RES JUDICATA: THE SHIELD BECOMES A SWORD. PRIOR ADJUDICATION OF NEGLIGENCE BARS RELITIGATION OF THAT ISSUE BY OTHER PLAINTIFFS IN SUBSEQUENT ACTIONS BASED ON SAME ACCIDENT

A NUMBER of suits arising out of an airplane crash were instituted against the air line in diverse jurisdictions and in one such California action the defendant was adjudged negligent.[1] Thereafter, in *United States v. United Air Lines, Inc.*,[2] the Nevada District Court held that the California adjudication estopped the air line from relitigating the negligence issue.[3] In so holding, the court rejected the defense contention that since these plaintiffs had not been parties to the previous action, the doctrine of "mutuality of estoppel"[4] prevented the application of res judicata.[5]

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[1] Wiener v. United Air Lines, 216 F. Supp. 701 (S.D. Cal. 1962).

[2] 216 F. Supp. 709 (D. Nev. 1962).

[3] In the instant case, 49 persons were killed when United's airliner collided with a United States Air Force F-100-F jet fighter on April 21, 1958. Suits were filed in 11 different jurisdictions. *United States v. United Air Iines, Inc.* represented the claims of survivors of nine of these victims, consolidated for trial. The prior judgment, relied upon as an estoppel, Wiener v. United Air Lines, 216 F. Supp. 701 (S.D. Cal. 1962) was an action brought by 24 other representatives of victims of the collision.

The issue arose on plaintiff's motion for summary judgment on the issue of liability only, as allowed by FED. R. CIV. P. 56(c). Of course the damages suffered by each plaintiff remained to be completely litigated.

The United States, a party plaintiff in these actions, sued to recover from United Air Lines the statutory compensation that it would be required to pay to the heirs of government employees killed in the crash, and for subrogation in the event that the verdicts rendered were in excess of the amounts that the United States would be required to pay. 216 F. Supp. at 712-14.

[4] "On the principle that estoppels must be mutual, no person is entitled to take advantage of a former judgment or decree, as decisive in his favor of a matter in controversy, unless, being a party or in privy thereto, he would have been prejudiced by it had the decision been the other way." 2 BLACK, JUDGMENTS § 534 (2d ed. 1902).

This doctrine has been liberalized to some extent by allowing exceptions. See, *e.g.*, Taylor v. Sartorious, 130 Mo. App. 23, 108 S.W. 1089 (1908) (indemnitor-indemnitee relationship); Bernard v. Metropolis Land Co., 40 Nev. 89, 160 Pac. 811 (1916) (parties so closely related in interest as to constitute privity); Good Health Dairy Prods. Corp. v. Emery, 275 N.Y. 14, 9 N.E.2d 758 (1937) (mutuality not required if liability derivative from exculpated party).

[5] The doctrine of res judicata embodies two main rules. First, it prevents a party from relitigating the same cause of action against his opponent after a final judgment has been rendered on that cause of action. Secondly, a final judgment is conclusive as to issues of fact necessarily decided in the determination of that action before a competent court. This aspect has been referred to as "collateral estoppel." 50 C.J.S. *Judgments* § 592 (1947). Both segments are commonly called res judicata without

The court applied the rationale of the leading case of *Bernhard v. Bank of America*[6] which held that a res judicata plea is appropriate where there is identity of issues, a final judgment on the merits, and where the party against whom the plea is asserted had been a party, or in privity with a party, to the previous action.[7] Although the *Bernhard* decision effectuates the policy underlying the res judicata principle,[8] application of the *Bernhard* test raises serious problems when, as in the present case, res judicata is asserted offensively by one not a party to the previous action.[9] Consequently, there has been a marked judicial tendency to restrict the doctrine to defensive use only.[10] In addition, several commentators, while approving *Bernhard* have urged that it be limited in application.[11]

Without question, the most serious objection to *Bernhard* is the enigmatic problem raised by the multiple plaintiff anomaly.[12] For example, in the present case forty-nine persons were killed.[13] Supposing that a separate action had been instituted on behalf of each, what should be the result if the defendant had won the first fifteen of these and had then lost number sixteen? Should the

distinguishing between them. In this note, the collateral estoppel aspect is of primary importance and when the term res judicata is used, refers to that segment.

