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ISSUE ESTOPPEL: MUTUALITY OF PARTIES RECONSIDERED

Michael J. Herman*
Gerald F. Hayden, Jr.*
Toronto

The doctrine of issue estoppel prevents parties from relitigating any issue which was necessarily and specifically decided in prior litigation between them. There is a rule, often referred to under the rubric "mutuality of parties", that issue estoppel only operates where the parties to the subsequent litigation were also the parties in the prior litigation. The United States Supreme Court has abandoned this requirement except where, in the exercise of the court's discretion, it would be unfair to work an estoppel. English and Canadian courts have also felt uneasy about the requirement but, rather than eliminate it, they have reached the desired result through the application of the principle of abuse of process. As well, English and Canadian legislators and judges have decided that convictions in prior criminal proceedings can be used as prima facie evidence in the subsequent civil proceedings, subject to rebuttal. The thesis of this article is that English and Canadian law has developed in an undesirable way. Canadian judges ought to adopt and clearly articulate the doctrine of issue estoppel, without the requirement of mutuality of parties. Moreover, Canadian legislators and judges ought not to encourage or countenance any half-way measures by which proof of prior criminal convictions are admissible as prima facie proof, subject to rebuttal evidence.

Le principe de fin de non-recevoir d'une question litigieuse empêche les parties de porter devant la cour tout litige qui a déjà été l'objet explicite d'une décision de la cour. Cette fin de non-recevoir d'une question litigieuse ne peut entrer en jeu que si les parties de la seconde action sont les mêmes que ceux de la première. La cour suprême des États-Unis a abandonné cette nécessité sauf dans les cas où la cour décide, à sa discrétion, qu'il serait injuste d'appliquer la fin de

* Michael J. Herman and Gerald F. Hayden, Jr., both of the Ontario Bar, Toronto, Ontario.

non-recevoir. Les tribunaux anglais et canadiens ont aussi ressenti le besoin d'éviter autant que possible cette nécessité mais, au lieu de l'éliminer, ils sont arrivés aux mêmes fins en se servant du principe d'abus de procédure. Les juges et législateurs anglais et canadiens ont aussi décidé que les condamnations résultant de procès criminels peuvent servir de commencement de preuve dans les affaires civiles subséquentes si ces condamnations restent soumises à la réfutation. Le but des auteurs est de montrer que ce développement du droit anglais et canadien est malheureux: les juges canadiens devraient adopter le principe, clairement exprimé, de fin de non-recevoir d'une question litigieuse, tout en abandonnant la nécessité des mêmes parties dans les deux affaires, et les législateurs et juges canadiens devraient s'absentir d'encourager ou d'approuver les demi-mesures qui permettent d'admettre comme commencement de preuve des condamnations résultant de procès criminels.

Introduction

Over the years Anglo-Canadian common law developed a principle called res judicata. The leading text on the subject describes the operation of the principle of res judicata as follows:

> The rule of estoppel by *res judicata* . . . is a rule of evidence [and] may thus be stated: where a final judicial decision has been pronounced by . . . [a] judicial tribunal of competent jurisdiction over the parties to, and the subject of, the litigation, any party or privy to such litigation, as against any other party or privy thereto . . . is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the foundation of an action, or relied upon as a bar to any claim, indictment or complaint, or to any affirmative defence, case or allegation . . .[1]

The policy of res judicata is to prevent litigants from abusing the judicial process through the relitigation of causes of action and issues, to bring a finality to litigation, and to avoid a multiplicity of judicial proceedings.

There are really two separate and independent applications of the general principle of res judicata. The separate doctrines are generally known in Anglo-Canadian law as cause of action estoppel and issue estoppel.

Recently, as the quantity of litigation has increased, some Anglo-Canadian courts have apparently felt that the two doctrines of cause of action estoppel and issue estoppel have not been adequate to protect properly and fully the values and the policies behind the principle of res judicata. Accordingly, these courts have looked elsewhere for assistance and have latched on to the principle of abuse of process as an appropriate and necessary judicial tool. In our view the use of the principle of abuse of process is both unnecessary and unfortunate. It is unnecessary because the principle of res judicata, and particularly the doctrine of issue estoppel, is capable of being expanded and reformulated so that it can adequately and properly deal with current problems. It is unfortunate because

[1] G. Spencer Bower and A.K. Turner, The Doctrine of Res Judicata (2nd ed., 1969), p. 9.

the principle of abuse of process is general, somewhat vague and multi-purpose, and is not well suited to the determination of whether a litigant is improperly trying to relitigate a cause of action or issue.

This article will proceed in the following sequence. We will begin by describing the requirements and applications of the principle of res judicata, and particularly the doctrine of issue estoppel. We will then demonstrate how the doctrine of issue estoppel has adapted itself to meet current needs, particularly as evidenced by two recent decisions of the Supreme Court of the United States. We will then consider the English and Canadian cases where the courts, in responding to current needs, have often and inappropriately employed the principle of abuse of process. Finally, we will consider a related issue; namely, whether there should be a half-way house by which findings in prior adjudications are admitted simply as *prima facie* but rebuttable evidence.

I. *Cause of Action and Issue Estoppel in English and Canadian Law*

As stated above, the principle of res judicata is founded on a public policy that there should be an end to litigation in order to prevent the hardship to an individual of being vexed twice for the same cause.[2] The principle of res judicata operates through the application of the two doctrines of cause of action estoppel and issue estoppel.

A. *Cause of Action Estoppel*

The phrase "cause of action estoppel" appears to have been popularized by Diplock L.J. in 1964:[3]

> The first species, which I will call "cause of action estoppel," is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties.

Cause of action estoppel simply means that where the legal claims and liabilities of two parties have been determined in a prior action, the claims, having been denied in the prior litigation, cannot be asserted anew, and the liabilities, having been imposed in the first litigation, cannot now be denied.

The leading Canadian case on cause of action estoppel is the Supreme Court of Canada decision in *Town of Grandview* v. *Doering*.[4] Doering brought two separate actions, in succession, against the Town of Grandview. In the first action Doering alleged that his property was damaged in 1967

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[2] *Fenerty* v. *City of Halifax* (1920), 50 D.L.R. 435, at p. 437 (N.S.S.C.).

[3] *Thoday* v. *Thoday*, [1964] P. 181, at p. 197, [1964] 1 All E.R. 341, at p. 352 (C.A.).

[4] *Town of Grandview* v. *Doering* (1975), 61 D.L.R. (3d) 455 (S.C.C.).

and 1968 by surface flooding caused by the construction of a dam by the defendant, the Town of Grandview. The action was dismissed, with the Trial Court holding that the dam was not the cause of the surface flooding. Thereafter, Doering brought a second action against the Town of Grandview, alleging that in the years 1969 through 1972 his land was damaged by surface flooding caused by the Town of Grandview. The majority of the Supreme Court of Canada held that the second action should be dismissed because there was no new cause of action, and because the prior proceedings had determined the legal rights and liabilities between the parties. Therefore, the plaintiff was estopped from relitigating the same cause of action.

The minority judgment held, in effect, that the second proceeding was based on an entirely different cause of action which was separate and distinct from the cause of action in the prior action. The issue was not the question of direct surface flooding caused by the construction of the dam, which had been decided against Doering in the first action, but was whether the flooding was caused indirectly by the dam due to the presence of an aquifer four feet below the surface which caused water saturation and would not allow the surface waters to properly abate. In responding to the minority, the majority stated that new facts, new evidence and new factual theories of causation and responsibility were not sufficient to constitute a new cause of action for the purpose of allowing a plaintiff to avoid the application of the doctrine of cause of action estoppel. The majority held that it was the obligation of Doering in the first proceeding to muster all relevant evidence by making reasonable and diligent inquiries so that all factual aspects could be canvassed and adjudicated in the first proceeding; multiplicity of proceedings must be avoided, and that was why there was a heavy obligation imposed on both parties to present all relevant facts and evidence in the first trial.

Based on the decision in *Town of Grandview,* there appear to be four criteria which must be satisfied before the doctrine of cause of action estoppel will apply:

(1) There must be a final decision of a court of competent jurisdiction in the prior action;

(2) The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action;

(3) The cause of action in the prior action must not be separate and distinct; and

(4) The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

The decision in *Town of Grandview* is sensible in light of the underlying policy of the principle of res judicata which seeks to avoid multiplicity of proceedings.

B. *Issue Estoppel*

Where the cause of action itself in the subsequent proceeding is separate and distinct, cause of action estoppel will not apply. However, within one cause of action, there may be several issues that have to be decided as part of the overall adjudication. If an issue has been determined between the parties in a prior action, neither party should be allowed to fight that issue again in a subsequent action between the same parties—this is the doctrine of issue estoppel.

The doctrine of issue estoppel was explained by Diplock L.J. in 1964:[5]

> The second species [of res judicata], which I will call "issue estoppel," is an extension of the same rule of public policy [that a person should not be vexed twice for the same cause of action]. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfillment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfillment of the identical condition, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.

The leading English case on issue estoppel is *Carl Zeiss Stiftung* v. *Raynor & Keeler Ltd. (No. 2)*.[6] Lord Guest in the House of Lords defined what is meant by issue estoppel:[7]

> . . . it may be convenient to describe res judicata in its true and original form as "cause of action estoppel." . . . Within recent years the principle has developed so as to extend to what is described as "issue estoppel," that is to say, where in a judicial decision between the same parties some issue which was in controversy between the parties and was incidental to the main decision has been decided, then that may create an estoppel . . .

He then went on to articulate the three requirements which must be present before the doctrine will apply:[8]

> The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

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[5] *Thoday* v. *Thoday, supra,* footnote 3, at pp. 198 (P.), 352 (All E.R.).

