ISSUE ESTOPPEL, PERJURY AND CRIMINAL PROCEDURE

D.P.P. v. *HUMPHRYS*[1]

Introduction

There are a number of interrelated concepts in the criminal law which prevent, in certain circumstances, multiple convictions or prosecutions of a defendant. These include the ancient pleas of *autrefois convict* and *autrefois acquit,* the doctrine of "inconsistent verdicts", the special plea of issue estoppel and "the rule — which is a part of a wider principle of abuse of process — which prevents the Crown from unreasonably splitting its case".[2]

Issue estoppel is well established in civil cases. "[O]nce an issue has been raised and distinctly determined between the parties then, as a general rule, neither party can be allowed to fight that issue all over again".[3] This is so even though the second trial involves a different cause of action from the first. Mutuality is an essential requirement[4] and the doctrine will not apply where the person relying on the estoppel has been guilty of fraud[5] or where the person sought to be estopped was "excusably ignorant"[6] at the first trial of matters crucial to the decision.

In Australia issue estoppel seems well established in criminal cases though its content is doubtful in a number of respects. The purpose of this note is to examine the first House of Lords case to deal squarely with criminal issue estoppel, and then to discuss the implications of the decision for Australian criminal procedure.

The Facts and Decision

Humphrys was tried on a charge of driving a motorcycle on 18th July, 1972 while disqualified. A policeman, Police Constable Weight, stated that he had identified Humphrys as the rider of a motorcycle which was stopped at a radar speed trap on that date. Humphrys admitted that he was disqualified during 1972 but denied that he had been the

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[1] [1977] A.C. 1; [1976] 2 All E.R. 497; [1976] 2 W.L.R. 857.

[2] M.L. Friedland, *Double Jeopardy* (1969) p. 17.

[3] *Fidelitas Shipping Co. Ltd.* v. *V/O Exportchleb* [1966] 1 Q.B. 630 at 640 *per* Lord Denning, M.R. "Cause of action estoppel" and "issue estoppel" together comprise *"res judicata"* (but *cf.* Dixon, J. in *R.* v. *Wilkes* (1948) 77 C.L.R. 511 at 519). The issue must have been essential to the first decision: G. Spencer Bower and A.K. Turner, *Res Judicata* (2nd ed., 1969) p. 54.

[4] *Ramsay* v. *Pigram* (1968) 118 C.L.R. 271 at 276. (Contrast the United States position: *Blonder-Tongue* v. *University Foundation* 402 U.S. 313 (1971)). This rule does not apply to decisions *in rem.*

[5] G. Spencer Bower and A.K. Turner, *op. cit.* n. 3 p. 322.

[6] *Id.* pp. 168-170.

rider and suggested that one Brian Scott might have been. While giving evidence Humphrys was asked "Did you do any driving of any vehicles in the year 1972?" to which he replied "No, none at all". Humphrys was acquitted by the jury.

The police made further investigations and in June 1973 Humphrys was charged with having committed perjury at his earlier trial by denying that he had driven at all during 1972. Before the perjury trial began Humphrys pleaded guilty to two other counts in the indictment, one of which alleged that he had forged an application for a re-licence of a motorcycle in the name of Brian Scott. The forged application was put in evidence in the perjury trial.

When the perjury trial began the prosecution produced three witnesses, "respectable elderly persons described as 'senior citizens' ", neighbours of Humphrys who gave evidence that he had driven in 1972. Their evidence was not objected to. However the prosecution then called P.C. Weight who over objections repeated the evidence he had given at the earlier trial. Humphrys and his wife gave evidence but the jury convicted him.

The trial judge, Shaw, J. (as he then was), overruled the objection to P.C. Weight's evidence on the ground that it was "not directed to establishing [Humphrys'] guilt on the charge of driving while disqualified but simply to the question whether he was riding the motorcycle on July 18th, 1972".[7]

The Court of Appeal[8] held that in view of Humphrys' admission that he had been unlicenced on 18th July, 1972 the acquittal could "only have meant that the jury were not satisfied beyond reasonable doubt that he was the driver at the appropriate time". The Court considered that, in view of the opinions of three judges in *Connelly* v. *D.P.P.*,[9] they should hold that issue estoppel was part of English criminal law and allowed the appeal and quashed the conviction. Although the Crown had argued that as a matter of public policy issue estoppel should not apply in a perjury charge the attention of the court was not drawn to the exception, where there is fraud, to the doctrine in civil cases. The Director of Public Prosecutions appealed to the House of Lords who unanimously allowed the appeal and restored the conviction.

Humphrys' counsel contended that criminal issue estoppel was a development of *autrefois acquit*. Their Lordships examined the nature and interrelationship of the various concepts mentioned earlier in order to see whether this contention was correct.

Viscount Dilhorne considered that "[t]he pleas of *autrefois acquit*

[7] [1977] A.C. 1 at 14. For other efforts to avoid the estoppel question see *R.* v. *McDermott* (1899) 24 V.L.R. 636 at 638; *U.S.* v. *Haines* 485 F.2d 564 (1973) (cert. den. 417 U.S. 977 (1974)); *People* v. *Housman* 112 P.2d 944 at 947 (1941).

[8] [1976] 1 Q.B. 191 at 195.

[9] [1964] A.C. 1254 at 1306 (Lord Morris of Borth-y-Gest), 1334 (Lord Hodson), 1365 (Lord Pearce).

and *autrefois convict* do not depend on an issue being determined in an earlier trial but on the result of that trial".[10] In *Sealfon* v. *U.S.*[11] it was held that a person who had been acquitted of conspiracy could not be later convicted of aiding and abetting where an examination of the record and transcript of the earlier trial showed that the same illegal agreement which was alleged at the second trial had not been established at the first trial. Viscount Dilhorne stated that "[o]n the facts of that case it would seem that a plea of *autrefois acquit* would have been upheld in this country". It is unclear with respect how this could be correct. For aiding and abetting there need not be an agreement and in conspiracy there need not be a completed offence.[12] In *Connelly*[13] Lord Morris stated that extrinsic facts could only be admitted in limited circumstances; of course if one could on a plea of *autrefois acquit* minutely examine what happened at the previous trial to see what must have been decided in the accused's favour there would be no need for issue estoppel.

