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The travails of issue estoppel

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Professor Rickett explores recent New Zealand and overseas cases on the law of estoppel per rem judicatam, especially issue estoppel. He notes a liberalisation of the rules on party identity and argues that this should be reflected in the rules on issue identity. He suggests that while the new approach to issue identity has been a restrictive one, there are nevertheless signs that the courts are ready to claim much more discretion in this area.

I INTRODUCTION

It is settled law that a plea of estoppel *per rem judicatam* can be asserted in two basic circumstances, known these days as "cause of action estoppel" and "issue estoppel".[1] Both are acknowledged as being founded on two central principles, stated as follows in Spencer-Bower and Turner:[2]

> ...first, the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and, secondly, the right of the individual to be protected from vexatious multiplication of suits and prosecutions at the instance of an opponent whose superior wealth, resources and power may, unless curbed by the estoppel, weigh down judicially declared right and innocence. The former is public policy, and is succinctly expressed in the maxim, *interest* (or *expedit*) *reipublicae ut sit finis litium*: the latter is private justice, and is reflected in the maxim, *nemo debet bis vexari pro una et eadem causa*...

The technical requirements of both cause of action and issue estoppel should be informed by these principles, and it can be suggested with some confidence[3] that courts will and should found their decision in any particular case on a general assessment of the weight to be given to the principles, rather than merely apply the technical requirements in the manner of some mechanical checklist. In other words, the interpretation to be

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1 A recent authoritative discussion of the distinction between these is found in *Arnold* v *National Westminster Bank Plc* [1991] 2 AC 93, 104-106 (per Lord Keith of Kinkel). See also *Shiels* v *Blakeley* [1986] 2 NZLR 262, 266 (per Somers J).

2 *Res Judicata* (2 ed, Butterworths, London, 1969) 10-11.

3 For example, the liberalisation of some of the requirements for issue estoppel by Lord Denning MR and Sir George Baker in *McIlkenny* v *Chief Constable of the West Midlands* [1980] QB 283 was credited by Sir George Baker (343) to the argument that issue estoppel should be segregated from cause of action estoppel in the manner in which the principles were operated, concentrating in the case of issue estoppel more on the first principle. Likewise, in *Arnold*, above n 1, Lord Keith (108-109) doubted the absolute force of the two principles in issue estoppel cases, but unlike Sir George Baker, his Lordship concentrated on the second principle.

given to the "requirements" is that they are at most safeguards rather than absolutes. This paper is an argument for a liberalisation of two of the technical requirements of issue estoppel, so as effectively to increase the measure of and quality of judicial discretion expected to be exercised in cases where issue estoppel is pleaded.

It is generally accepted that to found issue estoppel, the following technical requirements must be established:[4]

(i) a final judgment;
(ii) between the same parties and/or their privies;
(iii) litigating in the same capacity;
(iv) on the same issue;
(v) which must be pleaded.

The two factors which often give rise to difficulties, and around which the debate about liberalisation is centred, are factors (ii) and (iv). It appears that courts in the United States and Canada, and to a lesser degree in England, take on the whole a more liberal view on the contents of these required factors, whilst in some quarters even questioning their very existence as useful, let alone required. The New Zealand and Australian courts tend to adopt a more conservative stance, although there are some hints of liberalisation. A recent New Zealand case, *Bullock* v *Randerson*, in which judgments were delivered in the High Court[5] and in the Court of Appeal,[6] provides a convenient backdrop against which to traverse the scope of the New Zealand position on the two factors.

II *BULLOCK* v *RANDERSON*

A The Facts

Whiting Yachts (1984) Ltd was wound up in April 1987 on the resolution of the two directors and shareholders, Mr and Mrs Bullock. Mr Randerson was appointed as liquidator at a creditors' meeting. The company's assets were adequate to pay off secured creditors, but there was a deficit in respect of the unsecured creditors of just over $156,000. The liquidator brought an action against the Bullocks alleging, inter alia, breaches by them of section 320 of the Companies Act 1955, in that they carried on the company's business in a reckless manner; contracted debts on the company's behalf not honestly believing on reasonable grounds that the company would be able to pay the debts; and carried on the company's business with intent to defraud the company's creditors.

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4 As set out in *Cross on Evidence* (NZ ed by DL Mathieson QC, Butterworths, Wellington, 1989) 315-321. See also *Mills* v *Cooper* [1967] QB 459, 468-469.

5 Unreported, Auckland Registry, M 696/87, 8 February 1991, Sinclair J.

6 Unreported, CA 226/91, 17 July 1991, Cooke P, Casey, Hardie Boys, Gault and McGechan JJ.

The Bullocks responded in part by alleging issue estoppel. They relied on the decision of Wylie J in *Gilliard* v *Bullock*.[7] That case concerned a claim by Mr and Mrs Gilliard, customers with whom the company had contracted to build a yacht, for $60,000, an amount paid by the Gilliards towards the construction costs of the yacht. There were four causes of action, one of which was in fraud, which Wylie J rejected thus:

> Consistently with my earlier finding [in the context of two breach of trust claims] that such specific assurance or guarantee [an alleged personal assurance by Mr Bullock] or trust has not been proved and that the arrangement was part of an ordinary commercial transaction, I do not find any fraud on the part of Mr Bullock, still less on the part of Mrs Bullock. I accept the evidence of Mr Bullock that he was not motivated to make the arrangement by an intention to reduce the company's liability to the bank and thus his own and Mrs Bullock's liability under their guarantee. While it is clear from the evidence that by the time of the arrangement and at the time of the payment of the $60,000 the company was experiencing difficulties, I accept that Mr Bullock was not aware of the full extent of those difficulties, or that the company faced liquidation. He had not at that stage had the annual accounts for 31 March 1986. He must have been aware of the substantial increase in turnover and from the information he gave to Mr Niccol [the bank manager], there were explanations for the company's cash flow problems. The truth of those explanations has not been challenged in any way and while Mr Bullock may have taken an unduly optimistic view of the company's ability to make good, unjustified optimism falls far short of fraud. So the plaintiffs must fail on this cause of action also.

The Bullocks argued against the liquidator that Wylie J's findings on the allegation of fraud estopped him from raising his claims under section 320.

