RES NOVA IN RES JUDICATA

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In *Bernhard v. Bank of America*,[1] Chief Justice Traynor dealt what has turned out to be a mortal blow to the doctrine of mutuality of estoppel by judgment. As those familiar with the subject recall, *Bernhard* permitted one who was not a participant in a prior litigation to invoke the determination of facts therein as conclusive against a person who was a party to that litigation. It repudiated the rule of mutuality, which permitted conclusive effect to be accorded such a determination only if the person invoking it in the second litigation was himself bound by the first proceeding. The immediate consequence of repudiating the mutuality rule was greatly to enlarge the number and variety of circumstances where an adjudication might be regarded as conclusive of the matters it undertook to decide. A further consequence has been the stimulation of more searching analysis of the conceptual components of which the traditional res judicata rule is constructed—"cause of action," "issue of fact," "adverse party," and particularly "on the merits." An even farther reaching consequence, one whose implications have not yet unfolded, is the questioning of basic assumptions about the legal character and social uses of adjudication. In exposing these questions, repudiation of the mutuality rule, when its effects are fully felt, could have an impact on American procedure comparable to the one which occurred when the forms of action were abolished. Neither legal doctrine nor legal consciousness have yet come this far, but the course of movement seems inexorable.

That we attribute repudiation of the mutuality rule to *Bernhard* illuminates why Roger Traynor is rightly considered a great judge. The decision in *Bernhard* was certainly not the first judicial opportunity to question the mutuality rule. In one sense, every case in which a party invoked the rule of collateral estoppel was an opportunity to do so. More specifically, every case in which enforcement of collateral estoppel required reliance on the auxiliary rule of "privity" was an occasion for fashioning a new principle to displace the old doctrine *cum* exceptions. Indeed, in the years immediately before the decision in *Bernhard*, at

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1. 19. Cal. 2d 807, 122 P.2d 892 (1942).

least two other state appellate courts received but declined invitations to repudiate the mutuality doctrine.

One of these was the Superior Court of Delaware in *Coca-Cola Co. v. Pepsi Cola Co.*[2] That case presented a situation essentially similar to *Bernhard*—a defendant relying on collateral estoppel against a plaintiff who had lost an earlier suit against another defendant based on the same essential facts. The Delaware court sustained the defense, making reference to very much the same body of judicial and scholarly authority to which Justice Traynor later referred in his opinion in *Bernhard*. Yet with these materials the Delaware court pronounced a rule of narrow conception and limited reach, which said little more than that a plaintiff may be estopped from protesting the application of collateral estoppel:

> But assuming the identity of the issues, we are of the opinion that a plaintiff who deliberately selects his forum and there unsuccessfully presents his proofs, is bound by such adverse judgment in a second suit involving all the identical issues already decided. The requirement of mutuality must yield to public policy. To hold otherwise would be to allow repeated litigation of identical questions, expressly adjudicated, and to allow a litigant having lost on a question of fact to re-open and re-try all the old issues each time he can obtain a new adversary not in privity with his former one.[3]

The opinion in *Coca-Cola* thus established that, in addition to the relationships traditionally regarded as constituting "privity" for purposes of collateral estoppel, there were some other circumstances in which the first adjudication could be conclusive between persons who were not opposing parties in the first litigation. However, there was no explanation for the result, nor invitation to consider whether there was some latent principle from which a new doctrine could be derived that would displace the mutuality-privity rule of collateral estoppel. There was not even a recognition that the reason assigned for the decision—"to hold otherwise would be to allow repeated litigation of identical questions [against] a new adversary"—would justify an "exception" to the mutuality rule fully coextensive with it but wholly opposite in result. The opinion, in short, gave no clue as to whether it was merely marking another doctrinal dead-end or was blazing a new path in the law.

In the interval between *Coca-Cola* and *Bernhard* the New York

2. 36 Del. 124, 172 A. 260 (1934).

3. *Id.* at 132-33, 172 A. at 263.

