities, (2) upon the opposite party through the occasioning of additional costs, and (3) upon other litigants vying for the use of scarce judicial resources. There are also the indirect impacts of multiplicity upon the administration of justice discussed

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compensated by costs for having to attend, or be relieved from attending, any part of a hearing in which the party has no interest; ... (e) make such other order as is just.

Ontario *Rules of Civil Procedure*, O.Reg. 560/84, r. 5.05. Similar provisions are contained in U.K. *Rules of the Supreme Court 1965*, O. 15, r. 5 and in Victoria *General Rules of Procedure in Civil Proceedings, 1986*, O. 9, r. 9.04.

above which transcend the direct costs occasioned to public and private litigants.[14]

Further, the costs system will only impose costs on the private plaintiff if he is unsuccessful. The re-litigating plaintiff with a strong likelihood of success has the smaller disincentive to litigate. Even if he is unsuccessful, the re-litigating plaintiff will only be liable for a portion of the costs of the other side.[15]

Where litigants have widely diverging abilities to pay, the nuisance suit can be an effective means to coerce a less wealthy party to settle for less than his legal entitlement. Re-litigation may increase the risk of a nuisance suit based upon this disparity in wealth, and may be undesirable for that reason alone. Therefore some incentive needs to be built into the litigation system to reduce the risk of costly re-litigation.

2. Costs incentives

It has been suggested by some writers that rather than having a rule which barred re-litigation, costs awards should penalize parties attempting to re-litigate questions or attempting to raise issues which could have been appropriately dealt with in an earlier proceeding.[16]

Punitive costs awards are only appropriate where the basis for the award is conduct which adversely affects another party. The award of costs is therefore some function of the costs incurred by party in whose favour the award is made. This also acts as a *cap* on the punitive award and prevents it from going beyond a full

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[14] See *supra*, note 7 and text accompanying and following.

[15] Under the English system, the customary award of party and party costs to the successful party represents only a partial indemnity of costs actually incurred: see D.B. Casson & I.H. Dennis, *Odgers' Principles of Pleading and Practice in Civil Actions in the High Court of Justice*, 21st ed. (London: Stevens & Sons Ltd, 1975) at 371-74.

[16] E.W. Cleary, "Res Judicata Reexamined" (1948) 57 Yale L.J. 339 at 347.

indemnity to the party awarded costs.[17] This is not a sufficient deterrent in the case of re-litigation where its undesirable effects impact elsewhere in addition to the opposite party. A conventional award of costs therefore cannot capture all costs occasioned, and thus cannot act as an adequate incentive to control the threat of re-litigation.

Further, a rule prohibiting multiplicity works to actually prevent such matters from going forward to judgment, thus preventing the effects of multiplicity in the instant case. A costs rule operates *ex post facto*, only providing an incentive effect for future behaviour by other litigants, and does not act to prevent the costs imposed on the parties and the judicial system by the current litigation. Further, given the discretionary nature of most costs rules, it is uncertain whether judges can be counted upon to make effective use of punitive costs awards to create any consistent deterrent.

3. Joinder rules

Might not the use of joinder rules provide an alternative to a ban on division? Although they could have no effect on re-litigation, they could provide sufficient incentive to ensure the joinder of all related claims in one proceeding.

The proposal is unobjectionable in principle. However, the suggestion dodges the question of sanction. What should any such rule provide if a party fails to observe the requirement — a penalty in costs, or the striking out of the subsequent claim? At this point the debate shifts to the grounds already canvassed above.

It is important, however, to realize the important connection between joinder rules embodied in rules of court, and judge-made rules respecting division of claims. Although the primary joinder of

[17] Typically, the court is limited in its discretion to awarding solicitor and client costs, which represents a full indemnity to the party: see Casson & Dennis, *supra*, note 15 at 373.

claims rules are generally only permissive,[18] there is the potential for conflict between a broad rule against division of claims and a narrow permissive joinder rule. The real possibility of a situation where the latter requires joinder, and the former prevents joinder, makes clear the need to harmonize judicial and legislative policies in this regard. Unfortunately, there is little indication that either judges or legislators are aware of the issue, let alone its significance.

C. *The Traditional Rules*

The modern principles of the law in this area may be defined in three parts. Attempting to use the term *res judicata* with any clarity is futile given the wide variety of situations to which it has been loosely applied. Still, out of the chaos, one may outline the following three generally accepted principles which apply to lawsuits involving the same parties:[19]

1. A plaintiff or equivalent claimant may not re-litigate the same cause of action against the same defendant in two lawsuits. This is known as the narrow *res judicata*, or *cause of action estoppel.* This principle applies whether or not the plaintiff seeks to re-argue the factual or legal theory of the litigated cause of action previously adjudicated upon, or present a new one.

2. Even where the cause of action in the second lawsuit is different in the sense of not giving rise to a cause of action estoppel, the plaintiff is precluded from re-litigating issues against defendants which have been finally determined in the previous proceeding. This is generally called *issue estoppel.*

3. In cases where neither of the above estoppels apply, the court nonetheless retains a general discretion to refuse to allow a plaintiff to advance a claim where it could have and should have

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[18] "A plaintiff may join any number of claims against a defendant...": Victoria *General Rules of Procedure in Civil Proceedings, 1986*, O. 9, r.9.01. Also, Ontario *Rules of Civil Procedure, supra*, note 13, r. 5.01; *Rules of the Supreme Court (U.K.), 1965*, 0.14, r. 1.

[19] One of the clearest recent summaries appears in the judgment of McGarvie J. in *Port of Melbourne Authority* v. *Anshun Pty. Ltd* (1979), [1980] V.R. 321 (S.C.) at 324-25, aff'd (1980), [1981] V.R. 81 (F.C.), aff'd (1981), 55 A.L.J.R. 621, 33 A.L.R. 248 (H.C.) [hereinafter *Anshun* cited to A.L.J.R.].

been advanced in a prior proceeding. This discretion is exercised as part of the inherent jurisdiction of the court to prevent abuses of the court's process.

Such a simple formulation of the traditional law in this area hides a number of difficult questions regarding the scope and application of these "rules." Quotation marks are in order because the use of the word might be taken to imply some kind of systematic ordering of criteria. The incremental development of the law has avoided the discussion of the rationale for stating the rules in three stages. A first question would be whether there is any validity to the distinction between cause of action estoppel and issue estoppel, and, assuming that the first is merely a subset of the latter, whether much judicial confusion and hairsplitting, as to the difference between the legal rules, could be avoided. In order to do so, each of the rules relating to cause of action estoppel and issue estoppel must be stripped of the heavy encrustations of judicial elaboration, to bare the essential impact of the rule.

There appear to be two primary distinctions between the doctrines. The first is that *cause of action estoppel* encompasses not only everything that was decided in the earlier cause of action, but also those things which *might* have been raised and decided.[20] *Issue estoppel* only applies to those questions actually decided upon in the earlier proceeding. The former acts to require the joinder of claims falling under the cause of action umbrella; the latter merely prevents the part from acting inconsistently with a former decision.

Although some cases have asserted a distinction in principle between cause of action estoppel and issue estoppel,[21] there is little discernable content in the alleged distinction. Rather, one might view the existence of the two as a reflection of their historical development. Cause of action estoppel developed first, and then issue estoppel arose to deal with instances of re-litigation that were

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[20] *Fidelitas Shipping Co. Ltd* v. *V/O Exportchleb* (1965), [1965] 2 All E.R. 4 at 8-9, Denning M.R., [1965] 2 W.L.R. 1059. This is accounted for in part by the *scholastic metaphysic* that the cause of action is *merged* in the judgment: see G.S. Bower & A.K. Turner, *supra*, note 6 at 355-58.

