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*A CRITICAL ANALYSIS OF CAUSE OF ACTION AND ISSUE ESTOPPEL AS
SPECIES OF RES JUDICATA ESTOPPEL*

BY

BY KENNETH NCHIMA

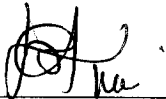
A dissertation submitted to the University of Zambia in partial fulfilment of the requirements for the degree Bachelor of Laws (LLB) of the University of Zambia.

AUGUST

2013

DECLARATION

I, **KENNETH NCHIMA**, computer number – **92017908** do hereby declare that I am the author of this Directed Research entitled: ***A CRITICAL ANALYSIS OF CAUSE OF ACTION AND ISSUE ESTOPPEL AS SPECIES OF RES JUDICATA ESTOPPEL***, and confirm that it my own work. I further declare that due acknowledgement has been given where work of other scholars has been used. I verily believe that this research has not been previously presented for a degree at the University of Zambia or any other University.

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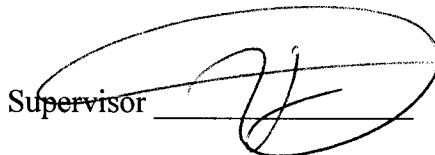
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ABSTRACT

This research highlighted and critically analysed the essential ingredients necessary for the defence of *res judicata* estoppel. It investigated the effects of the rule of *res judicata* estoppel on the parties and the Courts. The research also investigated and analysed the application of *res judicata* estoppel in criminal matters.

Considering the doctrine of *res judicata* as a species of the law of estoppel appear to have resulted in the extension of the application of the doctrine and thus obscured the essential ingredients and the rationale of the doctrine. Therefore, there was need for a critical analysis of the essential ingredients and rationale of the defence of *res judicata* as cause of action estoppel and issue estoppel. The research employed a qualitative research paradigm. Data collection was primarily based on desk review of the relevant materials such as legislations, judicial decisions, legal commentaries and various forms of publications.

Res judicata estoppel is a rule of substantive law as opposed to being procedural rule and it is a strict rule of law except in special circumstances. The rationale of the doctrine of *res judicata* estoppel is two fold, the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decision and the second being the right of the individual to be protected from vexatious multiplication of suits and prosecutions. It is recommended that issue estoppel be advocated for in Zambia to apply to criminal proceedings as is the case in the Canadian criminal system. It is also recommended that the Courts in Zambia on decisions of *res judicata* estoppel must adopt the approach whereby a distinction is made between issue estoppel or cause of action estoppel and the relevant ingredients upon which the decision is anchored are outlined.

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CHAPTER 1

General Introductions

1.0 Introduction

This research was intended to highlight and critically analyse the essential ingredients necessary for the defence of *res judicata* estoppel. For this purpose the research considered the rule of *res judicata* estoppel as being divided into cause of action estoppels and issue estoppels. It was also envisaged to investigate the effects of the rule of *res judicata* estoppel as cause of action estoppel or issue estoppel on the parties and the Courts; here it was desired to investigate whether any of the two species of *res judicata* estoppel created a strict rule of law whereby Courts had no discretion on its application and further whether there could be exceptional situations in which the rule of *res judicata* estoppel could be waived. The research also investigated and analysed the application of *res judicata* estoppel in criminal matters. The research was further aimed at critically examining the rationale of the defence of *res judicata* as cause of action estoppel or issue estoppel and the extent to which this had been appreciated in Zambia. To achieve these objectives the research highlighted the essential ingredients of *res judicata* both as a cause of action estoppel and issues estoppel and the distinction and intersections of the ingredients were highlighted so that a clear demarcation between the two forms of *res judicata* estoppel could be drawn.

1.1 Statement of the Problem

Considering the doctrine of *res judicata* as a species of the law of estoppel appear to have resulted in the extension of the application of the doctrine and thus obscures the essential ingredients and the rationale of the doctrine. Therefore, there is need for a critical analysis of the essential ingredients and rationale of the defence of *res judicata*

as cause of action estoppel and issue estoppel. Further the blurring distinction between the two species of the defence of *res judicata*, cause of action estoppel and issue estoppel, necessitates the critical analysis of the essential elements of, and distinction between, *res judicata* as cause of action estoppel and issue estoppel. The distinction between the two species of *res judicata* is of potential importance because it is said that the former creates an absolute bar whereas the latter does not¹.

1.2 Significance of the Research

The significance of the research is in the fact that it highlighted the essential ingredients of the defence of *res judicata*, both as cause of action estoppel and issue estoppel. This will afford a party pleading the defence of *res judicata* to pre-examine the plea as to whether it squarely falls under the doctrine and under which of the two species. This would in turn afford the party an opportunity to have focused arguments for their defence and anticipate the remedy. Further by virtue of the adversarial system, employed in the Zambian Courts, focused arguments would in turn assist the Courts have consistence in the application of the doctrine of *res judicata*. On the other hand the study would assist the party intending to re-litigate the matter to fully appreciate the rationale of the defence of *res judicata* thereby granting them an opportunity to evaluate their intention to re-litigate. It is expected that parties who fully appreciate the rationale and understand the essential ingredients of the defence of *res judicata* would not frivolously or vexatiously re-litigate matters, especially in light of the provisions of section 16 of the High Court Act.² This will in turn contribute to the economic and efficient operations of the Courts as there will be fewer of such re-litigation against the doctrine of *res judicata*.

¹ R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales, [2011] UKSC 1

² Cap. 27 of the Laws of Zambia.