Court of Appeals in *Good Health Dairy Products Corp. v. Emery*[4] also had an opportunity to reconsider the mutuality rule. The fact situation in *Good Health* differed from *Bernhard* and *Coca-Cola.* To use the notation system suggested by Rosenberg, Weinstein and Smit,[5] in *Bernhard* and *Coca-Cola,* the situation had been:

A-1: A v. [B]
A-2: A v. (C),

i.e., in Action 1 the defendant won, and in Action 2 that determination is invoked by a defendant who was not a party to the first action. In contrast, the situation in *Good Health* was:

A-1: [A] v. B^1 and B^2
A-2: B^1 and B^2 v. (C),

i.e., in Action 1 the defendant lost, and in Action 2 that determination is invoked by one who was not a party to the first action and against whom the erstwhile defendant is now trying to impose liability.[6]

In dealing with the problem, the Court of Appeals could have said —as others have said since—that there is a decisive difference between invoking collateral estoppel against one who was previously a plaintiff (the situation in *Bernhard* and *Coca-Cola*) and doing so against one who was previously a defendant (the situation in *Good Health*). Alternatively, the court might have inquired whether the present plaintiff/erstwhile defendant could have counterclaimed in the first action, in which event the situation could be treated as more nearly comparable to that in *Coca-Cola.* The court pursued neither possibility. Instead, it tendered a rationale broad enough to undermine the mutuality rule, as the Delaware court had done—"one who has had his day in court should not be permitted to litigate the question anew"—but then seemed to rest its decision on the "derivative liability" exception to the mutuality rule:

> [W]here the liability of a principal or master is derivative, a judgment on the merits in favor of the servant or agent from whom the liability is derived may be set up as a defense by the principal or master, although he was not a party to the earlier action.[7]

4. 275 N.Y. 14, 9 N.E.2d 758 (1937).

5. *See* ROSENBERG, WEINSTEIN & SMIT, ELEMENTS OF CIVIL PROCEDURE 961 (2d Ed. 1970).

6. Action 1 was by the Driver of vehicle A against the Driver and Owner of vehicle B. Driver A won. Action 2 was by Driver and Owner B against the Owner of vehicle A in circumstances where the only basis for liability of Owner A would have been the negligence of Driver A.

7. 275 N.Y. at 18, 9 N.E.2d at 759. The Court of Appeals distinguished an earlier

Because they lack coherent analytic structure, the decisions in *Coca-Cola* and *Good Health* lead only to confusion. The principal reason they advance for qualifying the mutuality rule is one that justifies flatly repudiating it, because *all* cases which adhere to the mutuality rule result in "one who has had his day in court litigating the question anew." The additional point made in *Good Health* about derivative liability was not explained. Is it "more worse" (to employ a phrase of Fleming James) to impose inconsistent obligations on a single individual than to reach inconsistent results as between two individuals similarly situated? Why?

The failure to articulate the issues involved in *Coca-Cola* and *Good Health* seems in large part attributable to the style and method of opinion employed in the two cases. The opinions are in a form that was, and to a large extent still is, characteristic of the American judicial tradition. The line of legal thought and argument is at the same time deferential to precedent and strongly disposed to "fireside equity," yet unconscious of the contradictory prescriptions which may be inherent in this dual allegiance. A more illuminating analysis might have resulted from an effort to construct explicit and logical connections between the general rule and the impulse to reject it in favor of a more "equitable" result. The method is to discover by analysis the basis of dissatisfaction with the doctrine expressed in the precedents, to express the analysis in terms that are general rather than merely *ad hoc*, and to reformulate the product as a legal rule.[8]

This is the approach Chief Justice Traynor utilized in *Bernhard*. The case could have been decided by the same method used in *Coca-Cola* and *Good Health*. That is, the plaintiff could have been characterized as one who "deliberately selects his forum and there unsuccessfully presents his proofs,"[9] or one whose liability was derivative from that of a primary wrongdoer.[10] Justice Traynor made a more

New York decision, *Neenan v. Woodside Astoria Transp. Co.*, 261 N.Y. 159, 184 N.E. 744 (1933), by saying of it that "not only was there no privity between the [prior plaintiff and present plaintiff], but the liability of neither was derived from the other," thus retiring the conventional terms of analysis.

8. *Cf.* WASSERSTROM, THE JUDICIAL DECISION (1961).

