Criminal Issue Estoppel — an Ambiguous Epitaph

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The courts display a "traditional dislike"[1] for estoppel, particularly issue estoppel. It survives in civil proceedings,[2] but since the decision of the House of Lords in *D.D.P.* v. *Humphrys*[3] and the more recent judgements of the High Court in *R.* v. *Story*[4] it seems to have no future in the criminal law. We may apply to criminal issue estoppel an aphorism unkindly uttered of a great ex-colony of England: it has passed from youth to decadence without experiencing a period of maturity.

The nature of issue estoppel has been considered elsewhere.[5] It is a rule of evidence or procedure refined from *res judicata* or "cause of action estoppel".[6] Instead of extinguishing an entire cause of action it prevents a question which was essential to the first action (e.g. alibi, title to property) from being re-litigated on the trial of a second and admittedly different cause of action between the same parties. The leading authority on issue estoppel in the criminal field[7] is complex and subtle; a simpler case is *O'Mara* v. *Litfin*; *Ex parte O'Mara*.[8] In that case there were successive prosecutions for two quite different traffic offences allegedly committed on the same occasion. The defendant successfully contested identity at the first trial and it was held that the same issue must be found in his favour on the hearing of the other charge.

Criminal issue estoppel was recognized for the first time by an Australian Court in 1948,[9] and was applied by the same court, in the case of *Mraz*,[10] in 1956. In that case close analysis of the record of a murder trial satisfied the High Court that it had subordinately but necessarily been found at that trial that the accused was not guilty of rape; thus an issue estoppel arising from the first trial pre-determined the entire cause of action at the second (rape) trial.

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1. *Azzopardi* v *Bois* [1968] V.R. 183 *per* Adam J. at p. 185.
2. But it is closely confined by technicalities: see *Jackson* v. *Goldsmith* (1950) 81 C.L.R. 446. It has recently been held that a party found guilty of negligence in a property-damage case is free to deny negligence in a later personal injuries case against the same opponent: *Bollen* v. *Hickson* Q.L.R. 5/4/80.
3. [1977] A.C. 1.
4. (1978) 52 A.L.J.R. 737.
5. See e.g. J.R. Forbes "Short-Circuiting the Criminal Trial: The Rise of Criminal Issue Estoppel". (1972) 7 *U.Q.L.J.* 418.
6. *Thoday* v. *Thoday* [1964] p. 181 *per* Diplock L.J. at p. 198.
7. *Mraz* v. *The Queen* (No. 2) (1956) 96 C.L.R. 62.
8. [1972]. Q.W.N. 32, considered in detail in Forbes *loc. cit.* at pp. 423-425. See also *R.* v. *Flood* [1956] Tas. S.R. 95.
9. *R.* v. *Wilkes* (1948) 77 C.L.R. 511 *per* Dixon J. at 518. Although the history of issue estoppel is long, the term itself was not invented until 1921 — by Higgins J. in *Hoysted* v. *Commissioner of Taxation* (1921) C.L.R. 537, at p. 561. See also *Phipson on Evidence* 11th edn. para. 1347, *R.* v. *Story* (1978) 52 A.L.J.R. 737, at p. 741, and pp. 755-756.
10. (1956) 96 C.L.R. 62. The facts and issues are detailed in Forbes *loc. cit.* at pp. 422-423.

Given the authority of a unanimous High Cout decision,[11] criminal issue estoppel might have been expected to continue as an established, if rarely used, rule of evidence. Issue estoppel of any kind is governed by strict preconditions. The parties must be the same; the issue must be precisely the same,[12] and it must be an "ultimate" issue (*i.e.* one logically essential to the first judgement) not merely an evidentiary one.[13] Criminal issue estoppel has to pass additional tests. Because an accused usually pleads only the general issue,[14] and the jury returns a general verdict, it is often impossible to isolate one ultimate issue which was decided for or against him.[15] In practice it is necessary to show clearly that the first trial was really a one-issue affair,[16] or that it was decided by a magistrate[17] who clearly decided the point in question, whether or not other elements of the charge were disputed.

Most of the reported cases[18] relating to criminal issue estoppel have concerned prior acquittals,[19] and[20] there is no reason in principle why a prior *conviction* could not raise the *locus in quo* at a time vital to the second charge.