[21] For the contention that cause of action estoppel and issue estoppel are based on completely different principles, see *Scruby* v. *Hoggan* (1955), 55 S.R. (NSW) 2.

not encompassed by the rule as embodied in the narrow version of *res judicata*, but were nonetheless seen to be undesirable and to be prohibited. Finally, the residual resort to abuse of process may be regarded as an effort on the part of the court to provide for those cases which did not fall within the traditional doctrines as defined, but somehow ran afoul of the unarticulated principles underlying them.

How effective have the courts been in controlling multiplicity through the two doctrines? The next three sections devote their attention to this question. Although there are other important questions that must be determined in an application of the traditional rules,[22] a useful test of the court's performance lies in the success they have had in construing the core criteria of cause of action or issue. The next section discusses the former concept, and compares it to the use of the abuse of process doctrine.

III. CAUSE OF ACTION ESTOPPEL AND ABUSE OF PROCESS

A. *What Is a Cause of Action?*

There is a remarkable lack of judicial elaboration as to how one is to go about defining the limits of a cause of action. The stock definition, that a *cause of action* is "the fact or combination of facts which give rise to a right to sue,"[23] begs the question. Does this mean that when deciding whether the two causes of action are the same, the judge should have regard to identity between the factual basis of the suits, the legal characterization pleaded, the legal remedy requested in the suits, or any of the above? Is the scope of the cause of action to be determined solely by reference to the factual basis of the two lawsuits? The answer appears to be no.

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[22]These include: what kinds of judicial decisions can give rise to the estoppel, whether the former decision was final, whether the former court or tribunal had jurisdiction over the matter decided. They are beyond the scope of this article.

[23]John Burke, *Jowitt's Dictionary of English Law*, 2d ed. (London: Sweet & Maxwell Limited, 1977) at 297; see also John S. James, *Stroud's Judicial Dictionary of Words and Phrases*, 4th ed. (London: Sweet & Maxwell Limited, 1971) at 406.

The courts are generally quite clear, at least in the abstract, that the same facts can give rise to different causes of action, and that separate suits upon each of these causes of action gives rise to no estoppel.[24]

Do we then determine the cause of action with regard to the legal construction placed on the facts, in the sense that a single wrongful act may give rise to one cause of action in negligence and another cause of action in trespass? Here matters become much murkier. Witness the following:

1. In some jurisdictions, an action in negligence for property damage does not prevent a subsequent action in negligence for personal injury, based upon the same accident.[25]
2. An action for a debt owing under a contract may be a different cause of action from an action for damages for breach of contract, notwithstanding that the default that gave rise to each claim was the same in each situation.[26]

These situations, not atypical, might lead one to conclude that the distinguishing factor between causes of action lies in the nature of the demand or remedy sought. However, as the leading text in the area of numerous cases proclaims, this is not the case:

> [I]f ... the facts are identical [and] these facts give rise to substantially one and the same ground of complaint, the plea of former recovery prevails, notwithstanding that there may be technical and formal differences between the two causes of action, or that the two remedies may be called by different names.[27]

Under this banner we find the following results:

A. An action for damages for breach of contract to build a

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[24] *Brunsden* v. *Humphrey* (1884), [1881-85] All E.R. Rep. 357, 14 Q.B.D. 141 at 146 (C.A.), Esher L.J. [hereinafter *Brunsden* cited to Q.B.D.]; *Rowley* v. *Wilkinson* (1968), [1968] N.Z.L.R. 334 (C.A.); *Hall* v. *Hall and Hall's Feed & Grain Ltd* (1958), 15 D.L.R. (2d) 638 (Alta. C.A.).

[25] *Brundsen, ibid.* Not followed in *Cahoon* v. *Franks* (1967), [1967] S.C.R. 455, 63 D.L.R. (2d) 274.

[26] *Overstone, Ltd* v. *Shipway* (1961), [1962] 1 W.L.R. 117, [1962] 1 All E.R. 53 (C.A.); *Lawlor* v. *Gray* (1984), [1984] 3 All E.R. 345 (Ch. D.).

[27] G.S. Bower & A.K. Turner, *supra*, note 6 at 376, citing *Green* v. *Weatherill* (1929), [1929] 2 Ch. 213 at 221, [1929] All E.R. Rep. 428.

house in a workman-like manner precludes a subsequent action on the same facts for damages for failure to use proper materials.[28]

B. A claim for damages for breach of an agreement bars a subsequent action for specific performance of the agreement.[29]

One might attempt to distinguish between cases 1 and 2 and cases A and B on the basis that in the former two, the essential distinguishing point was the legal construction placed upon the facts, as opposed to the latter two where the different remedies arose out of a single legal characterization of the facts.[30] However, it is beyond explaining how one can rationally distinguish between the two pairs in the context of a rule designed to prevent re-litigation and division of claims. Such inconsistency in treatment would be perhaps understandable if it were in the course of an extended judicial debate over the tests to be used in determining the scope of a cause of action, and more importantly, if it were the appropriate function of the rule. Unfortunately, there is no sign of a debate, or even an awareness on the part of the courts that they are arriving at widely divergent results for no apparent reason.

A particularly good example of the problems of judicial decision making in cause of action estoppel is the *Flood Case*.[31] Are the causes of action alleged in the two suits in that case distinguishable because of the difference in time between when the various harms occurred? Arguably, however, this relates to the question of damages, and maybe not to the act (the building of the dam) which allegedly caused the damage. Does the different "theory" of causation raised in the second action allow one to

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[28] *Conquer* v. *Boot* (1928), [1928] 2 K.B. 336, [1928] All E.R. Rep. 120 (Div. Ct.), followed in *Van Amstel* v. *Country Roads Board* (1961), [1961] V.R. 780 (S.C.) [hereinafter *Van Amstel*], where an action for the recovery of money due under contract was held to preclude subsequent action for damages for non-payment of the same moneys.

[29] *Hennig* v. *Northern Heights (Sault) Ltd* (1980), 116 D.L.R. (3d) 496, 30 O.R. (2d) 346 (C.A.) [hereinafter *Hennig* cited to O.R.].

[30] Not even Sir Alexander Kingcome Turner attempts such an *ex post facto* rationalization in recounting these cases; see G.S. Bower & A.K. Turner, *supra*, note 6 at 372-82.

[31] *Supra*, note 2.

characterize the second action as being based on a different cause of action? Should it make any difference whether the information raising the possibility of the aquifer theory of causation was available at the time of the first action?

The court's analysis in the actual case[32] considered none of these potential issues, and proceeded on a very simple basis. No essential difference was found between the two actions. The holding is conclusion-oriented rather than analytical:

> [A]ll the facts which are alleged to constitute tortious conduct ... in the present case existed when the prior action went to trial and it was there found that these facts did not support the ... action....[33]
> The issue of whether the river was caused to overflow its banks by the dam and damage the respondent's lands ... was thoroughly explored in the first action. The same question is raised in the present action.[34]

Unfortunately, the dissent is expressed in a similar fashion:

> It is true that the issue of whether the river was caused to overflow its banks and damage the respondent's lands ... was thoroughly explored in the first action....
> That same question *is not raised* in the present action. What is urged is a completely different cause of action said to have occurred at a completely different time of the year....[35]

Both judges spoke with the same focus on the *question* and the *issue* in the two proceedings, yet both managed to come to completely opposite conclusions.[36]

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[32] *Ibid.*

[33] *Ibid.* at 549, Ritchie J.

[34] *Ibid.* at 462.

[35] *Ibid.* at 466, Pigeon J.