1.3 Methodology

The research employed a qualitative research paradigm. Data collection was primarily based on desk review of the relevant materials such as legislations, judicial decisions, legal commentaries and various forms of publications and unpublished articles on the doctrine of *res judicata* and related doctrines. The research findings will be presented in four chapters. Chapter Two will provide the analysis of the essential ingredients of *res judicata* estoppel. In this chapter the distinction and intersections of the ingredients of cause of action estoppel and issue estoppel will be highlighted. Chapter Three is going to present the investigation and analysis of the application of *res judicata* estoppel in criminal matters. Chapter Four will focus on the analysis of whether the Courts have been consistent in the application of the essential ingredients in deciding pleas of *res judicata* estoppel. The chapter will also provide an analysis of the realisation of the rationale of *res judicata*. Further the chapter will outline the effects on the parties and the Courts of a judicial declaration that the litigation is *res judicata*. The chapter will end with an examination of how the two species of *res judicata* have been applied in Zambia. Chapter Five being the last chapter will sum up the conclusions of the other chapters and provide general recommendations.

CHAPTER 2

Essential Ingredients of the Defence of Res Judicata Estoppel

2.0 Introduction

This chapter will provide an analysis of the essential ingredients of *res judicata* estoppel, both as cause of action estoppel and issue estoppel. In this chapter the distinction and intersections of the elements of cause of action estoppel and issue estoppel will be highlighted thereby forming a clear demarcation between these two forms of *res judicata estoppel*. The chapter will also consider the questions whether the doctrine of *res judicata* estoppel as cause of action estoppel or issue estoppel is a rule of substantive law or a procedural rule and whether *res judicata* estoppel is a strict rule of law such that courts have no discretion. The chapter will further investigate whether there are exceptional circumstances in which both species of the doctrine may not apply and the rationale of the doctrine of *res judicata* estoppel. This chapter will then be concluded by summing up the findings of the various aspects as highlighted above.

2.1 What is *Res Judicata*.

Res judicata is a decision pronounced by a judicial tribunal having jurisdiction over the cause and parties which disposes once and for all of the matters decided, so that except on appeal they cannot afterwards be relitigated between the same parties or their privies.³ It has also been defined to be an affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been, but was not, raised in the first suit.⁴ It is also said refer to the principle that when a matter has

³ Kenneth R. Handley. Spencer Bower, Turner and Handley: The Doctrine of Res Judicata, 3rd ed. (London: Butterworths, 1996), 1

⁴ Brayon A. Garner. Black's Law Dictionary. 9th ed. (Texas: Thomson Reuters, 2009), 1425

been finally adjudicated upon by a court of competent jurisdiction it may not be reopened or challenged by the original parties or their successors in interest.⁵

It has thus been stated that where a final judicial decision has been pronounced on the merits by a judicial tribunal with jurisdiction over the parties and the subject matter, any party to such litigation, as against any other party is estopped in subsequent litigation from disputing such decisions on the merits, whether it be used as the foundation of an action, or as a bar to any claim, indictment, affirmative defence or allegation, provided the party entitled raises the point at the proper time.⁶ In case of a decision *in rem* any person whatsoever, as against any other person, is estopped in subsequent litigation from disputing such decisions on the merits.⁷

2.2 Essential Ingredients of the Defence of *Res Judicata Estoppel*

In this context *res judicata* estoppel includes both cause of action estoppel and issue estoppel. For both cause of action estoppel and issue estoppel a party setting up *res judicata* by way of estoppel as a bar to his opponent's claim, or as the foundation of his own, must establish the constituent elements,⁸ namely: (i) the decision was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was-(a) final and (b) on the merits; (v) it determined the same question as that raised in the latter litigation; and (vi) the parties to the latter litigation were either parties to the earlier litigation or their privies, or the earlier decision was *in rem*. For *res judicata* to apply, all the above

⁵ Elizabeth A. Martin and Jonathan Law, ed., Oxford Dictionary of Law 6th ed. (Oxford: Oxford University Press, 2006), 463

⁶ Handley, *The Doctrine of Res Judicata*, 4

⁷ *Ibid.*

⁸ *Ibid.*, 10

essential requisites must exist.⁹ It is imperative at this point to critically analyse these essential ingredients of *res judicata* estoppel.

2.2.1 *Judicial Tribunal*

It is important to first understand the type of tribunal envisaged as judicial tribunal for the purpose of the doctrine of *res judicata* estoppel. In determining the characteristics of a judicial tribunal one must discard the antiquate view that only a court of record can be a judicial tribunal for the purposes of this doctrine. It is immaterial whether the tribunal is a court of record, or not, or whether it is a superior court, or not, even whether it is or is known as a court. Nor does it matter whether the tribunal, has civil or criminal jurisdiction. It is enough if the tribunal exercised judicial functions under the law, whether invested with permanent jurisdiction or only with temporary authority to adjudicate on a particular dispute, or group of disputes.¹⁰ For instance, in the Zambian context judicial tribunal includes the Supreme Court, the High court, Industrial Relations Court, Subordinate Courts, Local Courts and statutory and executive tribunals. It must be emphasised that the decision of the lowest judicial tribunal, if conclusive at all, is conclusive in the very highest, but if a party fails in an inferior court for want of jurisdiction, he is not liable to a plea of estoppel in subsequent proceedings.¹¹

2.2.2 *Judicial decision*

In order to establish a *res judicata* on which an estoppel may be founded, it must appear that what was pronounced was a judicial decision.¹² These include judgements, orders, decrees, sentences and judicial declarations.¹³ Whether the decision was of an issue of fact, law or both fact and law, whether the jurisdiction was original or

⁹ *Midland Bank Trust Co Ltd v. Green*, [1980] Ch 590 at 607

¹⁰ Handley, *The Doctrine of Res Judicata*, 12

¹¹ *Ibid.*, 16

¹² *Ibid.*, 17

¹³ *Ibid.*

appellate, and a decision resulting from an equal division on the tribunal such a decision still establishes *res judicata* estoppel. It has been held that a judgement by consent is intended to put a stop to litigation between the parties, just as much as is a judgement which results from the decision of the court after the matter has been fought out to the end and that it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgements and were to allow questions that were really involved in the action to be fought over again in a subsequent action.¹⁴ But while a judgement or order obtained by default, like one obtained by consent, will unless and until set aside, conclude between the parties the matters expressly decided by its operative and declaratory parts, it may speak nothing but the fact that a defendant, for unascertained reasons, negligence, ignorance, or indifference, has suffered the judgment to go against him.¹⁵

2.2.3 Jurisdiction

Jurisdiction is an essential condition of every valid *res judicata*, which means that, in order that a judicial decision may bind the parties, or in the case of a decision *in rem*, the world, the judicial tribunal pronouncing the decision must have had jurisdiction over the cause and the parties.¹⁶ The prior decision judicial, arbitral or administrative must have been made within jurisdiction before it can give rise to *res judicata* estoppel.¹⁷ Therefore, competent jurisdiction connotes jurisdiction over the cause and the parties.