[6] 19 Cal. 2d 807, 122 P.2d 892 (1942). For a discussion of this case and an analysis of the doctrine of mutuality of estoppel, see Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,* 9 STAN. L. REV. 281 (1957). For a defense of the requirement of mutuality see Moore & Currier, *Mutuality and Conclusiveness of Judgments,* 35 TUL. L. REV. 301 (1961).

[7] 19 Cal. 2d at 813, 122 P.2d at 895.

[8] It is generally stated that the doctrine of res judicata serves a dual purpose. Of primary importance, it serves the general interest of the community in the reduction of litigation and in the finality of judicial decisions. The doctrine also serves a private interest, the right of the individual to be protected from a multiplicity of suits aud prosecutions. 2 FREEMAN, JUDGMENTS § 626 (5th ed. 1925).

[9] In the *Bernhard* case, a judgment rendered by the probate court accepting an executor's account and ruling that certain monies were properly paid to the executor by the bank was given conclusive effect when one of the beneficiaries of the estate sued the bank for paying over the funds even though the bank (who asserted the former judgment) had not been a party to the prior action. It should be noted that here res judicata was being used defensively.

[10] Several jurisdictions have recognized defensive use of res judicata without requirement of mutuality but have not gone so far as to allow offensive use. See, *e.g.,* Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (Dist. Ct. App. 1958); Tezak v. Cooper, 24 Ill. App. 2d 356, 164 N.E.2d 493 (1960); De Polo v. Greig, 338 Mich. 703, 62 N.W.2d 441 (1954); Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955). See cases collected in Annot., 23 A.L.R.2d 710 (1952).

[11] See, *e.g.,* Currie, *supra* note 6, at 282. Comment, 18 N.Y.U.L. REV. 565 (1941); 35 TEXAS L. REV. 137 (1956).

[12] See Currie, *supra* note 6, at 285-89.

[13] 216 F. Supp. at 712.

remaining plaintiffs be allowed to assert res judicata on the basis of the judgment in action sixteen? Incontestably, the literal language of the *Bernhard* test requires such a result.[14] Moreover, even if the first verdict returned is for the plaintiff, it has been urged that, as there is no guarantee that this verdict was not the one wrongly decided, the anomaly still cannot be avoided.[15]

The danger of the inconsistent verdict is, in theory at least, difficult to overcome. As a practical matter, however, the problem is far from insurmountable and can be avoided by adopting the rule that unless there has been an *actual* inconsistency of verdicts, res judicata will be applied in proper cases. To adopt a contrary position and not allow the plea where there is a mere *possibility* of inconsistent verdicts destroys the effectiveness of the principle.[16] True, there is no guarantee that the first action was not the one wrongly decided, but by definition, a full and fair adjudication of the issue is prerequisite to entertaining a plea of res judicata. In any event, the objection here has no more merit than if it were raised against the accepted doctrine of res judicata generally.[17] If the issue has been fully and fairly litigated, the paper tiger of inconsistent verdicts should not be a barrier to the rejection of the requirement of mutuality of estoppel.

Several other objections have been raised against the *Bernhard* rule. It has been argued that a party should be afforded the opportunity to contest the issue of his liability against every party to whom he may be held liable, apparently in the hope that a later court will arrive at a different result.[18] However, the objective of the judicial process is to decide issues according to judicially determined facts, and not to give a disappointed litigant the oppor-

[14] The possibility of this anomalous situation has been urged as sufficient support for limiting the *Bernhard* doctrine by not applying res judicata if there is more than two injured plaintiffs. Currie, *supra* note 6, at 285-89.

[15] Currie, *supra* note 6, at 289.

[16] By definition, this limitation would automatically eliminate the possibility of asserting res judicata if there were more than two injured parties. Hence, in all mass disasters such as the present case, res judicata would be unavailable. There would seem to be little justification for withholding the practical advantages of the *Bernhard* decision in this situation because of mere possibility.