[36] Quite apart from the conclusive nature of the reasoning typical in these cases, both judges were guilty of ignoring a body of law that might have provided a firmer, though conventional, basis for decision. A series of cases dealing with the *continuing cause of action* conundrum in the law of damages have held that where one act (here, the construction of the dam) causes separate damage on two separate occasions, two causes of action accrue: see Harvey McGregor, *McGregor on Damages*, 13th ed. (London: Sweet and Maxwell Ltd, 1972) at 199; S.M. Waddams, *The Law of Damages* (Aurora, Ont.: Canada Law Book Limited, 1983) at 639. If one accepts this without discussion, the plaintiff should not have been barred by cause of action estoppel.

Behind these polar positions lie the following issues:

1. Given the lack of any coherent theory of what constitutes a cause of action for the purposes of the doctrine, does the concept serve any useful purpose in preventing multiplicity? Too many of the decisions in this area dissolve into historical analyses of the content of the forms of action at common law and their content,[37] or adopt the conclusion-oriented approach illustrated above, forgetting precisely why the question is being asked.
2. Would it not be better to substitute a test that more closely reflects the aims of the law? The key value of cause of action estoppel lies in its barring of claims that ought to have been litigated in a prior proceeding. The concept of a cause of action provides no more than a standard by which the court can determine what ought to have been litigated in a prior action.

Viewed this way, cause of action estoppel becomes more than a rule of compulsory joinder of claims. One may then confront the question of how to define which claims should be joined together squarely. Before that, one should examine the closely related area of dismissal for abuse of process.

B. *Bar As an Abuse of Process*

The courts have long recognized that there are claims which could and should have been raised in a prior proceeding which it would be unjust to permit the litigation of, notwithstanding that the situation does not fall within the boundaries of cause of action estoppel as conventionally defined. Rather than revise the approach to "what is a cause of action" to encompass these cases, the judiciary has relied upon the inherent jurisdiction of the court, holding that the subsequent claim should be struck out as an abuse of the process of the court.

This approach does not rely upon a single criterion to determine whether the subsequent litigation is in fact an abuse. Rather, the recent judgments in this area have looked backward to

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[37] See, for example, *Van Amstel*, *supra*, note 28.

cases which formed the foundation of cause of action estoppel and extracted their aim, relying principally on the following statements from 1843 and 1889:

> [W]here a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special circumstances, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.[38]

> ... [I]t would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted, by changing the form of the action, to set up that same case again.[39]

The first statement reflects the purposive approach to *res judicata* prior to the taking up of the weighty terminological baggage of *cause of action*, *merger*, and *bar*. It differs from cause of action estoppel in two important respects. First, the test is directly aimed at the question of whether the party in the earlier proceeding ought to have raised the matter which is raised in the second proceeding. Second, the test acknowledges a substantial degree of discretion as to what constitutes *reasonable diligence* or *special circumstances*, whereas the cause of action estoppel has been presented as a fairly rigid and objective test.[40]

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[38] *Henderson* v. *Henderson* (1843), 3 Hare 100 at 115, 67 E.R. 313, Wingram V.-C, [hereinafter *Henderson* cited to Hare]. This statement has been relied upon by many courts as a basis for cause of action estoppel: see *Doering*, *supra*, note 2 at 548.

[39] *Reichel* v. *Magrath* (1889), 14 App. Cas. 665 at 668, Halsbury L.J. [hereinafter *Reichel*].

[40] Although the quotation from *Henderson*, *supra*, note 38 also forms the basis of conventional cause of action estoppel, most courts applying the narrower doctrine have avoided or ignored the question as to whether there was such a *special circumstances* exception to the application of the doctrine: see G.S. Bower and A.K. Turner, *supra*, note 6 at 355-56. Some recent Canadian cases referring to *Henderson* have revived the possibility of there being such an exception in cause of action estoppel: *Hennig*, *supra*, note 29 (if exception exists, it applies only to matters not expressly dealt with); *Re St. Denis and Township of North Himsworth* (1985), 50 O.R. (2d) 482 (Div. Ct.) [hereinafter *Re St. Denis*]. The High Court

How have the courts fared in exercising their discretion under this approach? A review of the most recently decided cases indicates the following trends:

1. With a few exceptions, the courts have heeded the direction that negligence, inadvertence, or accident constitute insufficient grounds to escape from the application of the rule.[41]

2. The courts have taken a fairly practical approach to the question as to whether a litigant had the opportunity of raising the question in the former proceeding.[42]

3. There is some confusion in the courts as to the degree to which the test mandates the parties to bring forward all possible allegations, even in defence. The Privy Council has expressed the rule as preventing the litigation of matters "which could and therefore should have been litigated in earlier proceedings."[43]

The High Court of Australia has stated that this goes *too far* where the failure to raise a defence is in issue. The Court held that in such cases:

> ... there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject-matter of the first action that it would have been unreasonable not to rely upon it.[44]

In substance, the rule affords a practical replacement for the hollow rule of cause of action estoppel. In its present form, it covers the same ground as the traditional rule, and has a potentially broader scope. It makes explicit the aim of the rule, and does not use a surrogate.

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of Australia has recently affirmed the inapplicability of a "special circumstances" discretion in cause of action estoppel: *Chamberlain* v. *Deputy Federal Commissioner of Taxation* (1988), 78 A.L.R. 271.

[41] *Hennig, ibid.*; but see *Re St. Denis, ibid.* (failure of lawyer to raise validity of administrative action avoided application of rule).

[42] *Yat Tung Investment Co. Ltd* v. *Dao Heng Bank Ltd* (1975), [1975] A.C. 581, [1975] 2 W.L.R. 690 (P.C.), Kilbrandon L.J.

[43] *Ibid.* at 590.

[44] *Anshun, supra*, note 19 at 626.

This is not to say that the present operation of the rule is without law. The first difficulty lies with its conceptual basis as an exercise of the inherent jurisdiction of the court to prevent abuses of process. The concept of abuse is extraordinarily slippery, and could pave the way for *ad hoc* decision making, obstructing the development of truly workable criteria.[45] It would be more accurate to define the rule as a return to the underlying principles of *res judicata* as expressed in *Henderson,*[46] and a discarding of the cause of action concept that made resort to the abuse of process doctrine necessary in the first place.

The second potential difficulty lies in the extent to which the rule will mandate the joinder of claims and defences, and the raising of all issues in a single proceeding. Should the court look to the *reasonableness* of the party's motivation in failing to raise a question in an earlier proceeding?[47] Further, or alternatively, what scope should the court give to any *special circumstances* exception?

The reasons advanced at the outset why a rule preventing division of claims is a necessary part of the law in this area provide a guide to answer these questions. The subjective motivation of a party as to why a claim might not have been advanced earlier is irrelevant to the rationale for the rule. In fact, the rules are there precisely to provide a contrary incentive for the action which the party might otherwise have taken.

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[45] *Ibid.* at 626 ("Even the abuse of process test is not one of great utility").

[46] *Supra*, note 38.

[47] In *Anshun*, *supra*, note 19 at 626, the Court stated that "there are a variety of circumstances ... why a party might justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings for example, expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few...," citing *Cromwell* v. *Sacramento County* (1877), 94 U.S. 351 at 356-57. The reliance on *Cromwell* v. *Sacramento County* is problematic in that the proposition was expressed there in relation to the decision to raise a separate cause of action, the meaning of which has considerably expanded in the intervening years: see *Nevada* v. *U.S.* (1983), 463 U.S. 110 at 130-31. The American trend is clearly towards the barring of defences and counterclaims that may have been conveniently raised in the earlier proceeding: see American Law Institute [hereinafter ALI], *Restatement (Second) of Judgments* (St. Paul, Minnesota: American Law Institute Publishers, 1982) at s. 22.