2.2.4 Finality

For a judicial decision to operate as a *res judicata* it must be final. The burden of establishing finality rests upon the party who relies upon the decision.¹⁸ A judicial decision may be final for one purpose but not the other. Decisions on finality for

¹⁴ Dinch v. Dinch, [1987] 1 WLR 252 at 263

¹⁵ New Brunswick [1939] ACat 1010

¹⁶ Handley, The Doctrine of Res Judicata, 49

¹⁷ Danyluk [2001] 2 SCR 406, 482 per Binnie J.

¹⁸ Handley, The Doctrine of Res Judicata, 69

purposes of appeal are often relevant in the present context but not always. Some decisions which are final for appeal are not final for *res judicata*, and some decisions which are interlocutory for the purpose of appeal are final for *res judicata*. A judgment by default, like one by consent, is final although it is open to the defendant or plaintiff to apply to have it set aside. Until that occurs, it remains a final judgment. But dismissals for want of prosecution are not final, and do not constitute *res judicatae*. A plaintiff whose action has been dismissed for want of prosecution can sue again on the same cause of action, subject to any limitation defence.

2.2.5 Decision on Merits

A decision on the merits is a decision which establishes certain facts as proved or not in dispute, states what are the relevant principles of law applicable to such facts, and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned.¹⁹ Accordingly a decision which determines an issue otherwise than on purely procedural grounds is a decision on the merits although it may not determine all the issues in controversy.²⁰ Thus dismissals for want of prosecution being based on procedural defaults are not decisions on the merits, and do not constitute *res judicatae*.²¹ Similarly the dismissal of a suit for want of necessary parties was not a decision on the merits which would support a plea of *res judicata* estoppel.²² Dismissals for want of jurisdiction are also not decisions on the merits, except on the issue of jurisdiction, but will be *res judicata* on that issue only.²³

2.2.6 Subject Matter of the Judicial Decision

There can be no *res judicata* estoppel unless a substantial discrepancy exists between the *res judicata* and the case set up in the subsequent proceedings; and no such

¹⁹ Per Lord Brandon, *The Sennar*(No.2) [1985] 1 WLR 490, HL at 499

²⁰ *Ibid.*

²¹ *Pople v. Evans* [1969] 2Ch 255

²² *Sheosayer Singh v. Sitaram Singh* (1897) LR24 Ind APP50

²³ *The Sennar*(No.2) [1985] 1 WLR 490, HL at 499

discrepancy can exist unless they relate to the same subject matter.²⁴ The party setting up the estoppel must establish identity of subject matter. It must be shown that the opponent is seeking to re-agitate some question of law, or issue of fact, which has been the subject of a final decision between the same parties by the tribunal of competent jurisdiction.²⁵ In considering the subject matter the judicial decision may create either cause of action estoppel or issue estoppel.

2.3 Essential ingredients of the defence of *res judicata* as cause of action estoppel

It is cardinal at this point to first define what amounts to cause of action. It has been held that cause of action simply means a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.²⁶ It has also been said to refer to every fact which it will be necessary for a party to prove, if traversed, to support his right to the judgment of the court.²⁷ Therefore, a cause of action is disclosed only when a factual situation is alleged which contains facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other.²⁸

Cause of action estoppel prevents a party from asserting or denying as against the other party, the existence of a particular cause of action, the existence or non-existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, that is to say, judgment was given upon it, it is said to be merged in the judgment; if it was not to exist, the unsuccessful plaintiff can no longer assert that it

²⁴ Handley, *The Doctrine of Res Judicata*, 86

²⁵ *Ibid.*

²⁶ *Letung v Cooper* [1965] 1 Q.B. 232., per Lord Diplock

²⁷ Order 15/1/2A R.S.C. 1979 Edition

²⁸ *William David Carlisle Wise v. E.F. Hervey Limited* (1985) Z.R.179 (S.C.)

does; he is estopped *per rem judicatam*.²⁹ Thus cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. Thus in addition to the essential ingredients discussed above as generally applying to *res judicata* estoppel, for cause of action estoppel, another essential element is that the judicial decision must be based on the existence or non-existence of the cause of action.

2.4 Essential ingredients of the defence of *res judicata* as an issue estoppel

There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more causes of action.³⁰ If in litigation upon one such cause of action any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation, assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was.³¹

Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the court, and appearing from the judgment itself

²⁹ *Thoday v. Thoday* [1964] P 181, CA. per Diplock L.J.

³⁰ *Ibid.*

³¹ [1964] P 181, CA at 198, per Diplock L.J.

to be the ground on which it was based.³² Thus in addition to the essential ingredients applying generally to the doctrine of *res judicata* estoppel, there are three conditions laid down for issue estoppel, that is that the facts or questions of law must be (i) directly in issue in the case; (ii) actually decided by the tribunal and; (iii) appearing from the judgment itself to be the ground on which it was based.³³ These conditions are now analysed below.