[6] [1967] 1 A.C. 853, [1966] 2 All E.R. 536 (H.L.).

[7] *Ibid.*, at pp. 933-934 (A.C.), 564-565 (All E.R.).

[8] *Ibid.*, at pp. 935 (A.C.), 565 (All E.R.).

To these requirements can be added a fourth. This was articulated by the Supreme Court of Canada in *Angle* v. *Minister of National Revenue*,[9] which is the leading Canadian case on issue estoppel. Dickson J., speaking for the majority, described this fourth requirement as follows:[10]

> It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. . . . The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings. . .

An interesting decision on issue estoppel is that of the Ontario Court of Appeal in *Hennig* v. *Northern Heights (Sault) Ltd.*[11] In a previous action, Hennig was a defendant and plaintiff by counterclaim. The trial judge in the earlier action had found that there was no subsisting option agreement between the parties, and accordingly the plaintiff's action was dismissed. During the course of the proceedings, Hennig had admitted that the counterclaim, which claimed damages for the plaintiff's failure to implement the option agreement, was the idea of his former solicitor who had withdrawn from the case. The trial judge, in giving reasons, held explicitly that the option agreement was not exercised, that the counterclaim had been the idea of the defendant's former solicitor, that the defendant had abandoned the counterclaim while giving evidence, and that accordingly the counterclaim was dismissed without costs. Hennig then commenced a new action for specific performance of the option agreement and for damages. The motions court judge dismissed the action by applying the doctrine of issue estoppel. The Ontario Court of Appeal affirmed the decision of the motions court judge, with Morden J.A. stating:[12]

> Although Mr. Hennig had no desire to pursue [the counterclaim], it was before the trial Judge for determination and it was his duty to determine it, with final and binding effect, unless it was lawfully discontinued.

Later in his judgment he put the matter thus:[13]

> . . . in dealing with the status of the option agreement earlier in his reasons [the trial judge] had, effectively, dealt with the claim and counterclaim in such a way that the counterclaim had to be dismissed "on the merits" and so it cannot be said that there was no legal basis, in the mind of the trial Judge, apart from the abandonment at trial, for the disposition of the counterclaim.

Following the rule laid down in *Angle*, the Court of Appeal determined that the trial judge in the earlier proceeding found as a necessary and

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[9] [1975] 2 S.C.R. 248, (1974), 47 D.L.R. (3d) 544.

[10] *Ibid.*, at pp. 255 (S.C.R.), 555-556 (D.L.R.).

[11] (1980), 116 D.L.R. (3d) 496, 30 O.R. (2d) 346 (Ont. C.A.), leave to appeal to the Supreme Court of Canada denied (1980), 116 D.L.R. (3d) 496 n., 30 O.R. (2d) 346 n.

[12] *Ibid.*, at pp. 502 (D.L.R.), 353 (O.R.).

[13] *Ibid.*, at pp. 504 (D.L.R.), 354 (O.R.).

indispensible fact that the option agreement was null and void. Accordingly, issue estoppel applied.[14]

C. *Mutuality of Estoppel*

The interesting and vital question of current concern is what can be referred to as "mutuality of estoppel"; that is, whether it makes sense to require that the parties or their privies to both pieces of litigation be the same. With this question in mind let us return to the *Carl Zeiss Stiftung* v. Rayner & Keeler Ltd. (No. 2).[15] The facts and the legal issues in *Carl Zeiss* are quite complex and far-ranging, and we do not propose to deal with the case at any length, but simply focus on the requirement that the parties to the second adjudication be the same as the parties to the first adjudication.

For our purposes, the relevant facts are as follows. In a previous lawsuit in West Germany the East German Council of Jera and a West German company each claimed full beneficial and legal interest in and title to the assets and name of Carl-Zeiss-Stiftung. The West German court decided that the Council of Jera did not have any such title or interest. Thereafter, by interlocutory application, the West German company challenged the authority of English solicitors who had, on instructions of the Council of Jera and in the name of Carl-Zeiss-Stiftung, commenced a passing-off action in England against the West German firm. By launching the interlocutory application and challenging the authority of the plaintiff's solicitors to bring the English action, the West German firm was simply asserting issue estoppel against the Council of Jera in accordance with the prior adjudication by the West German court.

The majority of the English court held that issue estoppel did not apply since the respondent in the present application in the English proceeding was the English firm of solicitors, and that they were not a party

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[14] In fact, counsel for Hennig advanced interesting arguments in support of his position that issue estoppel should not apply:

(1) Since the counterclaim had been abandoned, there was no adjudication on the merits;

(2) Because the counterclaim had been abandoned and because Hennig had won the main action, he could not appeal any adverse finding of fact from the first trial.

The Court of Appeal in effect held that the first argument was irrelevant, since issue estoppel is premised on a necessary finding of fact adverse to one of the parties, and not an adjudication on the merits of any particular cause of action. The second argument advanced by Hennig is really much more troublesome, and in appropriate circumstances could be a reason for denying the application of issue estoppel; the reader is directed to the next subsection of the article which discusses the American authorities, and the limits which might be imposed on the application of the doctrine of issue estoppel. However, the Court of Appeal felt that "Mr. Hennig had no intention of preserving for the future any rights he may have had to litigate with respect to the option agreement" (*ibid.*, at pp. 504 (D.L.R.), 354 (O.R.)), and accordingly felt little compunction in dismissing the second action.

[15] *Supra*, footnote 6.

or privy to the prior adjudication in West Germany. The reasoning of the majority seems an unnecessarily rigid and mechanical adherence to an application of the requirement that the parties to the two pieces of litigation be the same. The effective respondent in the English interlocutory application was not the firm of solicitors but the Council of Jera; moreover, it could certainly be argued that the English solicitors were in a sense privies to the Council of Jera. This was a case in which the doctrine of issue estoppel ought to have been applied against the Council of Jera and ought to have led to a stay or dismissal of the English action.[16] The Council of Jera should not have been allowed to relitigate an issue against the same party, the West German company, where that issue had been determined against the Council of Jera in a prior adjudication.

Fortunately, American, Canadian and subsequent English courts have manoeuvred around the problem presented by the "mutuality of estoppel principle". The next section of the article studies the American response to the requirement of mutuality of estoppel, and illustrates how the American courts exercise a discretion in determining whether to employ the doctrine of issue estoppel. We will then consider the English and Canadian responses, as evidenced by the most current cases in these jurisdictions, to the requirement of mutuality of estoppel.

II. *American Law on Issue Estoppel and Mutuality of Estoppel*

The doctrine of issue estoppel in American jurisprudence is known as collateral estoppel. Stewart J. of the Supreme Court of the United States said in a leading case, *Parklane Hosiery Co., Inc.* v. *Shore*:[17]

> Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation.

There are two fairly recent decisions of the Supreme Court of the United States which carefully canvass the scope and application of the doctrine of collateral estoppel and the requirement of mutuality of estoppel.

The earlier decision is *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*.[18] In the prior action, University of Illinois Foundation sued Winegard Co. alleging an infringement of patent. The court found that the patent was invalid, and accordingly the action was

[16] We are ignoring for present purposes the other bases relied upon by one or more of the Law Lords to decide that issue estoppel did not aply: the West German determination was not a final adjudication; issue estoppel did not apply where the prior proceedings were in a foreign court; the West German result, if not perverse, was wrong, beyond the jurisdiction of the West German court, and in any case inconsistent with the prior adjudication of an East German court between the same or similar parties.

[17] 99 S. Ct. 645, at p. 649 (1979).

[18] 91 S. Ct. 1434 (1971).

dismissed. Before that prior action had reached trial, the University of Illinois Foundation had commenced the present action against Blonder-Tongue Laboratories, claiming infringement of the same patent. The trial judge in the present action held that the University of Illinois Foundation patents were valid and infringed, a result inconsistent with the finding in the prior action. The trial judge in the present action attempted to defend this inconsistent finding:[19]

> Although a patent has been adjudged invalid in another patent infringement action against other defendants, patent owners cannot be deprived "of the right to show, if they can, that, as against defendants who have not previously been in court, the patent is valid and infringed." . . . On the basis of the evidence before it, this court disagrees with the conclusion reached in the *Winegard* case and finds both . . . [patents] valid and enforceable patents.

Blonder-Tongue's appeal to the Appellate Court was dismissed. However, Blonder-Tongue did obtain leave to appeal to the Supreme Court of the United States on the following question:

> Should the holding of Triplett v. Lowell, 297 U.S. 638 . . . that a determination of patent invalidity is not res judicata as against the patentee in subsequent litigation against a different defendant, be adhered to?[20]

The problem is the requirement of mutuality of estoppel. As stated above, the traditional jurisprudence in England, Canada and the United States applied issue estoppel only where *both* the plaintiff and defendant in the subsequent litigation were also parties or in privity with the parties to the previous litigation. The question posed by the Supreme Court of the United States in granting leave to appeal was whether the requirement of mutuality of estoppel was sensible, or, whether alternatively, it ought to be sufficient that only *the party against whom* the estoppel was sought be a party, or privy to a party, to the earlier litigation.