9. See text at note 3, *supra*.

10. See text at note 7, *supra*. The defendant bank in *Bernhard* had derivative liability on the following analysis: Plaintiff's claim in the first action was that the executor of an estate had wrongfully transferred money from the estate to his own account. Plaintiff's claim in the second action was that the bank wrongfully permitted the executor to make the transfer complained of. Plaintiff could impose liability on the bank only by establishing the wrongfulness of the executor's conduct. Furthermore, if plaintiff had been

searching effort, however, to discern and to express a principle that avoids the internal contradictions of mutuality-and-its-exceptions, and that reflects the view that one good opportunity on the merits is a sufficient "day in court." Accordingly, the relevant questions were stated as follows:

> Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?[11]

There were those who thought that this formulation conferred unfair advantage on claimants who made identical assertions of liability against the same defendant, because they could rely on a victory by one of them by offensive use of collateral estoppel,

Action 1: [A] v. B
Action 2: (C) v. B,

but were not barred by defendant's defensive use of collateral estoppel when one of them lost:

Action 1: A v. [B]
Action 2: C v. [B] [12]

It also could have been said that the formulation ignored distinctions of law and differences in policy concealed by the assimilation of the ideas of estoppel (prior party asservation) and res judicata (prior judicial adjudication).[13] Yet these defects, if they can be called such, were not consequences of reaching too far, but of not reaching far enough:

(a) Is a question whose resolution involves $100 "identical" with one whose resolution involves $100,000?

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allowed to win against the bank, the bank presumably would have a right of indemnity against the executor, based on conduct for which the executor had already been exonerated.

11. 19 Cal. 2d at 813, 122 P.2d at 895.

12. *See* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957); Note, 35 GEO. WASH. L. REV. 1010 (1967); Anno. 31, A.L.R.3d 1044; (Nevarov) v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958); Spettigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1968). *But see* Currie, *Civil Procedure: The Tempest Brews*, 53 CALIF. L. REV. 25 (1965). A second plaintiff is not barred by the defeat of a prior plaintiff because he has not had his own day in court.

13. *See* Millar, *The Historical Relation of Estoppel By Record to Res Judicata*, 35 ILL. L. REV. 41 (1940). The thrust of Professor Miliar's analysis, particularly his hypothesis concerning the development of estoppel-res judicata doctrine in the 19th Century, seems to have been inadequately appreciated.

(b) Is a judgment rendered "on the merits" when it goes off on pleadings? Summary judgment? A one-day hearing?

(c) Are there ever any circumstances that would countervail the application of collateral estoppel, and, if so, what are they any why are they so compelling?

While the cases that went before left these questions closed, *Bernhard* revealed them in detailed clarity. They are the questions of judicial administration and legal policy to which the res judicata doctrine, its corollaries, auxiliaries and exceptions, are the conventional answer. Chief Justice Traynor's distinctive contribution to the collateral estoppel problem, like his contribution to so many other problems, was to reopen the questions rather than merely to reiterate the answers.

When the questions advanced in *Bernhard* concerning res judicata are fully opened for reconsideration, the following thoughts suggest themselves:

1. The doctrines of res judicata and collateral estoppel are not satisfactorily explicable as measures designed for conserving time of the courts or minimizing inconvenience for opposing parties. The burdens of time and inconvenience involved in a policy which liberally allows relitigation are miniscule when compared with those burdens now imposed by elaborate discovery and pre-trial procedures, prolonged trials, and multiple appeals. Furthermore, in areas where the problem of relitigation has become quantitatively serious, as it has for example in prisoner habeas corpus petitions, more fundamental solutions must be sought than simply tightening res judicata doctrine. In short, the issue of policy is more extensive than administrative considerations as such.

2. Res judicata doctrine has little direct relevance to maintaining "public confidence" in the courts. Whatever the number and significance of the elements that instill such confidence, a more or less inhibiting relitigation rule is surely minor compared to such problems as corruption, delay and inconsistency.