2.4.1 *Directly in Issue in the Case*

The fact or question of law is directly in issue in the case where the decision set up as *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without determining that question or issue in a particular way.³⁴ Such determination, even though not declared on the face of the decision, constitutes an integral part of it; but, beyond these limits, there can be no such thing as *res judicata* by implication.³⁵ Thus the judgment relied upon as *res judicata* concludes not merely as to the point actually decided but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue and is conclusive evidence not merely of the facts directly decided, but those facts which are necessary steps to the decision, in the sense that they are so cardinal to it that, without them it cannot stand.³⁶

2.4.2 *Actually Decided by the Tribunal*

Though many issues may arise in a particular case, it is only on those issues that the tribunal had actually decided that issue estoppel may be founded. It has been held that

³² Jaeger Co. Ltd v Jaeger (1929) 46 RPC 336 at 349

³³ Handley, *The Doctrine of Res Judicata*, 90

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ R v Hartington, *Middle Quarter Inhabitants* (1855) 4E & B 780 at 794-7, see also Blair v Curran (1939) 62 CLR 464 at 510

the judgment concludes, not merely as to the point actually decided, but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue.³⁷

2.4.3 *Appearing from the Judgment itself to be the Ground on which it was Based*

This does not mean that the facts, or questions of law, in issue must appear to be the ground on which the judgment was based, from the mere formal judgment as drawn, but this must be so, considering the judgment as delivered.³⁸ To decide what questions of law and facts were determined in the earlier judgment the court is entitled to look at the judge's reasons for his decision and his notes of the evidence, and is not restricted to the record, but, as a general rule, the judge's reasons cannot be looked at for the purpose of excluding from the scope of his formal order any matter which, according to the issues raised on the pleading and the terms of the order itself, is included in it.³⁹

2.5 **Is *res judicata* estoppel a rule of substantive law or a procedural rule?**

The rule of estoppel by *res judicata* was formerly said to be a rule of evidence but has recently been considered to be a rule of public policy.⁴⁰ It has been said to be part of the adjectival law.⁴¹ However, since the rule of estoppel by representation is more correctly viewed as a substantive rule of law,⁴² this must also be true of *res judicata* estoppel.⁴³ It has been said with reference to issue estoppel that, whatever may be said of other rules of law to which the label of estoppel is attached issue estoppel is not a rule of evidence, it is a particular application of the general rule of public policy that

³⁷ Ibid.

³⁸ *Jaeger Co. Ltd v Jaeger* (1929) 46 RPC 336 at 349

³⁹ Halsbury's Laws of England Volume 16 4th Ed

⁴⁰ *Mills v Cooper* [1967] 2 QB 459 at 469 per Diplock LJ

⁴¹ *Vervaeke v. Smith* [1983] 1 AC 145 at 162

⁴² *Canada and Dominion Sugar Co Ltd v Canadian (West Indies) Steamships Ltd* [1947] AC 46 at 56 per Lord Wright

⁴³ Handley, *The Doctrine of Res Judicata*,

by either of them again in the same or subsequent proceedings except in special circumstances.⁵² Thus issue estoppel also creates an absolute bar to re-litigation, save in special circumstances.⁵³ The determination of the circumstances invariably is at the discretion of the judicial tribunal. Thus, the proposition that *res judicata* is a strict rule of law and that the parties are bound by any decision made by a competent court and that courts have no discretion⁵⁴ is a very wide and misleading proposition only correct with respect to cause of action estoppel and not issue estoppel. The distinction between the two species is of potential importance because the former creates an absolute bar whereas the latter does not.⁵⁵

2.7 Exceptional Circumstances to *Res Judicata* Estoppel

The principles governing *res judicata* estoppel reflect the attempts of courts to achieve finality in litigation on principled and predictable grounds while allowing some flexibility in special cases.⁵⁶ For instance decisions on income tax, rating and other annual taxes are an established exception to the general rules of *res judicata*.⁵⁷ Other special cases include some matrimonial proceedings. It has been held that when question in later proceedings is whether a ground for finding irretrievable breakdown of marriage exists, no affirmative finding in earlier proceedings can bind the court which must investigate the facts.⁵⁸ Therefore, cases do exist to which the general rules of *res judicata* estoppel do not apply.

2.8 The Rationale of the Defence of *Res Judicata* Estoppel

There are two policy reasons on which the doctrine of *res judicata* estoppel has been anchored. The first being the interest of the community in the termination of disputes,

⁵² *Fidelituas Shipping v. VV/O Exportchles* [1995] 2 ALL ER 4

⁵³ [1999] 4 All ER 217

⁵⁴ (1981) Z.R. 221

⁵⁵ [2011] UKSC 1

⁵⁶ Handley, *The Doctrine of Res Judicata*, 4th ed., 5

⁵⁷ *Ibid.*, 189

⁵⁸ *Harriman v. Harriman* [1909] P123, CA, at 142, 144; see also *Hudson v. Hudson* [1948] P 292.

and in the finality and conclusiveness of judicial decision and the second being the right of the individual to be protected from vexatious multiplication of suits and prosecutions.⁵⁹ The former is public policy and is succinctly expressed in the maxim, *interest reipublicae ut sit finis litium*; the latter is private justice, and is reflected in the maxims, *nemo debet bis vexari pro una et eadem causa*, and , in connection with criminal litigation, *nemo debet bis vexari pro uno eadem delicto*.⁶⁰ It is one of the most fundamental doctrines of all courts that there must be an end to all litigations.⁶¹ Otherwise 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 that had right by suits and actions; and in the end compel him to relinquish his right.⁶² Thus the rules exist not only to protect society and its citizens from the obsessions and frivolities of serial suers, but also to ensure that, even for those who litigate disputes in good faith, all cases must come to an end.

2.9 Conclusion

In this chapter it has been established that *res judicata* estoppel generally arises where a final judicial decision has been pronounced on the merits by a judicial tribunal with jurisdiction over the parties and the subject matter, any party to such litigation, as against any other party is estopped in subsequent litigation from disputing such decisions on the merits, whether it be used as the foundation of an action, or as a bar to any claim, indictment, affirmative defence or allegation. *Res judicata* estoppel is divided into cause of action estoppel and issue estoppel.