C. *A Unified Test*

Assuming that the cause of action estoppel and the abuse of process approaches can be merged into a single rule, what is the content of that rule to be? The extreme rule would be to require both parties to assert all claims and defences between them when a lawsuit is commenced whether or not the various claims have anything to do with one another factually, leaving it to the discretion of the court to organize the most effective way for the pre-trial and trial handling of those issues. It is probably not necessary to go that far, and it should be possible to formulate a rule which reflects the law's main concern — that all questions and issues related to a factual dispute or incident involving two parties be litigated once and for all at one time.

The first temptation is to try to supplant the concept of a *cause of action* with another concept that directs the court's attention more broadly. In other contexts, and other jurisdictions, the concepts *matter*,[48] or *transaction*,[49] have been construed fairly broadly, and may provide possible candidates for a *test*. An alternate approach would be to say that when litigation arises between two parties, both are under an obligation to raise all claims, counterclaims, and defences arising out of or connected to the original subject-matter of the lawsuit, and whether raised or not, they may not be raised in a subsequent proceeding.

Regardless of the choice, it is suggested that the following criteria are relevant to the scope of the judge's power under either formulation of the rule

1. Would a reasonably diligent party, acting with reasonably diligent legal advice, have been aware of the opportunity to advance the claim or defence?

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[48] In Australia, the concept has been used to create a pragmatic and expansive approach to the pendent and ancillary jurisdiction of the federal courts: see *Fencott* v. *Muller* (1983), 46 A.L.R. 41, 57 A.L.J.R. 317 (H.C.).

[49] ALI, *Restatement (Second) of Judgments*, *supra*, note 47 at s. 24.

2. Was the claim or defence connected in any way with the subject-matter of the earlier litigation?[50]
3. Was the claim or defence available at the time of the earlier proceeding, in the sense of having accrued?
4. Did the court in the prior proceeding have jurisdiction over the claim or defence asserted in the subsequent proceeding?

If the answer to these questions is yes, then *prima facie*, the attempt to litigate the claim or defence in a subsequent proceeding should fail. As regards the *special circumstances* legacy of the *Henderson*[51] exception, the sole basis of the inquiry should be whether there was fraud, duress, or similar improper conduct on the part of any person which prevented the joinder.

Such a rule, when combined with the other traditional requirements in this area,[52] would allow for the development of a general doctrine against a party splitting its case which would subsume the old cause of action estoppel and abuse of process approaches into a single, unified approach.

IV. ISSUE ESTOPPEL

The preceding section focused on the rules aimed primarily at division of claims, and only incidentally at the re-litigation of disputes. The concurrent doctrine of issue estoppel is aimed solely at the re-litigation of disputes already decided.

If there existed a comprehensive and effective rule relating to cause of action estoppel – abuse of process, as discussed in the previous section – would there be any need for a separate doctrine of estoppel? Under the former rule, all issues connected with or arising out of a matter or transaction would be required to be raised in the first proceeding. Thus, a plaintiff or defendant in the second proceeding would be prevented from raising the question, much less

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[50] As the economy of joinder relates primarily to the avoidance of duplication of proof, and factual and legal decision making, this criteria avoids the necessity to join factually unrelated claims.

[51] *Supra*, note 38.

[52] See *supra*, note 22.

taking a position contrary to it. While this may be the case, and most cases now dealt with under issue estoppel could be disposed of under a revised cause of action estoppel, there would be situations where there would be a need for the doctrine to be retained. The first is in situations where jurisdiction over the matter or transaction is unavoidably divided between two or more courts or tribunals. Here, it would be impossible for all questions arising out of the *transaction* or *matter* to be adjudicated in one proceeding. A rule as to issue estoppel, however, would be necessary to prevent re-litigation of issues decided in the prior proceeding. The second situation arises if the traditional requirement of mutuality is eliminated.[53]

Under its traditional approach, the court determining the application of issue estoppel asks itself three basic questions. First, is the judgment relied upon a final judgment? Second, are the parties to the two pieces of litigation the same? Third, are the issues giving rise to the estoppel the same? Although there is a vast amount of case-law dealing with matters arising out of the first two questions, it is the third that raises the most fundamental questions regarding the scope of the doctrine. As a means of assessing effectiveness of the rules, two questions are considered. The first is the extent to which a default judgment can give rise to an issue estoppel. The second is how the courts have gone about generally in determining whether there is an identity between the two issues in the former and subsequent proceedings.

A. *Default Judgments*

While there is little question that a default judgment can give rise to cause of action estoppel,[54] the extent to which a default judgment can form issue estoppel is open.[55]

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[53] See *infra*, notes 62-88 and accompanying text.

[54] *Halsbury's Laws of England*, 4th ed. (London: Butterworths, 1976), vol. 16, para. 1520.

[55] *New Brunswick Railway*, *supra*, note 5 at 21, Maugham L.J. (an estoppel based upon a default judgment "must be very carefully limited."); *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd* (1963), [1964] A.C. 993 at 1012, [1964] 1 All E.R. 300 (P.C.).

One line of judicial reasoning holds that a default judgment can give rise to an issue estoppel, but that the court must examine the previous action to determine what was "necessarily, and with complete precision," decided.[56] Such a test is, of course, nonsensical. The conundrum for issue estoppel founded on a default judgment is that there is no reasoned judgment from which one can extract any decided issues. A pleading may contain a series of broad allegations, many of which may be inconsistent with one another.[57] How can one, except by metaphysical abstraction or by lot, determine which of the issues raised in the pleading have been *necessarily decided* when no decision has been reached? Or is one to adhere to the procedural fiction deeming a defaulting party to have admitted all the allegations against him,[58] and happily conclude that all of the allegations in the pleading, inconsistent or not, can give rise to an estoppel in a subsequent proceeding. This leads to a ridiculous result: the creation of several estoppels because of divergent or inconsistent versions of facts.

An alternative approach which may be emerging is that a default judgment cannot give rise to an issue estoppel, because there has been no judgment on the merits.[59] Here the estoppel would apply where the court had actually made a determination on the merits of the case, and it could be said that explicitly or implicitly it had decided the necessary issues before it. It would avoid the

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[56] *New Brunswick Railway, ibid.*

[57] And perfectly permissible, so long as they are pleaded in the alternative: Ontario *Rules of Civil Procedure, supra*, note 13 at r. 25.06(4); Victoria *General Rules of Procedure in Civil Proceedings, 1986*, O. 13, r. 13.09(1); *Philipps* v. *Philipps* (1878), 4 Q.B.D. 127.

[58] Ontario *Rules of Civil Procedure, supra*, note 13 at r. 19.02(1); Victoria *General Rules of Procedure in Civil Proceedings, 1986*, O. 13, r. 13.12(1); *Rules of the Supreme Court (U.K.), 1965*, O. 18, r. 13(1); *Cribb* v. *Freyberger* (1918), [1919] W.N. 22 (C.A.).

[59] Lord Brandon of Oakbrook in *D.S.V. Silo-und Verwaltungs-Gesellschaft m.b.H.* v. *Owners of the Sennar* (1985), [1985] 1 W.L.R. 490 at 499, [1985] 2 All E.R. 104 speaks of the requirement that the judgment be *on the merits*:

> [A] decision on the merits is a decision which establishes certain facts as proved or not in dispute; states what are the relevant principles of law applicable to such facts; and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.

problems with the existing approach, and allow the courts to base their decision on an analysis of a real judgment with reasons.

Such an approach reflects the rationale for the rule more closely. If the main aim is to prevent the re-litigation of questions previously determined by the court, it would follow that the rule should only apply where there is re-litigation of a question which has been actually determined by the court in a prior proceeding. Such an approach addresses the main reservations expressed in the case-law respecting the creation of estoppels by default judgments, while eliminating the need for the court to engage in an after-the-fact inquiry into the reason why a party chose not to defend a particular claim.

