Relitigation in Government Cases: A Study of the Use of Estoppel Principles in Public Law Litigation

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INTRODUCTION

This article is concerned with the application of the principles of estoppel by *res judicata* and issue estoppel to litigation in which the validity of administrative action (including subordinate legislation) is called into question, and the validity of that action has already been the subject of an adjudication. I shall refer to such litigation as public law litigation.

The article begins with an overview of the relevant estoppel principles and their rationale. There follows an analysis of features of litigation in which the validity of administrative action is contested which either distinguish that type of litigation from other forms of litigation, or which present particular problems when it comes to applying the estoppel principles. The subsequent sections of the article deal with the applicability of the estoppel principles to cases in which the validity of administrative decisions has been determined by a court of law and the manner in which those principles have been applied to such cases. The article concludes with a discussion of the question of whether litigation on the validity of administrative action is so different, in relevant respects, from other forms of litigation that it should not be subject to the ordinary estoppel principles.

ESTOPPEL PER RES JUDICATA AND ISSUE ESTOPPEL

According to the principle of estoppel per *res judicata* (or cause of action estoppel),

> where a final decision has been pronounced by . . . [a] judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of the litigation, any party or privy to such litigation, as against any other party or privy thereto, and in the case of a decision *in rem*, any person whatsoever, as against any other person, is estopped in subsequent litigation from disputing or questioning such decision on the merits, whether it be used as a foundation of an action, or relied on as a bar to any claim, indictment or complaint, or to any affirmative defence, case, or allegation, if, but not unless the party interested raises the point of estoppel at the proper time and in the proper manner.[1]

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[1] G Spencer Bower and A K Turner, *The Doctrine of Res Judicata* (2nd ed, 1969) para 9. In England, the principle is commonly known as cause of action estoppel. In the United States the preferred expression is now 'claim preclusion'.

So, for estoppel per *res judicata* to operate there must, first, be a final judgment of a judicial tribunal,[2] albeit a judgment which is appealable. Second, the tribunal's judgment must be one in a cause in which the tribunal had jurisdiction.[3] Third, the cause in which the plea of estoppel is raised must be the same as that to which the prior judgment relates. And, except where the prior judgment is *in rem*, there must be identity of parties.

The doctrine described above is subject to exceptions and qualifications.[4] For example, no estoppel operates in relation to a judgment procured by fraud or collusion.[5] If a judgment is to dismiss a proceeding it does not create an estoppel unless it involves an adjudication of the substance of the cause.[6] If, for example, a court declines, as a matter of discretion, to make a declaration, its judgment creates no estoppel. The judgment is not even, relevantly, final.[7]

Issue estoppel was defined by Dixon J in *Blair* v *Curran* thus:

> A judicial determination directly involving an issue of fact or of law disposes once [and] for all of the issue, so that it cannot afterwards be raised between the same parties or their privies. The estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification for its conclusion. . . . Nothing but what is legally indispensable to the conclusion is thus finally closed or precluded.[8]

For issue estoppel to operate against a person, that person must not only have been a party to the prior proceedings in which the issue was determined. The issue in respect of which estoppel is raised must also have been an issue between that person and the party pleading estoppel. But if this condition is satisfied, the party pleading estoppel is not precluded from raising the plea merely because there are other parties to the present proceedings who were either not party or privy to the prior proceedings, or not in issue over the particular matter to which the estoppel plea relates.[9]

According to Dixon J, the distinction between estoppel per *res judicata* and issue estoppel

[2] For the purposes of the estoppel principles a body can be a judicial tribunal even though it is not a court of law in the strict sense. See *Administration of the Territory of Papua and New Guinea* v *Guba* (1973) 130 CLR 353, 453. The application of the principles to decisions of tribunals is considered in the next chapter.

[3] See *Secretary, Department of Aviation* v *Ansett Transport Industries Ltd* (1987) 72 ALR 188, 197–200.

[4] See Spencer Bower and Turner, op cit (fn 1) ch 13. Contrast American Law Institute, *Restatement of the Law of Judgments, Second* (1982) ss 26, 28.

[5] Exceptions of particular relevance to public law litigation are discussed pp 55–62 infra.

[6] The test is whether the dismissal necessarily involved determination of a particular issue. See Spencer Bower and Turner, op cit (fn 1) paras 58–61.

[7] *Coles* v *Wood* [1981] 1 NSWLR 723; *Brinds Ltd* v *Chapmans Ltd* (1985) 10 ACLR 97; cf *Becker* v *City of Marion Corporation* [1977] AC 271; *A Hudson Pty Ltd* v *Legal and General Life of Australia Ltd* (1985) 1 NSWLR 701. On what is a final judgment see *Carr* v *Finance Corporation of Australia Ltd (No 1)* (1981) 147 CLR 246.

[8] (1939) 62 CLR 464, 531–2. In the United States issue estoppel was formerly known as collateral estoppel, but the preferred expression is now 'issue preclusion'.

[9] *Secretary, Department of Aviation* v *Ansett Transport Industries Ltd* (1987) 72 ALR 188, 201–3.

> is that in the first, the very right or cause of action claimed or put in suit has in the former proceedings passed into judgment, so that it is merged and no longer has any independent existence, while in the second, for the purpose of some other claim or cause of action, a state of fact of law is alleged or denied the existence of which is a matter necessarily decided by the prior judgment, decree or order.[10]

But as Brennan J pointed out in *Port of Melbourne Authority* v *Anshun Pty Ltd*, the phrase a 'cause of action' in this context is not precise. The phrase, he noted, is 'sometimes used to mean the facts which support a right to judgment ... sometimes to mean a right which has been infringed ... and sometimes to mean the substance of an action as distinct from its form ...'.[11] So while the doctrines of estoppel per *res judicata* and issue estoppel are distinct, there can be cases in which there is dispute as to which of them is applicable.

The estoppel principles outlined above are extended by what is known as the principle in *Henderson* v *Henderson*.[12] This principle was expressed by Sir James Wigram V-C as follows:

> Where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points on which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought foward at the time.[13]

This principle has been affirmed by the High Court of Australia,[14] the Judicial Committee of the Privy Council[15] and the House of Lords.[16] It is accepted that the principle extends not merely to estoppel per *res judicata* but also to issue estoppel, though the High Court has said that 'its application to cases of issue estoppel is to be treated with caution'.[17] But 'generally ... a party will be estopped from bringing an action which, if it succeeds, will result in a judgment which conflicts with an earlier judgment',[18] even though the

[10] *Blair* v *Curran* (1939) 62 CLR 464, 532.
[11] (1981) 147 CLR 589, 610.
[12] (1843) 3 Hare 100; 67 ER 313.
[13] Id Hare 115; ER 319.
[14] *Port of Melbourne Authority* v *Anshun Pty Ltd* (1981) 147 CLR 589.
[15] *Hoystead* v *Commissioner of Taxation* [1926] AC 155; *Kok Hoong* v *Leong Cheong Kweng Mines Ltd* [1964] AC 993, 1010–11; *Yat Tung Investment Co Ltd* v *Dao Heng Bank Ltd* [1975] AC 581; *Brisbane City Council* v *Attorney-General for Queensland (Ex rel Scurr)* [1979] AC 411, 425.
[16] *Carl Zeiss Stiftung* v *Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 915–16, 966. See also *Arnold* v *National Westminister Bank PLC* [1991] 2 AC 93.
[17] *Port of Melbourne Authority* v *Anshun Pty Ltd* (1981) 147 CLR 589, 598–9 (Gibbs CJ, Mason and Aickin JJ).
[18] Id 603 (Gibbs CJ, Mason and Aickin JJ).

judgment in the prior case was not pronounced on the same cause of action.

It is now generally accepted that the estoppel principles here in question are principles of law and not merely rules of evidence.[19] They express 'a broad rule of public policy based on the principles expressed in the maxims "*interest reipublicae ut sit finis litium*" and "*nemo debet bis vexari pro eadem causa*"':[20] namely that 'It is in the public interest that there should be an end to litigation' and 'No person should be proceeded against twice for the same cause'.

Finality in litigation is also required to prevent harassment of litigants. If there were no finality, Coke observed in 1599,

> great oppression might be done under colour and pretence of law; for if there should not be an end of suits, then a rich and malicious man would infinitely vex him who hath right by suits and actions; and in the end (because he cannot come to an end) compel him (to redeem his charge and vexation) to leave and relinquish his right.[21]

The repose in judicial outcomes compelled by the estoppel principles serves also to avoid inconsistent judgments and to foster respect for and reliance on judicial decisions.[22] 'The convention concerning finality of judgments', the American Law Institute's *Restatement of the Law of Judgments, Second* suggests, 'has to be accepted if the idea of law is to be accepted . . . certainly if there is to be practical meaning to the idea that legal disputes can be resolved by judicial process'.[23]

PUBLIC LAW LITIGATION

The ways in which the validity of administrative acts may arise for judicial determination are various. The validity of such acts may be raised directly upon an application for a prerogative writ or an order in the nature of such a writ, in a suit for a declaration of invalidity or for an injunction. Issues about the validity of administrative action can also be raised for judicial determination collaterally, for example by way of a defence to a prosecution for breach of subordinate legislation, in the course of a civil action for damages, debt or restitution.

Salient features of the law which governs judicial proceedings by way of direct challenge of the validity of administrative action include the following:

(a) Usually, the relevant Attorney-General, in the capacity of *parens patriae*, has, by reason of that status, standing to sue, and, where declarations and injunctions are sought, to grant a fiat to a private person (the relator) to sue in the Attorney-General's name.

[19] *Commonwealth of Australia* v *Sciacca* (1988) 78 ALR 279, 283; *Queensland* v *Commonwealth* (1977) 139 CLR 585, 615.
[20] *Jackson* v *Goldsmith* (1950) 81 CLR 446, 466 per Fullagar J.
[21] *Ferrer's Case* (1599) 6 Co Rep 7a, 9a; 77 ER 263, 266.
[22] See *Allen* v *McCurry* 449 US 90, 94 (1980).
[23] (1982) Vol I, 11.

(b) To gain standing to sue, a private party does not have to show that any private right is affected by the act or omission complained of, or that the matter complained of affects him and him alone, or affects him to a greater extent than anyone else. For present purposes it is unnecessary to describe the precise qualifications the suitor must exhibit to gain standing to sue. Suffice it to say that, although in the past different formulations have been adopted to express the qualifications required, depending on the remedy sought, nowadays the trend is towards a common test of standing and an increasingly liberal test.[24]

(c) While in some cases, the matter raised for decision may affect only the suitor (or appear to do so) — for example where it is alleged that a public duty owed to a particular individual has not been fulfilled or that a requisition made of a particular individual is invalid — in other cases the matter may affect the public at large, or a class of the public, eg a rate-payer suit to contest the validity of a local government by-law.

(d) In some jurisdictions, eg England, the leave of the court is required in respect of applications for judicial review. Even where there is no such formal requirement, procedural rules may operate so as to ensure that unmeritorious applications can be dismissed at the outset. The traditional rules governing applications for prerogative writs are an example.[25]

(e) Except in suits for declarations and injunctions, there is no formal exchange of pleadings.[26]

(f) In proceedings for prerogative writs, the applicant is, technically, the Crown, not the prosecutor.

(g) In applications for judicial review, courts have discouraged governmental respondents from playing an active adversarial role, at least where there is some other respondent who can be relied upon to perform that role.[27]

(h) Grant of remedy is at the discretion of the court. Remedy may even be refused notwithstanding that the court rules on the substantive issues and finds that the act complained of is invalid.[28]

[24] See M Aronson and N Franklin, *Review of Administration Action* (1987) ch 15; M Allars, 'Standing: The Role and Evolution of the Test' (1991) 20 *FL Rev* 83.

[25] On an *ex parte* application for prerogative remedy, the court may simply refuse to make an order nisi for review.

[26] Rules of court may nevertheless permit applications for injunctions to be made otherwise than by writ or summons. See, eg, General Rules of Procedure in Civil Proceedings, 1986 (Vic), rule 4.06.

[27] See E Campbell, 'Appearances of Courts and Tribunals as Respondents to Applications for Judicial Review' (1982) 56 ALJ 293; R Sadler, 'Reviewing an Adjudicatory Tribunal Decision: The Costs' (1990) 64 LIJ 938; *R* v *Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13; *R* v *Gough; Ex parte Key Meats Pty Ltd* (1982) 148 CLR 582, 597–8; *Fagan* v *Crimes Compensation Tribunal* (1982) 150 CLR 666, 681–2; *Sordini* v *Wilcox* (1982) 42 ALR 245; *Charlton* v *Members of Teachers Tribunal* [1981] VR 831, 855; *Kaycliff* v *Australian Broadcasting Tribunal* (1989) 19 ALD 315; *Australian Conservation Foundation* v *Forestry Commission* (1988) 81 ALR 166; *Custom Credit Corporation Ltd* v *Lupi* [1992] 1 VR 99, 100–1, 111–12, 125–7.

[28] See eg, *Fitzgerald* v *Muldoon* [1976] 2 NZLR 615; *R* v *Monopolies and Mergers Commission; Ex parte Argyll Group PLC* [1986] 1 WLR 763, 774–5.

APPLICABILITY OF THE ESTOPPEL DOCTRINES IN PUBLIC LAW LITIGATION

With the possible exception of constitutional lititgation,[29] there seems to be no question that judgments in suits for declarations and for injunctions in respect of public rights and duties — at least judgments in suits commenced by ordinary action — are capable of attracting both estoppel per *res judicata* and issue estoppel.[30]

The position with regard to decisions on applications for prerogative writs or orders, or like statutory remedies is, as will be seen, a matter on which judicial opinions are divided. It should, however, be said that there have been cases of this type in which, while an estoppel plea was rejected, it was assumed by the court, without discussion, that estoppel principles were applicable.[31] There are also cases in which courts have dismissed applications for prerogative remedies on the ground that the applicant was seeking to relitigate a matter raised in a prior unsuccessful application for the same remedy.[32] In most of these cases, the court which dismissed the second application for review did not expressly invoke any principle of estoppel, and seems to have relied rather on its general discretion to refuse to grant remedy or refuse to deal with the merits of an application.[33]

Prior to *R* v *Secretary of State for the Environment; Ex parte Hackney London Borough Council*,[34] no English court seems to have had occasion to consider whether the estoppel principles do or do not apply to decisions on applications for judicial review. In that case a plea of issue estoppel was raised in respect of an issue which, it was claimed, had been decided in a prior application for review involving the same parties. In the event, both the

[29] See *Queensland* v *Commonwealth* (1977) 139 CLR 585, 594, 597, 605, 614–15.