But after consideration of cases reported before 1974 a niggling doubt remained. In the few criminal cases in which an issue estoppel was actually found the successful claimant was the accused. That was an attractive result in a system of criminal justice oriented, in theory at least, to the rights of the citizen in jeopardy. Despite the natural scarcity of issue estoppels it was inevitable that sooner or later a *prosecutor* would be in a position to claim reciprocity. Would the courts then adhere to the logic of the authorities, or would they decline to appear illiberal, and decide on policy grounds to give criminal issue estoppel a one-way effect only?[21] Or would they disown the doctrine of *Wilkes*[22] and *Mraz*[23] altogether?

11. In *Mraz* (1956) 96 C.L.R. 62.
12. *Jackson* v. *Goldsmith* (1950) 81 C.L.R. 446, *Bollen* v. *Hickson* Q.L.R. 5/4/80.
13. *Blair* v. *Curran* (1939) 62 C.L.R. 464, at p. 532.
14. I.e. guilty or not guilty.
15. *Connelly* v. *D.P.P.* [1964] A.C. 1254, *R.* v. *Story* (1978) 52 A.L.J.R. 737, at p. 740, at p. 742 and p. 747, *et passim.*, Forbes *loc. cit.* at pp. 421-422.
16. That issue being of course the one upon which an estoppel is claimed at the second trial.
17. Who of course sits without a jury and who may — indeed should — articulate reasons for judgement: cf. *O'Mara* v. *Litfin; Ex parte O'Mara* [1972] Q.W.N. 32. Unfortunately although most criminal cases are decided in this manner (cf. *Story* at 755 *per* Murphy J.) the resulting records are often inadequte for the present purpose.
18. In addition to cases already cited see *R.* v. *Cleary* [1917] V.L.R. 571, *Clout* v. *Hutchinson* (1950) 51 S.R. (N.S.W.) 32, *R.* v. *Clift* (1952) 69 W.N. (N.S.W.) 87, *R.* v. *Diakakis* (1932) 297, *Kosanovic* v. *Sarapuu* [1962] V.R. 321, *R.* v. *Tween* [1965] V.R. 687, *R.* v. *Daniels and Kalazitis* [1972] Qd.R. 323, *R.* v. *Wright* [1976] Tas.S.R. (N.C.) 19, *R.* v. *Lucas* [1977] Tas. S.R. 53, *R.* v. *Garrett* (1977) 15 S.A.S.R. 501.
19. An acquittal is treated as a definite conclusion against the prosecution although in reality the jury (or some members of the jury) may merely have felt a degree of doubt on the issue: cf. *R.* v. *Story* (1978) 52 A.L.J.R. 737 *per* Barwick C.J. at p. 738, *per* Murphy J. at p. 754.
20. *Pace* Barwick C.J. in *Story* at pp. 738-9.
21. An expedient suggested by Murphy J. in *Story* at 755. See also D. Lanham "Issue Estoppel in English Criminal Law" [1970] *Crim.L.R.* 428, at p. 442.
22. (1948) 77 C.L.R. 511.
23. (1956) 96 C.L.R. 62.

Considering the rarity of these cases the answer to these questions[24] was foreshadowed surprisingly soon. In *R.* v *Hogan*[25] Lawson J. applied the logic of *Wilkes*[26] which was supported by considered *dicta* of the House of Lords,[27] and effectively narrowed the range of defences available to the accused in a case of murder.[28] Although the latter was acquitted, much professional and academic criticism descended upon the unhappy trial judge. *Hogan* was overruled with considerable — indeed gratuitous — severity by the House of Lords in *Humphrys'* case.[29] *Humphrys* has already been analysed[30] and the details need not be repeated. It was submitted that *Humphrys* is "essentially a policy decision"[31] and that its attempt to dispose of the Australian authorities logically is, with respect, less than convincing.[32]

For some time after *Humphrys* it was uncertain whether the High Court of Australia would follow suit. Increasingly that court proclaimed its independence of English precedent; it faced more local authority supporting criminal issue estoppel than the House of Lords had to contend with in *Humphrys'* case. Further, it was open to the High Court to hold that their Lordships' ringing declaration that "criminal issue estoppel is no part of the law of England" was strictly *obiter:* at Humphrys' second trial the Crown alleged that the earlier verdict upon which he sought to build his estoppel was affected by perjury. It is well settled that a party cannot base an estoppel upon his own fraud.[33] Notwithstanding their Lordships' sweeping approach in *Humphrys* this less spectacular point sufficed to dispose of that case. It may be added that *Humphrys* relies upon the proposition[34] that there is a wide discretion to dismiss "follow-up" charges as abuses of process. If this is so, then the discretion extends *autrefois acquit*[35] so far that a sub-species of *res judicata*, namely criminal issue estoppel, is quite superfluous. But this reason for discarding *Mraz*[36] received scant attention in *Story's* case;[37] insofar as it was mentioned there, it was treated with scepticism or positive disfavour.[38]