3. The situations in which res judicata or collateral estoppel might be applied are cases in which the professional operators of the judicial system, *i.e.*, judge and counsel, entertain doubt about whether the first adjudication was correct on the merits. As Professor Preble Stolz has said in conversation, "If our trial procedure produced truth at every trial, the need for doctrines against relitigation would be

relatively weak; all that we would be assuring against is the cost of relitigation—a value, but not a compelling one if everyone knew the results would always be the same." On the other hand, if we were sure that the prior result was wrong, we would apply one of the escape clauses in conventional res judicata doctrine or invent a clause that would accomplish the desired result.[14]

In this light there are two reasons for declining to reexamine an issue which has already been afforded an opportunity for formal determination.

First, so far as possible, the courts should avoid imposing conflicting legal obligations on a single individual. Hence, to the extent permitted by other legal and practical considerations, a person who has once litigated an issue may not relitigate it if a difference in its resolution would result in subjecting another individual to such a conflict. This appears to be the underlying rationale of the old privity cases and cases decided in terms of the "derivative liability" problem, for example, *Good Health*.[15] The same principle finds expression elsewhere in the "necessary parties" rule and the procedures for impleader, intervention, and interpleader.[16]

Second, to the extent possible, law-making bodies should not jeopardize the authority of decisions they have made upon due opportunity to be heard by readily reconsidering them. The law, particularly litigation, is, in Harry Kalven's phrase, a system for managing doubt and doubt requires strict management because its dissolving power is so strong. Where the system of procedure gives, as ours does, ample oppor-

14. *Cf.* Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948).

15. *See* note 6, *supra*. Such inconsistency of obligation would have been unlikely in fact to have eventuated because all the parties to the collision probably carried liability insurance. The development and definition of collateral estoppel principles has been greatly confused by the fact that many of the cases involve automobile accidents, for in these cases, the insurers have liabilities and interests that diverge from those of their insureds. *See* Justice Breitel's dissenting opinion, in B.R. De Witt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195, 278 N.Y.S.2d 596 (1967).

16. Necessary parties rule: Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968); Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 483 (1957); Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961). Impleader: F. JAMES, CIVIL PROCEDURE § 10.20; Kaplan, *Amendment of the Federal Rules of Civil Procedure, 1961-1963 (II)*, 77 HARV. L. REV. 801 (1964); *cf.* Degnan & Barton, *Vouching to Quality Warranty: Case Law and Commercial Code*, 51 CALIF. L. REV. 471 (1963). Intervention: Cascade Natural Gas Co. v. El Paso Natural Gas Co., 368 U.S. 129 (1967); D. LOUISELL & G. HAZARD, PLEADING AND PROCEDURE 731-735 (2d ed. 1968). Interpleader: State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523 (1967); Hazard and Moskovits, *An Historical and Critical Analysis of Interpleader*, 52 CALIF. L. REV. 706 (1964).

tunity for developing contentions and discovering evidence, as ours does, a correspondingly extensive rule against relitigation is not merely warranted, but is essential, for otherwise the procedural armory is turned on itself.

On this premise, a party who has had a full opportunity to present a contention in court ordinarily should be denied permission to assert it on some subsequent occasion. This is the underlying rationale for the "multiple adversary" cases in which the derivative liability factor is absent.[17] It likewise supports and explains the rule of merger and bar as between the *same* parties which precludes later assertion not only of contentions which were made, but also those which "might have been" made.[18] Such a formulation corresponds to the modern rules that respectively govern joinder of parties and joinder of claims, and, in effect, makes joinder compulsory so far as concerns subsequent reopening of the issues.[19]

This analysis of judgment preclusion has several virtues. It presents questions which can be answered in practical, empirical terms without resort to the question-begging and illusorily definite conceptual categories of "cause of action," "privity," and "on the merits."[20] It establishes symmetry and consistency between the policy on joinder and the policy on conclusion of litigation. It also recognizes that the problem of res judicata, like that of joinder, is one of multiple factor analysis and hence not reducible to categorical rules that have yes-no application. In this perspective, moreover, the principles governing the collateral enforcement of judgments can be integrated in form and substance with those governing collateral attacks on judgments and with those governing the grant or denial of a new trial.