[30] In *Dunlop* v *Woollahra Municipal Council* [1982] AC 158 declarations that resolutions of the Council were invalid estopped the Council in subsequent proceedings by the plaintiff for damages from contending that the resolutions were valid. The plaintiff in turn was 'prevented, by a similar issue estoppel, from asserting that in passing the resolutions the council were acting mala fide.'

[31] See, eg, *Sleeth* v *Hurlburt* (1896) 25 SCR 620; *Groeneveld* v *Calgary Power Ltd* (1980) 109 DLR (3d) 99; *Re St Denis and Township of North Himsworth* (1985) 17 DLR (4th) 289; *Re Budge and Workers' Compensation Board; City of Calgary* (1988) 42 DLR (4th) 649; *R* v *Balfour; Ex parte Parkes Rural Distributions Pty Ltd* (1987) 76 ALR 256. See also *Vermeulen* v *Attorney-General* [1986] LRC (Const) 786 where the Supreme Court of Western Samoa (Mahon J) assumed that a refusal of *mandamus* in one case could estop subsequent judicial review proceedings. It was held that the decision in the previous action for *mandamus* to direct an appointment to a post, that there had been no appointment of the plaintiff to the post of Director of Health, was *res judicata* as against the plaintiff in the later proceedings in which the plaintiff sought relief on the basis that he was entitled to be appointed to the office. On the other hand, the plaintiff was not precluded from bringing the present proceedings because the issues in the two actions were not the same.

[32] *R* v *Manchester and Leeds Railway Co* (1838) 8 Ad & El 413; 112 ER 895; *R* v *Pickles* (1842) 12 LJ QB 40; *Ex parte Thompson* (1845) 6 QB 721; 115 ER 272; *R* v *Mayor and Justices of Bodmin* [1892] 2 QB 21; *Re Ottawa Collegiate Institute Board and Ottawa* [1937] 2 DLR 230.

[33] See *R* v *Mayor and Justices of Bodmin* [1892] 2 QB 21, 23.

[34] [1983] 3 All ER 358 (Div Ct); [1984] 1 All ER 956 (CA) (hereafter referred to as *Hackney*).

Divisional Court and, on appeal, the Court of Appeal, rejected the estoppel plea on the ground that, even if issue estoppel could operate in respect of the prior proceedings, the issue raised in the present case had not been decided in the prior case. In other words the issues were not identical.

Nevertheless, both courts doubted whether the principle of issue estoppel ever applies to matters decided in judicial review proceedings. Neither court dealt with estoppel by *res judicata*, though, arguably, their reasons for doubting the applicability of issue estoppel to judicial review proceedings would have led them also to question the applicability of *res judicata* to such proceedings.

What then were those reasons? In the Divisional Court, May LJ, with whom McNeil J concurred, made the following observations:

(a) In proceedings under Order 53 (ie, judicial review proceedings) 'there are no formal pleadings and it will frequently be difficult if not impossible to identify a particular issue which the "first" application will have decided'.[35]

(b) In such proceedings there is no 'true *lis* between the Crown, in whose name the proceedings are brought . . . and the respondent or between the *ex parte* applicant and the respondent'. Here a reservation was expressed 'whether or not issue estoppel *could* operate against the Crown'.[36]

(c) It is doubtful whether a decision in judicial review proceedings is ever a final decision 'in the sense necessary for issue estoppel to operate'.[37] This is because the remedy in Order 53 proceedings is discretionary, because of the need to obtain the court's leave to make an application for review, because 'the nature of the relief, in many cases, leaves open reconsideration by the statutory or other tribunal of the matter in dispute'[38] and because, in review proceedings, the court is not, in Professor Wade's words, 'finally determining the validity of the tribunal's order as between the parties themselves' but 'is merely deciding whether there has been a plain excess of jurisdiction.'[39]

(d) The court exercising the judicial review jurisdiction, 'is fully able to give effect to the rule of public policy that there should be finality in litigation, which underlines the doctrines of issue estoppel in civil litigation and the prohibition against double jeopardy in criminal prosecution, by the use of its powers to refuse to entertain applications and to refuse to grant relief in the process of judicial review of administrative acts or omissions; this is particularly but not exclusively so when the application may be oppressive, vexatious or an abuse of the process of the court'.[40]

The Court of Appeal's reasons for doubting the applicability of the estoppel

[35] [1983] 3 All ER 358, 367.
[36] Ibid.
[37] Ibid.
[38] Ibid.
[39] Ibid, citing H W R Wade, *Administrative Law* (5th ed, 1982) 246.
[40] Ibid.

doctrines to judicial review proceedings were less expansive. Sir John Donaldson MR noted the special nature of proceedings under Order 53 and adopted Professor Wade's reason for questioning the application of estoppel per *res judicata* to these proceedings. Dunn LJ agreed but went on to point out that a court has an inherent jurisdiction to prevent relitigation of an issue.[41]

The Divisional Court's decision in the above case, but not the Court of Appeal's decision, was considered by a Full Court of the Federal Court of Australia in *Secretary, Department of Aviation* v *Ansett Transport Industries Ltd*[42] in relation to a declaration previously made by the Court[43] that a decision made by the secretary of the department, the appellant in the present case, was a decision of an administrative character made under a federal enactment, and thus one in respect of which the company was, under s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (hereafter referred to as the *ADJR Act*), entitled to written reasons. In subsequent proceedings instituted by the company under the same Act, seeking review of the decision for which reasons had been given, the secretary of the department sought to relitigate the issue of whether the decision was one of an administrative character made under a federal enactment, and thus one reviewable under the Act.

Strictly speaking, the prior declaration as to the company's entitlement of reasons for decision was not made in the course of judicial review proceedings. Nevertheless, in the appeal on the judicial review application proper, Fisher J considered it appropriate to deal generally with the question 'whether issue estoppel can be relied upon in applications for judicial review' in relation to issues determined in prior review applications.[44] He concluded that the differences between judicial review proceedings in England and judicial proceedings under the *ADJR Act* were sufficiently substantial as not to warrant adoption of the view taken in the *Hackney* case. His view was that 'in appropriate circumstances the doctrine of issue estoppel can have application in this country in the area of judicial review'.[45]

What then were these substantial differences between judicial review proceedings in England and those under the federal Act? They were, according to Fisher J, the following:

(a) The Federal Court's review 'jurisdiction flows from the provisions of the Act and not Rules of Court.'[46]

(b) Notwithstanding that the grant of 'ultimate relief' by the court under the Act 'may be discretionary, the power of the court to hear an application is expressly confined to the special circumstances laid down by s 5, namely in favour of a person aggrieved by a decision of an

[41] [1984] 1 All ER 956, 964–5; see also *R* v *Home Secretary; Ex parte Momin Ali* [1984] 1 WLR 663, 669–70.
[42] (1987) 72 ALR 188.
[43] Under s 13(4A) of the *ADJR Act* 1977 (Cth).
[44] (1987) 72 ALR 188, 201.
[45] Id 202.
[46] Ibid.

> administrative character under an enactment .... In respect of these matters, at least, it is not difficult, and certainly not impossible, "to identify a particular issue which the 'first' application will have decided"', in the words of May LJ in *Hackney*.[47]

(c) The fact that Order 53 of the English Rules of Court 'requires the applicant to obtain leave before an application can be made enables the court there to give effect to the rule of public policy which underlies the doctrine of issue estoppel'.[48]

Before commenting on the reasoning of Fisher J, brief mention should be made of the views expressed by the other members of the Full Court on the availability of a plea of issue estoppel. Ryan J, the other judge of the majority, agreed that there were 'no sound reasons of policy or principle for denying to issue estoppel its full operation in respect of declarations made under s 13(4A) of the *ADJR Act*', ie declarations as to a person's entitlement to reasons for decisions under the Act.[49] He conceded too that 'a mere ruling in the course of an application for review under the *ADJR Act* that the decision' sought to be reviewed under the Act was a decision of a kind reviewable under the Act,

> would not finally determine any entitlement of a party to the application.... Were it otherwise, a party to proceedings under the *ADJR Act*, would be constrained to appeal every decision given in the course of the hearing on some matter which was pre-requisite to relief, in order to prevent an issue estoppel arising against him on the hearing of an appeal against the order disposing of the application.[50]

To return to the reasoning of Fisher J. The first point that needs to be made is that his Honour did not make it clear how the source of a court's supervisory jurisdiction is relevant to the question of the applicability of the estoppel principles to decisions made in the exercise of that jurisdiction. In any event, his Honour's statement regarding the sources of the supervisory jurisdiction of the English courts and Federal Court is wrong. The English supervisory jurisdiction, like that of the Federal Court, derives from statute law.[51] Order 53 merely regulates the exercise of that jurisdiction.

The second point to be made about Fisher J's reasons for rejecting the views expressed in *Hackney* is that the only real differences between review proceedings under English Order 53 (and the *Supreme Court Act* 1981) and review proceedings under the *ADJR Act* are these:

(a) A person seeking review under the *ADJR Act* does not need the Court's leave to make an application, whereas a person who seeks review under English Order 53 does.

(b) The grounds on which review may be sought and granted under the *ADJR Act* are delineated by the Act, whereas, under the governing English legislation, they are not. This difference is, however, apparent rather than real because the grounds for review specified in the *ADJR*

[47] Ibid.
[48] Ibid.
[49] Id 211.
[50] Ibid.
[51] *Supreme Court Act* 1981 (Eng).

Act were meant to codify the grounds for grant of remedy in the exercise of a supervisory jurisdiction which were already recognised at common law, and to extend them.[52] The grounds are expressed in sufficiently general terms as to accommodate developments in the common law.

(c) The *ADJR Act*, and Rules of Court made thereunder, eliminate the fiction maintained in the English judicial review proceedings that the Crown is always a party to the proceedings.

Whether the differences between judicial review proceedings under English Order 53 and review proceedings under the *ADJR Act* are sufficiently and relevantly substantial to exclude proceedings under Order 53, but not proceedings under the *ADJR Act*, from the operation of estoppel principles is open to question.

In *Hackney*, the reasons for doubting whether issue estoppel can operate in relation to judicial review proceedings under Order 53 of the English Rules of Court were primarily the peculiar features of these proceedings: the need to obtain the Court's leave to proceed, the absence of written pleadings, the absence of any true *lis* between parties, the discretionary nature of the remedies which may be awarded, and absence of finality of decision.[53] In contrast, a majority of a Full Court of the Federal Court of Australia in *Secretary, Department of Aviation* v *Ansett Transport Industries Ltd*[54] took the view that proceedings for judicial review under the *ADJR Act* were sufficiently different in character from those under English Order 53 as not to preclude the operation of issue estoppel in relation to those proceedings. In fact, the only significant differences between proceedings under Order 53 and proceedings under the *ADJR Act* are that the Crown is not even nominally a party to proceedings under the Act, and that proceedings under the Act may be instituted without the Court's leave. It is difficult to understand why these differences should affect the operation of issue estoppel.

The Federal Court's decision is, of course, authoritative only in relation to proceedings under the *ADJR Act*. It does not conclude the question of whether issue estoppel operates in relation to proceedings for prerogative remedies, or prerogative-type remedies, before State and Territory Supreme Courts, and before the Federal Court of Australia in the exercise of its jurisdiction under s 39B of the *Judiciary Act* 1903 (Cth).

Leaving aside for the moment the fact that judicial review proceedings in Australia can be initiated without a formal application to the relevant court for leave to make an application for review, judicial review proceedings in Australian courts resemble those in England in ways that the English courts in *Hackney* thought material in deciding whether issue estoppel could operate in relation to such proceedings. But are the features of judicial review proceedings which in *Hackney* were identified as material of any significance at all in determining whether issue estoppel can operate in relation to such proceedings?

[52] See ss 5, 6 and 7. The most important new ground is error of law, whether or not it is disclosed on the face of the record.

[53] [1983] 3 All ER 358; [1984] 1 All ER 956. See p 27 supra.

[54] (1987) 72 ALR 188. See pp 29–30 supra.

Take first the absence of written pleadings. The absence of written pleadings may sometimes make it difficult to ascertain what the issues were. It is one of the reasons commonly given for not applying issue estoppel to criminal cases.[55] But it is not an insuperable difficulty and is less a difficulty in judicial review proceedings than it is in criminal cases before a judge and jury.[56] Evidence as to the issues which were necessarily determined is supplied not merely by formal written pleadings, but also by the judgment and reasons for judgment, affidavits and other evidence received, and any other matter a court is prepared to accept as relevant.[57]

Consider next the argument that, in judicial review proceedings in the traditional form, there is no true *lis* between parties. This argument, it seems to me, ignores reality. Whatever the form of the proceedings, the true contestants are the prosecutor (or applicant) and the respondent.

In *Hackney* it was also suggested that the 'decision' of the court in judicial review proceedings lacks the requisite qualities of a final judgment or determination, partly because of the discretionary character of the relief which may be awarded, and partly because the court's decision may leave open reconsideration by another body 'of the matter in dispute'.[58] If this is correct, a 'decision' on an application for judicial review cannot even create an estoppel per *res judicata*. But is it correct?

It is true that the court's order at the conclusion of judicial review proceedings may not represent a final determination of the entire dispute between the parties. The court may, for example, conclude that the administrative determination under challenge is *ultra vires* or in excess of jurisdiction, and both set aside that determination and order a re-determination according to law. But, even in that case, has not the court made a final determination in the matter raised for its determination in the exercise of its supervisory jurisdiction? And what of the case where the court concludes that there is no power at all to make a valid determination of the kind of which the applicant for review complains, or that the respondent had a particular duty to perform and commands 'specific performance', eg by grant of the licence sought?

The fact that a court has a discretion to award or not award remedy in proceedings for judicial review is surely of marginal relevance in determining whether estoppel principles can operate in relation to such proceedings. It has never been suggested that those principles do not apply to cases which have been brought as ordinary civil actions merely where the relief sought is discretionary. Rather the fact that a case has been dismissed on discretionary grounds is treated as a factor to be considered in determining whether any estoppel can operate.[59]

What then is left of the reasoning in *Hackney*? It is no more than that the

[55] *The Queen* v *Storey* (1978) 140 CLR 364, 379–80 per Gibbs J.
[56] Id 380.
[57] *Jackson* v *Goldsmith* (1950) 81 CLR 446, 447; *Carl Zeiss Stiftung* v *Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 965; *The Queen* v *Storey* (1978) 140 CLR 364, 379.
[58] [1983] 3 All ER 358, 367.
[59] See text accompanying fn 6 supra.

remedies available on applications for judicial review are 'a special class of remedies designed to maintain due order in the legal system',[60] and the court exercising the judicial review jurisdiction 'is fully able to give effect to the rule of public policy that there should be finality in litigation . . . by the use of its powers to refuse to entertain applications and to refuse to grant relief in the process of judicial review' and of its inherent jurisdiction to prevent abuses of process.[61] Thus, whether a matter can be relitigated on an application for judicial review is entirely within the court's discretion and respondents have no rights to resist relitigation of matters previously decided. When and when not relitigation should be permitted remains to be worked out from case to case.