[17] In any instance in which a prior judgment is said to be determinative of an issue, there is no guarantee that the previous verdict was absolutely correct. This fact has not prevented the courts from universally applying res judicata in the proper cases when mutuality is present.

[18] Note, 57 HARV. L. REV. 98, 105 (1943).

tunity to continue disputing them. Once the defendant has had his "day in court" on the issue, there would seem to be no injustice to require that he be bound by that determination.

Furthermore, it has been urged that allowing many plaintiffs to assert one judgment against the defendant would, by destroying the incentive of parties to settle claims out of court, actually lead to increased rather than reduced litigation.[19] As a corollary to this premise, it is argued that there is an element of unfairness in thus depriving the defendant of an opportunity to compromise the claims against him. The theory is that once one plaintiff has proceeded to litigation and has obtained a favorable verdict, all others similarly situated, being assured of victory, would also litigate their claims. Even assuming this to be true, the argument seems tenuous. The time spent in litigating solely the issue of damages in numerous cases does not equal the time consumed in fully litigating the issue of liability in but a few cases.[20] Undoubtedly, adoption of the *Bernhard* rule will affect the position of the parties with relation to compromising the claims. However, the danger does not appear to be that plaintiffs will refuse to compromise, but rather that the defendant will be unfairly pressured into settling all claims and not taking a chance in court. By going into court, the defendant can win only one action; if he loses, he loses them all.[21] However, according to the suggested rule, if the defendant does go into court and wins the first action, res judicata could not be applied as a result of losing any subsequent action.[22] After this action, the parties are in the same position as they would be in without the *Bernhard* rule. And if the defendant loses the first action, it might well be argued that the result would be merely to equalize the bargaining position of the parties as to the terms of a possible

[19] See, *e.g.*, Currier & Moore, *supra* note 6, at 309. It should he noted that this argument is directed more against any abandonment of mutuality, not merely abandonment of mutuality when res judicata is sought to be asserted offensively.

[20] For example, in *Wiener v. United Airlines* trial on the issue of negligence alone consumed eight days of pre-trial conference and sixty-nine days of actual trial time. 216 F. Supp. at 730. By contrast, each of the twenty-four separate claims in that action was tried separately on the issue of damages and although the actual trial time is not given, all were completed within three months. Wiener v. United Air Lines, 216 F. Supp. 709, 713 (S.D. Cal. 1962).

[21] This of course follows naturally from the application of the *Bernhard* rule. The remaining plaintiffs would be able to establish the defendant's liability by virtue of the first judgment leaving only the question of damages to be litigated.

[22] See text accompanying note 12 *supra*.

settlement, resulting in a more equitable compensation for the plaintiff's injuries.[23]

Although there seems to be no compelling reason for restricting the *Bernhard* rule to defensive use, it is clear that the problems posed require that the doctrine be limited in its application. The basic requirements of the *Bernhard* test must be met.[24] Particularly, the issue must be clearly defined as the same in both actions. Also it must be clear that the prior verdict was a final judgment on the merits, consent judgments or default judgments not being conclusive.[25] In addition to the *Bernhard* requirements, there should be no estoppel if there has been an actual inconsistency of verdicts in prior actions on this issue.[26] Further, before applying res judicata, the courts should consider the controversy in the prior action and determine whether the defendant had sufficient reason to defend to the utmost. Otherwise, the defendant might be required to defend a minor claim to an extent out of proportion to the damages involved, in order to prevent the verdict from binding him on an issue when a disproportionate amount is sought in later actions.[27]

There must be some method of protecting against irregularities in the first action. Of particular concern is the possibility that the

[23] Undoubtedly, in many cases, prior to an actual determination of liability, the defendant has a stronger bargaining position due to the uncertainty surrounding litigation and an often stronger economic position. This could result in a settlement which would not fully recompense the injured party. However, once liability is determined, the plaintiff can offset this bargaining power with the prior judgment assuring him of compensation.