Viscount Dilhorne did consider that the prosecution could not at any stage in a second trial contradict an acquittal at a previous trial. In *Sambasivam* v. *Public Prosecutor*[14] "the accused was charged with two offences, having a firearm and being in possession of ammunition. He was acquitted on the charge of possessing ammunition and a new trial was ordered on the charge of having a firearm. In the course of that trial a statement made by the accused admitting his guilt of both offences was put in evidence". Viscount Dilhorne thought that the prosecution were in effect challenging the verdict of acquittal of the previous charge; that that verdict was binding; and hence (as was held) that the prosecution could not invite a finding that that part of the confession contradicting the aquittal was true.[15]

Throughout his judgment Viscount Dilhorne adhered to the view that criminal issue estoppel could only apply with mutuality, like the civil doctrine, and not as an extension of *autrefois acquit*. In *R.* v. *Hogan*[16] Lawson, J. had held that after a conviction of causing grievous bodily harm with intent to do so, where the victim later died the Crown could rely on issue estoppel and only had to prove causation on a charge of murder. Viscount Dilhorne said that this situation was "very undesirable" and that criminal issue estoppel could not exist at all.

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[10] [1977] A.C. 1 at 15. See the discussion of Lord Morris' nine propositions, in *Connelly* [1964] A.C. 1254 at 1305, in G. Spencer Bower and A.K. Turner *op. cit.* n. 3 Ch. XI.

[11] 332 U.S. 575 (1948).

[12] *Cf. Rex* v. *Kupferberg* (1918) 13 Cr. App. R. 166.

[13] [1964] A.C. 1254 at 1305, 1307.

[14] [1950] A.C. 458. Lord McDermott at 479 appeared to base the decision on issue estoppel.

[15] As Viscount Dilhorne described the decision: [1977] A.C. 1 at 17. *Cf.* at 36 *per* Lord Hailsham and at 43 *per* Lord Salmon but *cf.* at 49-51 *per* Lord Edmund-Davies.

[16] [1974] Q.B. 398. Noted [1974] *Crim. L.R.* 247 where *Rouse* v. *State* 97 A.2d 285 (1953), to which Lord Edmund-Davies referred ([1977] A.C. 1 at 51), is also discussed.

Consistently with his opinion of the nature of criminal issue estoppel his Lordship held that even if the doctrine did exist it did not apply to a perjury trial as perjury is a type of fraud. His Lordship also discussed whether a criminal court had power to stop a prosecution on the ground that it is oppressive and an abuse of process of the court. He denied that there was an inherent power to prevent a properly preferred indictment from being proceeded with. His Lordship put forward a forceful argument in favour of leaving the discretion to prosecute to authorities such as the Director of Public Prosecutions and for the need for judges to "keep out of the arena". In particular his Lordship disagreed with the idea that a judge or bench of magistrates could decide that in his or their opinion there was an abuse of process. However his Lordship added an important qualification.

> But saying this does not mean that there is not a general power to control the procedure of the court so as to avoid unfairness. If at the time of *Connelly* v. *Director of Public Prosecutions* it had been possible to try the murder and robbery charges together, then it might well have been unfair, oppressive and an abuse of process for them to be tried separately, each charge being based on the same evidence.[17]

Lord Hailsham of St. Marylebone also considered that "if the doctrine of issue estoppel is applicable at all to criminal proceedings, it must be taken for better or for worse, with all its incidents".[18] His Lordship thought that as perjury involved fraud issue estoppel was not available to Humphrys. In addition Lord Hailsham pointed out some of the "extraordinary results" which would follow if acquittals of perjury could be secured by issue estoppel. He described the doctrine as "purely arbitrary" and stated that it would produce anomalies which would "create a public outcry".[19] Like Lord Devlin in *Connelly*,[20] Lord Hailsham considered that the doctrine would only apply in a small number of cases and hence would be of no practical benefit to most defendants. However his Lordship noted that the civil rule that issue estoppel was not available to a party guilty of fraud was itself subject to the rule that the evidence produced to show the fraud must be "significant new evidence": *Birch* v. *Birch*.[21] Lord Hailsham then made a novel suggestion.[22] "I believe that in many cases prosecutions would be barred by the equivalent of the rule in *Birch* v. *Birch*"[23] and this would apply

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[17] [1977] A.C. 1 at 24.
[18] *Id.* at 30.
[19] *Id.* at 30-31.
[20] [1964] A.C. 1254 at 1344.
[21] [1902] P.130, *cf.* at 138 *per* Stirling, L.J. This case involved an attempt to set aside a judgment but the principles are similar for issue estoppel: G. Spencer Bower and A.K. Turner, *op. cit.* n. 3 p. 324. See too *McDonald* v. *McDonald* (1965) 113 C.L.R. 529 at 533 where the requirements, if "new evidence" or "fraud" is raised, are discussed and distinguished.
[22] [1977] A.C. 1 at 31-32.
[23] [1902] P.130.

"not as a matter of discretion but as a matter of law when the court is satisfied in substance that all the prosecution is doing is trying to get behind the original verdict by re-trying the same evidence".[24] His Lordship considered that the rule of public policy on which the pleas of *autrefois acquit* and *autrefois convict* were based was the protection of the accused against double jeopardy whereas issue estoppel was designed to ensure finality in civil litigation. The Crown and the accused are not like civil litigants and accordingly, he reasoned, issue estoppel was not available to the Crown.