If it makes sense that, generally, default judgments should not give rise to an issue estoppel, why then allow a cause of action estoppel to be created by the same judgment? The reason for allowing a cause of action estoppel to be set up by a default judgment is to provide an incentive for the parties to raise all of the claims relevant to a *matter* or *transaction* in the one proceeding and avoid division. If a default judgment did not give rise to a cause of action estoppel, a party could avoid the rule by simply defaulting, without endangering his ability to litigate the same matter in a subsequent lawsuit. Further, the practical problems of issue delineation in default judgments are not raised to the same degree in the assessment of the scope of a *matter* or *transaction.*

B. *Scope of the Issue*

Have the problems of interpretation that have afflicted the courts when dealing with the concept of *cause of action* recurred when the same courts have turned their attention to *issue*? In lieu of a cause of action's conclusion-oriented characterization, the courts have enunciated a number of rules to assist with the definition of what is an *issue.* The main variations articulated are:[60]

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[60] *Blair* v. *Curran* (1939), 62 C.L.R. 464 at 532, Dixon J; *Hoystead* v. *Commissioner of Taxation* (1925) 1 W.W.R. 286, [1926] A.C. 155 at 166 (P.C.), Shaw L.J.

1. The question must have been directly (as opposed to indirectly or collaterally) in use in the former proceeding; that is, *essential* to the court's disposition of the case.
2. The former decision concludes not only the direct point expressly litigated and decided, but *all matters necessary* to that decision.
3. The former decision concludes all facts fundamental to the decision.

Two points arise out of these rules: first, that not all questions actually decided give rise to an estoppel; and second, an estoppel can be created on matters not explicitly decided by the court in the prior proceeding.

The requirement of directness or of being essential to the decision in the case parallels the traditional *obiter-ratio* distinction in the doctrine of precedent. Is the analogy an appropriate justification for limiting the effect of a former decision? If the question is actually litigated between parties, and decided by the court, a subsequent narrow construction of what is *essential* to the prior decision would result in a counter-productive restriction on the effort to prevent re-litigation. The real rationale for the limitation must be that a judge may make findings on non-essential matters that were not seriously litigated by parties, and concern for the quality of adversarial decision making militates against such a decision being final. This justifiable concern is better met by a rule extending the estoppel to issues decided *which were seriously litigated* by the parties, whether or not they were *essential* to the result in the case.

The second characteristic referred to, the ability to estop matters not specifically litigated in the prior proceeding, flows from the need to take a substantive rather than a formalistic approach to the scope of the prior decision. Any given decision may have a number of findings of fact or law implicitly wrapped up in it. To allow a subsequent case to proceed on the basis of a challenge to one of the implicit findings, but not the ultimate finding in the prior proceedings, would provide an ulimited number of avenues for the litigant escaping the application of the rule.

It should be quickly apparent that while these rules provide benchmarks which revolve around the identification of what aspects of the prior decision may be looked at to establish an estoppel, they

do not strictly speak to the comparison between the former and present proceedings. How have the courts fared in making this comparison?

The *Solicitor-Client Controversy*[61] provided the New South Wales Court with an exercise in determining whether the issue decided in the first case *covers* the issue in the second case. The majority of the court analyzed the first decision to find what was explicitly decided and what findings were implicit. They found that the first decision created an estoppel in the second case on the question of whether the client received any benefit from the services rendered.

While the analysis of the court of what was necessarily decided by the first claim is unobjectionable as far as the result achieved is concerned, the test depends upon a technical parsing of the finding in the prior case which a court may perform liberally, or illiberally, as the case or the temperament of the court may vary. An alternative way to approach the question would be to ask whether a finding on the issue raised in the second case would be in any way inconsistent with or undermine the finding in the former case. If so, the parties to the second case are estopped from litigating the point. Such a test may provide the courts with a more pragmatic approach to the question of re-litigation.

V. EXPANDING NON-MUTUAL ESTOPPEL

One of the central premises of the existing law respecting *res judicata* is that the rules only apply where the same parties are involved in the two proceedings. This is the requirement of mutuality. This requirement may be met by showing that a party in the latter proceeding was in privity with a party in the former proceeding, so that the two are regarded as having the same interest in the two proceedings.

The requirement of mutuality does not flow automatically from the premises of the law in this area. If economy of resources, and reduction of uncertainty in judicial decision making are two

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[61] *Supra*, note 3 and accompanying text.

primary motivations, there is little reason to suspect that the estoppel could not apply usefully where the subsequent proceeding involves only one party. Consider the *Motorcycle Accident*.[62] The central question in the former proceeding was whether the motorcycle driver's negligence caused the accident. In the second case, similarly, the success or failure of the action of the sidecar passenger would depend upon whether the accident was due to the fault of the car driver, the motorcycle driver, or both. In the third-party proceedings, the sole question before the court would be the negligence of the motorcycle driver in causing the accident, the same issue as in the first case. However, under application of the mutuality requirements and the limited scope of the privity rule, the finding against the motorcycle driver in the first action could not be used against the sidecar passenger to prevent the issue of the responsibility of the motorcycle driver for the accident from being re-litigated.[63] Further, while the finding in the first lawsuit could be relied upon by the owner of the car in the third-party proceeding, it could not be relied upon by the driver of the car, as he was not a party to the prior determination.

So long as the issue tried in the subsequent action is the same, there appears to be no cogent reason for not holding the party common to both actions bound by the prior determination. Of course, since a basic assumption in the traditional rule is that the parties have had an adequate opportunity to litigate the issue being raised again in the second action, it is assumed, at this stage, that the estoppel could not apply to any party in the second proceeding who was not a party in the first proceeding.[64] But the fact that the

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[62] *Supra*, note 1.

[63] It is conceded that if the question of contributory negligence on the part of the driver had not been raised in the first proceedings, it would be open to suit in the second proceeding.

[64] On this point, see *infra*, note 100 and accompanying text.

effect of the rule is asymmetrical does not afford an automatic basis for its rejection.[65]

The requirement of mutuality has been met with a number of differing responses. There are a small number of decisions where a party has been held to have been estopped in a subsequent proceeding, even though the opposite party was not involved in the prior case. This has been achieved in the confines of the traditional approach either through ignoring the requirement of mutuality,[66] or by stretching unbelievably the concept of who are privy to the parties in the first proceeding.[67] The courts, however, have adhered to a relatively strict notion of mutuality.[68]

This blockade against the use of prior judgments in cases involving only one of the former parties has been traditionally assisted by the rule in *Hollington* v. *F. Hewthorn & Co., Ltd*,[69] that evidence of a conviction in a criminal case was inadmissible in a subsequent civil proceeding as evidence of guilt. Overruled by statute in England,[70] and now considered to have been wrongly

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[65]The origin of the mutuality requirement has been blamed on the misapplication of a paragraph in Sir Edward Coke, *Commentaries on Littleton*, 19th ed. (Philadelphia: Robert H. Small), vol. 17, s. 667, at 352a: see *McIlkenny* v. *Chief Constable of the West Midlands* (1980), [1980] 2 All E.R. 227, [1980] 1 Q.B. 283 at 327-30 (C.A.), Goff L.J.

[66]See, for example, *Remnant* v. *Savoy Estate, Ltd* (1949), [1949] 2 All E.R. 286 (C.A.).

[67]*Cavers* v. *Laycock, Cardinal and Cardinal Shell Service Station* (1963), 40 D.L.R. (2d) 687, [1963] 2 O.R. 639 (Ont. H.C.) (passenger and driver in car accident are privy); *Raison* v. *Fenwick* (1981), 120 D.L.R. (3d) 622 (B.C.C.A.) (school board employees' written reports, privy to the school board, terminates a teacher's appointment on the basis of the reports).