[24] Bernhard v. Bank of America, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942).

[25] Under the traditional rules of res judicata, there is a conflict as to whether a consent judgment or default judgment is conclusive as to the issues presented by the claim. According to the "majority rule," consent judgments and default judgments are conclusive as to all issues necessarily present in the claim. See, *e.g.*, Riehle v. Margolies, 279 U.S. 218 (1929); Hay v. Salisbury, 92 Fla. 446, 109 So. 617 (1926).

[26] See text accompanying note 16 *supra*, on the multiple plaintiff problem.

[27] In the present case, the court noted that in the prior action, the total amount of liability had been $2,337,308.51. 216 F. Supp. at 730. Obviously, disparity in amounts at stake was not an issue. However, this problem represents one of the most difficult stumbling blocks for the *Bernhard* doctrine. Some commentators have dismissed it summarily, but as a practical matter the problem is real. See Comment, 35 YALE L.J. 607 (1926). The classical illustration is the minor claim for property damage, instituted in a municipal court, followed by an action for personal injury seeking much greater damages. This problem prompted the Califoruia Court of Appeals in Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (Dist. Ct. App. 1958), to declare that as the public policy of that jurisdiction, res judicata would not be available to nonparties in the multiple claimant situation. The California Supreme Court however has yet to rule on that question.

first jury might have rendered a compromise verdict.[28] Similarly, there may be other defects which would indicate that no bona fide determination of the issue was made. There is no set formula which can dispose of these objections; rather, the courts must be willing to examine subjectively the prior verdict and determine whether it represents a full and fair adjudication of the issue.[29] The present case illustrates that this approach can be successfully and beneficially applied.[30]

This subjective approach may leave one less than satisfied. Final solution of the problems raised by the multi-victim disaster probably lies in improved devices for transfer and consolidation of actions,[31] in which case res judicata would become secondary. However, until such time as these devices are perfected, res judicata will continue to be an important tool in the reduction of litigation and the *Bernhard* rule can be profitably utilized.

[28] The California courts, after examining the prior action, have apparently declined to allow res judicata in several cases because a compromise verdict was suspected. See Taylor v. Hawkinson, 47 Cal. 2d 893, 306 P.2d 797 (1957); Leipert v. Honold, 39 Cal. 2d 462, 247 P.2d 324 (1952).

[29] Professor Currie, in his article, *supra* note 6, at 308, suggested as a possible limitation on the *Bernhard* rule that it be used only against the party who had the initiative in the prior action. The purpose of this limitation would be to protect the parties from harassment and to some degree insure the fairness of the preceding action. The theory is that if the party had had the initiative, it would be more probable that the issue had been fully and fairly litigated as to him. However, if the court is willing to examine subjectively the prior action for fairness, such a limitation is not necessary and if applied would unduly restrict the principle because res judicata could then be used only against an unsuccessful plaintiff.

[30] In addition to the previously noted factors of amount involved and time spent in litigation, the court in the instant case commented on several other factors which are persuasive. Among these are: quality of counsel for defense, thoroughness of the previous litigation, and the admission of defense counsel that no new evidence on the issue of negligence would be forthcoming. 216 F. Supp. at 730-31. These factors are all indicative of the fact that the defendant had had a full and fair adjudication of the issue.

[31] For examples of existing transfer and consolidation devices see 62 Stat. 937, 28 U.S.C. § 1404(a) (1948) (U.S. transfer statute) and FED. R. CIV. P. 42(a) (federal rule on consolidation of actions). For state statutes on consolidation of actions, see, *e.g.*, CAL. CODE CIV. PROC. § 1048; ILL. REV. STAT. ch. 110, § 175 (Smith-Hurd 1956); 23 OHIO REV. CODE § 2309.64 (Page 1954).

Another device for simplifying procedures when many actions arise from the same issue is by assigning one district judge to hear all such cases which are brought within a particular circuit. 62 Stat. 901 (1948), as amended, 28 U.S.C. 292(b) (1958).