Lord Hailsham considered that those cases which had purported to apply "issue estoppel" in favour of the defence were merely using the term "as a sort of intellectual shorthand to describe cases of double jeopardy in which the formal pleas of *autrefois acquit* and *autrefois convict* were not available to the accused".[25] He also thought that courts have an inherent jurisdiction to prevent an abuse of process where an "unscrupulous prosecutor" attempted to use a perjury prosecution "as a mere excuse for having a second shot at securing a conviction on the original charge".[26] Where the two charges are different "in substance and form" his Lordship considered that evidence inconsistent with innocence on the first charge could be admitted on the second charge.[27] His Lordship considered that the two offences in *Sambasivam*[28] were not sufficiently different, nor were the offences the Crown sought to use as similar fact evidence in *Kemp* v. *The King*.[29] Lord Hailsham thought that were the position otherwise the legitimate requirements of the prosecution would be frustrated. He gave the extreme example of the prosecution being unable to bring evidence to disprove an alibi on a robbery or murder charge if that evidence would contradict an issue found on a driving charge.[30]

Lord Salmon clearly stated that criminal courts have an inherent power to stop a prosecution, though only if it is "an abuse of the process of the court and is oppressive and vexatious".[31] His Lordship illustrated his views by saying that if the only evidence against Humphrys had been P.C. Weight's evidence and the forged application this would have been "oppressive and an abuse of the process of the court".[32] Despite his use of the term "double jeopardy" it would seem that his remarks only applied where there was an acquittal at the first trial.[33]

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[24] [1977] A.C. 1 at 40.
[25] *Id.* at 33.
[26] *Id.* at 34.
[27] *Id.* at 41. *Cf.* his remarks at 40F which do not appear to require inconsistency.
[28] [1950] A.C. 458.
[29] (1953) 83 C.L.R. 341.
[30] [1977] A.C. 1 at 34. *Cf.* at 21 *per* Viscount Dilhorne, at 55-56 *per* Lord Edmund-Davies; [1975] *Crim. L.R.* 708 at 709. The admissibility of such evidence is discussed by Evatt, J. in *Piddington* v. *Bennett and Wood Pty. Ltd.* (1940) 63 C.L.R. 533 at 558; *cf.* at 553 *per* Dixon, J.
[31] [1977] A.C. 1 at 46.
[32] *Id.* at 47.
[33] *Id.* at 45.

His Lordship's views on issue estoppel were similar to those of Lord Hailsham though he made no direct reference to the rule in *Birch* v. *Birch*.[34]

Lord Edmund-Davies agreed with Viscount Dilhorne and Lord Hailsham that criminal issue estoppel did not exist. His Lordship thought that issue estoppel could not apply in favour of the Crown though with respect his Lordship gave no legal reasons why this was so beyond saying that *Hogan*[35] was "a considerable departure from our well-established rules governing the proof of guilt".[36] Accordingly if the doctrine did exist it would be in a "mutilated unilateral form". His Lordship frankly remarked "[b]ut that sort of untidiness would not perturb me if I thought that there existed a defect in the administration of our criminal law which could be cured by importing this new notion".[37] After approving an observation of Professor J.C. Smith that "[e]stoppel, like other exclusionary rules, is an obstacle to the discovery of truth and therefore needs justification on grounds of policy",[38] his Lordship discussed whether such a justification existed and concluded that it did not. Apart from the pleas of *autrefois acquit* and *autrefois convict* he thought there did exist, despite what he had said in *Connelly*,[39] a discretion to "decline to hear proceedings on the ground that they are oppressive and an abuse of the process of the court".[40] His Lordship approved a statement of Lord Pearce in *Connelly*[41] that a man "ought not be tried for a second offence which is manifestly inconsistent on the facts with either a previous conviction or a previous acquittal" and also approved the course taken by Barry, J. in *R.* v. *Riebold*.[42] In that case Barry, J. refused to allow the Crown to proceed on 27 counts of larceny and obtaining by false pretences where the evidence to support them had been used to try to prove the overt acts of a conspiracy of which the defendants had been previously acquitted. By approving this decision it is submitted that Lord Edmund-Davies was prepared to ignore the theoretical possibility that the two defendants were joint participants but not co-conspirators.

Lord Fraser of Tullybelton agreed with the other judges that issue estoppel had no place in the criminal law of England and that even if it did it did not apply to a perjury trial. His Lordship reserved his opinion on the question whether there was a discretion to stay a prosecution, as that question had not been argued.

To summarize:—

(i) their Lordships unanimously considered that criminal issue

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[34] [1902] P. 130.
[35] [1974] Q.B. 398.
[36] [1977] A.C. 1 at 51.
[37] *Id.* at 52.
[38] [1974] *Crim. L.R.* 249.
[39] [1964] A.C. 1254 at 1277.
[40] [1977] A.C. 1 at 53.
[41] [1964] A.C. 1254 at 1364.
[42] [1967] 1 W.L.R. 674

estoppel was not part of English law, and even if it was it could not assist a person charged with perjury;

(ii) Lords Salmon and Edmund-Davies considered that if the prosecution used a perjury trial merely because it had failed to prove an earlier charge this would be an abuse of the process of the court;

(iii) Lord Hailsham considered that where the evidence at a second trial was substantially identical with that at an earlier trial, and the prosecution was in reality trying to get behind the earlier verdict of acquittal, this would substantially infringe the rule against double jeopardy and would also be an abuse of process.

The Bases of the Decision

Their Lordships were clearly influenced by policy considerations as their descriptions of issue estoppel ("very undesirable", "purely arbitrary", "artificial", "inappropriate, artificial, unnecessary and unfair", "artificial and unjust") and its "extraordinary" results and "dramatic and unfortunate" effects indicate.[43] There was no recognition that the policy behind the civil rule, that there should be finality to litigation, could be applied to criminal cases. In recent years it has been suggested[44] that the purpose of the criminal rules is to prevent harassment of defendants who if repeatedly charged may eventually be convicted and this need not be confined to verdicts as Blackstone's description[45] would indicate.