B The Judgment of Sinclair J

Sinclair J refused to uphold an issue estoppel. He based his finding on the failure of the Bullocks to satisfy both factors (ii) and (iv), *party identity* and *issue identity*. As will be seen, his Honour's conservative approach to defining the content of these requirements necessitated his finding against the Bullocks.

C The Court of Appeal

Cooke P delivered the judgment of the Court, again rejecting an issue estoppel, but this time focusing only on lack of *issue identity*.[8] Once again, a conservative view was adopted.

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7 Unreported, High Court, Auckland Registry, CP 1009/87, 4 October 1990.

8 Cooke P was prepared to accept that a restricted application of issue estoppel might be appropriate ("It might be that the liquidator should not be heard to say that in the particular transaction with the Gilliards relating to the $60,000 cheque the appellants were guilty of fraud against the Gilliards, or otherwise to challenge any of the specific findings of Wylie J as to that transaction"), although the Court did not need to decide the point since an agreement was reached by counsel. Cooke P's comments are, of course, quite consistent with the restrictive view of *issue identity* accepted by him.

III PARTY IDENTITY

A *Sinclair J's Analysis*

In discussing party identity, Sinclair J cited first two passages from *Halsbury's Laws of England*,[9] to the effect that a judgment would raise an estoppel "only against the party to the proceedings in which it was given" - which, of course, could not be so in *Bullock* v *Randerson*, since the two relevant parties were Randerson and the Gilliards - *or* the privies of those parties. To establish such privity, *Halsbury* required not only a similar interest in the "property" but also a derivation of the title of the privy from the title of the party. Sinclair J also cited a statement of Somers J in *Shiels* v *Blakeley*:[10]

> We conclude that there must be shown such a union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent proceeding, that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped.

His Honour concluded that Randerson "does not derive title from the Gilliards". It must be said that Sinclair J's judgment did not in its structure maintain a clear distinction between party identity and issue identity. Indeed, in discussing issue identity, he spoke of community or mutuality of interest, obviously a reference to the dicta of Somers J, which were beyond doubt in their original setting concerned only with party identity. Although there is a close relationship between the two factors, as will also become clear herein, it is possible and preferable to maintain their conceptual separation. Furthermore, as indicated, Sinclair J's use of Somers J's dicta ought technically to have been limited to the matter of party identity.

B *The Meaning of "Privity" in New Zealand*

The leading New Zealand decision on party identity by privity is *Shiels* v *Blakeley*.[11] The plaintiff was a member of the Waterfront Industry Superannuation Fund by virtue of his membership of a union. The defendants were the trustees of the Fund. The parties in the earlier judgment relied on as founding the issue estoppel were the union itself and the trustees of the Fund. The issue was whether the plaintiff was a privy of the Union. Somers J gave a comprehensive analysis of the legal test, which

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For the sake of completeness it should be noted that the Bullocks also argued "abuse of process", which the Court likewise rejected. There is a close jurisprudential relationship between issue estoppel and abuse of process, and although the relationship will be adverted to on occasion, no attempt is made in this paper to analyse the abuse of process doctrine itself. Leading cases on abuse of process are *Hunter* v *Chief Constable of the West Midlands Police* [1982] AC 529, and *New Zealand Social Credit Political League Inc* v *O'Brien* [1984] 1 NZLR 84.

9 4th ed, Vol 16, paras 1543 and 1544.

10 Above n 1, 268.

11 Above n 1.

concluded with the paragraph which Sinclair J cited in *Bullock* v *Randerson.* The analysis is in rather general terms (as shown in those parts where emphasis has been added), and is interesting for its close association with the general principles:[12]

> Privity in this sense denotes a derivative interest founded on, or flowing from, blood, estate, or contract, or *some other sufficient connection, bond or mutuality of interest.* No case has yet sought to define exhaustively the degree or nature of the link necessary to render a person privy in interest. That this is so is not surprising for *the necessary connection may arise in a variety of ways and its existence falls to be tested in the light of the object of the rules about estoppel by res judicata and their effect in preventing the party in the subsequent proceeding from putting his case in suit.* But while there is no ready definition the cases give some indication of what is necessary.
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> In *Carl Zeiss Stiftung* v *Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, Lord Reid at p 910 said that privity of interest may arise in many ways "but it seems to me to be essential that the person now to be estopped from defending himself must have had some kind of interest in the previous litigation or its subject-matter". Lord Guest, at p 936, said that "Before a person can be privy to a party there must be community or privity of interest between them". The nature of the connected interest was further discussed in *Gleeson* v *J Wippell & Co Ltd* [1977] 1 WLR 510. There Sir Robert Megarry V-C , at p 515, held that there must be a sufficient degree of identity between the party to the first action and the party whom it is sought to estop in the second to make it just to hold that the first decision should be binding on a party in subsequent proceedings. Nourse J adopted that approach in *Official Custodian for Charities v Mackey (No 2)* [1985] 2 All ER 1016.
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> We conclude that there must be shown such a union or nexus, such *a community or mutuality of interest,* such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent proceeding, *that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped.*

Party identity was also at point in the decision of Tipping J in *Matai Industries* v *Jensen,*[13] although *Shiels* was not cited. The plaintiff company sued, inter alia, the Attorney-General on behalf of the Government of New Zealand on various grounds. An earlier judgment had been given in an action to which the Attorney-General and the company's shareholders had been parties. Was there adequate privity between the company and its shareholders? After a lengthy review of cases, Tipping J adopted an apparently limited test, "that the privy must claim through or under the person of whom he is said to be the privy."[14] However, the judgment should not be taken as *requiring* a limited analysis. First, the facts of the case were such that it was not necessary to go beyond the test applied ("...[I]t is reasonable here to say that the shareholders in the first action claimed through or under the company to which they were thus privies"[15]). Secondly, the general tenor of Tipping J's analysis is that a realistic view, consistent

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12 Above n 1, 268.
13 [1989] 1 NZLR 525.
14 Above n 13, 551.
15 Above n 13, 551.

with the effective implementation of the general principles underlying the doctrine, should be taken of the party identity issue. Particularly revealing was his Honour's readiness to cite the Court of Appeal's decision in *New Zealand Social Credit Political League Inc* v *O'Brien*[16] as a significant example of the requirement of party identity.[17]