Strictly speaking, the ruling in *Hackney* is confined to cases in which issue estoppel is pleaded in judicial proceedings in relation to an issue alleged to have been decided in prior judicial review proceedings. Neither the Divisional Court nor the Court of Appeal considered what the position would be where (a) a plea of issue estoppel is made in judicial review proceedings in relation to an issue decided in prior litigation commenced by ordinary action, or (b) a plea of issue estoppel is raised in an ordinary action in relation to an issue decided in prior judicial review proceedings.[62] The court's reasons do, however, suggest that issue estoppel could be raised in the first case but not in the second.

The fact that in England a person seeking judicial review must obtain the court's leave to proceed whereas in Australia no such leave is required, should not, in my view, be regarded as decisive in determining whether issue estoppel can apply in judicial review proceedings. Even without a formal leave requirement, Australian courts exercising a supervisory jurisdiction have ample power to prevent abuses of their processes and in many instances can dismiss an application at the *ex parte* stage. It seems to me therefore that the question of whether *Hackney* should be followed in Australia ultimately requires a judgment to be made on grounds of policy.

If it is accepted, as it was in *Hackney*, that finality in litigation should be promoted in judicial review proceedings as much as in other kinds of proceedings, the question becomes whether, in judicial review proceedings, that object is best promoted in the way proposed in *Hackney*, or through a combination of estoppel principles, judicial discretions and the inherent jurisdiction to prevent abuses of court process. Then there is the further question whether it ever makes sense to treat judicial review proceedings as *sui generis*. Why, it may be asked, should pleas of issue estoppel not be acceptable in judicial review proceedings if they continue to be accepted in, and in relation to, ordinary civil suits in which issues of public law are raised and the very purpose of which is to vindicate public rights or enforce public duties?

[60] H W R Wade, *Administrative Law* (6th ed, 1988) 276. The corresponding passage in the fifth edition was referred to in *Hackney* [1983] 3 All ER 358, 367; [1984] 1 All ER 956, 964–5.

[61] [1983] 3 All ER 358, 367.

[62] But, generally, matters which can be the subject of Order 53 proceedings must be litigated under that Order. See Wade, op cit (fn 60) 676–87.

No convincing reasons have, in my opinion, been given for exempting judicial review proceedings, or public law litigation generally, from the operation of estoppel principles. This is not, however, to say that the estoppel principles may not need some modification to take account of the peculiarities of public law litigation.

STATUS OF JUDGMENT

As has already been noted,[63] a final judgment *in rem* is *res judicata* as against the world at large and not merely against the parties to the case and their privies.

A judgment *in rem* has been defined as 'a judgment of a court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from a particular interest in it of a party to the litigation)', and not a judgment by consent.[64] Spencer Bower and Turner have suggested that, in the context of the *res judicata* doctrine, the contrast between judgments *in rem* and judgments *in personam* is unfortunate and that it would be preferable to describe these two broad classes of judgments as judgments *inter omnes* and judgments *inter partes*.[65] Be that as it may, we must accept the traditional rubrics and simply acknowledge that the concept of a judgment *in rem* relates essentially to determination of questions of status of things, in the broadest sense, and of persons.

For a judgment to be recognised as a judgment *in rem*, the judgment must deal directly with the issue of status in the sense that it must declare or define the relevant status. A judgment is not considered to be *in rem* if status is determined incidentally in a suit *inter partes*.[66]

While there is a considerable body of case law on what judgments are and are not *in rem*, relatively few of the cases have been ones involving application of principles of public law. Decisions operating as judgments *in rem* have been held to include decisions granting writs of *habeas corpus*,[67] judgments on a parliamentary election petition as to the validity of an election,[68] a judicial determination on the validity of a decision which deprives a person of an office or membership of a college or which affects the status of a person as a member of a licensed profession.[69] It has been suggested also that, on principle, a judgment of ouster from office, on an application for *quo warranto*, should also be regarded as a judgment *in rem*.[70]

[63] See pp 21–2 supra.
[64] *Lazarus-Barlow* v *Regent Estates Co Ltd* [1949] 2 KB 465, 475.
[65] *The Doctrine of Res Judicata* (2nd ed, 1969) para 246.
[66] See *Halsbury's Laws of England* (4th ed reissue, 1992) Vol XVI (Estoppel), para 971.
[67] *Cox* v *Hakes* (1890) 15 App Cas 506. See also *P E Bakers Pty Ltd* v *Yehuda* (1988) 15 NSWLR 437, 443–4.
[68] *Waygood* v *James* (1869) LR 4 CP 361, 365, 366, 371, 372; *Stevens* v *Tillett* (1870) LR 6 CP 147, 155–64, 172.
[69] *Philips* v *Bury* (1694) Skin 447; 90 ER 198; *R* v *Grundon* (1775) 1 Cowp 315; 98 ER 1105; *Hill* v *Clifford* [1907] 2 Ch 236, 245, 252, 257; affirmed on other grounds *Clifford* v *Timms* [1908] AC 12.
[70] Spencer Bower and Turner, op cit (fn 1) para 257.

There is, however, surprisingly little judicial authority on the operation of judgments in suits for declarations on the validity of legislation or suits for injunctions in respect of enforcement of legislation alleged to be *ultra vires*, whether on constitutional or non-constitutional grounds. In 1639 in *Lord Say's Case*,[71] in an action for trover and conversion of three oxen seized to satisfy the plaintiff's alleged liability to pay Ship Money, the Court of King's Bench refused to allow argument in opposition to the judgment of the Exchequer Chamber in 1637 in the famous *Ship Money Case — R* v *Hampden*.[72] Lord Say had not been a party to the prior litigation against Hampden and others and, according to the report of the case, his counsel 'offered to argue, that any one, who was not party to the former judgment given in the Exchequer Chamber, may be permitted to argue against it.'[73]

That former judgment, in proceedings in which Hampden and his co-defendants were called on to show cause why they should not pay the demand made upon them by the royal writ, sustained the validity of the King's exaction as a proper exercise of the royal prerogatives. But in *Lord Say's Case*, the Court agreed with the Attorney-General's objection to relitigation of the legality of Ship Money and said that the judgment in *R* v *Hampden* 'ought to stand until it were reversed in Parliament, and none ought to be suffered to dispute against it.'[74]

While *Lord Say's Case* might seem to lend support to the broad proposition that any judgment on a question as to the validity of legislation, or legislative-type action, operates *in rem*, it should be recognised that its weight as a precedent is minimal. The report of the case is exceedingly brief and discloses nothing of the reasoning of the judges. It also needs to be borne in mind that the judges at that time did not enjoy security of tenure and that for them to have permitted argument in opposition to ruling of the Exchequer Chamber in favour of the King might have led to their dismissal from office.

There have, in much more recent times, been Canadian rulings on the effect of judgments on the validity of subordinate legislation. In *Dilworth* v *Town of Bala*, Rand J observed in passing that 'a direct determination *in rem*, by means furnished by the statute, of illegality, such as the setting aside of a by-law, will bind all rate-payers.'[75] In *Emms* v *The Queen*[76] the Supreme Court of Canada dealt squarely with the issue and held that a declaration as to the validity of a by-law operates *in rem*. In the instant case it was held that a prior declaration of this type by the Federal Court was *res judicata* notwithstanding that the parties in a later case in which the same issue was sought to be raised were different.

'If', Pigeon J reasoned,

[71] (1639) Cro Car 524; 79 ER 1053.
[72] 3 St Tr 825, 1089.
[73] (1639) Cro Car 524; 79 ER 1053.
[74] Ibid. The judgment in *Hampden's* case was 'reversed' by resolutions of both Houses of Parliament, and the resolutions embodied in 16 Car 1 c 14 (1641). On the effect of the 'reversal' see *Chambers* v *Brumfeild* (1641) Cro Car 601; 79 ER 1116.
[75] [1955] 2 DLR 353, 357.
[76] (1979) 102 DLR (3d) 193.

> a formal declaration of invalidity of an administrative regulation is not considered effective towards all those who are subject thereto, it may mean that all other persons concerned with the application of the regulation, including subordinate administrative agencies, have to keep on giving effect to what has been declared a nullity. It is obviously for the purpose of avoiding this undesirable consequence that, in municipal law, the quashing of a by-law is held to be effective *in rem*.[77]

Pigeon J referred to no precedents. Nor did he indicate whether a judicial quashing of a by-law referred merely to 'a judgment' in exercise of some special statutory power to quash by-laws (whether on the *ultra vires* ground or on some other ground) or encompassed as well either a declaration on a by-law's validity, or, more generally, any judicial ruling on the validity of a by-law, as an essential step in the reasoning, in support of a judgment in any cause.[78]

Contrast, however, the view taken by the Manitoba Supreme Court in *Attorney-General for Manitoba* v *Winnipeg Electric Railway Co.*[79] There the Attorney-General sued at the relation of the City of Winnipeg and its building inspector for an injunction to restrain the company from engaging in an activity in breach of a council by-law. The company contested the validity of the by-law but the Council argued that the question of validity was *res judicata*, having been determined in a prior suit brought by the council against the company in respect of activities alleged to contravene the by-law. The Manitoba Supreme Court held that the judgment in the prior case did not estop the company from disputing the validity of the by-law, for the Attorney-General had not been a party to the prior suit. While the status of the prior judgment was not discussed, the clear implication was that it was a judgment *in personam* rather than *in rem*.

B L Strayer has suggested that a judgment involving the determination of the validity of legislation should not operate *in rem* unless it is made in a suit for a declaration of invalidity. He argues

> that on principle a decision as to statutory invalidity, made in ordinary litigation, other than a declaratory action, should not lead to a judgment *in rem*. Such proceedings involve a collateral attack on the legislation, not a direct attack. That is, the issue before the court may involve for example a claim for damages, a criminal prosecution, or an application to quash the order of an inferior tribunal. The relief requested is not a declaration of invalidity of a statute *per se*, though it may be necessary for the court to make some finding in this regard where statutory invalidity is alleged, as a ground for the granting of the relief requested.[80]

I agree that collateral attacks on the validity of statutes of the kind described by Strayer do not fall into the category of suits for determination of the status of the statute, 'as distinct from the particular interest in it of a party to the

[77] Id 201.
[78] There is a curious statement in Pigeon J's opinion to the effect that 'declarations of invalidity of statutes ... seem to have always been considered only as precedents': ibid.
[79] (1912) 5 DLR 823.
[80] *The Canadian Constitution and the Courts* (3rd ed, 1988) 194.

litigation.'[81] While it may be possible to characterise a judgment in a suit for a declaration as to the validity of legislation as a judgment *in rem*, and likewise a judgment in special statutory proceedings for determination of the validity of legislation, the consequences of so characterising the judgment would be that, subject to the exercise of any rights of appeal, the judgment would be unassailable, no matter how inadequately the case had been argued and no matter whether the resolution of it was 'right' or 'wrong'.

In this connection it is worth noting that in *Queensland* v *Commonwealth*[82] there appears to have been no suggestion, either by counsel or the judges, that the declaration in the first *Territories Senators* case that federal legislation was valid[83] operated as a judgment *in rem*. The assumption of both was clearly that the prior judgment was a judgment *in personam*.

Judgments in suits which directly challenge the validity of legislation are not, of course, the only kinds of judgments in public law matters which can give rise to problems of classification. Similar problems arise in relation to judgments in suits which directly challenge the validity of executive orders, made in purported exercise of statutory powers, which affect the rights and liabilities of classes of persons; judgments in proceedings which directly challenge the validity of resolutions of local government councils; judgments in proceedings which directly challenge the validity of grant, suspension or revocation of licences; or appointment to or dismissal from a public office. In these sorts of cases too it may be contended that the judgments determine a matter of status and, thus, operate *in rem*.

Once again, the case law does not yield definitive answers. When estoppel has been pleaded in cases such as these, more often than not it has been assumed, without argument, that the prior judgment operated only *in personam*.[84] A notable exception is the New South Wales case of *P E Bakers Pty Ltd* v *Yehuda*[85] which concerned the status of a judgment of the Land and Environment Court involving determination of the validity of conditions attached to the grant by a local government council of consent to the development of a certain site.

The Court's ruling on the validity of the conditions had been made in the course of proceedings brought by the Council against the appellants, the persons to whom the development consent had been granted. The Council had alleged breach of the conditions and sought restraining orders. The Court held two conditions invalid but upheld the validity of the other conditions. It declared the appellants to be in breach of the development consent, and an interim development order. It granted a restraining order. The Court's jurisdiction to entertain proceedings of the kind instituted by the Council and to make orders of the kind here made was, it should be noted, an exclusive jurisdiction.

[81] The phrase used in *Lazarus-Barlow* v *Regent Estates Co Ltd* [1949] 2 KB 465, 475.
[82] (1977) 139 CLR 585.
[83] *Western Australia* v *Commonwealth* (1977) 134 CLR 201.
[84] See cases referred to in fn 42 supra and fns 125 *(Wattmaster)* and 132 *(R* v *Balfour)* infra.
[85] (1988) 15 NSWLR 437.

At a later date, the respondent, a neighbour of the appellants, instituted proceedings in the Land and Environment Court, as he was entitled by statute to do, seeking declarations that the appellants were still acting in contravention of the development consent and interim development order. The respondent sought injunctions as well. The appellants contested the validity of the conditions previously held valid, without success, and the Court granted the relief sought. In the subsequent appeal to the State's Court of Appeal, that Court gave leave to the respondent to raise and argue the question whether the first decision of the Land and Environment Court was a judgment *in rem* which prevented relitigation of the validity of the conditions of the development consent. The Court of Appeal concluded that it was a judgment *in rem*.[86] Although the orders made in the prior case did not expressly pronounce on the validity of the conditions, the particulars given of the respects in which the appellants were in breach of the development consent enabled identification of the conditions held invalid. The prior ruling on the validity of the conditions, in the opinion of the Court of Appeal, concerned the status of the land and of the development consent granted in exercise of a public power. 'The granting of the consent', Hope JA observed, 'was a public act affecting the status of the land. The consent was also a thing in itself, deriving its status from the statute and instruments made pursuant to the statute. The status of the land and of the consent is a matter in which the public generally are interested.'[87] This was shown by the provisions of the statute which entitled any person to institute proceedings for enforcement of the terms of development consents.