Apart from insisting that criminal issue estoppel was the same as the civil doctrine, if it existed at all, their Lordships rejected the notion that issue estoppel was the basis of,[46] or was an extension from, *autrefois acquit*. While the traditional view was that *autrefois acquit* and *autrefois convict* "are pleas which depend on the principle that a man shall not be twice in jeopardy for the same thing; not on an estoppel"[47] there were decisions which indicate that *autrefois acquit* and *autrefois convict* did not always operate in the same way. If a person was convicted of assault and the victim later died the defendant could be charged with murder;[48] however if he had been acquitted of assault the better view is that he

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[43] *Cf.* J.R. Forbes, "Criminal Issue Estoppel — England Secedes" 3 *Queensland Lawyer* 157 at 163-65; *D.P.P.* v. *Majewski* [1976] 2 All E.R. 142.

[44] M.L. Friedland *op. cit.* n. 2 pp. 3-4; *U.S.* v. *Jenkins* 420 U.S. 358 at 370, 95 S. Ct. 1006 (1975) at 1013; *Green* v. *U.S.* 355 U.S. 184 at 187 (1957).

[45] *Commentaries.* Book IV (1759 ed.) p. 329 cited by Viscount Dilhorne: [1977] A.C. 1 at 15.

[46] N. Morris and C. Howard, *Studies in Criminal Law* (1964) Ch. VII "Res Judicata in the Criminal Law" p. 233; *Connelly* [1964] A.C. 1254 at 1365 (Lord Pearce), 1334 (Lord Hodson); *contra*: *R.* v. *Tween* [1965] V.R. 687 at 699 *per* Sholl, J. (with whom Pape, J. agreed at 705).

[47] *R.* v. *Inhabitants of Haughton* (1835) 1 El. and Bl. 501 at 506, 118 E.R. 523 at 525 *per* Crompton, J. *arguendo*. *Cf. In re a Medical Practitioner* [1959] *N.Z.L.R.* 784 at 812; *R.* v. *Wilkes* (1948) 77 C.L.R. 511 at 519; but *cf. R.* v. *Hutchings* (1880) 6 Q.B.D. 300 at 306 *per* Lord Selborne, L.C.; *R.* v. *O'Loughlin; ex parte Ralphs* (1971) 1 S.A.S.R. 219; *Humphrys* [1977] A.C. 1 at 7-12.

[48] *R.* v. *Thomas* [1950] 1 K.B. 26.

could not be charged with murder.[49] This could be explained on the ground that a verdict of guilty of murder would be inconsistent with an acquittal for assault.[50]

It is clear that even if issue estoppel were adopted it would be difficult to decide whether it should be a defence to perjury. The United States approach may provide some illumination on this problem.[51] Long before it was declared to be enshrined in the Constitution "issue" or "collateral" estoppel was held to be available to a defendant in a criminal trial. At first the doctrine appears to have been imported from civil cases but it developed by analogy to the prohibition against double jeopardy.[52] So apart from isolated instances[53] the doctrine has only been applied in favour of defendants.[54] Finally it was held that the doctrine was incorporated in the Fifth Amendment prohibition against double jeopardy and applied to the States through the Fourteenth Amendment.[55] This development was partly an attempt to reduce the overcrowding of courts[56] and to curb dubious prosecution tactics.[57]

The United States courts remain divided on the question whether collateral estoppel is a defence to perjury.[58] One court has seen this as the result of a conflict of public policies. After setting out many reasons why defendants should not be able to immunize themselves against a perjury prosecution by relying on the doctrine, the court[59] said: "[o]n the other hand some apprehension exists that allowing prosecutions for perjury will actually give the state a second shot at the defendant for the same wrong. The mere fact, this argument continues, that one charge

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[49] M.L. Friedland *op. cit.* n. 2 pp. 95-96, 121; *Connelly* [1964] A.C. 1254 at 1332 (Lord Hodson); *cf. Martinis* v. *Supreme Court* 206 N.E. 2d 165 at 170 (Fuld, J.) (1965). Humphrys' counsel stated the contrary: [1977] A.C. 1 at 7.

[50] *Cf. Connelly* [1964] A.C. 1254 at 1354 (Lord Devlin); *R.* v. *Hilton* (1895) 59 J.P. 778.

[51] See particularly R.M. Perkins "Collateral Estoppel in Criminal Cases [1960] *U. of Ill. L. Forum* 533; Comment, *"Twice in Jeopardy"* [1965] *Yale L.J.* 262; Comment, "Perjury by Defendants" 74 *Harv. L.R.* 818; 51 A.L.R. 3d 693; 9 A.L.R. 3d 203; 147 A.L.R. 1001; 37 A.L.R. 1290; the Comment on the difficult case of *State* v. *De Schepper* 231 N.W. 2d 294 (1975) in 60 *Minnesota L. Rev.* 597.

[52] *Cf. U.S.* v. *Carlisi* 32 F. Supp. 479 (1940); Friendly, J. in *Jenkins* 490 F. 2d 868 (1973) (affd. 420 U.S. 358 (1975)) at 870-74.

[53] E.g. *Commonwealth* v. *Evans* (1869) 101 Mass. 25; *Hernandez-Uribe* v. *U.S.* 515 F. 2d 20 (1975); *cf. U.S.* v. *Colacurcio* 514 F. 2d 1 at 4-6 (1975).

[54] *Rouse* v. *State* 97 A. 2d 285 at 289 (1953). It has been said that it is "much too late" to argue that collateral estoppel does not apply because of the lack of mutuality: *Ashe* v. *Swenson* 397 U.S. 436 at 443 (1969).

[55] *Ashe* v. *Swenson* 397 U.S. 436 (1969).

[56] *Cf. Eagle* v. *State* 249 So. 2d 460 at 465 (1971); *Benton* v. *Maryland* 395 U.S. 784 at 798 *per* White, J. (1969).