In *O'Brien* the plaintiff brought an action against both the League and one Riddoch. An earlier action in 1975, brought by the plaintiff against the League, had failed. *O'Brien* was essentially an abuse of process case, but Somers J did make an important reference to issue estoppel, and in particular raised the question whether the plaintiff was estopped as against Riddoch, who, it must be noted, was not a party to the 1975 action. Riddoch could thus only at most be a privy of the League. Somers J stated:[18]

> Estoppel per rem judicatam, issue estoppel, and abuse of process in at least one of its manifestations, may be seen as exemplifying similar concepts - that *a matter once determined may not be again litigated, that a matter which could and should have been raised in proceedings which have been determined should not be allowed to be raised subsequently,* and that a collateral attack upon a final decision in other proceedings will not be permitted. The dual objects are finality of litigation and fair use of curial procedures. The present case exhibits these features. Mr O'Brien is estopped by the verdict of the jury in his first defamation action from alleging and proving that the League caused its 1972 statement of claim to be published to the newspaper. *And he cannot now be allowed to prove that against Mr Riddoch either, for whether or not the latter made such a communication with the authority of the League was canvassed at that hearing too.*

These comments are important for three reasons. First, his Honour's approach is consistent with his later flexible approach in *Shiels*, as already discussed. Secondly, of considerable interest is the use of the general principles to inform the particular decision on party identity. Thirdly, Riddoch's "privity" with the League was very widely interpreted. In fact, Somers J referred *not* to the question of privity in the traditionally understood manner, but merely held that Riddoch's behaviour had been canvassed (and decided) at the earlier hearing - to which Riddoch was not a party! Riddoch was in reality, therefore, a non-party.

The House of Lords' decision in *Case Zeiss Stiftung* v *Rayner & Keeler Ltd (No 2)*[19] is often cited in issue estoppel cases. In the context of the specific factors of that doctrine (party and issue identity) however, it should be recognised that the somewhat conservative views expressed in *Carl Zeiss* were delivered at a time when the "independent" existence of issue estoppel in England was in its infancy. Their tenor needs to be re-adjusted in terms of the more developed and clearly wider approach of recent times.

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16 Above n 8.

17 Above n 13, 551 (lines 44-49).

18 Above n 8, 95 (emphasis added). See also *Gregoriadis* v *Commissioner of Inland Revenue* [1986] 1 NZLR 110, 117 (per Somers J).

19 [1967] 1 AC 853.

The leading English case specifically on party identity - *Gleeson* v *J Wippell & Co Ltd*[20] - is consistent with the more flexible view which, it is suggested, is emerging in New Zealand. Megarry V-C lamented the general lack of authority on the point - something which in England can still be lamented - but went on to provide a helpful indicator for the future. While an "interest" in "privity of interest" had to be more than a sense of mere curiosity or concern, it was not necessary that the one party should be the alter ego of the other. Rather, as Megarry V-C said:[21]

> [I]t does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party.

The paragraph in which this comment appears begins with a reference to "the substratum of the doctrine" which "is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation".[22] This approach is the basis of the more liberal view supported in this paper, and sits well with the New Zealand decisions.

C Party Identity - Beyond Privity?

It is suggested that the recent comments on party identity indicate clearly that an evolution is occurring. The movement is away from a narrowly defined attitude, and towards the exercise by courts of a much wider discretion to determine in individual cases whether the general principles underlying the issue estoppel doctrine are served or not served in recognising or not recognising any such estoppel in the context of the claims of any particular "party" before the court. The rapidly growing use of the "abuse of process" doctrine, whereby a court is expressly thrown back on the exercise of an inherently discretionary jurisdiction, indicates that courts are able to make decisions about the exclusion or otherwise of claims or matters on this type of fairly general basis of assessment. It is interesting to note that American courts have over recent decades developed issue (or collateral) estoppel to such a point that it is arguable that the doctrine of privity has been in effect abandoned. The outer limits of "privity" became so expansive that "privity" consequently began to disappear into the arena of general discretion.[23] The invitations latent in the statements of Somers J to develop the party

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20 [1977] 1 WLR 510.

21 Above n 20, 515.

22 See, further, *House of Spring Gardens Ltd* v *Waite* [1990] 3 WLR 347.

23 A useful recent discussion is by Hiroshi Motomura "Using Judgments as Evidence" (1986) 70 Minn LR 979, 1026-1032. Motomura lists three rough "categories" where party identity has been upheld, but where "traditional privity" would not have been recognised: first, privity based on a variety of significant relationships independent of litigation (eg, personal or family ties; corporate, partnerships or association ties - as perhaps in the case of Riddoch in *O'Brien*); secondly, privity based on effective practical or financial participation in the earlier decision; thirdly, a "virtual representation" category, where " a non-party is bound if a party who had the same

identity requirement beyond the traditional concept of privity, such as that portrayed in the extracts from *Halsbury* quoted by Sinclair J in *Bullock* v *Randerson*, are perhaps best understood as a first step along a road already travelled by American courts, towards the abandonment in practice of privity. It will be a pity, however, if the New Zealand courts insist on a slow journey. Indeed, such slowness would be in contradiction to the courts' apparent speed in their embrace and development of the abuse of process doctrine.

The proper exercise of a flexible attitude would not, it is submitted, have permitted Sinclair J to have held with such abruptness that there was no party identity in *Bullock* v *Randerson*. Ultimately, of course, the decision might have been the same, but what is being suggested is that a much increased element of discretion - and hence flexibility - be expressly introduced, requiring a more elaborate consideration than that offered by Sinclair J of "the substratum of the doctrine", and how it would be best served in the instant case.[24] The issue of the outer limits of an extension of the party identity requirement is taken up further in Part E below.

D The Close Correlation Between Party Identity and Issue Identity

It must be recognised that in many cases where the focus is properly issue identity, a restrictive view is taken of the party identity requirement, *simply as a direct result* of the restrictive view taken of issue identity. The same observation applies in reverse - cases where a restrictive view is taken of party identity often incorporate a restrictive view of issue identity. The correlation problem is particularly acute in many decisions on highway negligence, but is not limited to that area. It has already been suggested that Sinclair J's judgment in *Bullock* v *Randerson* failed to maintain a clear distinction, and Sinclair J's restrictive approach may well be explained by his elision of the two factors. Three further cases are good illustrations of this problem as something to be aware of in presenting any argument for increased flexibility in the courts' approach to either or both of the factors. The first two cases are discussed in *Cross on Evidence*[25] in the context of "Identity of parties", but a closer analysis reveals that both should be regarded with some circumspection as authorities on the matter of party identity per se, because of the intertwining of party and issue identity therein.