If the High Court had reserved its opinion of *Humphrys*[39] until it was presented with a case which really required a reappraisal of *Mraz* v *The Queen*,[40] Australia's original contributions to this subject

24. Raised by the present writer, *loc. cit.* at p. 426.
25. [1974] Q.B. 398.
26. (1948) 77 C.L.R. 511.
27. *Connelly* v. *D.P.P.* [1964] A.C. 1254.
28. See the judgment of Hailsham L.C.
29. [1977] A.C. 1.
30. J.R. Forbes "Criminal Issue Estoppel: England Secedes" (1976) 3 *Qld. Lawyer* 156.
31. *Ibid.*, at p. 163.
32. A view expressed by Aickin J. in *Story* (1978) 52 A.L.J.R. 737, at pp. 758-759.
33. *R.* v. *Lucas* [1977] Tas.S.R. 53, *R.* v. *Story* (1978) 52 A.L.J.R. *per* Aickin J. at p. 758.
34. Cf. (1976) 3 *Qld. Lawyer* at pp. 165-166.
35. I.e. the criminal aspect of *res judicata* in the form of "cause of action" estoppel.
36. (1956) 96 C.L.R 62.
37. (1978) 52 A.L.J.R. 737.
38. *Ibid. per* Barwick C.J., at p. 739, *per* Aickin J. at p. 758.
39. [1977] A.C. 1.
40. (1956) 96 C.L.R. 62.

might have stood for a considerable time. But, with respect, *Story's* case[41] conveys the impression of a court which, despite its declarations of post-colonial independence,[42] has gone out of its way to adopt the views expressed in *Humphrys'* case and to abandon hastily a considerable body of authority to the contrary. We have submitted that *Humphrys* is strictly *obiter*, and *Story* is decidedly more so. One point upon which the judges do agree in *Story's* case is that it is impossible to determine which of two ultimate issues at the first trial the jury decided in favour of the accused.[43] Nevertheless a majority of the court went on to discard a body of Australian authority, better developed than its English counterpart,[44] under the influence of *Humphrys*.[45] As noted already the review of criminal issue estoppel in that case was gratuitous, albeit less so than in *Story*.[46]

The particulars of *Story* may now be summarised. It was an appeal by the Crown from an order of the Victorian Court of Criminal Appeal that the accused should have a new trial upon a charge of rape. By a majority of 4-3 the High Court decided that the order should stand. But it was not sustained upon its original basis, which was a finding of issue estoppel in favour of the accused.

The High Court proceedings arose out of the second trial of Story and his co-accused. At their first trial they were charged with (i) forcible abduction of a girl from a suburban railway station at night (ii) theft and (iii) rape. The theft charge is now immaterial. The jury acquitted them of forcible abduction but could not reach a verdict on the charge of rape. They were re-tried upon that charge, whereupon they claimed successfully[47] that evidence of their accosting the complainant at the railway station and taking her away in a motor car was excluded by an issue estoppel arising from the prior decision that they were not guilty of abduction.

But as the dissenting judge[48] in the State Court pointed out, and as six members of the High Court agreed,[49] there was really no question of an issue estoppel; *two* ultimate issues went to the jury[50] and it was impossible to tell from the record whether the jury resolved[51] both questions in favour of the accused, or only one — and, if only one, which one. That was sufficient to dispose of the estoppel point. However the High Court chose to reconsider criminal issue estoppel *ab initio*.

The Chief Justice agreed with Hailsham L.C. and other members of the House of Lords in *Humprys*[52] that issue estoppel is not, or at

41. (1978) 52 A.L.J.R. 737.
42. See e.g. *Viro* v. *The Queen* (1978) A.L.R. 257.
43. (1978) 52 A.L.J.R. 737 *per* Barwick C.J. at p. 740, *per* Stephen J. at p. 746, *per* Mason J. at p. 747, *per* Jacobs J. at p. 753, *per* Murphy J. at p. 745, *per* Aickin J. at p. 759, *per* Gibbs J. at p. 745 found it unnecessary to express an opinion.
44. Cf. Forbes 7 *U.Q.L.J.* at p. 419, and pp. 426-427, 3 *Qld. Lawyer* at: p. 163, 167.
45. [1977] A.C. 1.
46. (1978) 52 A.L.J.R. 737.
47. I.e. in the Court of Criminal Appeal.
48. Gillard J.
49. See footnote 43.
50. Namely: (1) Did the accused take the complainant from the station against her will? (2) Did they then intend that she be carnally known? Cf. *Crimes Act* (Vic.) S. 62.
51. The artificiality of treating the jury as a unit is admitted but has never been regarded as a fatal objection to criminal issue estoppel: cf. footnote 19.
52. [1977] A.C. 1.