[57] For examples of these tactics see *State* v. *Redinger* 312 A. 2d 129 (1973); *Ashe* v. *Swenson* 397 U.S. 436 at 447 (1969); *Giucci* v. *Illinois* 356 U.S. 571 (1958).

[58] Comment, 60 *Minnesota L. Rev.* 597 at 604-605. In Canada issue estoppel is a bar to perjury: *R.* v. *Quinn* (1905) 10 C.C.C. 412; *R.* v. *Gushue* 13 C.C.C. 2d 101 (1973); *contra L.* v. *R.* (1934) 62 C.C.C. 308. In New Zealand a contrary decision was reached: *R.* v. *Morrison* (1974, Roper, J.) unrep. — see [1974] *N.Z.L.J.* at 482, and see Note [1975] N.Z.L.J. 697; J. Miller "Issue Estoppel in Criminal Proceedings" [1975] *N.Z.L.J.* 703; R.A. Moodie, "Issue Estoppel — Estopped" [1976] *N.Z.L.J.* 417.

[59] *Adams* v. *U.S.* 287 F. 2d 701 at 703 (1961).

relates to the doing of an act and the other to a denial of having done it, or to affirmative proof that it was not so done is not sufficient basis on which to make a distinction. This is particularly true when the same or substantially the same evidence is presented in both cases. . . . This, we see, approaches closely, whether acknowledged or not, an intuitive feeling akin to double jeopardy despite the fact that the two are distinct". Obvious parallels can be drawn with the reasoning in *Humphrys*.[60]

The Position in Australia[61]

Autrefois Acquit and Autrefois Convict[62]

The nature of these defences is set out in the first seven propositions of Lord Morris in *Connelly*.[63] One test as to whether these defences are available is, briefly, whether the evidence necessary to support the second charge would have been sufficient to procure a conviction of the first charge or a charge which could properly have been included in the first indictment. This test was applied in a number of early High Court decisions[64] and was carried to an extreme length in one New South Wales case which in effect held that the number of possible indictments arising out of one act of arson was equal to the number of combustible objects in a building: *R.* v. *Bingham*.[65] The Victorian Supreme Court[66] thought that this test was too much in the accused's favour and notwithstanding the early High Court decisions considered that it was not "exclusive". In a later decision that court held that where the prosecutor relied on the same act of the defendant to support separate charges *autrefois convict* was available.[67]

It would appear that all the judges in *Humphrys*[68] (apart from

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[60] [1977] A.C. 1; *cf.* 40 *M.L.R.* 83.

[61] Sections 16 and 17 of the Queensland and Western Australian Criminal Codes differ from the common law and in particular are wider than *autrefois acquit* and *autrefois convict*. See R. F. Carter, *Criminal Law of Queensland* (4th ed., 1974) pp. 56-60, 284-85 and p. 467 (on recharging defendants); *cf. R.* v. *Gordon; ex parte Attorney-General* [1975] Qd. R. 301; *Connolly* v. *Meagher* (1906) 3 C.L.R. 682; *O'Halloran* v. *O'Byrne* [1974] W.A.R. 45; *Graves* v. *McRae; ex parte McRae* [1976] *A.L.M.D.* 4949.

[62] *Cf.* N. Morris and C. Howard *op. cit.* n. 46 p. 240; P. Brett and P.L. Waller, *Criminal Law Cases and Text* (3rd ed. 1971) Ch. 20.

[63] [1964] A.C. 1254 at 1305-306.

[64] *Sherwood* v. *Spencer* (1905) 2 C.L.R. 250; *Chia Gee* v. *Martin* (1905) 3 C.L.R. 649; *Li Wan Quai* v. *Christie* (1906) 3 C.L.R. 1125; N. Morris and C. Howard, *op. cit.* n. 46 pp. 240*ff.*; *cf.* M.L. Friedland *op. cit.* n. 2 pp. 97-102 where the "in peril test", Lord Morris' second proposition in *Connelly* [1964] A.C. 1254 at 1305 (approved in N. Morris and C. Howard *op. cit.* n. 46 p. 240) is also discussed.

[65] (1881) 2 N.S.W.R.(L) 90, approved in *Sherwood* v. *Spencer* 2 C.L.R. 250.

[66] *R.* v. *Cleary* [1914] V.L.R. 571. The approach in Canada is much broader: *Kienapple* v. *R.* (1974) 15 C.C.C. (2d) 524. The United States cases are in hopeless conflict: R.M. Perkins *supra* n. 51 at 543-561; B.R. Layton "Criminal Law: The Same Offence in Oklahoma — Now You See It; Now You Don't" (1975) 28 *Oklahoma L. Rev.* 131.

[67] *Falkner* v. *Barba* [1971] V.R. 332; *cf. R.* v. *O'Loughlin; ex parte Ralphs* (1971) 1 S.A.S.R. 219 at 265; 1972 *Annual Survey of Commonwealth Law* pp. 206-209.

[68] [1977] 1 A.C. 1 though in *Sealfon* 332 U.S. 575 (1948) which Viscount Dilhorne approved, the same agreement was involved in both charges.

Lord Fraser who expressed no opinion) were prepared to ignore the technical distinctions which appear in cases such as *Bingham*[69]: Viscount Dilhorne on the ground of *autrefois acquit;* Lords Salmon and Edmund-Davies as a matter of "discretion" and Lord Hailsham as a matter of "law".

Issue Estoppel[70]

In *Mraz* v. *R.*[71] the defendant was charged with having committed murder by causing the death of a woman during or immediately after the commission of rape. The accused did not deny that intercourse had taken place nor that the woman had died soon afterwards but he did deny that she had not consented and that he had caused her death. The trial judge directed the jury that he could be convicted of manslaughter if the rape was not committed "maliciously". The accused was acquitted of murder and on appeal his conviction for manslaughter was set aside.[72] He was then charged with rape and the High Court held that issue estoppel was a defence to the charge.[73]

Briefly their Honours considered that the acquittal of murder could only have meant that the jury were not satisfied either that the woman had not consented or that the accused had caused her death. Their verdict of guilty of manslaughter negated the latter alternative and as the jury must be deemed to have found that the woman consented the accused could not be convicted of rape.