The Court of Appeal drew attention to 'the public inconvenience which would result' if a decision on the validity of conditions were to be characterised as a judgment *in personam* and thus creative of an estoppel only as regards the parties and their privies. Since any person at all had standing to institute enforcement proceedings, one result of accepting that view would be the possibility of 'a variety of decisions as to the validity or invalidity of conditions attaching to a consent.'[88]

While the Court of Appeal clearly attached some significance to the fact that the statute had granted standing to sue to any person, there is nothing in its reasoning to suggest that it would have come to a different view as to the status of the first judgment of the Land and Environment Court had the qualifications for standing to sue been less liberal. Indeed, having regard to the precedents cited by the Court,[89] it seems that the critical test it applied was whether the judgment in question was determinative of the status of a person or thing.

If a judgment determining the validity of the conditions attached to a permit is regarded as a judgment determining the status of a thing, and thus a

[86] Hope JA; Samuels and McHugh JJA concurring.
[87] (1988) 15 NSWLR 437, 445.
[88] Id 441–2.
[89] These included *Lord Say's Case* (1639) Cro Car 524; 79 ER 1053; *Cox* v *Hakes* (1890) 15 App Cas 506 and other *habeas corpus* cases, *Washington H Soul Pattinson & Co Ltd* v *Ogilvy* (1954) 55 SR (NSW) 143 and *Wakefield Corporation* v *Cooke* [1904] AC 31.

judgment *in rem*, it necessarily follows that a judgment which determines the validity of the permit as a whole is also a judgment *in rem*.

IDENTITY OF CAUSES AND ISSUES

One of the essential conditions for the operation of estoppel per *res judicata* is that the cause in the later case should be the same as that in the prior case. But, as has already been noted, the term 'cause of action' in this context is imprecise and has been employed in at least three different senses: 'the facts which support a right to judgment', 'a right which has been infringed', and 'the substance of an action as distinct from its form'.[90] 'Imprecision in the meaning of cause of action', Brennan J has observed, 'tends to uncertainty in defining the ambit of the rule that judgment bars subsequent proceedings between the same parties on the same course of action.'[91] Different results may be produced depending on the sense in which the term is used.

For example, if a cause of action is taken to mean the facts which support a right to judgment, the *res judicata* principle will bar proceedings for remedy based on the facts upon which an earlier judgment was given as between the parties, even though the right asserted in the second proceedings is different from the right asserted in the earlier proceedings.[92] If, on the other hand, a cause of action means a right which has been infringed, judgment in a proceeding in respect of that right does not preclude a party from litigating in respect of another and different right, 'provided that the facts which support the right sued upon in the second action are not the same facts as those supporting the right which passed into the first judgment.'[93]

The concept of a cause of action has been developed primarily in relation to litigation for the vindication of private rights and its meaning in the context of public law litigation is by no means clear. There would seem to be little doubt that an action claiming damages for trespass is a cause quite different from an application for judicial review to challenge the validity of the act for which, in the trespass action, the defendant successfully claimed statutory authority, for the rights asserted in the two cases would be different, one being private, the other public. (There could, of course, be a question of issue estoppel.) Similarly, if a search warrant were to be quashed on an application for judicial review, the defendant to a subsequent civil action for damages for acts done pursuant to the warrant would not be estopped by *res judicata* from relying on the warrant, again because the causes would be relevantly different.[94]

But, if the facts relied on in two proceedings for judicial review are the same, are the causes of action to be regarded as different merely because the

[90] *Port of Melbourne Authority* v *Anshun Pty Ltd* (1981) 147 CLR 589, 610 per Brennan J.
[91] Id 601–11.
[92] Id 611.
[93] Ibid.
[94] Compare *Skeeth* v *Hurlbert* (1896) 25 SCR 620 where it was held that the defendant to the civil action was not estopped from relying on the warrant, previously quashed on an application for *certiorari*, because he had not been a party to the prior proceedings.

remedies sought are different? This question was considered in *Groeneveld* v *Calgary Power Ltd.*[95] There, the plaintiffs sought a declaration that the decision of the Energy Resources Conservation Board to grant Calgary Power Ltd a licence to construct and operate a transmission line, and certain other decisions made by the Board on the application of the company, were void. Previously, the plaintiffs had made other applications to the court in the matter, including an application for an order in the nature of *certiorari* to quash the Board's decisions. The prior applications failed, both at first instance and on appeal. In the later suit for a declaration, the company pleaded *res judicata*. The Alberta Court of Queen's Bench agreed that the only difference between the present case and the previous case was in the remedy sought. The facts in the previous case were not significantly different and the ground on which remedy was sought, breach of a duty to accord natural justice, was the same.[96] Nonetheless, the Court concluded that the matter was not *res judicata* because the relief claimed was different.[97] The Court also rejected the company's further argument that, since a declaratory judgment and an order in the nature of *certiorari* to quash were alternative remedies, the present suit should be dismissed as an abuse of the process of the Court. It did so because the appeal against the refusal of an order in the nature of *certiorari* had been dismissed on a ground other than the natural justice ground, namely, the existence of an adequate alternative statutory remedy.[98]

The Alberta Court cited no authority in support of its conclusion that estoppel *res judicata* was excluded merely because the remedies sought in the two cases were different. In the context of judicial review proceedings, to treat causes of action as different, merely because of a difference in the remedies sought, is to confuse substance with form. The position adopted by the Alberta Court is also one which it would be impossible to sustain, on any rational ground, in those jurisdictions in which judicial review procedures have been reformed in such a way that the supervisory jurisdiction can be invoked by a uniform originating process and the Court is authorised to grant whatever relief is appropriate, regardless of what relief the applicant has sought.

This is not to say that the plea of *res judicata* should not have been rejected by the Alberta Court. The plea could have been rejected simply on the ground that the relevant decision on the *certiorari* application, that of the appeal court, was to dismiss the application without a determination on the merits.[99]

Even if the nature of the remedy claimed, granted, or capable of being granted in judicial review proceedings is not decisive of the availability of *res judicata* in those proceedings, and the question is rather whether the substance of two proceedings is the same, there is still a problem about the criterion to be applied in deciding whether the cause in the prior proceedings

[95] (1980) 109 DLR (3d) 99.
[96] Id 102.
[97] Id 103.
[98] Id 103–4.
[99] See fn 7 supra.

is the same as that in the present proceedings. Suppose, for example, that in the prior application for judicial review the applicant unsuccessfully contested the validity of a decision on the ground that he or she had been denied natural justice, and contested the validity of the decision only on that ground. Suppose that in subsequent judicial review proceedings, the applicant contests the validity of the same decision on entirely new grounds, for example, on the ground the decision-maker had no authority at all to make the decision under challenge, or, if it did have authority, the decision was invalid because it was made without regard to relevant considerations and under dictation.

In a sense, both proceedings here would be directed towards the same end, establishment of the invalidity of a particular decision. But the facts to be established in order to sustain a challenge of the validity of the decision, at least where facts must be established, may vary according to the ground for review asserted by the applicant. It could, therefore be argued that, in the context of judicial review proceedings, a cause of action should be equated with an application for review of a particular act, on a particular ground. On this basis, an applicant for review who failed to establish the particular ground relied upon would not necessarily be precluded by *res judicata* from making a second application for review of the same act, but on other grounds. A second application might, however, be precluded by reason of the *Henderson* v *Henderson*[100] principle.

Even if the nature of the cause of action does vary according to the remedy sought, relitigation of particular issues may be precluded by the principle of issue estoppel, again as extended by *Henderson* v *Henderson*. Thus, having failed to establish, on an application for *certiorari* or like order, breach of a duty to accord natural justice, the applicant would be precluded from relitigating the natural justice issue in a suit for a declaration, and, applying the *Henderson* v *Henderson* principle, might even be precluded from advancing other grounds of invalidity which could have been raised in the first application.

Whether there is a relevant identity of issues as between prior and later proceedings for judicial review can, as the Canadian use of *Oley* v *Fredericton*[101] illustrates, present some problems. In that case the New Brunswick Court of Appeal accepted a plea of issue estoppel in relation to a prior determination of the validity of local government by-laws. In the prior case, it had been adjudged that certain by-laws were invalid because they had not been made according to the required procedure. But the substantive grounds for challenging the by-laws were not accepted. Afterwards, the impugned by-laws were re-made, this time according to the required procedure. In *Oley's* case the re-made by-laws were challenged, on the substantive grounds relied upon, but rejected, in the earlier case. According to the Court, this was a case of issue estoppel.

But was it? Technically, the by-laws sought to be reviewed in *Oley's* case

[100] (1843) 3 Hare 100; 67 ER 313.
[101] (1984) 15 DLR (4th) 269.

were not the same as those reviewed in the first case, even though they were the same in substance.

The kind of problem exemplified in *Oley's* case is by no means exceptional. There are many occasions on which governmental decisions are held invalid and the decision-maker then redecides the matter with the same result. The initial finding of invalidity may have involved acceptance of one or more grounds advanced by the applicant for review, but not others. As in *Oley's* case, the applicant may seek to challenge the decision-maker's redetermination on grounds unsuccessfully relied upon in the prior case, and again, be met with a plea of issue estoppel.

Take the following hypothetical example. A court has held that a purported refusal to grant a licence was invalid because the decision-maker took irrelevant considerations into account, but has rejected a further ground advanced by the applicant, namely, breach of a duty to accord natural justice. That second ground may have been rejected either because the court found that there was no duty at all to accord natural justice, or because, although natural justice was due, it had not been denied. Assume that, following the court's ruling, and in conformity with the court's direction, the decision-maker has redetermined the application for a licence, but again has decided not to grant it. The applicant has made a further application for review of this redetermination, on the ground of denial of natural justice.

It seems to me that in this situation there could be no relevant identity of issues as between the first and second cases unless in the first case the court had ruled that, in the exercise of the power to grant or refuse licence applications, the decision-maker was never, in any circumstances, bound to accord natural justice. Likewise, acceptance of the pleas of issue estoppel in *Oley's* case could only be sustained on the basis that the court in the prior case had effectively declared that the by-laws were of a kind which the council was authorised to make.

PARTIES AND THEIR PRIVIES

Whereas a judgment *in rem* operates against the world at large, a judgment *in personam* creates an estoppel per *res judicata* only as between the parties and their privies. Issue estoppel also may be raised only against the parties to the issue and their privies.[102]

It is well settled that when a party sues in a representative capacity, all members of the class that person represents are deemed privies to the suit.[103] What is not settled is whether the rule as to representative actions applies to proceedings brought in respect of purely public rights and duties, whether by an Attorney-General, a relator or a member of the public with the requisite

[102] See fn 9 supra.

[103] *Cox* v *Dublin City Distillary Co Ltd (No 3)* [1917] 1 IR 203. See also American Law Institute, *Restatement of the Law of Judgments, Second* (1982) ss 41, 42.

standing to sue, so that all members of the relevant public will be deemed to be privies of the suitor.

Although there is little explicit judicial authority on the point, it would seem that if suit has been brought by an Attorney-General in his capacity as *parens patriae*, in respect of public rights or duties, judgment in the cause would create an estoppel by *res judicata* which would bind any member of the public that Attorney-General represents who subsequently brought a suit in the same cause. In *Gouriet* v *Union of Post Office Workers*, Lord Wilberforce had no doubt that if the Attorney-General had been joined as a defendant to Gouriet's suit for an injunction to restrain an alleged breach of a criminal prohibition, 'he, and through him all members of the public, would be bound by the decision.'[104] Presumably judgment in a relator action would be treated on the same basis as judgment in a suit to which the Attorney-General is actually, rather than nominally, a party.

But clearly it is not every case in which an Attorney-General is a party and which, once decided, will be *res judicata* as against members of the public the Attorney-General represents. If, for example, a declaration in respect of public rights has been made at the suit of an Attorney-General, the judgment will not estop a member of the relevant public from relitigating the matter in a subsequent suit in which it is claimed that the breach of public rights involved infringement of the plaintiff's private rights.[105] In that case the cause would be different, though conceivably the prior determination on the issue of whether any public right had been infringed would be considered to have been concluded.

Similarly if an individual were to obtain a declaration in a suit against an Attorney-General that a certain course of conduct was not prohibited by statute, the declaration would not bar a subsequent prosecution of the plaintiff by the Attorney-General for breach of the statute, for although the parties to the criminal prosecution would be the same, the cause would not be.[106]

Consider also a case such as *Dyson* v *Attorney-General*.[107] There a declaration was made that a demand by the Commissioners of Inland Revenue for supply of information, under threat of penalty for non-compliance, was *ultra vires* and invalid. Similar demands had been made of more than eight million

[104] [1978] AC 435, 482. See also s 41(1)(d) of the *Restatement of the Law of Judgments, Second* (1982) according to which 'a person who is not a party to an action but who is represented by . . . (d) An official or agency invested by law with authority to represent the person's interests . . . is bound by and entitled to the benefits of a judgment as though he were a party.' This rule already covers the case where the official sues or is sued in respect of an interest held by members of the public at large (id Vol I, 402–3). See also 50 *Corpus Juris Secundum: Judgments* (1947) s 796(b)(1) and *Morganelli* v *Building Inspector of Canton* 388 NE 2d 708, 714–15 (1979, Appeals Court of Massachusetts).

[105] See *Taff Vale Railway Co* v *Pontypridd Urban District Council* (1905) 69 JP 351, where Buckley J held that a declaration concerning the defendant Council's right to lay gas pipes on a bridge built by the plaintiff would not bind the Attorney-General or the public, even though in making the declaration it was necessary to decide whether the bridge was a public road.

[106] See *London and Country Commercial Properties Investments Ltd* v *Attorney-General* [1953] 1 WLR 312, 317; *Imperial Tobacco Ltd* v *Attorney-General* [1980] 1 All ER 866.

[107] [1911] 1 KB 410; [1912] 1 Ch 158.

other taxpayers. But the judgment in favour of Dyson would not have estopped the Attorney-General in subsequent suits by any one of these other taxpayers from relitigating the issue of legality. Dyson had sued in a private capacity to vindicate his private rights.[108] Also the demands for information made of the other taxpayers were, technically, separate and distinct from the demand made of Dyson.

Less clear cut is the case where an Attorney-General of a State unsuccessfully sues for, say, a declaration against the Commonwealth that some federal Act is unconstitutional, and the State then seeks to relitigate the same matter in a suit to which the Attorney-General is not a party. The question is whether a State and its Attorney-General are to be treated as one and the same.