First, *Cross* discusses *Townsend* v *Bishop*:[26]

> ...[T]he plaintiff was injured in a collision with the defendant's lorry when he was driving his father's car. The plaintiff's father sued [in the county court] for damages to the car. The defendant's plea that it was caused by the contributing negligence of the plaintiff who was acting as his father's agent succeeded. It was held that the plaintiff

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interests litigated the prior case, even thought the non-party was neither a participant nor in privity with a party in the prior proceeding".

24 Motomura, above n 23, cites the leading American decision on "virtual representation": *Aerojet-General Corp* v *Askew* 5111 F2d (5th Circ) certiorari denied 423 US 908 (1975). *Askew* is an informative example of the type of discussion one might properly expect to find.

25 Above n 4, 317.

26 [1939] 1 All ER 805.

> was not estopped from denying his contributory negligence in an action in which he claimed damages for personal injuries. This was simply because the parties to the two actions were different.

In fact, in *Townsend* the matter of issue identity was regarded as inextricably a part of party identity. Lewis J actually cited as determinative one of the leading highway negligence cases, *Marginson* v *Blackburn Borough Council*,[27] where the focus was issue identity, and then stated:[28]

> He [the defendant] cannot in my view properly say what he must say in order to succeed in this plea of estoppel - namely, that the matter now in issue [personal injury] is the same as that which was litigated in the county court [damage to the car], and that that was a decision in litigation between the same parties.

The second case cited in *Cross* is *Re a Medical Practitioner*:[29]

> ...[A] doctor had been acquitted on a charge of indecently assaulting a girl patient. He subsequently sought a declaration that the question whether he indecently assaulted the girl was *res judicata* in proceedings to be brought before the Medical Council alleging that he had been guilty of infamous conduct in a professional respect. The Court of Appeal decided that the Solicitor-General, exercising the functions which he then had under the Medical Practitioners Act 1950, was not acting as a representative of, nor was he subject to direction by, the Crown, and that the parties in the criminal case and the parties to the proposed proceedings before the Medical Council were accordingly not identical. Nor was there any identity of subject-matter [issue identity]. The plea of *res judicata* therefore failed.

Both Gresson P, and North and Cleary JJ in their joint judgment, regarded issue and party identity as intimately connected. The refusal to uphold an issue estoppel, whilst posited on the basis of a conservative approach to the two requirements, can as easily be justified on the grounds that the seriousness of the proceedings for both parties meant that neither public policy nor private justice would have been served by upholding an estoppel.

The third example of the correlation of the factors is *Re Manly's Will Trusts (No 2)*,[30] a part of the headnote of which reads:

> Held - (i) The doctrine of estoppel could apply only if the question in issue in proceedings was precisely the same as the question in prior proceedings and between precisely the same parties as were parties to the original suit or their privies. In the instant case, the question in issue in the prior proceedings was the destination of the share taken by M, whereas the issue in the instant proceedings was the destination of E's share. Although the same points of construction were raised in the two matters,

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27 [1930] 1 All ER 273.
28 Above n 26, 809.
29 [1959] NZLR 784.
30 [1976] 1 All ER 673 (per Walton J).

the issues were different, as were the parties, some of whom had not been in existence at the time of the earlier proceedings. The doctrine did not therefore operate....

E Party Identity - Beyond Privity and Mutuality Towards Estopping Non-parties?

There is in theory a very close link between privity and *mutuality*. The latter is the principle that a party pleading an issue estoppel, in order to succeed, must also be in the position to have the issue pleaded *against* him or her.[31] The extension of the issue estoppel doctrine to "privies" is an obvious breach in this principle, and indeed the principle perhaps explains why the notion of privity has been rather conservatively applied. A frontal assault on the mutuality principle is necessary for either further extension of privity or the adoption of a genuinely flexible approach.

Such an assault was attempted by a majority of the English Court of Appeal in *McIlkenny* v *Chief Constable of the West Midlands*.[32] Several convicted murderers were attempting to sue the police for assaults alleged to have been committed on them while the police were securing confessions. This question of assault had been raised and decided against the plaintiffs on a voir dire to determine the admissibility of the confessions at the murder trial, and had been raised again at the trial itself on the question of the weight to be attached to the confessions. Lord Denning MR and Sir George Baker held that issue estoppel applied, on the ground that it was unjust that a party *against* whom an issue had been decided after a full opportunity to contest it should be allowed to raise the same issue again in later proceedings against another. The similarity of this holding with that concerning Mr Riddoch in *Social Credit Political League Inc* v *O'Brien*,[33] as already discussed, is evident.

On appeal, the majority's reasoning on extended issue estoppel was disapproved.[34] Although their Lordships found against the murderers, this finding was on the basis of the abuse of process doctrine.[35] The traditional requirements of issue estoppel were

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31 So, in *Bullock* v *Randerson*, could Randerson have relied on any finding in *Gilliard* v *Bullock* adverse to the Bullocks but in his favour in the context of his own action? If not, there is thus no mutuality.

32 Above n 3 (per Lord Denning MR and Sir George Baker, Goff LJ dissenting).

33 Above n 8.

34 See *Hunter*, above n 8.

35 One writer has suggested that the use by the House of Lords of the abuse of process doctrine was merely a different name tag by which their Lordships embraced the very concept which the majority in the Court of Appeal had announced - see Garry D Watson "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990) 69 Can Bar Rev 623, discussing the following statement of Lord Diplock in *Hunter*, above n 8, at 541: "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a trial decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made". See also the width of the issue estoppel doctrine applied since *Hunter* by the English Court of Appeal in *Bragg* v *Oceanus*

approved, and their Lordships expressly noted that this implied a difference between England and the United States insofar as issue estoppel was concerned.