The Supreme Court of the United States determined that the doctrine of collateral estoppel was a full and proper defence raised by Blonder-Tongue Laboratories, and accordingly allowed the appeal and dismissed the action of the University of Illinois Foundation. The court rejected the requirement of mutuality of estoppel in these terms:[21]

> But even at the time *Triplett* was decided . . . the mutuality rule had been under fire. Courts had discarded the requirement of mutuality and held that *only the party against whom the plea of estoppel was asserted* had to have been in privity with a party in the prior action. As Judge Friendly has noted, Bentham had attacked the [mutuality rule] "as destitute of any semblance of reason, and as 'a maxim which one would suppose to have found its way from the gaming-table to the bench'. . . ." . . .
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> . . . [T]he California Supreme Court, in Bernhard v. Bank of America Nat. Trust & Savings Assn. . . . unanimously rejected the doctrine of mutuality, stating that there

[19] *Ibid.*, at p. 1436, reproducing this passage from the trial judgment.

[20] *Ibid.*, at p. 1437.

[21] *Ibid.*, at pp. 1439-1440. (Emphasis added).

> was "no compelling reason . . . for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.". . . Justice Traynor's opinion . . . listed criteria since employed by many courts in many contexts:
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> > "In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was *the party against whom the plea is asserted* a party or in privity with a party to the prior adjudication?"

The court simply reviewed the doctrine afresh, and realized that there was no compelling, or even good, reason to sustain the doctrine of mutuality of estoppel. The court sensibly concluded that the plea of collateral estoppel should succeed against any party who is a party or in privity with a party in a prior adjudication. The court flatly rejected the argument that abandoning the requirement of mutuality of estoppel was unfair since it meant that only one or some, but not all, of the parties to the subsequent litigation was bound by issues or facts determined in the prior adjudication. White J. rejected this argument quite simply:[22]

> In reality the argument . . . is merely that the application of *res judicata* in this case makes the law asymmetrical. But the achivement of substantial justice rather than symmetry is the measure of the fairness of the rules of *res judicata*.

The court emphasized that there were really two policies or rationales for expanding the ambit of collateral estoppel and relinquishing the requirement of mutuality of estoppel:[23]

> In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defence on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources . . . . Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or "a lack of discipline and disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure."

The requirement of mutuality of estoppel was further eroded by the Supreme Court of the United States in the later case of *Parkdale Hosiery Co., Inc.* v. *Shore*.[24] In this case, Shore brought a shareholders class action against Parklane Hosiery Company, its officers and directors, alleging that they had issued a materially false and misleading proxy statement. Before that action came to trial, the Securities and Exchange Commission sued the same defendants, alleging that the proxy statement was materially false and misleading in essentially the same respects. The District Court, following a non-jury trial, entered its declaratory judgment for the Security and Exchange Commission, and the decision was affirmed on appeal. The plaintiff, Shore, then moved for partial summary

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[22] *Ibid.*, at p. 1441.

[23] *Ibid.*, at p. 1443.

[24] *Supra*, footnote 17.

judgment in the shareholders class action, asserting that the defendants were collaterally estopped from relitigating the issues resolved against them in the Security and Exchange Commission action. This motion ultimately found its way to the Supreme Court of the United States, which found that the doctrine of collateral estoppel was applicable. The case was somewhat different from *Blonder-Tongue* which involved the defensive use of collateral estoppel; that is, the doctrine of collateral estoppel was there being used in the subsequent litigation as a defence. In *Parklane Hosiery Co., Inc.*, the doctrine of collateral estoppel was being used offensively by a plaintiff as the basis of his cause of action and the motion for partial summary judgment. While the court conceded that the offensive use of the doctrine of collateral estoppel could pose problems and present certain elements of unfairness, it felt that the answer was "not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied".[25]

In fact, the Supreme Court of the United States recognized in both *Blonder-Tongue* and *Parklane Hosiery Co., Inc.* that collateral estoppel should not be applied automatically in all cases, but that the court must be discriminating and exercise a broad discretion to ensure that the party against whom collateral estoppel was being used had a full and fair opportunity to litigate in the earlier adjudication. There are a number of criteria or factors which the court can and should evaluate in deciding whether or not it is fair and appropriate to apply the doctrine of collateral estoppel:

(1) Did the party against whom the estoppel is sought have the choice of forum in the previous litigation?[26]

(2) Was the party against whom collateral estoppel is sought denied procedural opportunities or subjected to procedural disadvantages in the first action which could readily have caused a different result, for example, onus of proof or negative presumptions?[27]

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[25] *Ibid.*, at p. 651.

[26] *Blonder-Tongue Laboratories Inc.* v. *University of Illinois Foundation*, *supra*, footnote 18, at p. 1445.

[27] *Parklane Hosiery Co., Inc.* v. *Shore*, *supra*, footnote 17, at p. 651. See M.J. Holland, Modernizing Res Judicata: Reflections on the *Parklane* Doctrine (1979-1980), 55 Indiana L.J. 615.

It is most interesting that Lord Reed grappled with just this issue in *Carl Zeiss*, *supra*, footnote 6, at pp. 917 (A.C.), 554 (All E.R.):

> Suppose the first case is one of trifling importance but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought? . . . It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel.

(3) Did the party against whom collateral estoppel is sought have proper incentive to vigorously defend the earlier action? Relatedly, was the amount in issue in the first action small, and was future litigation foreseeable at that time?[28]

(4) Could the party seeking to rely upon issue estoppel have joined as a party in the prior litigation? Since that party, if not a party in the first action, is not subject to any estoppel in subsequent litigation, it is unfair to allow him to sit on the sidelines, hoping that the other party against whom he proposes to litigate will fail in earlier litigation, but not being prepared himself to be bound by the result of that litigation if it is favourable to that other party.[29]

(5) Whether the party against whom estoppel is sought is thereby deprived of a constitutional right, for example, jury trial.[30]

All of these factors must be considered by the court in the exercise of a broad discretion in deciding whether collateral estoppel ought to be applied.

Critics argue that the exercise of judicial discretion is a vague tool, leading to erratic and unpredictable results, and therefore gives little guidance to prospective litigants, and that a clearly formulated rule is a necessity. While there is merit in these criticisms, it is more important to recognize that the formulation and application of a rigid rule meant to encompass a variety of factually and dynamically disparate situations is inappropriate and unfair; while there must be guiding rules, there must also be judicial flexibility to promote fairness and justice in the individual case. The author of the leading American article in the area states:

> Modern American law has long since turned its gaze from the natural to the social sciences, and is no longer beguiled by the illusion of impersonal decisionmaking, whereby axiomatic rules, absolute and unqualified in their operation, are simply applied to the data at hand.[31]

In our discussion of the American formulation and application of the doctrine of collateral estoppel, we have focused on the American response to the requirement of mutuality of estoppel, and the American appreciation that the use of the doctrine of issue or collateral estoppel be discretionary. The American responses are candid, thoughtful, balanced and well articulated. Unfortunately, but not atypically, the English and Cana-

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[28] *Parklane Hosiery Co., Inc.* v. *Shore, ibid.*, at p. 651; *Blonder-Tongue Laboratories Inc.* v. *University of Illinois Foundation, supra*, footnote 18, at p. 1445.

[29] *Parklane Hosiery Co., Inc.* v. *Shore, ibid.*, at p. 651.

[30] This is the larger question in *Parklane Hosiery Co., Inc.* and the basis upon which leave to appeal to the Supreme Court of the United States was obtained. This may be an equally significant factor in Canada under the Charter of Rights and Freedoms (Constitution Act, 1982, Part I). It is beyond the scope of this paper to consider what effect Charter arguments will have in limiting the use of the doctrines of cause of action estoppel and issue estoppel.

[31] Holland, *loc. cit.*, footnote 27, at p. 640.

dian courts, while generally reaching defensible results, have not consistently or compellingly articulated the reasons for reaching these results in the individual cases.

IV. *English and Canadian Law on Mutuality of Estoppel*

A. *English Law*

The leading older English authority on the question of mutuality of estoppel is *Hollington* v. *Hewthorn*.[32] In that case, there was a motor vehicle accident involving Hollington and Hewthorn. Hewthorn was charged and convicted of careless driving, contrary to the Road Traffic Act, 1930. The estate of Hollington then commenced a civil action against Hewthorn claiming damages. Counsel for the estate of Hollington was Mr. Denning, later Master of the Rolls. He argued that the conviction of Hewthorn in the prior summary criminal proceedings was admissible evidence of negligence against Hewthorn in the civil proceedings. The parties to the summary criminal proceedings were the Crown as prosecutor and Hewthorn as defendant; the parties to the civil proceeding were the estate of Hollington as plaintiff and Hewthorn as defendant. The question for the Court of Appeal was whether issue estoppel, or some variant thereof, could be applied where there was no identicality of parties in the two proceedings; that is, would the English courts insist upon the requirement of mutuality of estoppel?

The Court of Appeal decided that issue estoppel did not apply, and that evidence of the prior criminal proceedings was inadmissible. The decision has been roundly criticized and the reasoning is, at best, mechanical and clearly riddled with numerous fallacies. Set forth below are four relevant passages from the judgment of the Court of Appeal and our criticisms of them.

> (1) A judgment obtained by A against B ought not to be evidence against C, for . . . "it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses or to appeal from a judgment he might think erroneous:. . . ." . . . If given between the same parties they are conclusive, but not against anyone who was not a party.[33]

It is indisputable that there cannot be an estoppel against a party who was not a party, or privy to a party, in a prior judicial proceedings. However, that had nothing to do with the point at issue since Hewthorn was a party to the prior proceedings; the only issue was whether or not it mattered that the estate of Hollington was not a party to the prior proceedings (the requirement of mutuality of estoppel).

> (2) . . . the opinion of Blackburn J., delivered to the House of Lords in *Castrique* v. *Imri* . . . says, without any qualification, that "a judgment of conviction on

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[32] [1943] K.B. 587, [1943] 2 All E.R. 35 (C.A.).

[33] *Ibid.*, at pp. 596 (K.B.), 40-41 (All E.R.).