Both the States and the Commonwealth and their Attorneys-General are recognised to have independent capacities to sue and be sued.[109] And in constitutional cases it seems that a State (or the Commonwealth) has standing to sue whenever its Attorney-General does. Indeed, in many cases, a State and its Attorney-General have been co-plaintiffs and have been represented by the same counsel, though some justices of the High Court have said that if a State has standing, it, rather than the State's Attorney-General, is the appropriate plaintiff.[110]

Yet one justice of the High Court at least has taken the view that, for the purposes of the estoppel doctrines, a State and its Attorney-General are to be regarded as different parties. 'Generally speaking', Aickin J observed in *Queensland* v *Commonwealth*, 'when an Attorney-General sues to enforce a public right or liberty he does so as representing Her Majesty's subjects, and not the body politic of the government unit in which he holds office.'[111]

While it may be conceded that there are many cases in which it is fictitious to treat an Attorney-General and the government unit in which he or she holds office as different parties, it seems to me that it would not be right to assimilate the two for the purposes of the operation of the estoppel doctrines. In theory, an Attorney-General, acting as *parens patriae*, has an independent discretion in the matter of whether to sue for the vindication of public rights. That is to say, the Attorney-General is in no legal sense bound to act at the behest of the political executive of his government.[112] It is open to an Attorney-General to sue that government or one of its instrumentalities.[113] More important, the Attorney-General may grant a fiat for a relator action against that government, or one of its instrumentalities, and there may be situations in which his or her consent to the institution of proceedings in the

[108] In *Gouriet's* case several of the law lords assumed that Dyson sued in respect of his private rights: [1978] AC 435, 483, 493, 514.

[109] The capacity of the Commonwealth and the States to sue and be sued, as bodies politic, is implied by s 75 of the federal Constitution.

[110] *Victoria* v *Commonwealth* (1975) 134 CLR 338, 366 (Barwick CJ), 383 (Gibbs J).

[111] (1977) 139 CLR 585, 615.

[112] See Australian Law Reform Commission, *Standing in Public Interest Litigation*, Report No 27 (1985) paras 161–3.

[113] See, eg, *Commonwealth* v *Australian Commonwealth Shipping Board* (1926) 39 CLR 1.

name of the Attorney-General is the only way in which the constitutional issue can, or is likely to be raised, for judicial determination.[114]

Similar issues regarding the identity or privity of parties can arise when one or more parties to prior court proceedings is an agent of government, and one or more parties to subsequent litigation is alleged to be an agent of the same government and thus a privy to the prior litigation. But the courts have distinguished between the capacities in which officers of the same governmental system sue and are sued. A statutory corporation which, by statute, is accorded a capacity to sue and be sued, is, for litigation purposes, a party separate and distinct from that of the larger body politic, even if the corporation, for the purposes of 'the shield of the Crown' doctrine, shares the privileges of that Crown.[115] In relation to the exercise of statutory powers, one Minister of the Crown may be a plaintiff in opposition to another Minister of the same government, each of them prosecuting or defending their own statutory rights and duties. A person who, in one case, is party to litigation in the capacity of an agent of the Crown, may, in a subsequent case litigate as an independent statutory officer.[116]

There may, however, be cases where, despite the fact that the parties to prior and subsequent litigation are different, they are in reality the same because in both cases one of the parties sues or is being sued as an agent of the same government or as an agent of the Crown.

For the purposes of the estoppel doctrines, the Crown should, it is submitted be regarded as divisible. In Australia, at any rate, the Crown in right of the Commonwealth must be seen as different from the Crown in right of the States. The view taken by the New Brunswick Court of Appeal in *Vautour* v *Province of New Brunswick*[117] is, I think, not likely to be adopted in Australia. In that case the plaintiff, Vautour, who had been evicted from land expropriated pursuant to a provincial statute, brought an action against the Province for trespass. Through that action he sought to contest the validity of the expropriation. But Vautour had been one of the defendants to a prior successful action brought by the Attorney-General of Canada for trespass in respect of the same land. The Court of Appeal accepted that the validity of the expropriation had been determined in the prior action and upheld a plea of *res judicata* on the ground that the Crown in right of Canada was indivisible from the Crown in right of a Province.[118]

There is surprisingly little authority on who is to be deemed to be privy to a suit which has been instituted by a private individual, virtually as a private Attorney-General, to vindicate public rights. If, for example, one ratepayer has been recognised as having standing to sue for a declaration that a local government by-law is invalid, but the court has held the by-law valid, is the

[114] See, eg, *Attorney-General for the Commonwealth (Ex rel McKinlay)* v *Commonwealth* (1975) 135 CLR 1.

[115] Notably, presumptive immunity from the operation of statutes.

[116] See *Re Caveat No 780; Ex parte Davenport* (1873) 3 QSCR 121; *R* v *Tween* [1965] VR 687, 697–8; *In re a Medical Practitioner* [1959] NZLR 784. See also 50 *Corpus Juris Secundum: Judgments* (1947) s 796(a).

[117] (1985) 62 NBR (2d) 142.

[118] Id para 33.

judgment *res judicata*, assuming it is a judgment *in personam*, in relation to all other ratepayers?

A question akin to this, involving consideration of the role of ratepayers who contest the validity of acts of local governments, arose for decision by the Supreme Court of Canada in *Dilworth* v *Town of Bala*.[119] The ratepayers in this case had sued the Town and the Royal Bank of Canada for declarations and injunctions in respect of a resolution of the Town Council under which the Town had incurred obligations to pay money to the Bank and others. This suit had been dismissed by both the trial court and the Ontario Court of Appeal. Prior to the hearing of the ratepayers' appeal to the Supreme Court, two other actions against the Town had been tried in which the validity of the Council's resolution was a central issue. One action had been instituted by the Bank, for recovery of money. In its defence, the Town had adopted the same arguments as the ratepayers had in their suit. Both at first instance, and on appeal to the Ontario Court of Appeal, judgment in these other actions was against the Town.

The ratepayers' appeal to the Supreme Court was dismissed. Kerwin CJC, with whom Taschereau J concurred, considered that, in the circumstances 'it would be improper to permit . . . [the] appeal to continue.' He noted that, in the other two actions against the Town, the Town had aided the ratepayers, so it could not be said that the latter were 'prosecuting any claim the Town declined to put forward and support'.[120] It was only after the judgments against it in these two other actions that the Town refused to appeal.

Rand J agreed that the ratepayers' appeal should be dismissed, but on somewhat different grounds. In his opinion, the cause of action on which the ratepayers' suit for a declaration rested no longer existed, having been merged in the judgment in the action by the Bank against the Town. To grant the declaration sought by the ratepayers would 'be futile because it could not nullify the efficacy' of the judgment.[121] Although the ratepayers had not been party to the action brought by the Bank, Rand J seems to have treated them as privies to the judgment in that action. This is indicated by his remarks on the role of the ratepayers as suitors:

> The right of a ratepayer to bring a municipal corporation into Court as a means of asserting the illegality of corporate action affecting its property or civil rights, and indirectly the interests of the ratepayers, is not challenged. It assumes that the organ of the corporation created to speak and act for all who are comprised within it is disregarding its duty: and the purpose and effect of the proceeding is to compel the execution of that duty. The right of the ratepayer arises from the delinquency of the corporation and its essence is of a coercive nature against the corporation and only mediately against third parties. If the corporation, of its own accord, has taken appropriate action, the basis of the interposition by a ratepayer, a breach of duty, does not arise. It is the primary right and duty of the corporation itself to repudiate *ultra vires* action and it is this right and duty which are brought before the Court for enforced action. The right of the ratepayer is thus accessory to

[119] [1955] 2 DLR 353.
[120] Id 355.
[121] Id 357–8.

that of the corporation; the substantive matter remains in the relation between the corporation and the third person.[122]

The right asserted by the ratepayers in the present case, Rand J added, was 'to be distinguished from a direct or personal right asserted when action is taken against a ratepayer and is resisted as being illegally founded within corporate action alone, not involving third persons.'[123] Here the ratepayers were 'acting on behalf of all the ratepayers; and a decision [meaning, presumably, a decision in their suit] that the action challenged in *intra vires* would bind all as between themselves and the corporation as well as between the corporation and the third parties in the proceeding', *that is, would operate*, virtually, as a judgment *in rem*.[124]

There appears to be no reported decision of any Australian court in which the court has had occasion to consider who is to be regarded as a privy to a prior suit instituted by a private party in respect of purely public rights and duties, and as such, precluded from relitigating the cause or issue previously decided. The question was, however, considered incidentally by the Federal Court of Australia in *Wattmaster Alco Pty Ltd* v *Button*.[125]

In this case an application for judicial review was made, under the *ADJR Act*, in respect of a declaration by the Minister pursuant to s 8(2) of the *Customs Tariff (Anti-Dumping) Act* 1975 (Cth). The declaration was in the form of a general notice applying to all importers, rendering them liable to pay 'dumping duty' on certain goods. At first instance the Minister's declaration was held to be invalid because, in making it, the Minister failed to take into account considerations which he was obliged to take into account. Nevertheless, the judge ruled that his order to set aside the Minister's declaration should take effect only from the date of his judicial order.[126] In the subsequent appeal to the Full Court of the Federal Court, the appellant sought a judicial order invalidating the Minister's declaration as from the date on which it was made, so as to provide a basis for a claim by the appellant for restitution of the moneys he had paid under the invalid declaration.

For present purposes it is not necessary to rehearse all of the reasons why the Full Court upheld the appeal, though it is important to note that it accepted as a general proposition that:

> A decision made in purported exercise of a statutory discretion, but which is attended by a relevant irregularity, will normally be treated as valid until successfully impugned by an appropriate plaintiff; but once the decision is held bad in law it will be treated as being invalid — at least in so far as substantive rights are concerned — as from the date upon which it was made.[127]

[122] Id 357.
[123] Ibid.
[124] Ibid.
[125] (1986) 70 ALR 330.
[126] He relied on s 16(1)(a) of the *ADJR Act* which provides that an application for an order for review of a decision, the Court may make 'an order quashing or setting aside the decision, or a part of a decision, with effect from the date of the order or from such earlier or later date as the Court specifies'.
[127] (1986) 70 ALR 330, 335.

The part of the Full Court's reasoning which is pertinent to the question here under discussion is its answer to the argument by counsel for the Minister that, because the Minister's declaration 'was a general notice applying to all importers', it was 'appropriate . . . that all importers be upon an equal footing: all bound by the declaration up to the date of the court's decision, none thereafter'.[128] This approach, the Court said, misunderstood the effect of a judicial 'finding that a statutory decision is invalid — at least where the invalidity stems from a procedural defect'.[129] That finding and the order setting aside the invalid decision could operate as an estoppel only as against the parties to the application for judicial review. In theory

> it would be open to the decision-maker to continue to insist upon the validity of the decision as against all other affected persons; putting those other persons to the trouble of bringing their own proceedings for appropriate relief. Although the doctrine of precedent would be relevant in the subsequent proceedings, in respect of holdings of law, it is possible that different evidence could result in different findings of fact and, thus, a different result.[130]

It is thus clear that the Court assumed that no member of the public would be deemed privy to the successful application for judicial review.

An altogether different assumption was made by the Australian Law Reform Commission in that part of its report on *Standing in Public Interest Litigation* which deals with the effects of its proposal to liberalise the federal law of standing on the operation of the estoppel principles. The proposal, the Commission asserted, 'would extend the effect of the earlier decision, at least so far as it resolved points of law, so as to bind any subsequent plaintiffs seeking to litigate the same issue. The earlier plaintiff would be taken to represent the world at large, including any subsequent plaintiffs.'[131]

Even where the principles of estoppel have no application because of the absence of the requisite identity of parties, a court may preclude relitigation of a matter decided in prior litigation by invoking its inherent jurisdication to prevent abuse of its processes. It was this jurisdiction that was invoked by the Federal Court in *R* v *Balfour; Ex parte Parkes Rural Distributions Pty Ltd*[132] to prevent relitigation of an issue of validity which had been determined in prior litigation in the Supreme Court of New South Wales and the New South Wales Court of Appeal. In the prior proceedings, the company had unsuccessfully challenged the validity of two repayment certificates issued under the *Petroleum Products Subsidy Act* 1965 (NSW). The first certificate was held invalid and, though it was accepted that there were grounds for holding the second certificate invalid, the Court, in its discretion, declined to grant relief. That certificate, it was said, remained valid and operative until held to be void. Subsequently the State of New South Wales commenced action in the

[128] Id 336.
[129] Ibid.
[130] Ibid.
[131] Paragraph 205. The Commission did not refer to any judicial precedents in support of its assertion.
[132] (1987) 76 ALR 256.

Supreme Court to recover from the company the money certified in the second certificate. The company then instituted judicial review proceedings in the Federal Court against the respondent to the proceedings before the State Supreme Court and the State of New South Wales.[133] Through these proceedings the company sought, inter alia, to relitigate the validity of the second repayment certificate referred to above, partly on grounds that had not been raised in the prior proceedings.

Wilcox J accepted that there was 'no question of *res judicata* or issue estoppel' because New South Wales had not been party to the earlier proceedings concerning the validity of the repayment certificate.[134] But what the company was seeking to do in the present proceeding was to reverse the effect of the Supreme Court's decision.[135] It was a proceeding which, if successful, would result in a judgment inconsistent with that of the Supreme Court.[136] This was an abuse of process.

REPRESENTATIVE PROCEEDINGS

It is well established that judgments in representative proceedings (or class actions) bind all those represented in the proceedings and that a plea of *res judicata* or issue estoppel may be raised against any member of the represented class should that member subsequently seek to relitigate the cause or issue.[137] Some difficulties can, however, arise in cases where the representative proceedings have been brought in respect of a question to be determined by reference to principles of public law. The kinds of difficulties which may arise are illustrated by *Zhang de Yong* v *Minister of Immigration, Local Government and Ethnic Affairs*.[138]

In this case Mr Zhang brought a representative proceeding under Part IVA of the *Federal Court of Australia Act* 1976. This Part, enacted in 1991, widens the scope for representative proceedings in that Court. Essentially, it allows such proceedings to be commenced when:

(a) 7 or more persons have claims against the same person; and
(b) the claims of all those persons are in respect of, or arise out of, the same, similar or related circumstances; and
(c) the claims of all those persons give rise to a substantial common issue of law or fact . . .[139]

[133] The proceedings were by way of an application under s 39B of the *Judiciary Act* 1903 (Cth) and the remedies sought were an injunction against Balfour, the author of the repayment certificates, and New South Wales, prohibiting them from further proceeding in the action in the State Supreme Court, and a writ of prohibition to prohibit Balfour from issuing any further certificate in respect of a specified period.

[134] (1987) 76 ALR 256, 264.

[135] Ibid.

[136] Reference was made to *Port of Melbourne Authority* v *Anshun Pty Ltd* (1981) 147 CLR 589, 603.