It should be noted that in both *McIlkenny* and *O'Brien* what was approved was a *defensive use* of issue estoppel by a non-party (and probably a non-privy of the original party) against a party to the original proceedings. This "extension" has long been recognised in the United States.[36] The facts in *Bullock* v *Randerson* were, however, somewhat different, in that there an estoppel was sought *not* by a non-party against a party, *but* by a party against a non-party (on the assumption that the privity concept did not reach Randerson). The first step to success would be to recognise an *offensive use* of issue-estoppel by a non-party against a party, followed secondly by a recognition of a further defensive use of issue estoppel by a party against a non-party. The initial step in this development has occurred in the United States, where the Supreme Court in *Parklane Hosiery Co* v *Shore*[37] has effectively destroyed both the privity and mutuality principles. The Securities and Exchange Commission had obtained an injunction against the defendants in earlier litigation, on the basis that they had violated securities law by false and misleading proxy statements in connection with a merger. The private shareholders of the defendants then brought a class action to recover damages arising from the false and misleading statements. The Supreme Court held that the plaintiff shareholders (who, it must be noted, could not on even a very liberal view of "privity" be said to be "privies" of the Securities and Exchange Commission) could use the earlier decision to prevent the defendants from relitigating the issues previously decided against them. It is unlikely, however, that the American courts will extend the doctrine of issue estoppel beyond the type of circumstances in *Parklane,* since the extension in *Parklane* itself was hedged about by two exceptions: first, if a plaintiff could easily have joined the first action, issue estoppel will not lie; and secondly, if the application of an offensive issue estoppel would be "unfair" to the defendant, it will not lie.

It seems that, if any type of extension does occur in the United States, it will not be in issue estoppel as such, but rather in the development of a practice by American courts of declaring that a prior judgment can at the very least in the instant case be accorded the role of being "prima facie evidence subject to rebuttal".[38] We return to this herein.

What is at issue in cases like *Bullock* v *Randerson* is whether issue estoppel can be extended to estop non-parties. To allow this would be the ultimate nail in the coffin of

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Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyds' Rep 132, and by Drake J in *North West Water Authority* v *Binnie & Partners* [1990] 3 All ER 547; and further discussion in Michael J Herman and Gerald F Hayden Jr "Issue Estoppel: Mutuality of Parties Reconsidered" (1986) 64 Can Bar Rev 435.

36 See, for example, *Bernherd* v *Bank of America* 122 P 2d 892 (1942) (Supreme Court of California); and *Blonder-Tongue Laboratories Inc* v *University of Illinois Foundation* 402 US 313 (1971) (US Supreme Court).

37 439 US 322 (1979).

38 See discussion by Motomura, above n 23; and Elinor P Schroeder "Relitigation of Common Issues: the Failure of Non-party Preclusion and an Alternative Proposal" (1982) 67 Iowa Law Review 917. See also Watson, above n 35, 659-660.

the mutuality principle. The general principles underlying estoppel *per rem judicatam* might indeed better be served were courts able in theory to extend issue estoppel to non-parties, on a case by case basis, but unhampered by a mutuality principle. If the aim is "finality of litigation and fair use of curial procedures",[39] surely these values are promoted by the potential in any case to declare a non-party "estopped"? As one writer suggests, an extension of issue estoppel to estop a non-party (as Randerson appeared to be) "would permit a common defendant to use a judgment in his favour against later plaintiffs who, since the demise of mutuality, may use an unfavourable judgment against the common defendant."[40]

The strongest argument against extending pure issue estoppel (and thereby preventing relitigation) to non-parties, and probably the argument which has caused many American writers,[41] but interestingly not Canadian writers,[42] to balk at any such extension is a due process argument, that the non-party must be allowed his or her day in court. Should not Randerson, as receiver on behalf of *all* the unsecured creditors, be allowed his day in court? In the Court of Appeal, Cooke P picked up on this point, not in discussing issue estoppel but in rejecting abuse of process:

> We are not now called on to examine the merits or otherwise of [Randerson's] claims but far from their entailing any abuse of process, we think that it would be unsatisfactory if the failure of a claim by particular clients in the position of Mr and Mrs Gilliard were to shut out proceedings under the Companies Act by [Randerson] in the interests of unsecured creditors generally.

If the due process argument holds sway in denying a claim of abuse of process, it will likely also succeed in New Zealand in defeating any attempt to extend pure issue estoppel to non-parties.

The New Zealand courts may need, therefore, particularly in respect of non-parties, ultimately to look at the same tool which is being developed in American courts, as indicated earlier, which is a sort of "half-way house" between a too limited issue estoppel doctrine and an overblown one. The use of prior judgments as prima facie evidence against non-parties to the litigation in which the prior judgment was delivered has several advantages. "It avoids wasting the prior judgment, thus aiding efficiency, while at the same time protecting the rights of non-parties to their day in court. They are still free to call any evidence they choose to rebut the earlier judgment."[43]

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39 *Gregoriadis* v *Commissioner of Inland Revenue*, above n 18, 118, per Somers J).
40 Watson, above n 35.
41 See, for example, Motomura, above n 23, and Schroeder, above n 38.
42 See, for example, the papers cited in n 35 above.
43 Watson, above n 35, 660. See also Motomura, above n 23, 1021-1036.

F *Conclusions on "Party Identity"*

The following statements result from the foregoing investigation.

(a) Party identity is satisfied if the relevant party is the same person.[44]
(b) Party identity is satisfied if the relevant party is a privy of the original party. Privity is traditionally defined narrowly, although comments by Somers J in particular suggest that privity in New Zealand may be expanding to include a wider range of circumstances where the general principles undergirding issue estoppel will be served by a finding of privity. It is not easy to define the extent of this liberalisation, but some help may be had from American materials.[45]
(c) A more liberal approach to party identity will often require a more liberal approach to issue identity.
(d) The position of non-parties (those who do not fall within classes (a) or (b) above) depends upon the scope to be accorded to the principle of mutuality.
(e) It appears that the defensive use of issue estoppel by a non-party against a party is permitted in New Zealand.
(f) There may be scope for the offensive use of issue estoppel by a non-party against a party, but this is undecided.
(g) It is unlikely that issue estoppel will be allowed *against* a non-party, since this breaches the due process principle that every person should have his or her day in court.
(h) It may be that a half-way house - permitting a prior judgment to be used as prima facie evidence - should be recognised as available against a non-party.
(i) *Bullock* v *Randerson* would need to be dealt with under either (b) or (h). Sinclair J's decision was, it was submitted, too abrupt. The discretion being recognised under (b) above surely required him to proceed more cautiously than he did.