> an indictment for forging a bill of exchange, though conclusive as to the prisoner being a convicted felon, is not only not conclusive, but is not even admissible evidence of the forgery in the action on the bill."[34]

While statements by eminent nineteenth century judges are worthy of respect, they should not be followed unthinkingly, and must be re-examined in light of current social, economic and commercial conditions, in order to determine whether they accord with modern concepts of law and justice.

> (3) To take the present case, it could be said that the conviction shows that the magistrates were satisfied on the facts before them that the defendant was guilty of negligent driving. If that be so, it ought to be open to a defendant who has been acquitted to prove it, as showing that the criminal court was not satisfied of his guilt, although the discussion by text-book writers and in the cases all turn on the admissibility of convictions and not of acquittals.[35]

As recognized by the American authorities, the question is not one of symmetry but one of substantial justice, and there is no injustice in applying estoppel against a party who has litigated an issue and lost. An acquittal would not have been admissible since the estate of Hollington was not a party to or participant in the first proceeding, and it would obviously have been inappropriate to work an estoppel against the estate of Hollington under the circumstances.

> (4) No doubt, it is difficult for a layman to understand why it is that if A prosecutes B, say, for doing him grievous bodily harm, and subsequently brings an action against him for damages for assault, . . . he cannot use the conviction as proof that B did assault him.[36]

It seems equally difficult for a jurist to understand why B should not be able to use the prior conviction of A in this fashion.

Lord Denning, as Master of the Rolls, persistently criticized the decision in *Hollington* v. *Hewthorn*. In *Goody* v. *Odhams Press Ltd.*,[37] he stated:

> . . . there is a strange rule of law which says that a conviction is no evidence of guilt, not even prima facie evidence. That was decided in *Hollington* v. *F. Hewthorn & Co. Ltd.* I argued that case myself and did my best to persuade the court that a conviction was evidence of guilt. But they would not have it. I thought that decision was wrong at the time. I still think it was wrong. But in this court we are bound by it . . . . In the [subsequent civil] action he cannot rely on the conviction as proof of guilt. He has to prove it all over again, if he can.

In *Barclays Bank Ltd.* v. *Cole*[38] Lord Denning continued his attack:

> He [the defendant] wishes to canvass again his guilt or innocence, but this time before a jury in a civil case. There is too much of this sort of thing going on: . . . It is made possible by the unfortunate decision of this court in *Hollington* v. *Hewthorn*

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[34] *Ibid.*, at pp. 599 (K.B.), 42 (All E.R.).

[35] *Ibid.*, at pp. 601 (K.B.), 43 (All E.R.).

[36] *Ibid.*, at pp. 596 (K.B.), 40 (All E.R.).

[37] [1967] 1 Q.B. 333, at p. 339, [1966] 3 All E.R. 369, at pp. 371-372 (C.A.).

[38] [1967] 2 Q.B. 738, at p. 743, [1966] 3 All E.R. 948, at pp. 949-950 (C.A.).

> *& Co.* where it was held that a conviction in a criminal court cannot be used as evidence, not even prima facie evidence, in a civil case. I hope it will soon be altered. See what it means here . . . . Now after seeing him duly prosecuted and convicted, they [the plaintiffs] are asked to prove his guilt all over again in this civil suit.

Lord Denning finally had the opportunity in *McIlkenny* v. *Chief Constable of West Midlands Police Force*[39] to give *Hollington* v. *Hewthorn* its quietus:

> Now [*Hollington* v. *Hewthorn*] has been examined with great skill and much learning in the New Zealand Court of Appeal in *Jorgensen* v. *New Media (Auckland) Ltd.* [1969] N.Z.L.R. 961: and I gladly adopt all their reasoning. Beyond doubt, *Hollington* v. *Hewthorn* . . . was wrongly decided.

In *McIlkenny,* bomb explosions in two Birmingham public houses killed twenty-one people and left 161 people injured. The defendants, I.R.A. terrorists, confessed to the bombings and were charged with murder. At the murder trial, the defendants contested the admissibility of their confessions, saying that the confessions had been involuntarily extracted as a result of police assault. The trial judge found that the confessions were voluntary, and therefore admitted the confessions which led to the defendants' convictions. Implicit in and necessary to the trial judge's finding of voluntariness was a finding that the police officers had not assaulted the defendants. The defendants then commenced a civil action for assault against the police officers. The issue for the Court of Appeal was whether the police officers, as defendants in the civil action, could successfully plead issue estoppel to prevent the plaintiffs' civil action from continuing. The majority of the Court of Appeal found that there was an operative issue estoppel. Lord Denning, in a characteristically incisive and pungent judgment, eschewed the need for mutuality of estoppel, relying on a combination of common sense, the common man's perception of the administration of justice, the common law in England, and the considerable American judicial experience. He expressly adopted the American position enunciated in *Blonder-Tongue* and rejected the requirement of mutuality of estoppel, thereby bringing the English decision into line with the American law.

Later in 1980, Lord Denning in *Tebbutt* v. *Haynes,*[40] readdressed the same issue and came to the same conclusion; that issue estoppel can apply in the absence of mutuality. In *Tebbutt* a wife applied in the first proceeding under the Matrimonial Causes Act, 1973, seeking the transfer to herself of the legal and equitable interest in the matrimonial home. The husband had disappeared and the husband's mother obtained leave to intervene in the application, claiming that she was the sole beneficial owner. On the appeal from the Registrar's decision, Hollings J. found in

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[39] [1980] Q.B. 283, at p. 319, [1980] 2 All E.R. 227, at pp. 236-237 (C.A.).

[40] [1981] 2 All E.R. 238 (C.A.).

favour of the husband's mother and determined that she was entitled to the full beneficial interest in the home (subject to some claims of the wife for contribution towards the purchase of the home). However, the jurisdiction of the Family Division under the Matrimonial Causes Act, 1973, was limited to a determination of rights between spouses, and accordingly the mother was forced to commence a new action in the Chancery Division against both her son, the husband, and the wife, claiming the full beneficial interest in the home. The wife counterclaimed, claiming a declaration that she was a ninety per cent beneficial owner of the house. The plaintiff mother brought an applicaton to dismiss the counterclaim based on issue estoppel. On appeal to the Court of Appeal, Lord Denning simply applied the decision in *McIlkenny,* and found there was an operative issue estoppel against the wife, and dismissed her counterclaim. Lord Denning, in referring to *McIlkenny,* stated:[41]

> I ventured to suggest this principle: if there has been an issue raised and decided *against* a party in circumstances in which he has had a full and fair opportunity of dealing with the whole case, then that issue must be taken as being finally and conclusively decided *against* him. He is not at liberty to reopen it unless his circumstances are such as to make it fair and just that it should be reopened.

The last phrase of the quoted passage is significant. It would appear that Lord Denning, like the American authorities,[42] recognized that the courts have and should exercise a discretion in preventing the operation and application of issue estoppel where such an estoppel would be unreasonable or unfair.

Unfortunately, Lord Denning's thoughtful analysis and adaptation of the doctrine of issue estoppel was rejected by the House of Lords in the appeal from *McIlkenny,* which appeal was styled *Hunter* v. *Chief Constable of the West Midlands Police.*[43] The House of Lords dismissed the appeal with little difficulty. However, the court decided that the applicable doctrine was not issue estoppel, but was rather the principle of abuse of process. Lord Diplock, who delivered the only judgment, stated:[44]

> Lord Denning M.R. and Sir George Baker were also in favour of extending the description "issue estoppel" to cover the particular example of abuse of process of the court presented by the instant case . . . . Goff L.J., on the other hand, expressed his own view . . . that such extension would involve a misuse of that expression. But if what [the plaintiff] is seeking to do in initiating this civil action is an abuse of the process of the court, as I understand all your Lordships are satisfied that it is, the question whether it also qualifies to bear the label "issue estoppel" is a matter not of substance but of semantics . . . .
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> Nevertheless, it is my own view, which I understand is shared by all your Lordships, that it would be best, in order to avoid confusion, if the use of the

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[41] *Ibid.*, at p. 242.

[42] Compare the text accompanying footnotes 27-31.

[43] [1982] A.C. 529, [1981] 3 All E.R. 727 (H.L.).

[44] *Ibid.*, at pp. 540-541 (A.C.), 732-733 (All E.R.).

> description "issue estoppel" *in English law, at any rate* (it does not appear to have been adopted in the United States), were restricted to that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies . . .

In fact, turning to a different aspect of the case, the initiation of the civil action for assault did amount to an abuse of process. Lord Diplock stated that the purpose of the civil proceeding was not to obtain damages for the assault, but rather to attack collaterally the finding of the trial judge in the prior criminal proceedings that the confessions, which were the evidence on which the defendants were convicted, were voluntary and had not been improperly obtained through police assault. The criminal defendants hoped that a successful civil action for assault would force a new criminal trial. Lord Diplock stated that the proper method of attacking the finding by the criminal trial judge that there had not been an assault was to appeal, but there had been no appeal on this ground.

It does seem that this attempt to collaterally attack the finding of the trial judge in the criminal proceedings is an abuse of process, and it may well be that this is another, independent ground on which the civil action for assault could have been dismissed or stayed. However, to preserve clear thinking, it is important to realize that the application of the doctrine of abuse of process for this purpose is quite different and distinct from the narrower and more specific doctrine of issue estoppel, which seems to deal with the more salient complaint in the case; namely that the defendants ought not to be able to relitigate a matter which has already been found against them in the prior criminal adjudication. In the instant case, the application of the doctrine of issue estoppel was sufficient to dispose of the case, whether or not the plaintiffs' conduct in the subsequent civil proceeding was abusive as an improper collateral attack on the criminal trial judge's findings. By simply relying on the generalized and multipurpose principle of abuse of process, the House of Lords has muddied the waters, and has failed to distinguish between two distinct, albeit complementary, bases on which the civil cause of action was properly dismissed.