[137] The authorities are reviewed in *Zhang de Yong* v *Minister for Immigration, Local Government and Ethnic Affairs* (1993) 118 ALR 165, 181–3.

[138] (1993) 118 ALR 165.

[139] Section 33C(1).

Mr Zhang's proceeding was an application for judicial review pursuant to the *ADJR Act*. Those he represented were 'applicants for refugee status whose applications. . .[had] been refused since 4 March 1992'. Each applicant had 'sought review of the decision refusing the application and, on review [by a Refugee Status Review Committee], those applications . . . [had] again been refused'.[140] The claim against the Minister was that he had 'breached the rules of natural justice by failing through his delegates, to offer the opportunity in every case of an oral hearing by the review delegate'.[141] At the review level it was a common practice not to offer every applicant an opportunity to be heard orally. The remedies sought were 'the setting aside of the decision that the [group] member . . . [did] not have refugee status and an injunction restraining the removal of that person from Australia'.[142]

French J concluded that there was 'nothing in the language of' Part IVA of the *Federal Court of Australia Act* 1976 'to prevent its application to appropriate proceedings for' review under the *ADJR Act* 'or prerogative or associated declaratory relief'.[143] He was 'satisfied that the claims of the members of the group' in the present case were 'connected by circumstances sufficiently related to warrant the use of the procedure under Part IVA for the determination of the common issue of law defined in the application' for judicial review.[144] That common issue of law was resolved by a declaration that the Minister had 'not failed to comply with the requirements of natural justice by reason only of the failure to adopt a practice of offering to each' of the persons in the relevant group 'the opportunity of an oral hearing by a Refugee Status Review Committee'.[145] Whether an oral hearing should be offered in a particular case depended on the circumstances of that case.

Having determined the common issue of law, French J exercised the discretion conferred by s 33N(1) of the *Federal Court of Australia Act* 1976 to order that the proceeding should not continue as a representative proceeding under Part IVA of the Act.[146] That order was made so that judgment would not prevent members of the group, other than Mr Zhang, from making individual applications for judicial review. Mr Zhang's individual application was dismissed.

French J offered some general comments on the utility of representative proceedings in cases where judicial review of administrative action is sought. They were as follows:

> A challenge to the lawfulness of an administrative policy or practice affecting the exercise of statutory power may raise, as does this case, a narrow point for decision. Individual claims in relation to particular determinations under the power are left unheard if the representative action fails. The possibility arises of the extended principle of res judicata affecting issues wider than those ventilated in the representative proceeding. Having

[140] (1993) 118 ALR 165, 184.
[141] Ibid.
[142] Ibid.
[143] Id 183.
[144] Id 185.
[145] Id 191.
[146] Id 186, 192.

> regard to that possibility, the utility of the representative action in judicial review requires scrutiny. The question must be asked in each case whether members of the group and the decision-makers are likely to be better off with a determination which binds them all on one issue but fails to deal with individual claims. Where the lawfulness of a policy is contested by an individual, that test case may, pending an appeal, establish the law. However, it does not provide as firm a bulwark against re-litigation of the same point in like cases as does the determination in representative proceedings which directly binds the decision-maker and members of the group. The costs and benefits of representative proceedings in the area of judicial review will have to be assessed on a case by case basis.[147]

The reference in this passage to 'the extended principle of res judicata' is to the *Henderson* v *Henderson*[148] principle. French J did not doubt that judgment on the common issue in the representative proceeding commenced by Mr Zhang would bind all members of the group and the Minister. That was made clear by s 33ZB(b) of the *Federal Court of Australia Act* 1976. But French J considered that 'the question whether the extended principle of *res judicata* is capable of application to proceedings confined as' the present proceedings had 'been to a common issue of law or fact remains open'.[149] Support for the view that the extended principle could operate in relation to such proceedings might, he suggested, be found in s 33Q of the Act, for this section 'contemplates the hiving off of individual claims when the common determination does not finally determine the claims of all group members'.[150] In proceedings 'in which the group members have not raised individual claims but have been defined into the group on their related circumstances and the common issue,' the court should, French J thought, take care 'to ensure that claims based on individual circumstances of which the court knows nothing are not prejudiced'.[151] It was to avoid the possible prejudice to subsequent individual claims that a right to natural justice had been denied that French J decided that, once judgment on the common issue had been given, the proceeding before him not be continued as a representative proceeding. This was clearly the right course of action.

THE HENDERSON v HENDERSON PRINCIPLE

When a party to litigation seeks, for the first time, to challenge the validity of some governmental action, the other (or another) party to the proceeding may, relying on the principle of *Henderson* v *Henderson*,[152] seek to preclude litigation on that issue on that ground that it is one which could and should have been raised in prior litigation between the parties. The prior case may have been one in which the initiator of the present proceedings was a defend-

[147] Id 184.
[148] (1843) 3 Hare 100; 67 ER 313.
[149] (1993) 118 ALR 165, 185.
[150] Ibid.
[151] Id 185–6.
[152] (1843) 3 Hare 100; 67 ER 313.

ant and failed to raise a defence based on the validity of the act now sought to be impugned. Or it may be a case in which the initiator of the present proceedings was also the initiator of the prior proceedings, but was unsuccessful.

The High Court of Australia in *Port of Melbourne Authority* v *Anshun Pty Ltd*[153] made some general observations on the application of the *Henderson* v *Henderson* principle which, while they were not addressed specifically to cases of the kind here in question, are nevertheless pertinent to cases of the first type mentioned above. In such cases, according to Gibbs CJ, Mason and Aickin JJ, the test should be whether the matter raised in the later proceeding was 'so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it' in defence.[154] Generally speaking, they observed,

> it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the issues to be determined in the one proceeding. . . . [T]here are a variety of circumstances . . . why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings eg expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few.[155]

The *Henderson* v *Henderson* principle has been invoked in a number of cases in which issues about the validity of governmental action have been raised, though not always with reference to that particular case. With what results?

Although *Brisbane City Council* v *Attorney-General for Queensland (Ex rel Scurr)*[156] did not involve a question of validity of governmental action according to principles of public law, it is nonetheless germane to the present discussion. The matter claimed to be *res judicata* concerned the actions of a governmental body. And the kinds of factors taken into account by the Judicial Committee of the Privy Council in applying the *Henderson* v *Henderson* principle were factors which it would probably have considered relevant if the matter claimed to be *res judicata* had been one of *vires* in the strict sense.

In this case, *res judicata*, in the extended sense, had been pleaded in defence to a relator action for a declaration that land held by the Brisbane City Council, which it had contracted to sell to the company Myer, was subject to a charitable trust. There had been prior litigation in relation to this land. First, there had been litigation arising from the relator's objection to the grant by the Council to Myer of a permit to use the land as a shopping centre, by way of an appeal by the relator and others to the Local Government Court. This appeal proceeded to the Full Court of the Supreme Court and thence to the High Court. There had been a second appeal by the relator and others to the Local

[153] (1981) 147 CLR 589.
[154] Id 602.
[155] Id 602–3.
[156] [1979] AC 411.

Government Court and then a Supreme Court action by the Attorney-General, at the relation of Scurr and others, against the Council and Myer in which the question was whether the Council had acted *ultra vires* in accepting Myer's tender. This action had been unsuccessful. In none of these prior proceedings was there an issue as to whether the Council was bound by a charitable or other trust.

The Judicial Committee of the Privy Council rejected the defence of *res judicata*, based on the extended principle enunciated in *Henderson* v *Henderson*. It did so for the following reasons: (a) Even if the existence of a trust had been known, it 'would have been entirely out of place' to assert its existence in the Local Government Court proceedings or in the earlier relator action in the Supreme Court;[157] (b) It was doubtful whether there was the necessary identity between the parties to the prior relator action and the present relator action, for whereas the prior action 'was in effect a ratepayers' action brought against the authority to restrain an alleged excess of power', the present relator action was one 'instigated by two members of the public asserting a right belonging to the public at large';[158] (c) 'The fact that the relator who was ignorant of the trust would have had to search the records of the council in order to discover its existence, and that he was to some extent obstructed by the council in his attempt to obtain the relevant documents', made the case 'totally unsuitable for the introduction or admission of' the defence of estoppel per *res judicata*;[159] (d) The *Henderson* v *Henderson* doctrine ought to be applied only 'when the facts are such as to amount to an abuse of process' and here it could not be claimed that to bring the second relator action after the first was such an abuse.[160]

The abuse of process test is, as Gibbs CJ, Mason and Aickin JJ later remarked in *Port of Melbourne Authority* v *Anshun Pty Ltd*, 'not one of great utility.'[161] Nevertheless the rejection by the Judicial Committee of the pleas of estoppel per *res judicata* in Scurr's case is supportable. Leaving aside the fact that the relators did not, in the first relator action, have knowledge of the transaction giving rise to the claim that a charitable trust existed, it could hardly be expected that the existence of a trust would be raised in an action framed solely as a test of the validity of the exercise of public powers. The absence of knowledge of the facts on which it might be asserted that the Council was constrained also by a charitable or other trust was merely an additional factor against acceptance of the *res judicata* defence. To what extent absence of knowledge of invalidating causes should affect application of the *Henderson* v *Henderson* doctrine will be considered later.

The question of whether an issue as to the validity of governmental action could and should have been raised in prior proceedings between the same parties as those in the present litigation in which that issue is sought to be determined, so as to attract estoppel principles, has arisen in several Cana-

[157] Id 425.
[158] Id 426.
[159] Ibid.
[160] Ibid.
[161] (1981) 147 CLR 589, 602.

dian cases. Some of these cases were ones in which the validity of governmental action had first been challenged on non-constitutional grounds, unsuccessfully, and then the validity of the same action had been contested in further litigation between the same parties on constitutional grounds, notably on the ground of an alleged violation of the Canadian Charter of Rights and Freedoms.

In *MacDonald* v *Marriott*[162] a police officer who had unsuccessfully sought prohibition in respect of disciplinary proceedings against him made a second application for prohibition in respect of the same proceedings. The second application was based on an alleged violation of the Charter provision which precludes double punishment.[163] This ground had not been raised in the prior application. The Supreme Court of British Columbia concluded that the applicant was estopped from raising the Charter issue because it could have been raised in his prior application for prohibition.[164]

This ruling is in contrast with that made in a later case before Alberta's Queen's Bench, *Re Budge and Workers' Compensation Board; City of Calgary*,[165] on an application for *certiorari* to quash a decision of the Board. There had been a prior application for *certiorari* to quash a determination by the Board that an employee of the applicant was entitled to compensation. This application was made on Charter[166] and non-Charter grounds and was, initially, unsuccessful. There was then a successful appeal against the determination to refuse *certiorari*, although, on the appeal, the case based on alleged violation of the Charter was abandoned. The appeal succeeded on the ground of breach of a duty on the part of the Board to accord natural justice. Thereafter the Board re-determined the application for compensation, in favour of the employee. Again the Board's determination was challenged on an application for *certiorari*, on Charter and non-Charter grounds. The Court rejected a plea of issue estoppel in relation to the Charter ground because, in the appeal proceedings on the first application for *certiorari*, that ground had not been pursued.

Arguably, the fact that the Charter issue was not pursued in the appeal in the first application for *certiorari* should not have been regarded as decisive. What surely should have clinched the estoppel question was the fact that the decision of the Board which was sought to be quashed on the first application was separate and distinct from that sought to be challenged in the second application for *certiorari*. In other words, the causes in the two *certiorari* proceedings were different.

In applying the *Henderson* v *Henderson* principle, the first question a court will need to ask is whether the issue now sought to be raised for determination could have been raised at all in the prior proceedings. In some cases, the answer will be 'no', simply because the court or other tribunal before which

[162] (1984) 7 DLR (4th) 697.
[163] Section 11(h).
[164] See also *Johnson* v *Law Society of Prince Edward Island* (1990) 70 DLR (4th) 278 (PEI Supreme Court, Appeal Division).
[165] (1988) 42 DLR (4th) 649.
[166] Sections 7 and 15.

the prior litigation came had no jurisdiction to decide the issue.[167] For example, a magistrates' court invested with jurisdiction to hear and determine prosecutions for breach of local government by-laws may be prohibited by statute from determining questions as to the validity of any such by-laws.[168] In that case, no principle of estoppel could prevent the defendant to a criminal prosecution before a magistrates' court from contesting the validity of the by-laws in subsequent non-criminal proceedings before a superior court.

Even if there is no jurisdictional impediment to the court in the prior litigation dealing with the issue sought to be determined in the subsequent litigation, there could be many reasons why it would be unreasonable to expect the party who now raises an issue of legal or constitutional validity to have raised that issue in the prior litigation. The issue may have been marginally relevant to the prior case. The party seeking to raise it may have considered, or been advised, that there were good prospects of succeeding in the prior proceedings without raising the validity issue. It may not even have occurred to the litigant, or the litigant's legal adviser, that there was an issue of validity which could be raised. Then again the litigant may have had no knowledge of, or ready means of discovering, the facts which, if established, might have suggested that an issue of validity might be raised, for example, facts suggesting that mandatory procedures governing the making of subordinate legislation had not been followed.

Another reason why the issue of validity may not have been raised in the prior proceedings is that the issue may have been determined in even earlier proceedings to which the litigant was not party, and determined by a court whose ruling in favour of validity bound the court which dealt with the litigant's prior case. *Vitosh* v *Brisbane City Council*[169] was a case of that kind. The issue in respect of which a plea of estoppel was raised, unsuccessfully, concerned the validity of a resolution of the Council classifying lands of a certain general description as residential lands and prohibiting building on those lands without Council permission. In the prior proceeding Vitosh had unsuccessfully sought *mandamus* in respect of the Council's rejection of his application for permission to build. In that proceeding he did not contest the validity of the Council's zoning resolution, presumably because the Full Court of the Supreme Court of Queensland had already decided in another case, to which Vitosh had not been party, that the resolution was valid.[170] The judge deciding the *mandamus* application was bound by the Full Court's decision and in fact expressly ruled that the resolution was valid. Subsequently Vitosh sued in the Supreme Court for a declaration that the resolution was invalid. On appeal, the High Court rejected a plea of issue estoppel on the ground that, in the *mandamus* case, validity had been merely assumed. It concluded that the resolution was *ultra vires*.[171]

[167] See Spencer Bower and Turner, op cit (fn 1) ch 4.
[168] For example, *Local Government Act* 1958 (Vic), s 232(2). This Act is superseded by the *Local Government Act* 1989 (Vic).
[169] (1955) 93 CLR 622.
[170] Id 628.
[171] Id 629.