[68]*Mills* v. *Cooper* (1967), [1967] 2 All E.R. 100, [1967] 2 Q.B. 459 at 468-69. Most cases have refused to hold that any of a passenger, owner, or driver of a car in an accident can be in privity: *Shaw*, *supra*, note 1 and cases cited therein. See also *Gleeson* v. *J. Wippell & Co. Ltd* (1977), [1977] 1 W.L.R. 510, [1977] 3 All E.R. 54 (Ch.D.) (re-litigation of same issue of copyright infringement for same product against different defendants not estopped).

[69]*Hollington* v. *F. Hewthorn & Co., Ltd* (1943), [1943] 1 K.B. 587, [1943] 2 All E.R. 35 (C.A.) [hereinafter *Hollington* cited to K.B.].

[70]U.K. *Civil Evidence Act 1968*, c. 64, s. 11.

decided,[71] the rule has been eliminated or is on the verge of elimination by judicial decision in New Zealand,[72] Canada,[73] and most recently, Australia.[74]

Another set of developments forming a background to the question of mutuality has been the statutory response to the traditional rule. In a number of discrete areas of the law, legislatures have enacted piggyback provisions which allow a finding in a prior proceeding to be used as *prima facie* evidence in a subsequent proceeding against the party defending in the first proceeding. These provisions are most generally used where powers of public and private enforcement overlap, and usually envisage the private action riding on the coattails of the findings in the prior public prosecution.[75]

These developments, occurring in and around the contours of the traditional rules, have posed a number of difficult questions which courts have begun to grapple with. The primary question is the extent to which a prior judgment will be binding upon a party to that finding in a subsequent proceeding. Predictably enough, there have been a number of differing approaches, although all exhibit varying degrees of willingness to evade the traditional requirement of mutuality. In all cases, these approaches have been fashioned outside of the limits of traditional doctrines.

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[71] *Hunter* v. *Chief Constable of the West Midlands* (1981), [1981] 3 W.L.R. 906, [1981] 3 All E.R. 727 at 734, Diplock L.J.

[72] *Jorgensen* v. *News Media (Auckland) Ltd* (1969), [1969] N.Z.L.R. 961 (C.A.) [hereinafter *Jorgensen*].

[73] *Demeter* v. *British Pacific Life Ins. Co.* (1983), 43 O.R. (2d) 33 (H.C.), aff'd (1984), 13 D.L.R. (4th) 318, 48 O.R. (2d) 266 (C.A.) [hereinafter *Demeter* cited to O.R.].

[74] *Mickelberg* v. *Director of the Perth Mint* W.A.S.C. [unreported], 7 June 1985, (F.C.), ; see also *Minister for Immigration and Ethnic Affairs* v. *Gungor* (1982), 42 A.L.R. 209, 63 F.L.R. 441 at 447-48 (F.C. Aust.), Fox J.

[75] Typical examples occur in the antitrust field. See, for example, Australia, *Trade*

A. *The Abuse of Process Approach*

Unwilling to redefine existing doctrines located in estoppel, some courts have found a basis to prevent non-mutual re-litigation in the inherent jurisdiction of the court to prevent abuses of the court's process. The most recent authoritative statement comes from the House of Lords:

> The abuse of process ... is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.[76]

It is uncertain whether this statement of approach should be used as anything more than identifying one category of circumstances where an abuse has been found.[77] Prior abuse of process cases, in situations of re-litigation, have, at their most informative, used vaguer standards relating to the existence of *vexatious or oppressive conduct.*[78]

Even if one is to accept the above statement as a general definition of abuse of process as applied to non-mutual re-litigation, there are substantial difficulties with the standard suggested. The focus on a collateral attack implies that what the court is primarily concerned with is conduct which has an improper motive or object. Otherwise, the characterization of the subsequent action by the plaintiff as an *attack* becomes meaningless. Apart from the practical problems of determining what the motives of a litigant are, the test may exclude a whole range of re-litigation which should be avoided, and begs for narrow application by the courts. Further, the test speaks only to actions by a plaintiff, and does not address the extent to which defendants may be bound by the doctrine, which has been

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[76]*Supra*, note 69 at 733, Diplock L.J.

[77]In the ellipsis omitted from the passage quoted, Lord Diplock refers to the abuse of process, "which the instant case exemplifies," *ibid.*

[78]For example, see *Reichel, supra*, note 39; *Westmoreland Green and Blue Slate Co.* v. *Feilden* (1891), [1891] 3 Ch. 15 (C.A.).

taken by some courts to refuse to supply the statement to re-litigation on the part of a defendant.[79]

Given these difficulties, it is of little surprise that efforts in subsequent cases to apply this statement have fallen back on the more general test of *is this an abuse?*[80] This approach is totally inadequate. It involves the exercise of an unprincipled discretion, without substantive guidance, except for a few analogous cases and the judge's own *ad hoc* sense of what is appropriate.[81] The absence of any attempt to articulate a rationale or standard deprives litigants of any guidance as to their conduct in the litigation process, and constitutes an abrogation of judicial responsibility. Participants in the litigation system have a simple right to know the basis upon which their case is in any danger of being dismissed for abuse of process.

The use of a standard based upon abuse of process is also subject to the historical reluctance of the courts to resort to the inherent jurisdiction of the courts, except in the most extreme circumstances;[82] a reluctance based in part upon the problems of *ad hoc* decision making already mentioned. Part of this also relates to

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[79]For judgments which have already asserted its inapplicability to defendants, see *Bragg* v. *Oceanus Mutual Underwriting Association (Bermuda) Ltd* (1982), [1982] 2 Lloyd's L.R. 132 at 137, Kerr L.J. [hereinafter *Bragg*]; *Q.* v. *Minto Management Ltd* (1984), 15 D.L.R. (4th) 581, 46 O.R. (2d) 756 at 757-61 (H.C.), Steele J. [hereinafter *Minto Management* cited to O.R.]; *Re Del Core and Ontario College of Pharmacists* (1985), 19 D.L.R. (4th) 68, 51 O.R. (2d) 1 at 18 (C.A.), Houlden J.A. [hereinafter *Re Del Core* cited to O.R.]; but contrast *Nigro* v. *Agnew-Surpass Shoe Stores Ltd* (1977), 82 D.L.R. (3d) 302, 18 O.R. (2d) 215 (H.C.), aff'd (1977), 84 D.L.R. (3d) 256, 18 O.R. (2d) 714 (C.A.) [hereinafter *Agnew-Surpass* cited to O.R.] (prior judgment against defendants precludes their relying upon same defence in subsequent proceeding).

[80]*Bragg* and *Re Del Core*, *ibid.*

[81]The vagaries of the approach are well illustrated by the decision at first instance in *Agnew-Surpass*, *supra*, note 79, which could be construed as an application of extended issue estoppel, *ad hoc* abuse of process, or extended privity. See the discussion in Michael J. Herman & Gerald F. Hayden, Jr., "Issue Estoppel: Mutuality of Parties Reconsidered" (1986) 64 Can. Bar Rev. 437 at 454-59.

[82]*Lawrance* v. *Norreys* (1890), [1886-90] All E.R. Rep. 858, 15 App. Cas. 210 at 219, Herschell L.J. [hereinafter *Lawrance* cited to App. Cas.] (jurisdiction "ought to be very sparingly exercised, and only in very exceptional cases"); see generally, I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Curr. Leg. Prob. 23.

the generally accepted implication that conduct which constitutes an abuse somehow involves impropriety. Such a standard is simply not relevant or appropriate to the regulation of the volume and content of litigation.

B. *The Prima Facie Approach*

Another line of thought has emerged out of the decline of *Hollington*.[83] Under this approach, the question is treated as an evidentiary one: assuming that the prior judgment or finding is admissible, what weight should it be given? With few exceptions, cases approaching the question from this angle have held that the former judgment or finding is to be treated as *prima facie* evidence of the facts on which it was based.[84] It is *prima facie* evidence only, and is subject to rebuttal by the party against whom it is proved.