Lord Denning's analysis and choice of the doctrine of issue estoppel seems apt. The doctrine of abuse of process is an inherent jurisdiction that courts have exercised to ensure that they can control their own process, and that litigants do not abuse access to and the process of the court. For example, the court will stay or dismiss frivolous proceedings, vexatious and oppressive proceedings, proceedings that are duplicative of proceedings pending in another forum or jurisdiction, and proceedings that do not raise any triable legal issue. Admittedly, the principle of res judicata was developed to deal with and eliminate abuse, but the doctrines of cause of action and issue estoppel have now matured and strengthened to the point where they can properly and fully deal with the particular kind of abuse in issue in the *McIlkenny* case, particularly where the requirement of mutu-

ality of estoppel is abandoned. It is retrogressive to decide cases like *McIlkenny* on the basis of the vague and generalized doctrine of abuse of process.

The House of Lords' preference for founding its decision on the principle of abuse of process is particularly difficult to understand in light of Lord Denning's well-reasoned and articulated preference for the doctrine of issue estoppel in *McIlkenny*:[45]

> In some cases in the past when the self-same issue has been decided *against* a party in previous proceedings, the courts have said that they will not allow him to raise it again in a subsequent proceeding. These decisions have been put on the ground that it is an abuse of the process of the court. But I cannot help thinking that, at the present time, they should be regarded as cases of issue estoppel . . .
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> The truth is that at the date of those cases the doctrine of issue estoppel had not emerged as a separate doctrine. So the courts found it necessary to put it on "abuse of process of the court." Now that issue estoppel is fully recognised, it is better to reach the decision on that ground: rather than on the vague phrase "abuse of the process of the court."

B. *Canadian Law*

The Canadian cases, like the House of Lords in *Hunter*, have been right in result but poor in reasoning.[46]

In *Nigro* v. *Agnew-Surpass Shoe Stores Ltd.*[47] a shopping centre was substantially damaged by fire. In the first action, the shopping centre landlord, Cummer-Yonge, brought an action against many parties, includ-

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[45] *Supra*, footnote 39, at pp. 322 (Q.B.), 239 (All E.R.).

[46] An exception is the questionable result in *Love* v. *Love* (1968), 2 D.L.R. (3d) 273, [1969] 1 O.R. 291 (Ont. H.C.). In a prior divorce proceeding, the divorce was granted on the grounds of adultery committed, with Mrs. Love as co-respondent. Mr. Love then commenced divorce proceedings against Mrs. Love based on adultery. The court reasoned, at pp. 274 (D.L.R.), 292 (O.R.):

> A judgment for divorce on the grounds of adultery between A and B makes the issue of adultery *res judicata* . . . .
>
> Therefore, in this action now before the Court the adultery alleged in this action between the defendants may be proved by filing the judgment *nisi* in the previous trial, together with proof that the defendants named in that judgment are the same as in the case at bar.

The result is questionable if Mrs. Love as the co-respondent in the prior proceedings had no real opportunity of actively and principally defending the action. Were this the case, this would be a situation where, in accordance with the American position set forth above, the court ought to exercise its discretion and prevent the application of the doctrine of issue estoppel against Mrs. Love.

However, in fairness it should be mentioned that Mrs. Love did not defend the divorce proceedings and accordingly there may well have been no reason for the court in its discretion to withhold the application of the doctrine of issue estoppel.

[47] (1977), 82 D.L.R. (3d) 302, 18 O.R. (2d) 215 (Ont. H.C.), appeal dismissed (1978), 84 D.L.R. (3d) 256, 18 O.R. (2d) 714 (Ont. C.A.).

ing Consumers' Gas Company, Blue Flame Heating and Air Conditioning Limited and one of the shopping centre tenants, Agnew-Surpass Shoe Stores. In that action, Agnew-Surpass denied negligence and alternatively denied that its negligence had caused or contributed to the fire. The trial judge expressly found that "Agnew-Surpass was negligent and that the negligence so found directly caused or contributed to the fire",[48] and gave Cummer-Yonge judgment against Agnew-Surpass for the damages suffered. Thereafter, Nigro, another tenant in the shopping centre, proceeded with an action against many defendants, including Consumers' Gas Company, Blue Flame Heating and Air Conditioning and Agnew-Surpass. Agnew-Surpass again filed a Statement of Defence alleging that it had not been negligent and, alternatively, that its negligence did not cause or contribute to the fire. Third party proceedings were commenced by Agnew-Surpass against Cummer-Yonge for contribution and indemnity. There were three applications brought: by Nigro to strike out the Agnew-Surpass Statement of Defence; by the other defendants to strike out the plaintiff's cause of action; and by Cummer-Yonge as a third party to strike out the third party action brought by Agnew-Surpass. All applications were argued on the basis of the principle of issue estoppel.

At trial, Weatherston J. stated:[49]

> The several defendants and the third party have had their day in Court, and as among themselves the issue as to liability for the fire had been determined. It ought not to be open to any of them to have that same issue retried in actions by plaintiffs who suffered damages in the same fire.

The third party proceedings, being a claim between two parties to the prior adjudication, was properly dismissed on the basis of the traditional approach to issue estoppel. But thereafter the reasoning of Weatherston J. is more difficult to justify. He said:[50]

> The plaintiffs [themselves], by bringing this motion, *have identified themselves with the plaintiff [the landlord Cummer-Yonge] in the first action,* and it is not open to them now to blame any of the defendants other than Agnew-Surpass. Their actions should be dismissed without costs, as against the defendants the Consumers' Gas Company and Blue Flame Heating & Air Conditioning Limited . . . . The plaintiffs' application should succeed to the extent of striking out all denials of liability [by Agnew-Surpass] . . .

Unfortunately, Weatherston J. had quoted from *Thoday* v. *Thoday*,[51] which implicitly accepted that issue estoppel had to be mutual, and thereafter seems to have viewed mutuality as a necessary and inescapable requirement of issue estoppel. In order to circumvent the requirement of

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[48] *Ibid.*, at pp. 304 (D.L.R.), 217 (O.R.) (Ont. H.C.).

[49] *Ibid.*, at pp. 305 (D.L.R.), 218 (O.R.).

[50] *Ibid.* (Emphasis added).

[51] *Supra*, footnote 3, at pp. 197-198 (P.), 352 (All E.R.), quoted *ibid.*, at pp. 304 (D.L.R.), 217-218 (O.R.).

mutuality, he was then driven to find that Nigro had "identified" itself with Cummer-Yonge. In fact, he could have decided, as Lord Denning did some three years later in *McIlkenny*, that there was no requirement of mutuality of estoppel, and that Agnew-Surpass was estopped simply because the precise issue had in fact been adjudicated against it in the prior litigation with Cummer-Yonge.

With respect to Nigro's claim against the other defendants, Weatherston J. stated that Nigro's "identification" with Cummer-Yonge prevented Nigro from taking any position inconsistent with the finding in the first action that it was the negligence of Agnew-Surpass and its employees that had caused the fire. This reasoning is suspect, since it runs counter to the fundamental tenet that issue estoppel cannot be used against a party (in this case Nigro) who is neither a party nor privy to a party in the first action. To suggest that Nigro had "identified" itself with Cummer-Yonge or was somehow "privy" to Cummer-Yonge is, at best, misleading. On the other hand, the result obtained is not necessarily objectionable, since it may well have been inappropriate and unfair to allow Nigro or any other party (there appear to have been ten actions proceeding in conjunction with the Nigro action) to relitigate issues that could have been determined in or in conjunction with the prior Cummer-Yonge action. The Nigro and the other actions were pending when the Cummer-Yonge action was tried, and no movement was made to have them consolidated or to have findings of fact in the first action bind all defendants. In order to avoid multiplicity of proceedings, to avoid inconsistent judicial determinations, and to discourage litigants from adopting a "wait and see" approach to ongoing litigation, Weatherston J.'s dismissal of the Nigro action may well have been just and reasonable.[52]

However, this was not a proper case for the application of the doctrine of issue estoppel. The problem was not the requirement of mutuality of estoppel, but rather the fact that Nigro was attempting to litigate against all defendants an issue that was adjudicated in the first proceed-

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[52] As explained above in discussing the American authorities, if the requirement of mutuality is dropped, the courts must ensure that those parties who could have participated in the first litigation do so. A non-participating party would try to use a finding in the first piece of litigation against its present opponent, while a finding in the first litigation in favour of its opponent could not be used against the non-participating party. In other words, the non-participating litigant by this "wait and see attitude" has ensured himself of no "downside" but a potentially large "upside". The court in the exercise of its broad discretion should refuse to allow this non-participating litigant the benefit of issue estoppel.

Of course, the immediate question was not whether Nigro could force issue estoppel against Agnew-Surpass, but whether Agnew-Surpass could rely upon a favourable finding and a prior adjudication in which Nigro did not participate. In ordinary circumstances the court would not allow Agnew-Surpass the benefit of this favourable finding against a non-party to the prior litigation.

ing. The court could with justification have said to Nigro that it ought to have participated in the first adjudication. This would have been akin to the requirement imposed in the application of the doctrine of cause of action estoppel that all causes of action are to be raised and litigated in one proceeding. Weatherston J. in fact stated:[53]

> Because this is a rule [issue estoppel] of public policy, in which the Court exercises its inherent jurisdiction to prevent an abuse of this process, I think I am entitled to take a rather broader view of the matter than by simply applying the doctrine of *res judicata* in its narrow sense.