IV ISSUE IDENTITY

A *Sinclair J's Analysis*

Sinclair J's view was that issue identity was not established. He regarded himself as bound to apply the (majority) decision of the New Zealand Court of Appeal in *Craddock's Transport* v *Stuart*[46] "where the Court preferred the Australian authorities which required *strict precision in the identity of issues* before concluding that the doctrine of estoppel should be applied" (emphasis added). The test of precision was not satisfied because Randerson's case "is not dependent upon anything said, or allegedly

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44 It will be recalled that factor (iii) requires that the party be "litigating in the same capacity". This factor is obviously satisfied by finding a *privity of interest*. The requirement is also linked to the issue identity factor, and in reality only has an independent place of operation in those cases where the parties are *identical in name*, when an examination will need to be undertaken as to their real status: See *Marginson* v *Blackburn Borough Council*, above n 27.

45 See above n 23.

46 [1970] NZLR 499.

said, between Mr Gilliard and Mr Bullock but is based on what is said to be a breach of proper commercial practice in the way monies in question were received and subsequently applied." Furthermore, the allegations of fraud related also to the manner in which the company's business was carried on and were not dependent on the Bullock-Gilliard discussions.

B The Court of Appeal's Analysis

Cooke P regarded it as unnecessary to consider a review of the *Craddock's Transport* decision, although he did hint strongly that its operation might be severely limited:

> ...[I]t was a case in the days before the Accident Compensation legislation when the possibility of a sympathy verdict by a jury in a personal injuries action may have encouraged an inclination to limit issue estoppel quite strictly.

What appears to have been the Court's position was that the somewhat specific findings in favour of the Bullocks in the *Gilliard* litigation could not be extrapolated into a general finding "that there was no inadequacy in the general financial management of the company". His Honour continued:

> All that [Wylie J] found was that there was no trust with respect to the Gilliard $60,000, no relevant duty of care to the Gilliards, and no fraud against the Gilliards in the obtaining and banking of the particular cheque. He was not dealing with any general question as to whether the conduct of the company's business was reckless or whether debts were contracted without honest belief on reasonable grounds that they could be duly paid or whether there was an intention to defraud creditors.

Neither was Wylie J concerned with the company's behaviour in relation to its ordinary trade creditors, on whose behalf Randerson was suing, and who were owed about $130,000. The most revealing comment from Cooke P was as follows:

> Even on the most liberal scope which could reasonably be given to issue estoppel, that doctrine could not be applied to preclude the liquidator from advancing the general claims pleaded by him....

This statement, reinforced by the Court's refusal to intervene on the basis of abuse of process, indicating thus a considered refusal by the Court to exercise its discretion, lends some weight to an argument that in New Zealand some liberalisation is or will be occurring in the interpretation and operation of the issue identity requirement.

C The New Zealand Approach to Issue Identity

Many of the cases which are cited and discussed in the context of issue identity arose in damages actions for personal injury by negligence, often in highway motor accidents. The leading New Zealand decision, *Craddock's Transport*, as Cooke P recognised, was such a case.

A collision occurred between a car driven by Stuart and a lorry driven by Kennett but owned by Craddock's Transport. Mrs Stuart was injured. She sued Craddock's, who

joined Stuart as a third party. The jury found that Kennett was negligent, but that Stuart was not negligent in any way causing or contributing to Mrs Stuart's injury. Stuart then sued Craddock's for the damage to his car, including in his action a plea of issue estoppel. Craddock's raised a defence of contributory negligence. Wilson J in the Supreme Court held that Craddock's was estopped from both denying negligence and raising the defence of contributory negligence.

In the Court of Appeal, both North P and Turner J (in the majority) produced full and lengthy discussions of issue estoppel in highway negligence cases. Their analyses showed that English cases, with one exception,[47] had adopted a flexible approach to issue identity.[48] Australian cases, on the other hand, especially since the High Court of Australia's decision in *Jackson* v *Goldsmith*,[49] had adopted a much more restricted approach. Although an earlier New Zealand Supreme Court decision by Shortland J in *Clyne* v *Yardley*[50] had followed the English approach, their Honours chose to follow the Australian cases. They held that the duties of care owed by the drivers (Stuart and Kennett) to Mrs Stuart as a passenger in Stuart's car were different from the duties of care owed by the two drivers to each other which had been at issue in the action by Stuart against Craddock's. Turner J made the following statement, widely cited as the locus classicus of the restrictive view of issue identity:[51]

> Issue estoppel depends entirely on the validity of the proposition that *the same question* has been decided between the same parties, as fundamental to the decision of earlier litigation between them. If the question now being litigated is not necessarily precisely the same question as the one previously decided, it cannot be enough. It is not enough that the questions are similar, or very similar, or almost the same; or that they may be the same. They must necessarily be precisely the same. It may at first sight seem unduly technical to say, of the second proceedings, that though the issues of fact appear extremely likely to be indistinguishable from those in the first, and though counsel cannot point to any respect of difference now apparent between them, yet the possibility in law that there may be a difference between the questions before the Court will preclude the foundation of an issue estoppel; but the whole reason for stifling the second proceedings, and preventing a party from making out his case upon them in a Court of Justice is that there *cannot* as a matter of law be any difference between the issues raised in the first case and those raised in the second. If the measure of duty owed by a party in the first case is *in law* not *identical* with the measure of the duty alleged to be owed by him in the second then, though the facts may be the same in every respect in the two actions, and the evidence may not alter by

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47 *Randolph* v *Tuck* [1961] 1 All ER 814.

48 *Marginson* v *Blackburn Borough Council*, above n 27; *Bell* v *Holmes* [1956] 1 WLR 1359; *Wood* v *Luscombe (Wood, third party)* [1966] 1 QB 169. See the discussion by H Street "Estoppel and the Law of Negligence" (1957) 73 LQR 358.

49 (1950) 81 CLR 446. The Australian cases are discussed in D St L Kelly "Issue Estoppel and Negligence on the Highway" (1967) 41 ALJ 12, 46.

50 [1959] NZLR 617. See RJ Sutton "Issue Estoppel in Motor Accident Cases" [1971] NZLJ 184, for discussion of *Craddock's Transport* and *Clyne*. Compare the critical analysis of *Clyne* by PT Mahon "Issue Estoppel and the Negligent Motorist" [1961] NZLJ 247.