⁵⁹ Handley, *The Doctrine of Res Judicata*, 5

⁶⁰ *Ibid.*

⁶¹ *Re May* (1885) 28 Ch D 516 at 518, CA per Brett MR.

⁶² *Ferrer v Arden* (1599) 6 Co Rep &a

For both cause of action estoppel and issue estoppel a party setting up *res judicata* by way of estoppel must establish that (i) the prior decision was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was-(a) final and (b) on the merits; (v) it determined the same question as that raised in the latter litigation; and (vi) the parties to the latter litigation were either parties to the earlier litigation or their privies, or the earlier decision was in *rem*. All these essential requisites must be satisfied.⁶³ In cause of action estoppel, in addition to the essential ingredients discussed above, the judicial decision must be based on the existence or non-existence of the cause of action. Whereas in issue estoppel additionally the facts or question of law must be (i) directly in issue in the case; (ii) actually decided by the tribunal and; (iii) appearing from the judgment itself to be the ground on which it was based.

Res judicata estoppel is a rule of substantive law as opposed to being procedural rule and it is a strict rule of law except in special circumstances under issue estoppel. Cause of action estoppel creates an absolute bar to re-litigation with no exception for special circumstances. But though issue estoppel also creates an absolute bar to re-litigation, there are circumstances⁶⁴ in which the judicial tribunal has the discretion to its application. The rationale of the doctrine of *res judicata* estoppel is two fold, the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decision and the second being the right of the individual to be protected from vexatious multiplication of suits and prosecutions.

⁶³ *Midland Bank Trust Co Ltd v. Green*, [1980] Ch 590 at 607

⁶⁴ [1999] 4 All ER 217

CHAPTER 3

Res Judicata Estoppel in Criminal Matters

3.0 Introduction

Having established the essential ingredients of *res judicata* estoppel, this chapter presents the investigation and analysis of the application of *res judicata* estoppel, either as cause of action estoppel or issue estoppel, in criminal matters. The chapter reviews the English law regarding issue estoppel in criminal proceedings. The chapter also highlights the objects that issue estoppel would serve in criminal proceedings and provides a determination of whether issue estoppel is necessary and desirable in criminal proceedings. The chapter also investigates whether cause of action estoppel is applicable in criminal proceedings and concludes with a conclusion on the necessity and desirability of the application of *res judicata* estoppel in criminal proceedings.

3.1 Issue Estoppel in Criminal Matters

The application of issue estoppel in criminal matters has generated considerable uncertainty. For instance the earlier position of English law as well as Australia and New Zealand was that issue estoppel applied both in civil and criminal proceedings.⁶⁵ Later this position changed and now issue estoppel is said not to have any place in criminal proceedings in these countries.⁶⁶ However, this is not the universal position of the law as in Canada issue estoppel still has application in criminal proceedings though with some modification.⁶⁷

⁶⁵ R v. Hogan, [1974] 2 ALL ER 142

⁶⁶ Director of Public Prosecutions v. Humphrys, [1976] 2 ALL ER 497

⁶⁷ R v. Mahalingan, [2008] 3S.C.R. 316, 2008 SCC 63

3.1.1 Review of English Law - Issue Estoppel in Criminal Proceedings

In the English law the starting point in answering the question of whether issue estoppel should apply in criminal cases could be *R v. Hogan*⁶⁸ in which the court considered the questions firstly whether or not the doctrine of issue estoppel applied as between the prosecution and the defendant; secondly, if the doctrine did so apply, did it operate only in favour of the defendant, or had it, as when applied in civil proceedings, a mutual operation?; thirdly, how were the matters to which issue estoppel related to be identified when a case arose in which the application of the doctrine was to be considered?⁶⁹ In answering these questions the court started by stating the doctrine in brevity as issue estoppel could be said to exist when there was a judicial establishment of a proposition of law or fact between parties to earlier litigation and when the same question arose in later litigation between the same parties, in the latter litigation the established proposition was treated as conclusive between those same parties; further that it could also be described as a situation when, between the same parties to current litigation, there had been an issue or issues distinctly raised and found in earlier litigation between the same parties.⁷⁰

The court then noted that at that point there was no direct English authority concluding the question whether issue estoppel applied or did not apply in criminal proceedings but that there were in English cases dicta pointing in both directions.⁷¹

The court then referred to *Sealfon v. United States*⁷² a case in which it was held that the doctrine of *res judicata* was applicable to criminal as well as civil proceedings, and operated to conclude those matters in issue which had been determined by a

⁶⁸ [1974] 2 ALL ER 142

⁶⁹ Ibid. at 144

⁷⁰ Ibid.

⁷¹ Ibid.; the court proceeded to state that it would rely on highly persuasive Australian and American authority which supported the application of issue estoppel to criminal proceedings when, but only when, a defendant relied on its application against a further prosecution.

⁷² (1948) 332US

previous verdict, even though the offences were different.⁷³ Then the court turned to *Sambasivam v. Public Prosecutor, Federation of Malaya*⁷⁴ in which it was held that the effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial was not completely stated by saying that the person acquitted could not be tried again for the same offence, to that it was to be added that the verdict was binding and conclusive in all subsequent proceedings between the parties to the adjudication and that the maxim “*Res judicata pro veritate accipitur*” was no less applicable to criminal than to civil proceedings.⁷⁵ The court also referred to *Connelly v Director of Public Prosecutions*⁷⁶ in which the question whether issues estoppel could be made available to the prosecution in criminal law and whether it was necessary in the interests of justice to give the defence this unreciprocated advantage was considered. The other issue was that the defence rightly enjoyed the privilege of not having to prove anything; it had only to raise a reasonable doubt, was it also to have the right to say that a fact which it had raised a reasonable doubt about was to be treated as conclusively established in its favour?