Where a litigant considers, or is advised, that he or she has a reasonable prospect of succeeding in a cause without raising an issue of validity, a deliberate decision may be made not to raise that issue because of the additional expense that is very likely to be entailed if it is raised. Additional expense may be incurred in discovering evidence relevant to proof of invalidity. There may be a risk that additional parties may seek to be joined. More senior counsel may have to be engaged. The proceedings may be prolonged. The litigant may also have been warned that, should an issue of invalidity be introduced and should the case go against him, any costs, as between party and party, which he may be ordered to pay could be inflated.

Cases in which federal constitutional issues might be raised do, of course, present special problems. Absent the introduction of such an issue, the case may be purely one within State jurisdiction. The introduction of the constitutional issue in a State court will immediately convert it into one in which the State court is exercising a federal jurisdiction.[172] But what is more important, the presentation of the constitutional issue will necessitate the service of notices on the Attorneys-General, State and federal, then suspension of the proceedings to give the Attorneys time to decide whether they wish to exercise their rights of intervention and to seek removal of the cause into the High Court.[173]

Given the consequences of raising a federal constitutional issue in a matter which is not otherwise one of federal jurisdiction, the *Henderson* v *Henderson* principle should not, I think, be applied to the detriment of litigants who could have raised a constitutional issue in cases which could have been resolved in their favour without reliance on that issue, but who, in consequence of their lack of success on non-constitutional grounds, then seek in other litigation to raise the constitutional issue directly.

EXCEPTIONS

It has long been recognised that there are circumstances in which the estoppel doctrines do not apply, for example, where a judgment has been procured by fraud or collusion, or has been pronounced by a court not having jurisdiction in the matter. In *Chamberlain* v *Deputy Commissioner of Taxation*[174] Deane, Toohey and Gaudron JJ referred to another exception. 'There can' they said, 'be no issue estoppel against the operation of a statute which creates public rights and duties or which creates imperative provisions.'[175] If there is such an exception, it is one that could have particular significance in public law litigation.

The exception as formulated in *Chamberlain's* case is very broad, and perhaps even broader than that applied in the cases there cited as authority. In

[172] *Judiciary Act* 1903 (Cth), s 39.
[173] *Judiciary Act* 1903, ss 78A and 78B.
[174] (1988) 164 CLR 502.
[175] Id 510.

one of these cases, *Griffiths* v *Davies*,[176] the English Court of Appeal ruled merely that a plea of estoppel should not be accepted if the result of acceptance would be to compel the Court to render a judgment which, by statute, it was prohibited from rendering — in the instant case, a determination of rental payable otherwise than in accordance with the governing *Rent Act*.[177] In the subsequent case of *Kok Hoong* v *Leong Cheong Kweng Mines Ltd*,[178] the Judicial Committee of the Privy Council stated that statutes do not necessarily exclude estoppels, but it concluded that the legislation which the defendant relied upon to resist an action to recover arrears of rent, alleged to be owing under an agreement for hire, was legislation of a kind which would prevent estoppel in relation to a prior judgment against the defendant for arrears of rent under the same agreement. If the legislation in question — a Moneylenders Ordinance and a Bills of Sale Ordinance — applied, and if it had, as the defendant alleged, been infringed, that legislation would have rendered the agreement void and unenforceable and the money claimed by the plaintiff irrecoverable. Where laws of money lending and monetary transactions were involved, a test to be applied in determining whether estoppels were excluded was, the Judicial Committee said, whether the legislation represented 'a social policy to which the court must give effect in the interests of the public generally or some section of the public.'[179]

In neither *Griffiths* v *Davies*, nor *Kok Hoong's* case, was any distinction made between statutes which create public rights and duties and other statutes. In each the central question seems to have been perceived as being whether, if the estoppel plea were allowed, the case might result in a judgment contrary to the legislation.

While the broad proposition advanced by Deane, Toohey and Gaudron JJ may not be entirely supported by the precedents, it is nevertheless a proposition which can be supported in point of principle. In this connection it is worth noting that among the exceptions to the *res judicata* principle recommended in the American Law Institute's *Restatement of the Law of Judgments, Second* (1982) is the case where 'the judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme'.[180] Another recommended exception is the case where 'it is clearly and convincingly shown that the policies favouring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty.'[181]

Another suggested exception to the estoppel principles relates to cases where judgment has proceeded from a view of the law or an interpretation of a

[176] [1943] KB 618.
[177] See also *Bradshaw* v *M'Mullan* [1920] 2 IR 412, 425–6 (HL).
[178] [1964] AC 993.
[179] Id 1016. See generally J A Andrews, 'Estoppels against Statutes' (1966) 29 MLR 1; A Goldman and S Lindsay, 'Estoppel in the Face of a Statute' (1988) 16 *Aust Business Law Rev* 375.
[180] Section 26(1)(d).
[181] Section 26(1)(f).

statute which view or interpretation has, in subsequent litigation between different parties, been held to be erroneous, rejected or overruled.

In the United States, it is now widely accepted that the general rule of issue estoppel (or issue preclusion) does not apply where the issue previously determined was one of law and a new determination of the issue is, in the words of the *Restatement of the Law of Judgments, Second*,[182] 'warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws'.[183] This exception, is not, it should be noted, absolute. It may or may not be applied depending on the circumstances of the individual case.

'In deciding whether to apply issue preclusion, or instead to apply a subsequent emerging legal standard, the choice is', the *Restatement* points out, 'between two forms of disparity in resolution of a legal controversy'[184] — between two competing concepts of equality. 'One is the concept that the outcomes of similar disputes between the same legal parties at different point of time should not be disparate',[185] which concept involves applying issue estoppel. 'The other is that the outcomes of similar legal disputes being contemporaneously determined between different parties should be resolved according to the same legal standards',[186] which may involve refusal to apply issue estoppel.

The choice to be made between these competing concepts of equality must, the *Restatement* suggests,

> be made in terms of the importance of stability in the legal relationships between the immediate parties, the actual likelihood that there are similarly situated persons who are subject to application of the rule in question, and the consequences to the latter if they are subject to different legal treatment. In this connection it can be particularly significant that one of the parties is a government agency responsible for continuing administration of a body of law that affects members of the public generally. . . . Refusal of preclusion is ordinarily justified if the effect of applying preclusion is to give one person a favoured position in current administration of the law.[187]

The question of whether issue estoppel may be excluded by an intervening change in judicial interpretation of the law was considered by the House of Lords in 1991 in the case of *Arnold* v *National Westminster Bank PLC*.[188] The House agreed with both the judge at first instance, Sir Nicholas Browne-Wilkinson V-C, and the Court of Appeal that a legal change of this kind could, in some situations, bring a case within one of the exceptions to issue estoppel, that exception being the 'special circumstances' referred to by Sir James

[182] Section 28.
[183] See also *Commissioner of Internal Revenue* v *Sunnen* 333 US 591 (1948); *Louis Stores Inc* v *Department of Alcoholic Beverage Control* 371 P 2d 758 (1962); *Limbach* v *Hooven & Allison Co* 466 US 353 (1984).
[184] Vol I, 277.
[185] Ibid.
[186] Ibid.
[187] Id 278.
[188] [1991] 2 AC 93.

Wigram V-C in *Henderson* v *Henderson*.[189] Lord Keith of Kinkel (with whom the other Lords of Appeal agreed) expressed his agreement with the following passage from the judgment of Sir Nicholas Browne-Wilkinson V-C:

> In my judgment a change in the law subsequent to the first decision is capable of bringing the case within the exception to issue estoppel [ie, the *Henderson* v *Henderson* exception]. If, as I think, the yardstick of whether issue estoppel should be held to apply is the justice to the parties, injustice can flow as much from a subsequent change in the law as from the subsequent discovery of new facts. In both cases the injustice lies in a successful party to the first action being held to have rights which he does not in fact possess. I can therefore see no reason for holding that a subsequent change in the law can *never* be sufficient to bring the case within the exception. Whether or not such a change does not bring the case within the exception must depend on the exact circumstances of each case.[190]

In the case of *Arnold*, all the judges concluded that the case before them presented special circumstances.[191] The circumstances were these. The earlier case which was the subject of the plea of issue estoppel was one involving construction of a clause in a lease. In subsequent cases, between different parties, there had been differences of judicial opinion as to the proper approach to the construction of such clauses, but eventually, the Court of Appeal had endorsed the approach which had been expressly rejected by Walton J, the judge who decided the first case between the parties to the present proceedings. According to Sir Nicholas Browne-Wilkinson V-C there was 'a very substantial chance' that if that earlier case has been decided in the light of the later decision of the Court of Appeal, the outcome would have been different.[192] In the opinion of the House of Lords, the decision of Walton J was 'plainly wrong'.[193]

The reasons why the Vice-Chancellor adjudged that justice required that the matter here in issue should not be regarded as having been foreclosed by the prior litigation were as follows. First, there was a continuing contractual relationship between the parties which, if issue estoppel applied, would be regulated by the decision in the earlier case; secondly, Walton J had decided in the capacity of an arbitrator and there was no right of appeal against his decision; thirdly, Walton J, in his discretion, had refused to certify the matter as fit for appeal and that ruling was unappealable; and fourthly, there were subsequent judicial decisions which made it, 'at the lowest, strongly arguable that the decision of Walton J, was wrong'.[194]

The Court of Appeal and the House of Lords agreed, substantially, with these reasons for rejecting the plea of issue estoppel.[195]

There was no suggestion in *Arnold* that the exception could not have applied at all had not the issue sought to be relitigated affected a continuing

[189] (1843) 3 Hare 100, 114–15; 67 ER 313, 319–20; see text accompanying fn 13 supra.
[190] [1989] Ch 63, 70–1.
[191] [1990] Ch 573 (Court of Appeal).
[192] [1989] Ch 63, 67.
[193] [1991] 2 AC 93, 111.
[194] [1989] Ch 63, 71.
[195] [1990] Ch 573; [1991] 2 AC 93.

relationship between the parties, and had not an unsuccessful attempt been made by the party, now seeking to relitigate the issue, to appeal against the decision in the prior case. The only essential conditions for application of the exception appear to have been that there should have been (a) a change in the relevant law subsequent to the prior decision of the issue between the parties, and (b) that the change was such as to make it highly likely that, if the new law had been applied in the prior case, the outcome would have been different. Certainly, there is a clear inference to be drawn from the Vice-Chancellor's remarks that the exception should not be applied in cases 'in which the decisive effect of the new authority on the law' is 'a matter of dispute'.[196]

What should, for the purposes of the exception, be recognised as a subsequent change in the law, was not discussed in detail in the judgments in *Arnold*. Obviously the courts did not have in mind subsequent changes in legislation, for in such cases there could be no identity of issues. Their concern was rather with changes in judicially-made law and, perhaps, changes in judicial interpretation of legislation. Presumably, relevant changes could come about by express overruling of the precedent or precedents relied upon in the case in which the issue was previously determined or by the judicial modifications of the rule or principle applied in the prior case. Whether the exception should be applied where the prior determination of the issue was plainly wrong, on the basis of existing authority, and the error has simply been exposed in a subsequent case, is doubtful. In such a case it can hardly be said that there had been any change in the law.

In considering whether a case should be brought within the 'subsequent change in the law' exception to issue estoppel, the courts in *Arnold* thought it relevant to inquire whether the party seeking to relitigate the issue previously determined had exercised any right to appeal against the prior decision or had sought leave to appeal. Presumably, they would also have regarded it as relevant to inquire whether that party had also sought any right to supervisory judicial review which might have been available. The clear inference is that if no steps had been taken by the party to seek review by a higher tribunal, that might weigh against the party seeking to relitigate. But there was no suggestion that failure to pursue rights to seek review should, of itself, debar relitigation of the issue.

There could, of course, be various good reasons why the party may have not chosen to seek review by a higher tribunal, for example, expense and an assessment that the result on review would probably be no different. In this connection it should be borne in mind that, generally, a change in the law after judgment does not, of itself, enhance a party's prospects of having judgment set aside on appeal. A subsequent change in the law is rarely regarded as a sufficient ground for extending the time for appeal,[197] or for granting leave to appeal, or for ordering a new trial.[198] Normally, it is not even regarded as a

[196] [1989] Ch 63, 70.
[197] *In re Berkeley* [1945] Ch 1; *Property and Reversionary Investment Corp Ltd* v *Templar* [1977] 1 WLR 1223; *R* v *Unger* [1977] 2 NSWLR 990.
[198] *Piening* v *Wanless* (1968) 117 CLR 498.

basis on which an appellant can introduce, as a ground of appeal, a point of law not considered at the initial hearing.[199]

One question which does not appear to have been resolved in the *Arnold* case is whether a subsequent change in judicial law can ever defeat a plea of cause of action estoppel. According to Sir Nicholas Browne-Wilkinson V-C, the rule as to cause of action estoppel is absolute. 'You cannot,' he said, 'sue twice for the same relief based on the same cause of action even if new facts or new law have subsequently come to light.'[200] Otherwise there would be no finality to litigation. In the judgments of Dillon and Staughton LJJ there are also observations which support the opinion of Sir Nicholas Browne-Wilkinson V-C. According to Dillon LJ, 'cause of action estoppel binds absolutely. There is no qualification such as "except in special circumstances". The only way round a decision on a point of law which is subsequently held by a higher court to have been erroneous, is to appeal, if necessary getting leave to appeal out of time'.[201] Staughton LJ seems to have accepted the proposition that 'in the absence of fraud or collusion there is no escape from the doctrine of *res judicata* in a case of cause of action estoppel', subject to a possible exception not relevant here.[202]

The House of Lords did not deal explicitly with possible exceptions to cause of action estoppel, though there are passages in the speech of Lord Keith of Kinkel which seem to suggest that the rule regarding cause of action estoppel is not subject to the exception which may be allowed in cases where issue estoppel is pleaded.[203] 'There is', Lord Keith remarked, 'room for the view that the underlying principles upon which estoppel is based, public policy and justice, have greater force in cause of action estoppel, the subject matter of the proceedings being identical, than they do in issue estoppel, where the subject matter is different.'[204] In his Lordship's view, 'different considerations apply to issue estoppel'.[205] Certainly the exception to the rules of estoppel which the Lords were prepared to allow was expressed only in terms of issue estoppel.

Not to allow that exception to operate in relation to cause of action estoppel is consistent with the attitude which courts have adopted when dealing with appeals.

Appellants are not, generally, permitted to reap the fruits of changes in law which have occurred subsequent to judgment.[206] The expectation of appellate courts seems to be rather that, if a litigant considers that the state of the law (judge-made) is unsatisfactory, the case of revision of it ought to be presented at first instance, even though the court of first instance may be bound to apply the precedents claimed to be unsatisfactory.[207]

[199] *Eggins* v *Brooms Head Bowling and Recreation Club Ltd* (1986) 5 NSWLR 521; *O'Sullivan* v *Watson* (1987) 7 NSWLR 693.
[200] [1989] Ch 63, 69.
[201] [1990] Ch 573, 588.
[202] Id 596; see also 597.
[203] [1991] 2 AC 93, 108, 109.
[204] Id 108.
[205] Ibid.
[206] See fns 197, 198, 199 supra.
[207] See fns 198 and 199 supra.