The decision is important as it confirmed that the acquittal of murder could not be contradicted and that a finding of a quashed verdict could be used to isolate an issue. Furthermore the finding of causing death was originally made against the accused.

Lord Hailsham considered that the decision went no further than stating "that the doctrine of double jeopardy precludes the acceptance of a verdict of guilty inconsistent with a previous verdict of acquittal".[74] While Lord Hailsham's view is consistent with the result of *Mraz* (*No.* 2)[75] it is clearly inconsistent with the reasoning. On the other hand it is doubtful whether the decision intended to incorporate the whole of the civil doctrine into the criminal law. There are indications in the judgment that the doctrine is only available to the accused.[76] If the doctrine is based on the rule of public policy that defendants should not be repeatedly prosecuted obviously this gives no justification to the view that the doctrine applies in favour of the Crown. Another argument is that the

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[69] (1881) 2 N.S.W.R.(L.) 90.

[70] In *R.* v. *O'Loughlin; ex parte Ralphs* (1971) 1 S.A.S.R. 219 at 222 Bray, C.J. said it was "undoubted that there is in Australia a rule of issue estoppel in criminal cases". *Cf. R.* v. *Flood* [1956] Tas. S.R. 95; *R.* v. *Clift* (1952) 69 W.N. (N.S.W.) 87; *Clout* v. *Hutchinson* (1950) 51 S.R. (N.S.W.) 32; *R.* v. *Wright* (Tasmanian S.C. 14/10/76) 1976 *A.L.M.D.* 4950.

[71] (*No.* 1) (1955) 93 C.L.R. 493; (*No.* 2) (1956) 96 C.L.R. 62.

[72] (*No.* 1) (1955) 93 C.L.R. 493.

[73] (*No.* 2) (1956) 96 C.L.R. 62.

[74] [1977] A.C. 1 at 38.

[75] (1956) 96 C.L.R. 62. *Cf. Broome* v. *Chenoweth* (1946) 73 C.L.R. 583 at 599.

[76] (1956) 96 C.L.R. 62 at 68. *Cf. R.* v. *Wilkes* (1948) 77 C.L.R. 511 at 518.

doctrine does not apply because "the prosecution cannot succeed unless it proves to the satisfaction of the court trying the accused that he is guilty of the offence charged".[77] An accused person could be embarrassed trying to defend the remaining issues if the doctrine were available to the Crown, particularly in a case like *Hogan*[78] where he might wish to prove defences, such as provocation or diminished responsibility, which were not available at the earlier trial.

Whether the exceptions to the civil doctrine would apply in criminal cases is most uncertain. As was said in *Humphrys*[79] the civil doctrine is subject to an exception where there is fraud and this also applies to the doctrine of merger of a judgment in a cause of action. It was settled early in the eighteenth century that there could be no new trial after an acquittal on indictment,[80] even if the defendant had been guilty of fraud.[81]

If criminal issue estoppel could be said to be a development from the doctrine of double jeopardy fraud might be held to be no answer to it; if on the other hand the civil doctrine and its exceptions apply in criminal cases there is, with respect, much to be said for the views of Lords Hailsham, Salmon and Edmund-Davies that the prosecution must produce significant new evidence, though their Lordships thought that this requirement only applied to the whole of the evidence at the second trial otherwise Humphrys' defence would have succeeded.

Newly discovered evidence is not admissible to rebut a plea of *autrefois acquit* or *autrefois convict*: "the distinction is clear between a *new* fact and an undiscovered (even if undiscoverable) fact: the former defeats the plea of *autrefois convict;* the latter does not".[82] There is no authority on whether this applies to criminal issue estoppel.[83]

Humphrys[84] had the peculiar feature that though the evidence of the

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[77] *Manipur Administration* v. *Bira Singh* A.I.R. 1965 S.C. 87 at 93 where the point was left open. A South African (criminal) affiliation case held that the doctrine could apply in favour of the Crown: *R.* v. *Kriel* 1939 C.P.D. 221 (criticized in L.H. Hoffmann. *South African Law of Evidence* (2nd ed. 1970) p. 247); in Rhodesia the position is open: *S.* v. *Gabriel* 1971 (1) S.A. 646 at 663; in Canada it appears that the doctrine only applies against the Crown: *McDonald* v. *R.* (1959) 126 C.C.C. 1 at 18. In Scotland the doctrine does not exist at all: *Advocate, H.M.* v. *Cairns* 1967 J.C. 37; 1967 S.L.T. 65.

[78] [1974] Q.B. 398.

[79] [1977] A.C. 1 at 21.

[80] The position is different in summary cases — see e.g. *Rex* v. *Muirhead and Bracegirdle* [1942] S.A.S.R. 226; M.L. Friedland *op. cit.* n. 2 p. 289. In summary cases there are rules analagous to those against double jeopardy discussed above: *Wemyss* v. *Hopkins* (1875) L.R. 10 Q.B. 378.

[81] J.B. Thayer, *Preliminary Treatise on Evidence* (1898) p. 177. *Cf. R.* v. *Carter* 6 Mod. 168, 87. E.R. 924; Story, J. in *U.S.* v. *Gibert* (1834) 25 Fed. Cas. 1287 at 1294, 1301; *Humphrys* [1977] A.C. 1 at 47 (Lord Salmon). But *cf.* M.L. Friedland, *op. cit.* n. 2 pp. 285-297 *passim; R.* v. *Furser* (1753) 96 E.R. 813; *Jenkins* 490 F. 2d 868 at 877 n. 7 (1973); *U.S.* v. *Wilson* 95 S. Ct. 1013 at 1021 n. 10 (1975); R.M. Perkins, *supra* n. 51 at 543.