After considering the above authorities the court concluded first, that issue estoppel did apply between the Crown and the defendant in criminal proceedings.⁷⁷ Secondly, that it applied with mutuality.⁷⁸ The court found it difficult to conceive of any principle of estoppel between the parties which only operated unilaterally and that was, of course, the distinction between issue estoppel and the double jeopardy principles.⁷⁹ Thirdly, that when one could determine the relevant issues with precision and certainty by referring to the earlier record and by what had transpired in

⁷³ Ibid. at 575

⁷⁴ [1950] AC at 479

⁷⁵ Ibid. , see also *Mraz v. The Queen* (1956) 96 CLR at 63; *R v. Wilkes* (1948) 77CLR at 511; *Brown v Robinson* (1960) 60 SRNSW at 297 and *Mills v Cooper* [1967] 2 All ER at 104

⁷⁶ [1964] AC at 1262

⁷⁷ [1974] 2 ALL ER 142

⁷⁸ Ibid.

⁷⁹ Ibid.

the course of the earlier proceedings in relation to those issues, issue estoppel could clearly operate.⁸⁰ It concluded that Issue estoppel was part of the law of England and applied as part of the law of England to criminal proceedings, subject to its necessary limitations and provided its difficulties can be overcome.⁸¹

3.1.2 The Demise of Issue Estoppel in Criminal Proceedings in English Law

The law that issue estoppel applied to criminal proceeding was short-lived as it shortly came under attack in *Director of Public Prosecutions v. Humphrys*⁸² in which it was held that the doctrine of issue estoppel had no application to criminal proceedings and consequently *R v Hogan*⁸³ was overruled. The following questions arose for decision, firstly whether the doctrine of issue estoppel applied in the criminal law; secondly whether *autrefois acquit* applied in this case? Thirdly whether if issue estoppel or *autrefois acquit* applied, that prevented evidence being given on the perjury charge? The court was of the view that issue estoppel, if it applied in criminal cases, must be distinguished from the pleas of *autrefois convict* and *autrefois acquit*. The court then referred to the holding in *Fidelitas Shipping Co Ltd v V/O Exportchleb*⁸⁴ that once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. It was then stated that the pleas of *autrefois acquit* and *autrefois convict* do not depend on an issue being determined in an earlier trial but on the result of that trial. The court then referred to *Connelly v Director of Public Prosecutions*⁸⁵ with the view that it was said that the pleas of *autrefois acquit* and *autrefois convict* were grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² [1976] 2 ALL ER 497

⁸³ [1974] 2 All ER 142

⁸⁴ [1966] 1 QB 630 at 640

⁸⁵ [1964] AC 1254 at 1306

more than once for the same offence, and that apart from circumstances under which there may be a plea of *autrefois acquit* a man may be able to show that a matter has been decided by a court competent to decide it, so that the principle of *res judicata* applied.

The court then made reference to a number of cases apparently in support of the proposition that issue estoppel applied to criminal cases such as *Sealfon v United States*⁸⁶ which the court considered to have opined that the doctrine of *res judicata* applied to criminal as well as civil proceedings.⁸⁷ Further the court made reference to *Sambasivam v Public Prosecutor, Federation of Malaya*⁸⁸ where it was stated that the verdict was binding and conclusive in all subsequent proceedings between the parties to the adjudication, the maxim "*Res judicata pro veritate accipitur*" was no less applicable to criminal than to civil proceedings.⁸⁹ However, the court was of the view that this passage did not deal with or refer to issue estoppel or did the court elsewhere in its judgment. But that it was the verdict which was binding and conclusive in all subsequent proceedings and consequently that case could not be regarded as any authority as to issue estoppel. Then the court returned to *Connelly v Director of Public Prosecutions*⁹⁰ and expressed serious doubts about the value of the doctrine to the criminal law.⁹¹ The court then launched an assault on *R v Hogan* as being a valuable illustration of some of the consequences of the application of the doctrine to criminal proceedings. Stating the application of issue estoppel meant the jury at a latter trial, although sworn to give a true verdict according to the evidence, were required to accept the conclusions of another jury on evidence which that jury had heard.

⁸⁶ (1947) 332 US 575, 68 S Ct 237

⁸⁷ The court also referred to *Mraz v. The Queen* (1956) 96 CLR at 63; *R v. Wilkes* (1948) 77CLR at 511; *Brown v Robinson* (1960) 60 SRNSW at 297 and *Mills v Cooper* [1967] 2 All ER at 104

⁸⁸ [1950] AC 458

⁸⁹ Ibid.

⁹⁰ [1964] 2 All ER 401, [1964] AC 1254

⁹¹ [1964] 2 All ER at 437, [1964] AC at 1345 per Lord Devlin

The court saw no escape from the conclusion that if issue estoppel applied in criminal cases, it must apply equally to both parties, to the Crown and the defendant, as it did to the parties to civil litigation. If it applied, then for the doctrine to operate it must be possible to identify a finding on the particular issue. Also the long-established rule that a conviction or acquittal does not prevent the admission of evidence given at a trial for the purpose of proving a man's guilt of an offence which is not the same or substantially the same as that for which he had been tried will require to be qualified. Such evidence will not be admissible if it is directed to an issue determined at the earlier trial. The court then recounted that though there were dicta to the contrary, in no English case, to which it were referred, had a conviction been quashed on the ground that evidence was admitted which was inadmissible on account of issue estoppel. The court opined that issue estoppel had not and never had a place in English criminal law and it was very undesirable that it should have. It concluded with the view that the ruling given by Lawson J in *R v Hogan* was wrong.