A further reason for not extending the subsequent change of the law exception to cause of action estoppel is suggested by observations made by the New South Wales Court of Criminal Appeal in *R* v *Unger*.[208] These observations concerned the theory behind the principle that the effect of a conviction in a criminal court, and a verdict and judgment in a civil court, 'is to merge in that conviction or judgment, as the case may be, all the material on which it proceeded.'[209] According to the Court:

> This concept of merger is no blind, arbitrary proposition. It is founded deeply in the fabric of the philosophy of the common law. Although in pure theory the overruling or modification by judicial decision of previous conceptions of legal principle does no more than correct a departure from the timeless perfection of the law, the plain fact is that legal principle is constantly evolving and being moulded in the light of the changing and developing social context. Recognizing this, there has always been an unwillingness to permit the re-opening of past decisions. Indeed, the process of appeal, either civil or criminal, is a comparatively recent and statutory concept — it finds no basis in the common law itself. This finality of decision in each individual case leaves the courts free to permit a judicious flexibility in the development of principle in later cases, free from inhibition lest such development may set at large disputes that have previously been resolved. The concept of merger of judgment ... equally with the doctrine of *res judicata*, serves this requirement of flexibility for potential development of the law.[210]

An argument for not accepting changes in the law subsequent to judgment as a basis for precluding the operation of cause of action estoppel is thus that, were the operation of the general estoppel rule to be affected by such changes, judges would probably be less disposed to effect desirable changes.[211]

Unger's case also suggests that no exception to estoppel per *res judicata* will be made where a conviction or judgment rests on legislation assumed to be valid, which legislation is subsequently found in other litigation, involving different parties, to be invalid. 'There is', the Court there observed,

> no difference in principle between a subsequent judicial decision which has the effect of exposing a prior misconception in relation to a principle of law which was wrongly regarded as well founded at the time of the trial, and a subsequent judicial decision exposing the invalidity of regulations that were wrongly treated as valid at the time of the trial. The trial having been concluded and the time for appeal having gone by, the general principle is that the matter is regarded as at an end.[212]

Where subsequent litigation shows that a judgment rests on a false assumption as to the validity of legislation or some other act, and that, in consequence, a person has been wrongly subjected to a liability, it may seem manifestly unjust to allow that judgment to stand. Courts have claimed an

[208] [1977] 2 NSWLR 990.
[209] Id 995.
[210] Id 995–6 per Street CJ.
[211] Query, however, whether this argument is valid where courts engage in prospective overruling or otherwise limit the retroactive effect of their decisions.
[212] [1977] 2 NSWLR 990, 995.

inherent jurisdiction to re-open and redecide cases which have passed into judgment in a limited number of circumstances, though the type of case here under consideration is not one of them.[213] This is not, however, to say that there are no means whereby the victim of the erroneous judgment can be relieved of its consequences.

If a person has been convicted of a criminal offence and it is clear that, had it not been falsely assumed that certain legislation was valid, that person would have been entitled to an acquittal, the prerogative of mercy, or similar statutory powers reposed in the executive branch, may be invoked.[214] If an injunction has been granted to restrain breach of legislation or an order subsequently found to be invalid, application can be made for the injunction to be suspended or dissolved.[215] If the judgment created a debt, and that debt has still to be discharged, the judgment debtor may apply for a stay of execution of the judgment.

The rules governing civil proceedings in some Australian Supreme Courts, it should be noted, expressly provided that a person who is bound by a judgment may move for a stay of judgment, or some other order, on the ground of matters occurring after the date on which the judgment or order took effect. There is no reason to suppose that a rule of this kind would not cover the kind of case here under consideration.[216]

ABUSE OF PROCESS

As *R* v *Balfour; Ex parte Parkes Rural Distributions Pty Ltd*[217] illustrates, even when there can be no estoppel per *res judicata* or issue estoppel, because the court adjudges that the conditions for operation of an estoppel are not satisfied, a person may still be prevented from relitigating questions that have already been decided by a competent court in other litigation to which that person was a party. In such a case, the court before which the question is sought to be relitigated may either stay or dismiss the proceedings in exercise of its inherent jurisdiction to prevent abuse of its processes.[218]

[213] *Cameron* v *Cole* (1944) 68 CLR 571, 590; *Bailey* v *Marinoff* (1971) 125 CLR 529; *Gamser* v *Nominal Defendant* (1977) 136 CLR 145.

[214] Query whether in these circumstances, a conviction by an inferior court could be quashed by *certiorari* or like statutory remedy. In *Ex parte Thomas; Re Arnold* [1966] 2 NSWR 197, the New South Wales Court of Appeal quashed a magistrate's decision to disqualify the applicant from obtaining a driver's licence for life notwithstanding that the decision had been made in 1939. It did so on the ground that the magistrate had no jurisdiction to impose the disqualification.

[215] See *Attorney-General (Ex rel Corporation of Tamworth and the Tamworth Rural District Council)* v *Birmingham, Tame, and Rea District Drainage Board* [1912] AC 788; *Regent Oil Co Ltd* v *J T Leavesley (Lichfield) Ltd* [1966] 2 All ER 454; *Permewan Wright Consolidated Pty Ltd* v *Attorney-General (Ex rel Franklin's Stores Pty Ltd)* (unreported, NSW Court of Appeal, 11 December 1978) (extract in *Ritchie's Supreme Court Practice* — Practice Decisions 13 031).

[216] Supreme Court Rules 1970 (NSW) Pt 42, r 12 and General Rules of Procedure in Civil Proceedings 1986 (Vic) r 66.14.

[217] (1987) 76 ALR 256.

[218] *Reichel* v *Magrath* (1889) 14 App Cas 665, 668; *Stephenson* v *Garnett* [1898] 1 QB 677, 680–1; *Hunter* v *Chief Constable of West Midlands Police* [1982] AC 529.

This jurisdiction may be invoked to prevent relitigation of matters decided on applications for judicial review. Indeed, according to the English Court of Appeal, exercise of the jurisdiction is the only way in which a court can preclude relitigation of issues decided in such applications.[219] On this view it would be open to a court, in the exercise of its inherent jurisdiction, to dismiss a civil action for damages, on the application of a defendant who pleaded statutory authority as a defence, on the ground that the plaintiff's claim could succeed only if the act alleged to give rise to liability was *ultra vires*, and that the validity of that act had previously been upheld in judicial review proceedings. Equally it might be regarded as an abuse of process to seek, on an application for judicial review, a determination as to the validity of some governmental act affecting liability to pay moneys if, in a prior civil action for recovery of moneys paid pursuant to the same governmental act, the validity of the act had been determined adversely to the plaintiff.

It is worth noting that in the United States, the kind of situation which arose in *R* v *Balfour; Ex parte Parkes Rural Distributions Pty Ltd*,[220] can often be dealt with, not by exercise of the court's inherent jurisdiction to control abuses of court process, but rather within the framework of the rules governing issue estoppel. Both the United States Supreme Court and many American State courts have repudiated the view that there can be no issue (or collateral) estoppel unless the parties/privies to the issue in the prior litigation are the same as the parties/privies to the later litigation, and are bound by the judgment in the prior litigation.[221] Subject to some qualifications, defensive use may be made of issue estoppel 'when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same *or a different party*'. Offensive use may be made of issue estoppel 'when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same *or a different party*'.[222] Abandonment of the requirement of mutuality has generally been justified on the basis that it is a means of conserving judicial resources, amongst them the time available to judges to dispose of case-loads in an equitable fashion.[223] But, as the United States Supreme Court acknowledged in *Parklane Hosiery Co Inc* v *Shore*,[224] offensive use of issue (or collateral) estoppel

> does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries". . . . Thus defensive collateral estoppel gives a plaintiff a strong incentive to join potential

[219] *R* v *Secretary of State for the Environment; Ex parte Hackney London Borough Council* [1984] 1 All ER 956.

[220] (1987) 76 ALR 256.

[221] See *Restatement of the Law of Judgments, Second* (1982) ss 28, 29. The turning point came in Traynor CJ's decision in *Benhard* v *Bank of America National Trust & Savings Assn* 122 P 2d 892 (1942). See also *Blonder-Tongue Laboratories Inc* v *University of Illinois Foundation* 402 US 313 (1971); *Parklane Hosiery Co* v *Shore* 439 US 322 (1979) and Annotation in 58 L Ed 2d 938.

[222] *United States* v *Mendoza* 464 US 154, 159 fn 5b (1984) (emphasis supplied).

[223] *Blonder-Tongue Laboratories Inc* v *University of Illinois Foundation* 402 US 313 (1971).

[224] 439 US 322 (1979).

> defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favourable judgment. . . . Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.[225]

This consideration alone, according to the United States Supreme Court, signified that the offensive use of issue (collateral) estoppel should be treated somewhat differently from defensive use. But there were other considerations favouring different treatment. There could be situations in which offensive use of issue estoppel could be unfair to a defendant, for example, (a) where the defendant in the first action has been sued for small or nominal damages and has had 'little incentive to defend vigourously'; (b) where the judgment relied on as a basis for offensive issue estoppel 'is inconsistent with one or more previous judgments in favor of the defendant'; and (c) 'where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result'.[226]

Because of these considerations, the Supreme Court concluded that the preferable approach in federal courts was not to preclude offensive use of issue estoppel absolutely, but to allow trial courts a discretion as to when it should be applied. 'The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.'[227]

Australian and English courts have, as yet, not demonstrated any readiness to reconsider the requirement of mutuality for the operation of issue estoppel. Since the principles of estoppel are almost entirely of judicial creation, and since the principles of issue estoppel in particular have already been recognised as susceptible to judicial renovation,[228] there would seem to be no real barrier to judicial abandonment of the strict requirement of mutuality and adoption of principles of non-mutual issue estoppel such as those adopted by the courts in the United States. Invocation of an inherent judicial jurisdiction to prevent abuses of court process may, in the end, lead to much the same outcomes as those produced by applications of the American rules about non-mutual issue estoppel and, with reference to much the same considerations as those which have inspired the American rules and which are taken into account by the courts in applying them. The American approach does, however, have the advantage of locating the problem as one pertaining to the whole range of problems sought to be resolved by estoppel principles and of accommodating that problem within those principles. To fall back on the inherent

[225] Id 329–30.
[226] Id 330–1.
[227] Id 331.
[228] *Carl Zeiss Stiftung* v *Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853, 917 per Lord Reid ('there is room for a good deal more thought before we settle the limits of issue estoppel'). See also *Arnold* v *National Westminster Bank PLC* [1991] 2 AC 93.

jurisdiction to control abuses of court processes in order to grapple with cases which raise issues which have already been litigated, and which cannot be disposed of by application of estoppel principles, merely because of a requirement of a precise equivalence of parties/privies, is to underestimate the continuing capacity of courts both to renovate judge-made law and to reformulate particular expressions of it, in the light of experience and changed conditions, by reference to the underlying policies of the prior formulations.

OVERVIEW

In considering the application and operation of the litigation-preclusive principles discussed in this article, courts have not, for the most part, drawn any distinction between public and private litigation. They have tended to assume that the principles, and the policies which underlie them, are equally applicable to both varieties of litigation. The reasons offered in the *Hackney* case[229] for not applying the principles of issue estoppel to issues determined on applications for judicial review are not, in my view, persuasive.

It must, however, be conceded that the application of these litigation-preclusive principles to public law litigation presents some special problems. One problem concerns the status of a judgment in relation to a question of public right or duty. What is to be classified as a judgment *in rem* and what is to be classified as a judgment *in personam*? The distinction between these two classes of judgments has been described as unfortunate,[230] but it is a distinction which is central to the operation of the estoppel doctrines. A matter determined by a judgment *in rem* is far less susceptible to relitigation than is a matter determined by a judgment *in personam*.

It seems to me that, in public law litigation, courts have not been sufficiently attentive to the distinction and its significance, and that, on occasions, they have assumed that a judgment which is the basis of an estoppel plea is a judgment *in personam*, without consideration of whether it fulfils the characteristics of a judgment *in rem*. A judgment in a cause in which the validity of a legislative instrument is directly in issue surely fulfils the description of a judgment on the legal status of a thing, and is thus a judgment *in rem*; likewise a judgment in a cause in which the central question is the validity of a licence granted in purported exercise of a statutory power, or the validity of the conditions of the licence, or the validity of a decision to revoke a licence. Judgments *in rem* include also judgments determinative of the legal status of persons. They must surely encompass judgments on the validity of elections or appointments to public offices, judgments in relation to the validity of decisions to remove or suspend persons from such offices, and judgments on the validity of decisions affecting a person's status under citizenship or migration legislation.

When a judgment in public law litigation is characterised as a judgment *in personam* it will, of course, be creative of estoppels only as between the parties

[229] See p 27 supra.
[230] See text accompanying fn 65 supra.

and their privies. Who are to be regarded as privies of the parties to such litigation is not altogether clear. This is hardly surprising since the law about privies has been developed primarily in the context of private law litigation. Under the liberalised rules about standing to sue to vindicate public rights and to enforce public duties, much public law litigation is instituted by persons and organisations acting, virtually, in the capacity of private Attorneys-General. The proceedings may not, formally, be representative proceedings, but in many cases the plaintiffs will be suing as representatives of members of the public affected by the official action under challenge. In such cases should not members of the public be regarded as privies of the plaintiffs?

Of course, the wider the range of judgments recognised as judgments *in rem*, and the wider the class of persons recognised as privies of parties to judgments *in personam*, the greater are the litigation-preclusive impacts of the estoppel doctrines. The doctrines rest on sound and defensible public policies, but they are not inflexible doctrines. They have been moulded to allow for exceptions and qualifications. There is, I believe, room for recognition of some special exceptions in relation to judgments in public law litigation. Some of the exceptions recommended in the American Law Institute's *Restatement of the Law of Judgments, Second* provide appropriate points of departure. In relation to estoppel per *res judicata* (claim preclusion), it has been recommended that relitigation should not be precluded where:

- The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme ... [or]
- It is clearly and convincingly shown that the policies favouring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.[231]

In relation to issue estoppel (issue preclusion), it is recommended that relitigation of the issue determined in the prior proceeding should not be precluded where:

- The issue is of law and ... a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise inequitable administration of the laws [or]
- There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties to the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive, to obtain a full and fair adjudication of the initial action.[232]

[231] Section 26.
[232] Section 28.