[82] *R. v. O'Loughlin; ex parte Ralphs* (1971) 1 S.A.S.R. 219 at 272 *per* Wells, J.

[83] In *O'Mara* v. *Litfin; ex parte O'Mara* [1972] Q.W.N. 73 a fresh witness was produced but the court, perhaps rightly in the result, thought issue estoppel still applied, adopting a very narrow interpretation of the civil doctrine. But *cf. Humphrys* [1977] A.C. 1 at 39 *per* Lord Hailsham.

[84] [1977] A.C. 1.

neighbours was material in the sense that it tended to disprove a statement by the accused at the earlier trial which was very important on the question of credibility yet their evidence would not have been admissible at all at the earlier trial as none of it related to July 18, 1972; and at the second trial only the policeman's evidence was objected to. It is submitted that as the prosecution only had to show that the earlier verdict was procured by fraud, which is an "extrinsic collateral act",[85] the evidence to prove it did not have to have been admissible at the first trial. This assumes that the civil exception applies in criminal cases.

Civil cases of the highest authority[86] differ as to the extent to which a party is precluded from raising issues at a second trial which could properly have been raised at the first trial. It has been said that cases will be decided on the basis of "justice", not technical doctrines.[87] The position in criminal cases is also obscure.[88]

Apart from the use of a finding against the accused and of a quashed verdict, it is submitted that the approach in *Mraz (No. 2)*[89] is not an "arbitrary" one. The method determines what issues must as a matter of law have been passed on by the jury, alternative issues being eliminated by reference to admissions or other verdicts. While no doubt it will only be possible to isolate one or a number of crucial issues in a few cases that seems to be no reason to abandon the doctrine altogether. There is a suspicion that the doctrine is disliked because juries do not always behave in a rational manner[90] though the doctrine is not concerned with a jury's process of reasoning. This in turn creates a problem where issues are not admitted but are not seriously contested by the accused. It is doubtful whether "a possible and indeed reasonable inference to be drawn from the verdict"[91] will be sufficient for issue estoppel.

Inconsistent Verdicts

This doctrine is not based on *res judicata* but supports an allegation on appeal that a conviction is impossible or unsatisfactory. A jury might find a man guilty of aiding and abetting after acquitting the alleged principal. If on the other hand a jury, for example, returns a verdict of not guilty of murder but guilty of assault where the evidence suggests

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[85] G. Spencer Bower and A.K. Turner *op. cit.* n. 3 p. 322. *Cf. McDonald* v. *McDonald* (1965) 113 C.L.R. 529 at 532.

[86] *Carl Zeiss Stiftung* v. *Rayner and Keeler (No. 2)* [1967] 1 A.C. 853 at 915-17, 947-49; *Vitosh* v. *Brisbane C.C.* [1956] St. R. Qd. 283 (which contains the argument), 93 C.L.R. 622; *Yat Tung Co.* v. *Dew Heng Bank* [1975] 2 W.L.R. 690 at 696-97; *Blair* v. *Curran* (1939) 62 C.L.R. 464 at 531-33; *Cromwell* v. *County of Sac* 94 U.S. 351 (1876); *Greenhalgh* v. *Mallard* [1947] 2 All E.R. 255.

[87] *Carl Zeiss Stiftung* v. *Rayner and Keeler (No. 2)* [1967] 1 A.C. 853 at 947 *per* Lord Upjohn.

[88] See M.W. Campbell "Issue Estoppel in Criminal Cases With Special Reference to Brown v. Robinson" (1974) 48 *A.L.J.* 469.

[89] (1956) 96 C.L.R. 62. *Cf.* on the use of a quashed verdict: *Butler* v. *Butler* [1894] P. 25.

[90] (1967) 21 *Rutgers L. Rev.* 274 at 286.

[91] ***State* v. *Little* 350 P. 2d 756 at 762-63 (1960); but *cf.*** G. Spencer Bower and A.K. Turner *op. cit.* n. 3 p. 173 n. 1. *R.* v. *Carlson* [1970] 5 C.C.C. 147 suggests that the need for issues to be identical should not be carried to absurd lengths.

murder or nothing the lesser verdict will not be set aside provided the court is satisfied that the evidence was strong enough to show that the verdict was not a compromise. Where the inconsistency occurs at a single trial the court can look at what "probably" occurred.[92] An accused may be able to successfully argue that an earlier conviction is inconsistent with a later acquittal: *R.* v. *Warner.*[93] Brereton, J. has said that this case can only be explained "on the basis that the Court of Criminal Appeal in the light of the acquittal in the second charge came to the conclusion that the verdict in the first was unsatisfactory and should not be allowed to stand."[94]

Their Lordships in *Humphrys*[95] were prepared, where the facts of two separate charges were essentially the same to recognize something similar in effect to the doctrine of inconsistent verdicts and despite their disapproval of issue estoppel approved the result in *Sealfon*[96] even though that case involved an examination of the facts and issues determined at the previous trial.

Abuse of Process

The High Court has said that "every court has an inherent jurisdiction to stay proceedings which are an abuse of its process".[97] This concept could be applied to a wide variety of situations, the authorities are obscure[98] and the problem is complicated by the constitutional relationship between the courts and the Crown.[99] Australian and English courts have used the expression in a number of situations which are best analysed separately.

(i) Their Lordships in *Humphrys*[100] affirmed the view that courts can lay down rules for hearing together charges arising out of the same matter. In New South Wales the prosecution has wide powers to join different offences arising out of the same transaction or against the same victim and the practice is to take advantage of these powers though the court is given a practically unfettered discretion to order separate trials if it thinks fit.[101]

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[92] *R. v. Wilkes* (1948) 77 C.L.R. 511 at 517.