3.1.3 Autopsy of *R v. Hogan*⁹²

It is necessary to analyse the points on which the application of issue estoppel in criminal cases as laid down in *Hogan* failed to find favour in *Humphreys*. In *R v. Hogan*⁹³ the court concluded that issue estoppel did apply between the Crown and the defendant in criminal proceedings.⁹⁴ Secondly, that it applied with mutuality.⁹⁵ Thirdly, that when one could determine the relevant issues with precision and certainty by referring to the earlier record and by what had transpired in the course of the earlier proceedings in relation to those issues, issue estoppel could clearly

⁹² [1974] 2 ALL ER 142

⁹³ *Ibid.*

⁹⁴ [1974] 2 ALL ER 142

⁹⁵ *Ibid.*

operate.⁹⁶ It was then concluded that issue estoppel was part of the law of England and applied as part of the law of England to criminal proceedings, subject to its necessary limitations and provided its difficulties can be overcome.⁹⁷ Principally there appear to be nothing wrong with the decision that issue estoppel applied in criminal cases. However, there were practical concerns in its application. Some of the concerns the court had to deal with in that case are firstly how to discern what issues were conclusively determined from the pronouncement of guilty or not guilty. Secondly whether issue estoppel should apply to issues resolved on the basis of reasonable doubt. Thirdly it was the issue of mutuality. These concerns are now discussed below.

3.1.3.1 Determination of Issues Conclusively Determined from Jury Verdicts

It is submitted that in resolving the first issue of how to discern what issues were conclusively determined from the pronouncement of guilty or not guilty, the court correctly outlined that when one could determine the relevant issues with precision and certainty by referring to the earlier record and by what has transpired in the course of the earlier proceedings in relation to those issues, issue estoppel should clearly operate. The onus of establishing this is on the accused who seeks to bar proof of the issue alleged to have already been resolved. To establish this, the accused must show that the question was or must necessarily have been resolved on the merits in the accused's favour in the earlier proceeding. It must be a necessary inference from the trial judge's findings or from the fact of the acquittal that the issue was in fact resolved in the accused's favour. Where criminal trials are held before judges alone, like is the case in Zambia, judges are required to give reasoned verdicts. Invariably this involves making findings on specific critical issues. Issue estoppel then requires

⁹⁶ Ibid.

⁹⁷ Ibid.

that those findings must be accepted and cannot be relitigated in a subsequent trial, unless set aside on appeal.

However, where the first proceeding was before a jury, as is usually the case in the English legal system, which renders a verdict of acquittal, it may be more difficult to determine whether a particular issue was resolved in favour of the accused. The question then is whether the fact or question of law was directly in issue in the case such that the verdict necessarily involved a judicial determination of the question of law or issue of fact, in the sense that the verdict could not have been legitimately or rationally pronounced by the jury without determining that question or issue in a particular way. Such determination, even though not declared on the face of the decision, constitutes an integral part of it; but, beyond these limits, there can be no such thing as issue estoppel by implication.⁹⁸ For instance, in a case of murder the verdict of guilty would necessarily imply the determination that the accused had malice aforethought and that other essential ingredients of the offence were satisfied. But the not guilty verdict would not necessarily determine which essential ingredient was not proved or that all the ingredients were not satisfied. Thus the judgment relied upon as issue estoppel concludes not merely as to the point actually decided but as to a matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue and was conclusive evidence not merely of the facts directly decided, but those facts which were necessary steps to the decision, in the sense that they were so cardinal to it that, without them it could not stand.⁹⁹

⁹⁸ Ibid.

⁹⁹ R v Hartington, Middle Quarter Inhabitants (1855) 4E & B 780 at 794-7, see also Blair v Curran (1939) 62 CLR 464 at 510

Admitted in jury trials, it may be difficult to rely on issue estoppel, because in some cases it will be harder for the accused at the subsequent trial to establish what issues were decided in their favour at the first trial. But that does not mean that issue estoppel should be removed from the criminal law on that basis. In certain instances civil cases are conducted by jury trials, and it may similarly be difficult to determine whether the jury resolved a particular issue in favour of the party asserting issue estoppel. Yet this practical difficulty has not rendered issue estoppel to be removed from the civil law.

3.1.3.2 Whether Issue Estoppel should Apply to Issues Resolved on the Basis of Reasonable Doubt.

To resolve this concern the question is really whether an issue having been resolved on the basis of reasonable doubt there has been a conclusive determination on that issue. The state is charged with that standard of proof of which short of that the matter is resolved in favour of the accused. That in itself is a conclusive determination of that issue. It should not make any difference whether the state has failed to prove the issue because the court had some reasonable doubt or because the court definitely found against the issue the state is tasked to prove. It is a fundamental requirement of the criminal law that the state should prove its case beyond a reasonable doubt. To suggest that issues determined on the reasonable doubt basis should be excluded from issue estoppel would undermine the core object of issue estoppel of finality in litigation. In fact, issue estoppel, even on issues determined on the reasonable doubt basis, would encourage the state to diligently and thoroughly marshal its evidence knowing very well that it will not have another chance once the issue is determined.

3.1.3.3 *Mutuality of Issue Estoppel in Criminal Proceedings*

Mutuality in the context of issue estoppel is considered in two senses. Firstly, that the parties to the two proceedings are the same. This does not create a challenge in establishing that parties in two criminal matters are the same because invariably the state is always the other party. Thus the accused need not labour to show that the state was a party in earlier proceedings in a claim of issue estoppel on issues that were resolved in his favour in the earlier trial. The second sense in which mutuality is considered in this context is reciprocity of the application of issue estoppel. The question here is whether issue estoppel could be made available to both the defence and the prosecution. In *Hogan* it was held that issue estoppel applied with mutuality, the court found it difficult to conceive of any principle of estoppel between the parties which only operated unilaterally. In principle that might appear correct, but it would create or introduce some conflicts with established criminal law principles such as the presumption of innocence and the requirement for the state to prove its case beyond a reasonable doubt.

Allowing the prosecution to rely on issue estoppel, say on matters on which the accused was earlier found guilty, would be in conflict with the well established criminal law principle of presumption of innocence. If issue estoppel were to be applied against the accused in that sense it would imply that the accused would stand guilty until proven innocent. Consequently the prosecution would not have to prove such matters to which issue estoppel would have applied thereby circumventing the burden on the prosecution to prove issues beyond reasonable doubt in the latter proceedings. Thus allowing issue estoppel to apply with mutuality in the sense of reciprocity of its effect would produce some absurd results with respect to the

principles of presumption of innocence and the burden of the prosecution to prove matters beyond a reasonable doubt.