51 Above n 46, 520. See also *Wilson* v *Matheson* [1955] NZLR 927.

> so much as one jot or one tittle, yet no estoppel will arise from one to the other, and the law must take its course, allowing the parties in the second action the same right of hearing as those in the first. That interest of the State which requires an end to litigation precludes only *identical issues* from being relitigated. In this case in my opinion the issues, though closely similar, are not in law identical; and for the same reasons as have been given by Courts of the highest authority for refusing estoppels contended for in the cases which I have cited, I would disallow the estoppel in this case.

The third judge, McCarthy J, issued a strong dissenting opinion, which has since received favourable citation in the two most recent English High Court decisions, *North West Water Ltd* v *Binnie & Partners*,[52] and *Wall* v *Radford*.[53] He referred to two approaches to issue identity questions in highway negligence cases. The first, the "robust" approach, was concerned with the practical question - who caused the collision? The second was concerned with the "often highly theoretical" question - what in law were the respective duties of care? His Honour favoured the first and stated:[54]

> Estoppel binds not only on issues of final duty, but on all issues of fact which are fundamental. As far back as 1855 Coleridge J in *R* v *Inhabitants of the Township of Hartington Middle Quarter* (1855) 4 E & B 780, said that a "judicial determination concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide and which was actually decided as the groundwork of the decision itself though not then directly the point at issue". All facts fundamental to the decision arrived at in the former proceedings are held to be concluded.

There have been in New Zealand several decisions where the strict issue identity test has been applied, but which were not cases of highway negligence. Two decisions are pre-*Craddock's Transport*. In *Maxwell* v *Commissioner of Inland Revenue*[55] a taxpayer had been acquitted on a charge of wilfully making a false return of income. The Commissioner amended the taxpayer's return on the basis that he had formed the opinion that the return was fraudulent or wilfully misleading. The taxpayer's plea of issue estoppel failed, North J stating that the issue in the criminal case - where the Commissioner was required to prove that the taxpayer had made fraudulent returns - was qualitatively different from that in the civil case - where the Commissioner needed to establish that he was still honestly of the opinion that the returns were fraudulent.[56]

In *Re a Medical Practitioner*[57] a doctor who had been acquitted on a charge of indecent assault argued that the Investigation Committee of the Medical Council was accordingly estopped from an investigation into the doctor's injurious conduct, based on the same facts. The doctor failed, one reason being lack of strict issue identity.

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52 Above n 35.
53 [1991] 2 All ER 741.
54 Above n 46, 522.
55 [1962] NZLR 683.
56 The party identity requirement was satisfied, although no question was raised whether the Commissioner was litigating in the same capacity.
57 Above n 29.

A similarly strict view has been applied after *Craddock's Transport*. In *Gregoriadis* v *Commissioner of Inland Revenue*[58] a taxpayer had been convicted of charges of wilfully making false income tax returns during a seven year period. An appeal was successful, on the ground that evidence had been wrongfully admitted and that the rejection of this evidence was fatal to the prosecution's case. The Commissioner of Inland Revenue then sought to assess the taxpayer for penal tax. The taxpayer pleaded an issue estoppel, and succeeded. In discussing issue identity, Richardson J stated:[59]

> The critical fact which it was necessary to decide, and which was actually decided as the groundwork of the decision of the prosecution, was whether the returns were false. The Commissioner failed on that issue and... he is precluded in these penal tax proceedings from tendering evidence to the contrary.

Interestingly, in *Shiels* v *Blakeley*,[60] whilst Somers J made comments supportive of increased flexibility in the party identity arena, his Honour discussed and followed *New Brunswick Railway Company* v *British and French Trust Corporation Ltd*[61] in requiring strict issue identity.[62]

> In substance we think the *New Brunswick* case recognises that before there can be an estoppel it must be possible to say positively and without room for doubt that the issues are identical.

D Towards the Liberalisation of Issue Identity

Even in the face of the apparent strength of New Zealand authority in favour of a strict and narrow approach to issue identity, and drawing a degree of support from Cooke P's cautious statements in *Bullock* v *Randerson*, there are several strong arguments for the express adoption of a more liberal view to issue identity.

First, there has been considerable criticism of the strict approach in *Craddock's Transport*. The approach clearly sits uneasily with the general trend in issue or collateral estoppel in Canada and the United States. Only in Australia does it appear that the strict approach holds sway,[63] although even there there has been much doubt expressed.[64] In New Zealand also, the majority decision in *Craddock's Transport* has been doubted.[65]

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58 Above n 18.

59 Above n 18, 115-116.

60 Above n 1.

61 [1939] AC 1.

62 Above n 1, 267. *New Brunswick* was also expressly followed in *Craddock's Transport*.

63 See the most recent reported decision: *Bollen* v *Hickson* [1980] Qd R 327.

64 See the discussion by D St L Kelly, above n 49. The same author discussed favourably the only Australian decision to adopt the flexible approach - *Black* v *Mount and Hancock* [1965] SASR 167 - in (1966) 40 ALJ 17. In *Cross on Evidence* (3 Aust ed by David Byrne QC and JD Heydon, Butterworths, Sydney, 1986) the authors, while supporting a strict approach to party identity, question such an approach to issue

Secondly, one commentator[66] has suggested that *Craddock's Transport* dealt with a special category of case - motor accident or highway negligence (or personal injury by negligence) cases[67] - where a narrow interpretation of issue identity might be justifiable on policy grounds. However, whilst this argument is certainly a potential way of limiting *Craddock's Transport*, it is suggested that ultimately it is unattractive. First, it is in such personal injury by negligence cases that the English High Court has refused to follow *Craddock's Transport*, seeing no attraction in any public policy basis. Secondly, the technical arguments founding the strict approach - the idea that a tortfeasor owes a distinct duty of care to each "victim", no matter that the event causing the injury or damage is the same in the case of each victim, thus equating each duty of care with a separate issue for the purposes of issue estoppel - have been demolished not only in the commentaries,[68] but also in the cases.[69] Thirdly, as shown earlier, the strict approach has been fruitfully applied in non-negligence cases in New Zealand, thus indicating that an argument based on distinguishing *Craddock's Transport* is unlikely to be successful.