any rate should not be part of the criminal law. The proper question is whether the Crown is attempting to throw doubt on a prior acquittal:

> "The correct principle relevant to the admissibility in a subsequent trial of evidence given in an earlier trial which has resulted in an acquittal is . . . that a verdict of acquittal shall not be challenged . . ."[53]

Thus if a person has been acquitted of indecency on occasions "A" and "B", evidence of those acts cannot be led as evidence of system at a second trial relating to occasion "C" because *ex hypothesi* — by virtue of *res judicata* — they simply did not occur.[54]

On the other hand, if evidence touching the earlier charge[55] can be led without logically contradicting the acquittal it is admissible, provided that the jury is "duly warned that they must . . . not use the evidence . . . to reconsider the guilt of the accused of the earlier offence or to . . . discount the effect of the acquittal."[56] If such evidence is relevant and otherwise admissible it can be accepted, provided that it does not lead inevitably to the conclusion that the prior acquittal was wrong.[57] "Individual elements (of the first charge) less than the whole" can be found against him.[58]

An unresolved ambiguity appears at this point. Consider, for an example a "one issue" case such as *O'Mara* v. *Litfin*.[59] There would have been no *logical* conflict between evidence of identity at the second trial and the acquittal at that trial. In other words, an attempt at the second trial to prove that Litfin was at the *locus in quo* at the time when (as was unsuccessfully alleged at the first trail) another offence was commited would not, on its face, challenge the first acquittal in any way — *unless* the real basis of the acquittal, in the particular circumstances, was refined from the record and taken into account. If we carry out such a process of refinement are we not extracting an issue estoppel, as distinct from that less subtle essence, a "cause of action" estoppel? But if we are not allowed to engage in that process, will not our consequent decision to let in any evidence which does not *per se* challenge the first decision be no less artificial than issue estoppel is accused of being?[60]

It is natural to assume that the normal business of the highest courts of appeal is complex and difficult and that such tribunals are adept at resolving the esoteric in an intellectually convincing and generally consistent manner. But *Story* is, with respect, remarkable

53. (1978) 52 A.L.J.R. at p. 739, citing *Sambasivam* v. *Public Prosector, Federation of Malaya* [1950] A.C. 458. (Acquittal on charge of possessing ammunition; evidence of possessing same not admissible on trial of charge of possessing gun on same occasion.)
54. *Kemp* v. *R.* (1951) 83 C.L.R. 341, *Garrett* v. *The Queen* (1977) 52 A.L.J.R. 206. Cf. *Story per* Mason J. at p. 750.
55. Which has resulted in an acquittal.
56. (1968) 52 A.L.J.R. *per* Barwick C.J. at p. 739. It is difficult to see why such an instruction should often be necessary, or desirable. Surely, once the judge has decided to admit the evidence, the less said about the previous charge the better? Cf. Gibbs J. at p. 746: " . . . if they adverted to the question."
57. *Ibid. per* Gibbs J. at p. 746.
58. *Ibid. per* Jacobs J. at p. 753, citing *R.* v. *Ollis* [1900] 2 Q.B. 758.
59. See footnote 8 and text following.
60. See text below for criticisms of that kind, aimed particularly at *Mraz* (No. 2) (1956) 96 C.L.R. 62.

not only for various interpretations of criminal issue estoppel and earlier authorities, but also for the different conclusions reached by justices who shared the basic belief that *Humphrys*[61] should eclipse *Mraz*,[62] even if the time when such a decision was *required* had not yet arrived. In the majority Mason J. (with whom Stephen J. agreed) held that no question of an estoppel arose. The subject evidence was wholly admissible, but the order for a new trial should stand because the trial judge's direction about the sanctity of the acquittal was not strong enough.[63] Jacobs J. considered that the direction was too weak and that in any event the admission of the evidence undermined the acquittal.[64] Aickin J. was not prepared to jettison criminal issue estoppel, but agreed that the jury was misdirected.[65]

In the minority Barwick C.J., perhaps the strongest supporter of the English view, held that a new trial should be refused because the impugned evidence was largely if not wholly admissible;[66] even if *Mraz* was correctly decided no issue estoppel could be extracted from the present record. Gibbs J. agreed on both points,[67] while Murphy J. was of the opinion that if an issue estoppel could be identified it ought to be applied for the benefit of the accused only.[68]