Such a rule represents a half-way house between treating the former finding as conclusive and not open to dispute, and giving it no weight at all. Is this an appropriate resting point for a test? It is not, for two distinct reasons.

First, the rule does not prevent the re-litigation of previously tried findings. It merely shifts the adjudicative basis upon which that re-litigation takes place. By making the prior finding *prima facie* evidence, the rule increases the risk to the party wishing to engage in the re-litigation, but does not attempt to prevent the matter from being raised and litigated once again. At best, the rule raises the costs to the party wishing to re-litigate, and may act only as a partial disincentive to re-litigation.[85]

Second, the rule has the potential for creating ludicrous problems for the judge at the second trial. If the party against whom the finding is adduced decides to call evidence in rebuttal,

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[83] *Supra*, note 69.

[84] *Jorgensen*, *supra*, note 72; *Demeter*, *supra*, note 73; *Rosenbaum* v. *Law Society of Manitoba* (1983), [1983] 5 W.W.R. 752, 22 M.R. (2d) 260 (Man. Q.B.); *Re Del Core*, *supra*, note 79.

[85] See parallel discussion, *supra*, note 16 and accompanying text.

how is the judge to weigh the probative value of a prior judgment against testimonial evidence? Is he to go behind the judgment and reasons to see whether the evidence presented in rebuttal was adduced at the first trial, and to see what weight the judge in the prior proceeding attached to that evidence? If any believable evidence is adduced in rebuttal, will it be inevitable that the party originally entering the prior judgment in evidence will, in reply, have to prove again the original finding?[86]

On either ground, the use of a *prima facie* standard should be rejected. It is therefore unfortunate that, with few exceptions, the trend in courts and legislatures post-*Hollington*[87] is to treat former judgments as being only *prima facie* evidence of the facts upon which they are based.

Parenthetically, it is interesting to note that a number of cases have treated the two approaches described above as being sequential tests which could be combined into one, such that, the prior judgment is admissible as *prima facie* evidence, which the opposite party is free to rebut, unless to do so would constitute an abuse of process of the court.[88] Such an approach merely combines the shortcomings of the two approaches, creating a needlessly bifurcated test for the determination of what is really a single question.

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[86]Some judges have recognized the potential difficulties, but have little clue as to their resolution:

> I do not overlook the practical difficulties which in some cases may arise in determining what weight should be given to proof of a conviction of a crime which is again in issue in civil proceedings but I think these difficulties are more apparent than real for the weight to be given to the conviction will vary very considerably according to the nature of the civil action with which the Court is concerned and the circumstances surrounding the conviction.

Jorgensen, *supra*, note 72 at 980, North P. For examples of the difficulties which can arise under statutory *prima facie* approaches, see *Taylor* v. *Taylor* (1970), [1970] 2 All E.R. 609, [1970] 1 W.L.R. 1148 (C.A.); *Wauchope* v. *Mordecai* (1969), [1970] 1 All E.R. 417, [1970] 1 W.L.R. 317 (C.A.). See also Herman & Hayden, *supra*, note 81 at 459-64.

[87]*Supra*, note 69.

[88]See *Demeter*, *supra*, note 73; *Re Del Core*, *supra*, note 79; *Taylor* v. *Baribeau* (1985), 21 D.L.R. (4th) 140, 51 O.R. (2d) 541 (Div. Ct.).

C. *The Collateral Estoppel Approach*

A further approach is to treat the finding in the former adjudication as conclusive and binding upon the common party in the subsequent proceeding. Essentially, it redefines issue estoppel so that it applies to non-mutual situations. Superficially, this approach reflects the aims articulated earlier most closely. Assuming that the party bound has participated in the previous proceeding, and the issue was finally determined, there seems little reason why it should be open to that party to avoid the consequences of that finding when the same question is raised in a subsequent proceeding.

To this point, I have assumed that there is little difference from a policy standpoint between situations of mutuality and non-mutuality as far as issue estoppel is concerned. Does the application of non-mutual issue estoppel pose any problems, either as to the avoidance of multiplicity, or other values in litigation?

In the United States, where a general doctrine of non-mutual issue estoppel or collateral estoppel has been embraced,[89] there has been preliminary consideration of the circumstances which might militate against a routine application of such a rule in all cases. The first step has been to distinguish between cases where the estoppel is asserted by a defendant against a plaintiff (*defensive estoppel*), and where the plaintiff asserts the estoppel against a defendant (*offensive estoppel*). Although, in both cases, the party against whom the estoppel is asserted has lost the issue in the prior litigation, several reasons have been advanced as to why the reasons for an application of offensive estoppel may be less absolute than those favouring an application of defensive estoppel.[90]

The first reason relates to the incentive effect of offensive collateral estoppel. A plaintiff relying upon an estoppel against a defendant may wait for the plaintiff in the first lawsuit to litigate and win an issue against the defendant in the first lawsuit. Adopting a *wait and see* attitude allows the second plaintiff to *freeload* on the effort of a successful first plaintiff, and creates a positive disincentive to the second plaintiff joining in the first action.

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[89] *Blonder-Tongue Laboratories* v. *University of Illinois Foundation* 402 U.S. 313 (1971), 91 S. Ct. 1434 (1971); *Parklane Hosiery Co.* v. *Shore* (1979), 439 U.S. 322 , (1979) 99 S. Ct. 645 [hereinafter *Parklane Hosiery* cited to U.S.].

[90] See *Parklane Hosiery*, *ibid.* at 329-31.

The alleged result: more, rather than less, litigation.[91]

There are a number of problems with this superficially attractive proposition. First, freeloading is usually a good thing in litigation. The benefit of freeloading is that it saves the parties to the proceeding and the court the cost of retrying the question determined in the prior proceeding.

Second, increasing the total amount of litigation is not automatically a bad thing. What is undesirable is the re-litigation of claims — in other words, wasteful litigation. Offensive collateral estoppel seeks to eliminate the first sort of waste, and the kind of division of claims discussed here does not arise in such a case. As far as the non-joinder of parties is concerned, the question is more complex than discussed in the cases. The asserted incentive to non-joinder of parties may be inaccurate when applied to litigation systems based upon the English model. Given the relatively low level of incentives for the joinder of plaintiffs in the English system,[92] it is unlikely that offensive estoppel will create significant additional incentives for potential litigants, who would have otherwise joined in the prior case, not to join as co-plaintiffs. On the other hand, it could create benefits for those piggybacking litigants who would not have had the opportunity nor ability to join in the initial case, and who lack the resources to litigate the whole matter afresh.

The second rationale for limiting the availability of offensive estoppel is that it might be *unfair*.[93] Unfairness is not defined but is described by example:

1. The claim in the first suit may be small and the defendant may have little incentive to defend, particularly if future suits are unforeseeable;
2. the finding, forming the basis for estoppel, may itself be contradicted by other prior cases; and

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[91] *Ibid.* at 330.

[92] These include minimal requirements of compulsory joinder, restrictive joinder of parties rules, and the lack of an effective class action provision: see Ontario Law Reform Commission, *Report on Class Actions* (1982), vol. 1, 9-49, 76-77.

[93] *Parklane Hosiery*, *supra*, note 89 at 330-33.

3. the second action might afford the defendant procedural opportunities not available in the first action (for example, cost or convenience of the forum).

The illustrations given seem appropriate and consonant with the general aims of the law, subject to one proviso. Is the determination of the incentive to litigate and the existence of procedural opportunities to be determined by a subjective analysis of the position of the party in the earlier lawsuit, or by an objective determination based on the expectations of a reasonable litigant? The former is undesirable, as it could lead to decision making based upon an after-the-fact assessment of the subjective preferences of the party.