It may well be that Nigro was caught by a "broader view" of the doctrine of issue estoppel; that is, by an extension of the doctrine of issue estoppel. Alternatively, Nigro was caught through the application of the principle of abuse of process. Either of these alternate bases is tenable in theory and practice, and gives the desired result; however, it is neither helpful nor accurate to suggest that Nigro's "identification" with Cummer-Yonge constituted Nigro a privy to Cummer-Yonge so that Nigro would be estopped in the subsequent proceeding.

Bank of Montreal v. *Crosson*[54] is a simple example of a Canadian court dismissing a second application on the grounds of abuse of process, where the better ground for disposing of the second application would have been issue estoppel. In this case, the plaintiff bank had sued several guarantors, and the defences of all defendants were identical. The plaintiff moved unsuccessfully for judgment against one defendant, and then proceeded to move for judgment against another defendant. Pennell J. held that technically this was not a case of issue estoppel since there was no identicality of parties (the requirement of mutuality of estoppel) in the two applications, but that the application should be dismissed pursuant to the court's inherent jurisdiction to prevent an abuse of process. Again, the preferred route would have been to ignore the traditional requirement for mutuality of estoppel, and to have disposed of the application on the basis of issue estoppel; the bank was estopped in subsequent litigation from arguing a matter found against it in the previous adjudication.

A Manitoba judge in *Rosenbaum* v. *Law Society of Manitoba*[55] squarely faced the issue of the requirement of mutuality of estoppel. Scollin J., citing *Hunter* and *Nigro,* noted the differences between the American law on the one hand, and the English and Canadian on the other:[56]

> Whatever the merit of the comprehensive American approach, the courts in Canada and in England have not yet perceived the need to enunciate a correspond-

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[53] *Supra,* footnote 47, at pp. 305 (D.L.R.), 218 (O.R.) (Ont. H.C.).

[54] (1979), 96 D.L.R. (3d) 765, 23 O.R. (2d) 625 (Ont. H.C.).

[55] [1983] 5 W.W.R. 752 (Man. Q.B.).

[56] *Ibid.*, at pp. 757-758.

> ingly broad doctrine. In Canada the courts have relied on the doctrine of abuse of process to prevent successive efforts to relitigate liability by a party who has already had its day in court on the identical issue . . .

The decision of the Ontario High Court in *Demeter* v. *British Pacific Life Insurance Co.*[57] is very similar to the *Hunter* case. Demeter had been convicted of the murder of his wife. His appeals were dismissed. Demeter then commenced an action against three insurance companies on policies of insurance by which the companies had agreed to pay the survivor of Demeter and his wife specific sums of money upon the death of the other. Demeter admitted at one point during an examination that one of his major motivations in commencing the present civil action was to re-open the criminal proceedings to prove his innocence and vindicate himself. The issue for the court was whether Demeter should be able to proceed with the civil action. Again, as in the *Hunter* case, the very issue in dispute in the civil action had been determined *against* the plaintiff in the prior criminal proceedings; as well, as in *Hunter,* the purpose of the civil proceedings, at least in large part, was an attempt to attack collaterally the findings in and result of the criminal conviction.

Osler J. reviewed the *McIlkenny* and *Hunter* decisions at length, focusing in large measure on those aspects of the judgments which have been dealt with in this article. He noted that the New Zealand Court of Appeal in *Jorgensen* v. *News Media (Auckland) Ltd.*[58] and the House of Lords in *Hunter* decided that *Hollington* v. *Hewthorn* was wrongly decided, and decided it was no longer good law or binding authority in Ontario. Osler J., not unexpectedly, concluded that the civil action was abusive and should be dismissed. The abuse consisted of two components: first, "[t]he gravamen of the abuse is the attempt to relitigate an issue already tried",[59] a statement which epitomizes the essence of the doctrine of issue estoppel; second, it was abusive to use the civil proceedings to collaterally attack the criminal conviction:[60]

> . . . to permit these actions to go forward would result in a travesty of justice and would bring the administration of justice into disrepute. . . .
>
> . . . it would be an affront to one's sense of justice and would be regarded as an outrage by the reasonable layman to let these actions go forward.

Unfortunately, Osler J. followed the lead of the House of Lords in *Hunter* and seemed content to lump both components, either of which would have been sufficient to justify the dismissal of the plaintiff's action, under

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[57] (1983), 150 D.L.R. (3d) 249, 43 O.R. (2d) 33 (Ont. H.C.), aff'd (1984), 13 D.L.R. (4th) 318, 48 O.R. (2d) 266 (Ont. C.A.).

[58] [1969] N.Z.L.R. 961.

[59] *Supra,* footnote 57, at pp. 265 (D.L.R.), 49 (O.R.).

[60] *Ibid.*, at pp. 266, 267 (D.L.R.), 50, 51 (O.R.).

the rubric of abuse of process, instead of labelling the first component issue estoppel and the second component abuse of process.[61]

Finally at trial in *Royal Bank of Canada* v. *McArthur*,[62] issue estoppel was held not to apply in favour of the plaintiff bank against the defendant in a civil action for conversion and conspiracy where there had been a prior criminal conviction of the defendant for conspiracy to rob and robbery. Anderson J. concluded:[63]

> . . . in the case before me the conclusions of fact which might be drawn from the certificates of the defendants' conviction, even when considered together with the indictment, do not simply and unequivocally resolve any of the central issues in the civil action. This is not a case, like *Hunter* or *Demeter*, where the issues raised in the civil proceedings are identical to, or coterminous with, the issues decided in the criminal trial.

The court did not consider this an appropriate case for issue estoppel, not because there was no mutuality of estoppel, but because the necessary elements in the criminal conviction were quite different from the elements in the civil action. This decision was, as we shall see below, reversed on appeal.[64] However, it is suggested that the reasoning at trial was sound, and in fact is in exact accord with the majority judgment of the Supreme Court of Canada in *Angle* v. *Minister of National Revenue*.[65]

V. *The Half-Way House: Admission as Prima Facie Evidence*

Let us return to *Hollington* v. *Hewthorn*. Denning, counsel for the plaintiff, the estate of Hollington, suggested that the prior conviction of Hewthorn was admissible:[66]

> . . . not as conclusive, but as prima facie evidence that the defendant was driving negligently . . . . The conviction will then still not be an estoppel, and it will be open to the defendant to show, if he can, that he ought not to have been convicted or that the negligence of which he was convicted did not cause the accident, but . . . the fact of his conviction is prima facie evidence that the defendant was guilty of negligence.

One can understand why counsel was only urging that the conviction be used as *prima facie* evidence. He could anticipate, based on judicial precedent, that he would encounter substantial resistance in having the conviction admitted at all, and probably felt that once the evidence was admitted in any fashion whatsoever that it would have *de facto* a very substantial if not conclusive effect in the civil trial.

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[61] However, it should be pointed out that the question posed for the court's consideration appears to have been phrased solely in terms of abuse of process, and not alternatively in terms of issue estoppel.

[62] (1984), 8 D.L.R. (4th) 411, 46 O.R. (2d) 73 (Ont. H.C.).

[63] *Ibid.*, at pp. 417 (D.L.R.), 79 (O.R.).

[64] *Infra*, the text at footnote 82.

[65] *Supra*, footnote 9.

[66] *Supra*, footnote 32, at pp. 593 (K.B.), 39 (All E.R.).

This approach to the use of the prior finding of fact, is, in our view, both an unnecessary and inappropriate watering down of the doctrine of issue estoppel. If the identical issue has been finally determined against a party in the first proceeding, there is no rationale for allowing that party in the subsequent proceeding to challenge the finding and lead rebuttal evidence; to allow this would be to effectively undermine the entire purpose of the doctrine of issue estoppel, which is meant to avoid multiplicity of proceedings and disentitle parties from relitigating matters already decided against them. Why should Hewthorn have been able to lead evidence that "the negligence of which he was convicted did not cause the accident", when it had already been determined in the quasi-criminal proceeding that he in fact was negligent and that this negligence did cause the accident? Why should the estate of Hollington have had to reprove these facts and why should valuable court time have been wasted for this purpose? Moreover, what does it really mean to say that the prior finding is *prima facie* evidence but can be rebutted? It is unclear exactly what weight or status is to be ascribed to the prior finding of fact and how much cogent evidence is required by the party in the subsequent proceedings to rebut the prior finding. Further, how does one go about rebutting a finding made in a completely different and independent proceeding? Relatedly, one would think that the mere introduction of a finding of guilt from a prior criminal or quasi-criminal proceeding would be somewhat inflammatory and prejudicial to the party against whom it is introduced, making it difficult for that party to overcome the psychological effect that the prior finding would necessarily have on the trier of fact.

Perhaps counsel was really trying to suggest that, in certain circumstances, it would be inappropriate or unfair to impose issue estoppel against a party. While this is admittedly true, the appropriate method of dealing with the situation is as set forth in the American jurisprudence, which suggests that the court has and should exercise a discretion to prevent the application of issue estoppel in appropriate circumstances.[67]

Unfortunately, England, when it responded in the Civil Evidence Act[68] to the criticisms of *Hollington* v. *Hewthorn*, adopted this "*prima facie* evidence" approach. Section 11 of the statute reads:

> (1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall . . . be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence . . .
>
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere—
>
> (a) He shall be taken to have committed that offence *unless the contrary is proved;* and

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[67] See the text accompanying footnotes 27-31.

[68] 1968, c. 64 (U.K.).