With great respect, the judgments in *Story* do not present closely or clearly reasoned support for the propositions that *Mraz* is misconceived, and criminal issue estoppel untenable. Three members of the court in *Story* suggested that although Dixon C.J. and the other judges in *Mraz* did not realise it, they were not dealing with an issue estoppel, but were merely saying in a complicated manner that a prior verdict, as such, cannot be relitigated.[69] But Gibbs J., although he was against criminal issue estoppel on policy grounds, conceded that *Mraz* was a genuine specimen of it.[70] Aickin J. regarded the treatment of *Mraz* by his colleagues, and by the Lords in *Humphrys*, as superficial and unsatisfactory.[71] He considered that *Mraz* was correctly decided and that it depends "exclusively on the proper application of issue estoppel".[72]

Gibbs J. listed several objections to criminal issue estoppel[73]:— In the nature of criminal procedure a decision on a single ultimate issue can rarely be ascertained;[74] cogent evidence may be excluded by undue reverence for a prior judgment; mutuality is part and parcel of estoppel, and the Crown should not enjoy such an advantage. None of these objections, he conceded, is logically insuperable.[75]

61. [1977] A.C. 1.
62. (1956) 96 C.L.R. 62.
63. (1968) 52 A.L.J.R. at pp. 749-750.
64. *Ibid.*, at p. 754.
65. *Ibid.*, at p. 759.
66. *Ibid.*, at pp. 740-741.
67. *Ibid.*, at pp. 745-746.
68. *Ibid.*, at pp. 755.
69. *Ibid.*, *per* Barwick C.J. at p. 740, *per* Mason J. at p. 750, *per* Jacobs J. at p. 753.
70. *Ibid.*, at pp. 744-745.
71. *Ibid.*, at pp. 758-759. Cf. Forbes 3 *Qld. Lawyer* at pp. 165-166.
72. (1978) 52 A.L.J.R. at p. 758.
73. *Ibid.*, at p. 742.
74. Aickin J. (*Ibid.* at pp. 758-759) rejected this as an argument against *Mraz*; he suggested that the careful definitions and rules which make criminal issue estoppel rare are points in its favour.
75. (1978) 52 A.L.J.R. at p. 745.

Story, like Humphrys, is essentially a policy decision. The accompanying and not always pellucid technical discussion is of secondary importance. The original Australian contributions in this field are disapproved rather than disproved. They are said to be "undesirable".[76] The persuasive force of Story's extensive *dicta* depends upon the happy[77] accident that *Mraz*,[78] hitherto the leading case, is indisputably complex, even abstruse. It is accordingly easier to brand the disapproved doctrine as "technical and often involved".[79] On this occasion distinguished appellate technicians criticise earlier authority for "subtle reasoning", "artificiality",[80] and preoccupation with matters "more theoretical than practical".[81] These prejudicial expressions may have had less force if the existing doctrine had been represented not by the involved *Mraz* but by simpler cases such as *O'Mara* v. *Litfin*,[82] *R.* v. *Clift*[83] or *R.* v. *Flood*.[84] Strangely *O'Mara* v. *Litfin*, one of the simplest, is not mentioned in any of the judgements in *Story's* case. There is of course nothing intrinsically wrong with policy decisions at a high appellate level but it may be permissible to ask whether they should be made *obiter*, and upon an unduly jaundiced view of the existing law.

However it appears that *Story* is the epitaph of the short-lived doctrine of criminal issue estoppel. It is ironical that while *Story* and *Humphrys* support themselves with an almost populist concern for citizens in criminal jeopardy, each (on the issue estoppel point) is a victory for the Crown.

76. *Ibid.*, *per* Gibbs J.
77. I.e. from the viewpoint of *Humphrys* supporters.
78. (1956) 96 C.L.R. 62.
79. (1978) 52 A.L.J.R. *per* Barwick C.J. at p. 738. Cf. *Humphrys* [1977] A.C. 1 *per* Viscount Dilhorne at pp. 15-21.
80. (1978) 52 A.L.J.R. *per* Barwick C.J., at p. 738 *per* Gibbs J. at p. 745, *per* Murphy J. at p. 755.
81. *Ibid.*, *per* Mason J. at p. 749.
82. [1972] Q.W.N. 32, footnote 8 and text following.
83. (1952) 69 W.N. (N.S.W) 87. (Acquittal of theft of sheep forecloses prosecution for possessing sheep reasonably suspected of being stolen).
84. [1956] Tas.S.R. 95. (Acquittal of charge of escaping from prison estops Crown from proving accused at another place, breaking and entering.)