A third argument for liberalisation is that any such liberalisation in the area of party identity, which as suggested above is underway, requires a like liberalisation in the area of issue identity if the doctrine of issue estoppel is to maintain any internal consistency. The examination earlier in this paper of the inevitably close relationship between issue and party identity only establishes this argument. The underlying arguments are the same for both factors. If change is accepted for one, it ought to follow for the other. For example, the adoption of a liberal approach to *party* identity would, as suggested earlier, require agreement with the reasoning of the majority of the English Court of

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identity thus (para 3.17 at 128): "[3.17]... It is open to question whether the requirement with regard to identity of issues should be applied strictly, for it is undesirable that there should be conflicting decisions on what is in substance the same issue of fact even though there is a technical ground for treating it as different from that which was the subject of earlier litigation". The argument is continued at para 3.19 (p 130): "[3.19] As it is permissible to have regard to the pleadings, evidence and arguments in each action for the purpose of identifying the common issues, there is much to be said for the broad approach, which prevents the existence of conflicting judgments on what are substantially identical issues of fact. If the pleadings, evidence or points taken in argument in the second action are different from those of the first, the court hearing the second action would not, it seems, be bound to hold that there is an estoppel. The basis of the decisions in *Bell* v *Holmes* and *Wood* v *Luscombe* [see above n 48] was that there was an estoppel because, though the issues were technically different, the issues of fact, and the evidence to support them, would be the same ...".

65 See RJ Sutton, above n 50. In *Cross on Evidence*, above n 4, there is expressed a clear preference for McCarthy J's view (320).

66 Sutton, above n 50.

67 See per Cooke P in *Bullock* v *Randerson*; and the facts of *North West Water*, above n 35, and *Wall* v *Radford*, above n 53.

68 See Sutton, above n 50, 186; Street, above n 48; Spencer-Bower and Turner, above n 2, Ch IX.

69 See, especially, *Wall* v *Radford*, above n 53, 749, per Popplewell J.

Appeal in *McIlkenny* v *Chief Constable of the West Midlands*.[70] It is instructive, therefore, to note that Lord Denning M R, in his assault on the doctrines of privity and mutuality, produced the following hypothetical:[71]

> To illustrate my view of the present law, I would take this example. Suppose there is a road accident in which a lorry driver runs down a group of people on the pavement waiting for a bus. One of the injured persons sues the lorry driver for negligence and succeeds. Suppose now that another of the injured persons sues the lorry driver for damages also. Has he to prove the negligence all over again? Can the lorry driver (*against* whom the previous decision went) dispute his liability to the other injured person? It seems to me that if the lorry driver (with the backing of his employer) 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. He was a party to the first action and should be bound by the result of it. Not only the lorry driver, but also his employer should be estopped from disputing the issue of negligence in a second action: on the ground that the employer was in privity with the lorry driver.

In Lord Denning's view, therefore, a liberal view of privity in party identity meant also a move away from technical duty of care arguments in the context of issue identity.

Fourthly, a recent English High Court decision provides, it is suggested, an example of an evidently sensible and workable "test" in the context of issue identity. In *North West Water Ltd* v *Binnie & Partners*, Drake J stated:[72]

> In my judgment, this broader approach [referring to McCarthy J's view in *Craddock's Transport*] to a plea of issue estoppel is to be preferred. I find it unreal to hold that the issues raised in two actions arising from identical facts are different *solely* because the parties are different or because the duty of care owed to different persons is in law different. However, I at once stress my use of the word 'solely'. I think that great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel or abuse of process. Before doing so *the court should be quite satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence which may properly be called on those issues in the new action.*

There is, it is suggested, an important difference between the *Craddock's Transport* test - which might be styled a test of "strict precision in the identity of issues" - and the *North West Water* test - which might be styled a test of "no real or practical difference between the issues".[73] Both require, as expected, some assessment of the nature of the issue in question. The latter test, however, permits the court a degree of discretion it does not possess under the first test (except for the court's ability to strain the nature of the "strict precision" in order to sustain an issue estoppel). It also encourages the court

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70 Above n 3.

71 Above n 3, 320-321.

72 Above n 35, 562 (emphasis added). See also the like expressions of Popplewell J in *Wall* v *Radford*, above n 53.

73 This is not unlike McCarthy J's reference to "facts fundamental to the decision": above n 54.

to determine expressly the relevant weight to be given to the general principles in any particular case before it.

E Conclusions on "Issue Identity"

The following statements result from the foregoing investigation:

(a) Issue identity is obviously satisfied if there is strict precision between the respective issues.
(b) *Craddock's Transport* is authority that there *must be* strict precision, and is supported by a number of other decisions, some of which are not negligence cases.
(c) A variety of reasons exists, as outlined in Part D above, for the adoption of a more flexible approach, such as that suggested by McCarthy J in *Craddock's Transport* and supported more recently by the English High Court.
(d) Cooke P's judgment in *Bullock* v *Randerson* suggests that the Court of Appeal may be ready to move towards a liberalisation.
(e) It is unlikely, however, as Cooke P himself suggested, that the adoption of a more liberal test would have helped the Bullocks, since the issues sought to be litigated by Randerson were substantially broader than and hence fundamentally different from those litigated by the Gilliards in the earlier case.

V CONCLUSION

As in other parts of the law of estoppel, there are strong indications of a liberalising and generalising trend in the area of issue estoppel. More discretion is being claimed by the courts in the context especially of the party identity requirement, but also, it is suggested, in matters of issue identity. The underlying principles of finality of litigation, and justice or fairness as between the parties, are better served by the courts' possessing greater freedom to disallow various claims than is possible under the traditionally technical and narrow interpretations of party and issue identity. That the courts themselves see greater freedom as desirable is perhaps illustrated by the increasing use of the abuse of process doctrine. It may be that the contemporary scope of this doctrine makes liberalisation in issue estoppel essentially unnecessary. If so, issue estoppel may ultimately fade away through non-use. Is it likely, for example, that any case in which a technically sound issue estoppel could be established would not also amount to an abuse of process? Even were there to be a liberalisation within issue estoppel, giving the doctrine new life, the effective merger of issue estoppel with abuse of power would appear to be the ultimate likelihood.[74]

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74 There are indications of this in *Bullock* v *Randerson*, and in *Meates* v *Taylor*, unreported, CA 109/91, 20 September 1991, Casey, Hardie Boys and Gault JJ.