(b) *without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based,* the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge-sheet on which the person in question was convicted, shall be admissible in evidence for that purpose.[69]

The legislation is both unnecessary and inappropriate. It is unnecessary because the courts, as they did in the United States, could simply have eliminated the requirement of mutuality of estoppel, thus expanding and modernizing the application of the doctrine of issue estoppel. As we have stated, we believe that the admission of a finding of fact from a prior judicial proceeding as *prima facie* evidence is unfair to the litigating party against whom it is introduced, is a waste of the court's time, and is an unworkable, unpredictable and ill-conceived solution.

The legislation is inappropriate because it is extremely difficult of application. Lord Denning M.R. had an opportunity to apply it in *McIlkenny*. He said:[70]

> Under [section 11], a previous conviction is admissible in a subsequent civil action for the purpose of proving that the man committed the offence: and further "he shall be taken to have committed that offence unless the contrary is proved."
>
> How is a convicted man to prove "the contrary"? That is, how is he to prove that he did not commit the offence? How is he to prove that he was innocent? Only, I suggest, by proving that the conviction was obtained by fraud or collusion, or by adducing fresh evidence. If the fresh evidence is inconclusive, he does not prove his innocence. It must be decisive, it must be conclusive, before he can be declared innocent.

He later added:[71]

> Can the . . . [party] (*against* whom the previous decision went) dispute his liability to the other injured person? It seems to me that if the [party] . . . has had a full and fair opportunity of contesting the issue of negligence in the first action, he should be estopped from disputing it in the second action.

In applying these general rules, Lord Denning concluded:[72]

> The only way in which the six men could hope to overcome the estoppel would be by adducing fresh evidence. This is what they tried to do. They said that Dr. Paul's evidence was fresh evidence. But that failed: because it could have been available at the trial, if reasonable diligence had been used. Then they said that they had the evidence of three prison officers which was fresh evidence: but counsel had to admit that he had their statements available and chose not to call them at the trial.

Lord Denning therefore refused the request of the six plaintiffs to relitigate the findings of fact or lead any rebuttal evidence to overcome the *prima facie* inference flowing from the criminal convictions.

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[69] Emphasis added.

[70] *Supra,* footnote 39, at pp. 320 (Q.B.), 237 (All E.R.).

[71] *Ibid.,* at pp. 321 (Q.B.), 238 (All E.R.).

[72] *Ibid.,* at pp. 323 (Q.B.), 240 (All E.R.).

Lord Denning's reasoning amply demonstrates the deficiency of the methodology whereby prior findings of fact are held to be only *prima facie* evidence: there are no criteria or standards on *when* or *how much* rebuttal evidence can or must be led. To suggest that rebuttal evidence should be allowed only where there was fraud or collusion in the first proceeding, or where the evidence was not available with reasonable diligence in the first proceeding, is really nothing new to the common law. Courts have historically granted new trials where fraud or collusion has been proven,[73] and courts will allow new evidence to be led on appeal where it was not available, and could not have been available with the use of reasonable diligence.[74] In the result, Lord Denning is really ignoring the statutory right given to the adversely affected party of leading rebuttal evidence, and is affirming and employing full blown the doctrine of issue estoppel, minus the requirement of mutuality. In our view, this is a creative and salutary response to the English legislation.

However, it must be noted that the House of Lords in *Hunter* disagreed with Lord Denning's observation that the only way in which a defendant can rebut the presumption is by showing that the conviction was obtained by fraud or collusion, or by adducing fresh evidence. Lord Diplock acknowledged that it may be difficult to rebut the presumption after a full criminal hearing, but nonetheless stated that there are a "wide variety of circumstances in which section 11 may be applicable",[75] and that "the burden of proof of 'the contrary' that lies on a defendant under section 11 is the ordinary burden in a civil action: proof on a balance of probability".[76]

Even accepting what Lord Diplock said as indicating the general approach to the interpretation of section 11, it must be said that the exact import of the section is far from settled. The uncertain state of the law is reflected in the following passage from the judgment of the British Columbia Supreme Court in *Betterton* v. *Turner:*[77]

> Commenting on the effect to be given to the provisions of the *Civil Evidence Act,* 1968, s. 11, Cross on *Evidence,* 4th ed. (1974), at pp. 395-6, says: . . .
>
> Various observations have been made about the weight to be attached to the conviction in the subsequent civil proceedings in which it is proved. In *Wauchope* v. *Mordecai* [[1970] 1 W.L.R. 317] the Court of Appeal *did not suggest that the burden cast on the convicted defendant was a specially heavy one.* In *Taylor* v. *Taylor,* on the other hand, it was said that the verdict of the jury finding the respondent to divorce proceedings guilty of incest was entitled

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[73] See Rule 529 of the former Ontario Rules of Practice, and, *e.g., 100 Main Street East Ltd.* v. *Sakas* (1975), 8 O.R. (2d) 385 (Ont. C.A.).

[74] See Rule 234 of the former Ontario Rules of Practice, and, *e.g., McCluckie* v. *McMillan* (1973), 2 O.R. (2d) 56 (Ont. Div. Ct.).

[75] *Supra,* footnote 43, at pp. 544 (A.C.), 735 (All E.R.).

[76] *Ibid.,* at pp. 544 (A.C.), 735-736 (All E.R.).

[77] (1982), 133 D.L.R. (3d) 289, at pp. 300-301 (B.C.S.C.). (Emphasis added).

> to great weight, while Lord Denning, M.R. and Buckley, L.J. took different views of this subject in *Stupple* v. *Royal Insurance Co., Ltd.*
>
> A useful discussion by Lord Denning M.R. and Lord Justice Buckley in *Stupple* v. *Royal Ins. Co. Ltd.*, [1971] 1 Q.B. 50, is to be found at pages 72-3, where Lord Denning M.R. espouses certain principles and at pp. 75-6 where Lord Justice Buckley takes a different view. In short, Lord Denning M.R. considers that the conviction *carries great weight*. This view was also held by Davies L.J. in *Taylor* v. *Taylor*, [1970] 2 All E.R. 609 at p. 612 (C.A.). Buckley L.J., however, was of the view that *no weight whatsoever should be given to the mere fact of conviction* but that *the evidence* underlying *the criminal conviction could be looked at and weighed.*

Accordingly, based on the English decisions commenting on section 11, one is left uncertain whether the conviction "carries great weight", or "no weight whatsoever", or whether after conviction there "was a specially heavy . . . burden cast on the convicted defendant", or that "the evidence underlying the criminal conviction could be looked at and weighed". It seems most inapt to suggest that the court in the subsequent civil proceeding should scrutinize and weigh the evidence in the prior criminal proceeding. This is really a suggestion that the civil court can and should somehow collaterally try to assess the evidence in the criminal proceeding, a task which is difficult if not impossible to do fairly and accurately. In any case, it could probably be better done simply by ignoring the criminal conviction and the possible application of issue estoppel altogether, and requiring that the whole matter be relitigated in the civil case itself.

Unfortunately, Canadian courts and legislatures seem to have taken their lead from counsel's submissions in *Hollington* v. *Hewthorn* and from the Civil Evidence Act, 1968.

In *Demeter* v. *British Pacific Life Insurance Co.*[78] Osler J. at trial carefully reviewed the decisions in *McIlkenny* and *Hunter*. Ultimately he concluded that Demeter's action was an abuse of process, and dismissed the action. On the question of issue estoppel, Osler J. followed the lead of Lord Denning M.R. in holding that *Hollington* v. *Hewthorn* was wrongly decided, does not represent the law in Ontario, and that:[79]

> . . . if the action is to go forward, proof of the conviction of the plaintiff for the murder of his wife may be adduced in evidence and, if this is done, should be regarded as *prima facie* proof of that issue, subject to rebuttal by the plaintiff on the merits.

The Court of Appeal affirmed the trial judgment, agreeing with the analysis and conclusions of Osler J.:[80]

> We agree with Mr. Justice Osler's careful and thoughtful analysis of the authorities and his conclusion that *Hollington* v. *F. Hewthorn & Co. Ltd. et al.*,

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[78] *Supra*, footnote 57.

[79] *Ibid.*, at pp. 264 (D.L.R.), 48 (O.R.) (Ont. H.C.).

[80] *Ibid.*, at pp. 320 (D.L.R.), 268 (O.R.) (Ont. C.A.).

> [1943] 1 K.B. 587 . . . is not the law of Ontario. We are equally of the view that the use of a civil action to initiate a collateral attack on a final decision of a criminal court of competent jurisdiction in an attempt to relitigate an issue already tried, is an abuse of the process of the court.

It is ironic that Osler J., in following the lead of Lord Denning M.R., adopted the *prima facie* use of the prior findings approach. In England, the legislature had mandated this test. Even then the decision of Lord Denning M.R. in *McIlkenny*, had it not been overruled by the House of Lords, would have had the effect of negativing the legislation and preventing the leading of rebuttal evidence except in extreme situations, where such evidence would have been received at common law.[81] Osler J., and the Court of Appeal through the adoption of Osler J.'s reasons, were not under any such statutory constraint, yet for some unexplained reason decided that the prior findings of fact were not conclusive, but only *prima facie* evidence, capable of being rebutted.

Nonetheless, the law in Ontario now seems to be clear. Thus, the Divisional Court on the appeal in *Royal Bank of Canada* v. *McArthur*[82] allowed certificates of conviction to be admitted as *prima facie* evidence against the defendants in the subsequent civil action on the basis that the convictions were relevant to the issues in the civil proceedings and that lack of identicality of issue goes only to weight and not to admissibility. The court decided that there was enough factual similarity between the elements of the criminal charge and the elements of the civil cause of action for the criminal conviction to be at least relevant to the civil action, and that very strong inferences could be drawn from proof of conviction. Unfortunately, it is difficult to know how one can draw a proper inference without delving unduly into the criminal proceedings and evidence.[82a]

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[81] See text, *supra*, commencing at footnote 68.