If this analysis is correct, then the essential question running through all of the cases is whether there are clear and distinct reasons for not according finality to a prior opportunity to resolve the issue in

17. See the analysis in Zdanok v. Glidden, 327 F.2d 944 (2d Cir. 1964).

18. *See* Estate of Roberts, 27 Cal. 2d 70, 162 P.2d 461 (1945); D. LOUISELL & G. HAZARD, *supra* note 16, at 587-92, 131-33; Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties*, 68 COLUM. L. REV. 1457, 1458 (1968). Compare Crowley v. Modern Faucet Mfg. Co., 44 Cal. 2d 321, 282 P.2d 33 (1955), *with* Keidatz v. Albany, 39 Cal. 2d 826, 249 P.2d 264 (1952). *See also* Friedenthal, *Joinder of Claims, and Cross-Complaints: Suggested Revision of the California Provisions*, 23 STAN. L. REV. 1, 35-39 (1970).

19. *See* Bruszewski v. United States, 181 F.2d 419, 421 n.2 (3d Cir. 1950); D. LOUISELL & G. HAZARD, *supra* note 16, 581; Semmel, *supra* note 18, at 1471-1475.

20. *Cf.* Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHNS L. REV. 165, 195 (1969).

question. The prior judgment is prima facie a resolution of the controversy between the persons then parties, subject, of course, to such vitiating circumstances as fraud or gross mistake. It is also prima facie a resolution of all the issues actually decided, subject to avoidances based on the scope of the prior inquiry or the fact that interests not then before the court would be unjustly affected if the judgment were given conclusive effect.

Such an approach does not always result, of course, in refusal to reexamine a prior determination. A redetermination may be indicated where one or more of the following circumstances is present: the sum involved in the first case was small compared to that in the second;[21] the burden of proof is different;[22] the prior result appeared to be a compromise;[23] newly discovered evidence is available;[24] the party seeking to invoke preclusion could have participated in the first proceeding;[25] the first result is inconsistent with that reached as to others similarly situated;[26] where, in summary, there are reasons for allowing a second trial that go beyond securing parity in exposure to trial fortuities among litigants.[27] The most recent of *Bernhard's* progeny, *Schwartz v. Public Administrator*,[28] has majority and dissenting opinions which, when read together, say as much.

In the course of his opinion in *Bernhard*, Chief Justice Traynor observed that "no satisfactory rationalization has been advanced" for the mutuality rule.[29] Roger Traynor regarded any such rule, whatever its subject or pedigree, to be vestigial. That outlook is the origin of his contributions to the law.

21. *See* Nevarov v. Caldwell, 161 Cal. App. 2d 762, 327 P.2d 111 (1958); *compare* Septtigue v. Mahoney, 8 Ariz. App. 281, 445 P.2d 557 (1968).

22. Lustik v. Rankila, 269 Minn. 515, 131 N.W.2d 741 (1964); *cf.* Teitelbaum Furs, Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P. 2d 439 25 Cal. Rptr. 559 (1962).

23. Berner v. British Commonwealth Pacific Airlines, Ltd., 346 F.2d 532 (2d Civ. 1965).

24. *See* Nickerson v. Kutschera, 390 F.2d 812 (3d Civ. 1968).

25. Semmel, *supra* note 18, at 1475. Although the thrust of Professor Semmel's analysis seems entirely sound, his specific proposal for dealing with preclusion appears to exclude variables that seem relevant.

26. Commissioner v. Sunnen, 333 U.S. 591 (1948); Louis Stories, Inc. v. Dep't. of Alcoholic Bev. Control, 57 Cal. 2d 749, 371 P.2d 758, 22 Cal. Rptr. 14 (1962). This consideration is associated with determinations made by administrative tribunals, particularly tax cases, but there is no reason why it does not have significance in other contexts. *Cf.* Weinstein, *Revision of Procedure: Some Problems of Class Actions*, 9 BUFFALO L. REV. 433 (1960).

27. *See also, e.g.*, Greenfield v. Mather, 32 Cal. 2d 23, 194 P.2d 1 (1948); Adams v. Pearson, 411 Ill. 431, 104 N.E.2d 267 (1952); White v. Adler, 289 N.Y. 34, 43 N.E.2d 798 (1942).

28. 24 N.Y.2d 65, 246 N.E.2d 725, 298 N.Y.S.2d 955 (1969).

29. 19 Cal. 2d 807, 812, 122 P.2d 892, 895 (1942).