[93] (1966) 50 Cr. App. R. 291. But *cf.* M.L. Friedland *op. cit.* n. 2 pp. 118, 143-45.

[94] *R.* v. *Cicio* [1968] 1 N.S.W.R. 613 at 617. *Cf. Hull* v. *Nuske* (1974) 8 S.A.S.R. 587; *R.* v. *Emery* (1975) 11 S.A.S.R. 169; *R.* v. *Jones* [1971] 1 N.S.W.L.R. 613; *Dunn* v. *U.S.* 284 U.S. 390 (1932); *R.* v. *Shannon* [1974] 2 All E.R. 1009 at 1035. But *cf. R.* v. *Whelan* [1973] V.R. 268.

[95] [1977] A.C. 1 at 38, 43, 45, 53.

[96] 332 U.S. 575 (1948).

[97] *Clyne* v. *N.S.W. Bar Association* (1960) 104 C.L.R. 186 at 201.

[98] Three judges of the Supreme Court of Canada denied that there was any such power in criminal cases: *R.* v. *Osborn* (1970) 15 D.L.R. (3d) 85. Their view is criticized in 1971 *Annual Survey of Commonwealth Law* pp. 199-200.

[99] Contrast the views of Lord Devlin in *Connelly* [1964] A.C. 1254 at 1354 with those of Viscount Dilhorne in *Humphrys* [1977] A.C. 1 at 22-26.

[100] [1977] A.C. 1 at 22-23, 45, 54.

[101] Crimes Act 1900 s. 365(2); see to *R.* v. *Demirok* (1976) 50 A.L.J.R. 550. Examples of the prosecution's powers are in ss. 370, 379, 380 and 384 of the Crimes Act 1900.

The Supreme Court of South Australia has strongly criticized the prosecution for withholding charges and indicated that doing so could amount to an abuse of process.[102]

(ii) Viscount Dilhorne and Lord Edmund-Davies agreed with two previous decisions of English courts that a trial judge has no power to stop a trial merely because it appears from the depositions that a prosecution will not succeed.[103]

(iii) In Australia failure to observe other procedural rules has sometimes been referred to as an abuse of process. In one decision it was said not to be an "abuse of process" for the prosecution to withhold evidence which weakened its case.[104]

(iv) Prior to *Humphrys*[105] opinions differed in England as to whether there is a residual discretion to stop a criminal prosecution where there is adequate evidence to support a properly drawn indictment. Lord Reading, C.J.[106] indicated that there was but gave no indication when it could occur. In another case a prosecution for larceny after a conviction for obtaining by false pretences arising out of the same transaction was said to be "altogether inconsistent with what is right and just".[107]

In *Connelly*[108] Lords Morris and Hodson denied that there was such a power; Lords Devlin and Pearce were of a contrary opinion.[109] Some remarks of Lord Reid[110] might suggest that he agreed on this matter with Lords Devlin and Pearce but he later made it clear that he did not.[111] It would seem that Lord Devlin and Lord Pearce (who spoke of preventing "inconsistency on the facts") did not think that the discretion could be exercised whenever the judge thought that the trial was in some way "unfair". In the case itself it was held not to be an abuse of process for the defendant to be charged with robbery after being acquitted at a previous trial of a murder arising out of the same transaction when at the time of the first trial there was a rule of practice, to which the defendant had not objected, that the two charges could not be tried together.

In *Howard* v. *Pacholli and Gailbraith*[112] a magistrate declined to commit one defendant for an offence under the Companies Act and another for aiding and abetting that offence. More than 3 years before

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[102] *R.* v. *De Kuyper* [1948] S.A.S.R. 108 at 112.
[103] [1977] A.C. 1 at 23-26, 53.
[104] *Lenthall* v. *Fimeri* [1933] S.A.S.R. 22; *cf. Lenthall* v. *Newman* [1932] S.A.S.R. 126.
[105] [1977] A.C. 1.
[106] *R.* v. *Barron* [1914] 2 K.B. 570 at 575.
[107] *R.* v. *King* [1897] 1 Q.B. 214 at 218.
[108] [1964] A.C. 1254 at 1300, 1337.
[109] *Id.* at 1347, 1364.
[110] *Id.* at 1296.
[111] *Atkinson* v. *U.S.A. Government* [1971] A.C. 197 at 232.
[112] [1973] V.R. 833. It is, with respect, difficult to understand his Honour's remark (at 842) that *Kupferberg* (1918) 13 Cr. App. R. 166 was an "additional factor" in the case of the aider and abettor, as *Kupferberg* concerned a plea of *autrefois acquit*.

another magistrate had declined to commit them on a charge of conspiring to commit the same offence.

Anderson, J. considered that there was no general discretion to stop a prosecution though his Honour thought the broad principle that a person should not be put twice in jeopardy might apply in circumstances where *autrefois acquit* and *autrefois convict* were not available. His Honour agreed with the views of Lord Pearce about "inconsistency on the facts". In the case before him Anderson, J. held that the dismissal of the first information was not an acquittal so the second prosecution could proceed.

Anderson, J.'s reasoning is in accord with the *obiter dicta* of Lords Salmon and Edmund-Davies in *Humphrys*.[113] The South Australian Supreme Court has gone further, holding that the discretion extends to where there is no inconsistency between the two verdicts but where a second conviction would mean that the defendant would be punished twice for the same *act*.[114]

The existence of the jurisdiction in the fourth situation will remain doubtful until the High Court decides the matter; if it exists the jurisdiction, ostensibly based on the underlying need to prevent double jeopardy, will produce conflicts with the technical rules evolved to protect defendants.

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[113] [1977] A.C. 1.

[114] *R.* v. *O'Loughlin; ex parte Ralphs* (1971) 1 S.A.S.R. 219. The law on this aspect is stated very differently in Friedland *op. cit* n. 2 Ch. 8 "Multiple Convictions", though the case may be correct as a penalty had been imposed on the first count.