The other problem relates to the use of the general characterization of *unfairness*. Although it is clear that the court wants to give itself an "escape hatch" to deal with unforeseen situations, the nature of the discretion could have been tied more tightly to the examples given.[94]

In the end, I am unconvinced that it was necessary for an acceptance of offensive estoppel that required trial courts to be granted a broad discretion to determine when it should be applied.[95] Particularly in the English model of litigation, failure to join in the earlier proceeding should not be a reason to disallow the use of collateral estoppel. What discretion that court should have to exclude collateral estoppel, should be related specifically to a substantial disparity of procedural opportunity and incentive for the person against whom the estoppel is asserted.

It would therefore appear that a rule based upon issue estoppel, but dispensing with the requirement of mutuality provides the most appropriate approach to the effect of prior judgments in non-mutual situations. Before confirming this conclusion, it is necessary to consider two possible factors which might militate against an application of non-mutual issue estoppel in all cases.

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[94]For example, points one and three could have been viewed as aspects of the party having had a full and fair opportunity and incentive to litigate the issue in the prior proceeding.

[95]For a contrary view, see Herman & Hayden, *supra*, note 81 at 467-68.

1. Are criminal cases different?

As long as mutuality applied, any interaction between criminal and civil cases was avoided. Are there any concerns arising out of any differences between the nature of the criminal and civil trial processes that might temper the application of non-mutual issue estoppel?

The difference in standard of proof should make little difference where it is a criminal judgment being used in a subsequent civil case;[96] in fact, the higher standard of proof should make the finding more, rather than less, dependable. Problems of issue identification, particularly in the case of jury trials, will occur, but they are no different in kind than problems which crop up in the application of issue estoppel between civil cases.

Is it somehow *unfair* to add to the consequences which can flow from a criminal conviction, by facilitating its subsequent effect in civil proceedings. In cases where the criminal ramifications of an act are minimal, yet the civil impact may be massive and unforeseeable, the full and fair opportunity and incentive test should avoid any serious problem. Generally, however, it would seem conducive to the ends of both types of enforcement, to allow criminal findings to assist in subsequent criminal proceedings.[97]

The only other reason advanced for not making criminal judgments binding has been that the court's decision may not be infallible.[98] This is blindingly obvious, but is not a reason for limiting the finding's effect in a subsequent trial. As has been pointed out earlier, a second opportunity to litigate a matter may result in a different decision, or in the same decision, but is no

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[96]Of course, the difference in standard of proof would mean that a civil finding should not give rise to any estoppel in subsequent criminal cases. Similarly, a criminal acquittal would give rise to no estoppel in a subsequent civil case, because a finding of not guilty merely denotes a failure to discharge the burden of proof beyond a reasonable doubt.

[97]The estoppel may be regarded as having analogous effect to orders for compensation and restitution which may be made in many jurisdictions as part of the sentencing process.

[98]U.K. Law Reform Committee, *15th Report*, (1967, Cmnd 3391), para. 13.

guarantee of a better decision.[99] In any event, the point, if valid, would be a reason for limiting the impact of all prior findings, and not just criminal ones.

2. Is privity inviolable?

At the outset, it was accepted that any non-mutual estoppel would only apply where the person against whom the estoppel was asserted in the second proceeding was a party to the earlier finding. Given the current state of the law, it is not argued, as some have, that the courts should also eliminate traditional privity, so that a person in a subsequent proceeding would be estopped on an issue if that issue was determined in a prior proceeding, and another person with a similar interest had a full and fair opportunity and incentive to litigate it.[100] In some cases, however, eliminating mutuality while maintaining privity can result in anomalous situations.

Consider the *Motorcycle Accident*.[101] In the second proceeding, it is clear that one of the primary questions to be litigated in the action by the sidecar passenger is the extent to which the motorcycle driver was responsible for the accident, an issue which has been determined against him in the first proceeding. Privity would prevent the prior finding being asserted against the passenger, although it could be used in a third-party action against the motorcyclist. The prospect is therefore raised of inconsistent decisions within the one proceeding. One way in which this might be avoided would be to say that a party not privy to the prior decision is estopped when another person with the same interest, who is also a party to the second proceedings, was party to the prior

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[99] See *supra*, note 7 and accompanying text.

[100] Lawrence C. George, "Sweet Uses of Adversity: *Parklane Hosiery* and the Collateral Class Action" (1980) 32 Stanford L. Rev. 655.

[101] *Supra*, note 1.

proceeding. This would deal with the anomaly, without preventing a future reconsideration of the maintenance of the privity requirement generally.[102]

VI. CONCLUSIONS

The conclusions of this paper can be summarized readily:

1. The concept of cause of action estoppel, as it now stands, has no current utility, being hopelessly emasculated by narrow or unreasoned approaches to the delineation of what constitutes a cause of action.
2. The effort to supplement the cause of action estoppel doctrine with an abuse of process approach is also inadequate, relying as it does on underlying notions of abuse, and uncertain criteria for application. However, the basic thrust of the approach is an improvement over the cause of action estoppel.
3. As regards the two, the best approach would be to merge the two into a single doctrine of *res judicata*, which would require a party to a law suit, whether plaintiff or defendant, to raise all claims and defences that arise out of or relate to the initial claim commenced, that are capable of being litigated in the one proceeding.
4. While the basic doctrine of issue estoppel as conventionally defined does not have the same fundamental problems as cause of action estoppel, care must be taken in its application to ensure that the basic aims of the rule, prevention of re-litigation and the risk of inconsistent decisions, are well served.
5. The requirement of mutuality in issue estoppel does not serve the aims of the law, and should be jettisoned. At this stage the requirement of privity should only be eliminated where the joinder of parties raises the risk of internal inconsistency in the later proceeding.
6. Existing attempts to deal with non-mutual estoppel via

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[102]This issue has been recognized (albeit in the context of the prima facie evidence approach) in one case where the prior criminal finding was allowed against both the criminal and his employer in the subsequent criminal proceeding: *Minto Management*, *supra*, note 79 at 760, Steele J.

approaches centring on evidentiary weight, abuse of process, or a discretionary threshold, are all flawed and should be rejected in favour of an application of issue estoppel, subject only to the requirement that the party in the former proceeding must have had an adequate opportunity and incentive to litigate the matter fully.

7. The fact that the former decision was made in a criminal proceeding should not matter.

The above approach suggests a more appropriate resolution to the cases discussed. The *Flood Case*[103] could not be considered to be a case of *res judicata*, because the claim for damages in subsequent years could not have been advanced in the original proceeding.[104] It then falls to be decided according to issue estoppel, which is then a question as to whether the finding that the defendant's dam did not cause the damage to the plaintiff's property expressly or implicitly rules out an alternative theory of the aquifer. In this case, it would be a close question, and may depend upon an examination of the trial record, but one is inclined to suggest that the issue of causation of the flooding for the subsequent years should be estopped by the initial finding that the flooding was an inevitable consequence of the elevation of the plaintiff's land and its proximity to the river, and had nothing to do with the dam.[105]

The *Motorcycle Accident*[106] may also be resolved by an application of these tests. The finding of the motorcyclist's responsibility for the accident in the first action would be conclusive against both the motorcyclist and the sidecar passenger, as the motorcyclist was a party to the first action, and has substantially the same legal interest as the passenger. This would render the third-party proceedings in the action unnecessary.

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[103] *Supra*, note 2.

[104] The result parallels that which would have been reached through an application of the continuing cause of action cases: see *supra*, note 36.

[105] Doering, *supra*, note 2 at 466.

[106] *Supra*, note 1.

No single legal rule is ever capable of dealing with every imaginable factual situation, but the approaches suggested will go farther toward ensuring a degree of consistency in the achievement of the law's objectives.