[82] (1985), 19 D.L.R. (4th) 762, 51 O.R. (2d) 86 (Ont. Div. Ct.). See also *Taylor* v. *Baribeau* (1985), 21 D.L.R. (4th) 140 (Ont. Div. Ct.); *Q. and Q.* v. *Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (Ont. H.C.).

[82a] The Ontario Court of Appeal addressed this issue recently in *Re Del Core and Ontario College of Pharmacists* (1985), 19 D.L.R. (4th) 68. The discipline committee of the Ontario College of Pharmacists had ordered a pharmacist suspended for 30 days. The pharmacist had been criminally convicted of defrauding his supplier with respect to a quantity of pharmaceuticals. The Health Disciplines Act (R.S.O. 1980, c. 196) provided that a pharmacist was guilty of professional misconduct if "he has been found guilty of an offence relevant to his suitability to practise, upon proof of such conviction" (s. 130(3)(a)), or his "conduct or an act relevant to the practice of a pharmacist . . . would reasonably be regarded . . . as disgraceful, dishonourable or unprofessional" (R.R.O. 1980, reg. 451, s. 47(x)). The College had simply tendered the certificate of conviction to prove that the pharmacist had committed the fraudulent acts, and the pharmacist had not called any evidence in rebuttal. The discipline committee conceded that not every breach of statute constituted professional misconduct, but held that this conduct did constitute professional misconduct.

The relevant issue for our purposes is whether the certificate of conviction was conclusive or *prima facie* evidence of the acts which were the subject matter of the

Other Canadian jurisdictions may be following suit. In *Rosenbaum* v. *Law Society of Manitoba*[83] Scollin J. followed the same approach as his Ontario brethren in deciding that findings of fact in the prior civil action were only some evidence in a subsequent discipline hearing, and were subject to rebuttal. He concluded:[84]

> However, I do not take the decision of the House of Lords in *Spackman* to mean that a disciplinary body *must* in all cases treat as prima facie evidence every finding by a court in prior proceedings. Much will depend on the particular circumstances in which the proceedings were conducted; provided the lawyer is given fair opportunity to adduce further evidence and to submit argument to dispute the accuracy of specific solemn and considered findings, the [Law Society] committee is entitled to exercise its discretion to rely upon the civil procedings as evidence in support of the charge.

Again, it is to be noted that Scollin J. gives really no guidance on *when and how much* evidence can or should be adduced in rebuttal. The quoted passage reads more like an apologia for the decision in the instant case than as a statement of guiding principle for future cases.

British Columbia is the only Canadian province to have had enacted legislation comparable to section 11 of the English Civil Evidence Act.[85] Sections 80 and 81 of the Evidence Act[86] are similar to section 11 of the English Act. There is, however, a significant difference as to the weight to be given to a prior conviction, once admitted. Under the English legislation the offence is to be taken to have been committed by the

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conviction. The question was not directly in issue in the case because the pharmacist did not lead rebuttal evidence. Finlayson J. did not directly deal with the issue. However, in *obiter*, Houlden and Blair JJ.A. canvassed the English and Canadian case law and concluded that the certificate of conviction constituted only *prima facie* and not conclusive proof of the acts of fraud and that the pharmacist did have the right to adduce rebuttal evidence. However, Blair J.A. seemed sensitive to the problems inherent in leading this rebuttal evidence, and concluded his reasons on this cautionary note (at p. 88):

> Since evidence of prior convictions affords only *prima facie* proof of guilt it follows that its effect may be countered in a variety of ways. For example, the conviction may be challenged or its effect mitigated by explanation of the circumstances surrounding the conviction. It is both unnecessary and imprudent to attempt any exhaustive enumeration. The law of Ontario is only now emerging from the long shadow cast over it by the decision in *Hollington* v. *Hewthorn* . . . It would be highly undesirable to replace this arbitrary rule by prescribing equally rigid rules to replace it. The law should remain flexible to permit its application to the varying circumstances of particular cases.

His Lordship leaves open the possibility that the Ontario courts should only allow rebuttal evidence in extraordinary circumstances, *e.g.* where fraud or collusion has been proven or where fresh evidence is available. As stated above, such an approach would be in accordance with the reasoning of Lord Denning as to when fresh evidence can be led.

[83] *Supra*, footnote 55.

[84] *Ibid.*, at p. 759.

[85] *Supra*, footnote 68.

[86] R.S.B.C. 1979, c. 116.

person who was convicted, unless the contrary is proved. The British Columbia legislation simply provides that the weight to be given to the conviction is a matter for the trier of fact.

The difficulty in applying, and the apparent futility, of the British Columbia legislation is illustrated in *Betterton* v. *Turner*.[87] One of the defendants had been convicted of negligence causing death resulting from a motor vehicle accident, and the present proceeding was the civil action brought by the victim against that same defendant for damages. The plaintiff sought to rely upon the criminal conviction as evidence of negligence, in accordance with the British Columbia legislation. The trial judge felt that he should determine the weight to be given to the conviction "in the light of all the evidence before the tribunal which is trying the civil case".[88] The court noted:[89]

> . . . the defendant Donald Turner did not give evidence at the criminal trial, but did give evidence in the civil action . . . . *Nothing has been given in evidence before me that leads me to question the validity of the criminal conviction.* In assessing the effect of that conviction in the light of all the evidence in this case, I must keep in mind that the burden of proof in the criminal proceedings was heavier, proof beyond a reasonable doubt, and that the degree of negligence to be established in the criminal proceedings is a higher degree than is necessary in the civil proceedings. The real force of the evidence that the accused was convicted of criminal negligence causing death, *in the light of all the evidence in these proceedings, is to add weight to the other evidence advanced by the plaintiffs on the issue of negligence. I should say that, without reference to the conviction in the criminal proceedings, I was satisfied on a balance of probabilities that the plaintiffs had established negligence on the part of* . . . [the defendant].

In fact, at the civil trial, extensive evidence, including expert evidence, was led as to the cause of and responsibility for the accident, and the trial judge concluded that the defendant, partially through impairment, lost control of his car and drove head on into the other vehicle. The legislation did not really appear to assist either the court or the plaintiff, since it was necessary to canvass fully the question of liability and the finding of liability was really arrived at independently of any legislatively presumed evidence from the prior criminal proceeding.

The last amendments to the Combines Investigation Act[90] provide a private cause of action based on conduct contrary to any provision of Part V of the Act. Section 31.1(2) provides:

> In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part V or convicted of or punished for failure to comply with an order of the Commission or a court under this Act is, *in the absence of any evidence to the contrary, proof* that the person

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[87] *Supra,* footnote 77.

[88] *Ibid.*, at p. 301.

[89] *Ibid.*, at pp. 301-302. (Emphasis added).

[90] S.C. 1974-75-76, c. 76.

> against whom the action is brought engaged in conduct that was contrary to a provision of Part V or failed to comply with an order of the Commission or a court order under this Act . . .[91]

This "half-way house", whether the creature of legislation or judicial decision, has not been and cannot be an effective approach to the problem. The better approach is to recognize and apply in full force the doctrine of issue estoppel without the requirement of mutuality of estoppel, except where the court, in its exercise of discretion, determines that issue estoppel cannot reasonably and fairly be applied.

Conclusion

The principle of res judicata and its younger offspring, the doctrine of issue estoppel, have honourably and usefully served to promote the policies and values of bringing finality to litigation, of suppressing a multiplicity of proceedings and of preventing parties from being subjected to unnecessary relitigation of the same issue. The doctrine of issue estoppel, like all common law rules and tools, is flexible and adaptable to modern and current situations and needs. The American courts have so adapted it, dropping the requirement of mutuality of estoppel, and recognizing that the court has and must exercise an overriding discretion to prevent the unfair and unreasonable application of the doctrine of issue estoppel. English and Canadian judges have generally reached the right results in the decided cases, but have not reasoned as thoughtfully or articulately as their American counterparts. In the process, the English and Canadian judges and legislators have lapsed in two ways:

(1) The common law has introduced the vague, generalized and multi-purpose principle of abuse of process to decide many of the cases, with the result that there is little predictability as to when and to what extent the court will rely on this principle in future cases;

(2) The legislators in England and in Canada, and the judges in Ontario and Manitoba, have accepted that determinations of fact in prior proceedings should be admitted as *prima facie* evidence, subject to rebuttal. The difficulty is that the legislation and the judges themselves offer no guidelines, and in fact seem to disagree amongst themselves, on what weight should be afforded the prior finding of fact, on whether the court can and should look at the substance of the proceedings in the prior adjudication to determine the weight to be afforded to these proceedings, on the circumstances in which the aggrieved party should be able to lead rebuttal evidence, and on the amount and type of rebuttal evidence that is required.

It is hoped that the Canadian law will follow the lead of the Supreme Court of the United States in the *Blonder-Tongue* and *Parklane Hosiery*

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[91] Emphasis added.

Co., Inc. decisions, as adopted by the English Court of Appeal in *McIlkenny*. The courts should expand the doctrine of issue estoppel by eliminating the requirement of mutuality of estoppel, and should refuse to espouse the use of prior findings of fact as *prima facie* evidence. Moreover, it is hoped that no other Canadian legislature will enact legislation similar to the British Columbia Act or the the amendments to the Combines Investigation Act, and that the existing Canadian legislation will be emasculated by the judicial gloss put on the corresponding English legislation by Lord Denning M.R. in *McIlkenny*.