The question then is whether these conflicts warrant the restriction of the application of issue estoppel only to civil litigations as is suggested in *Humphreys*. The other question is whether it would be necessary to modify the application of issue estoppel so that that aspect of reciprocity is severed thereby giving the defence the unreciprocated advantage of relying on issue estoppel in criminal proceedings. At this stage it is imperative to consider the object of issue estoppel. Issue estoppel serves three purposes, all integral to a fair criminal justice system: first, fairness to the accused who should not be called upon to answer questions already determined in his or her favour; second, the integrity and coherence of the criminal law; and third, the institutional values of judicial finality and economy.¹⁰⁰

The first goal of fairness to the accused requires that an accused should not be called upon to answer allegations of law or fact already resolved in his or her favour by a judicial determination on the merits. If a judge or jury conclusively decides a fact in favour of the accused, including via a finding of a reasonable doubt on an issue, then the accused should not be required in a subsequent proceeding to answer the same allegation.¹⁰¹ The second goal that would be served by issue estoppel is the integrity and coherence of the criminal process. While inconsistent verdicts are guarded against by the *res judicata* doctrines of *autrefois convict* and *autrefois acquit*, the criminal law abhors not only inconsistent verdicts, but inconsistent findings on specific issues.¹⁰² Inconsistent findings raise concerns about the fairness of the ultimate verdict and the integrity and coherence of the justice system as a whole.

Autrefois acquit and the rules restricting similar fact evidence cannot guard against

¹⁰⁰ R v. Mahalingan, [2008] 3S.C.R. 316, 2008 SCC 63, para 38

¹⁰¹ Ibid.

¹⁰² Ibid.

inconsistent findings with the same certainty, rigour and scope as does issue estoppel. The third goal of preservation of the related institutional values of judicial finality and economy are essential to preserving confidence in the justice system.¹⁰³ Criminal proceedings should not go on longer than necessary such that once factual issues are determined one way or the other; they should be deemed finally determined, subject to appeal,¹⁰⁴ re-litigation should not be permitted. This rule is consistent with the state's duty to be diligent in garnering evidence and pursuing its case as the state will be encouraged in its duty by the knowledge that it will not be permitted a second chance.

The question that arises is whether there are other criminal law doctrines or principles by which fairness to the accused, who should not be called upon to answer questions already determined in his or her favour; the integrity and coherence of the criminal law; and the institutional values of judicial finality and economy in criminal proceedings could be achieved. In *Humphreys*, the court was of the view that issue estoppel was unnecessary in the English criminal law, for the methods for safeguarding an accused against double jeopardy were in general adequate for his protection and that the rule against double jeopardy has some of its offspring the pleas of '*autrefois acquit*' and '*autrefois convict*', or to use another language and a lot more words, '*Nemo bis vexari pro eadem causa*' and '*Nemo bis puniri pro uno delicto*'.¹⁰⁵

It must be mentioned here, with the greatest respect, that the court in *Humphreys* proceeded on a misleading statement that issue estoppel in criminal proceedings took the form of double jeopardy of which *autrefois acquit* and *autrefois convict* are offspring. Double jeopardy as in the plea of *autrefois acquit* and *autrefois convict*

¹⁰³ Ibid.

¹⁰⁴ Ibid. para. 46

¹⁰⁵ [1976] 2 ALL ER 497 at 533 per Lord Edmund.

applies only to the final verdict, not to specific, underlying elements of the state's case. Issue estoppel and double jeopardy are two different doctrines. As regards the question whether there are other criminal doctrines or principles that would achieve the objects of issue estoppel, it appears the answer would be in the negative. Other rules of criminal law do not completely meet the fairness concern of not requiring the accused to answer factual and legal issues, short of the ultimate verdict, that have been resolved in his or her favour in a previous proceeding. Double jeopardy for instance applies only to final verdicts.

Other rules such as the rules of evidence restricting character evidence and evidence of similar facts are also unlikely to fully achieve the fairness goal that underlies the doctrine of issue estoppel.¹⁰⁶ Inconsistent findings raise concerns about the fairness of the ultimate verdict and the integrity and coherence of the justice system as a whole. *Autrefois acquit* and the rules restricting similar fact evidence cannot guard against inconsistent findings with the same certainty, rigour and scope as does issue estoppel.¹⁰⁷ Therefore, there appear to be no other doctrines or principles that may fully serve or achieve the objects that issue estoppel may in criminal proceedings. An accused should not be required to defend himself against the same allegations twice. Inconsistent findings on matters of fact are abhorrent to the criminal law; and finality and economy are important institutional values in the administration of justice.¹⁰⁸ Adequate protection of these goals requires, at a minimum, a rule that issues determined in one criminal trial cannot be relitigated in a subsequent criminal trial¹⁰⁹ and issue estoppel would do just that.

¹⁰⁶ [2008] 3S.C.R. 316, 2008 SCC 63, para 43

¹⁰⁷ *Ibid.*

¹⁰⁸ [2008] 3S.C.R. 316, 2008 SCC 63, para 47

¹⁰⁹ *Ibid.*

Coming to the questions whether the conflicts introduced by mutuality of issue estoppel in criminal proceedings warrant the restriction of the application of issue estoppel only to civil litigations and whether it would be necessary to modify the application of issue estoppel so that the aspect of mutuality, in the sense of reciprocity, is severed thereby giving the defence the unreciprocated advantage of relying on issue estoppel in criminal proceedings; the issue would be balancing between the objects that issue estoppel would serve in criminal proceedings and the difficulties or inconveniences that severing mutuality from issue estoppel would cause. Having established that there are no other doctrines or principles that would achieve the objects that issue estoppel would serve in criminal proceeding, it is inevitable to submit that it would be necessary to sever mutuality from the application of issue estoppel in criminal proceedings. Issue estoppel would serve important goals in the criminal process and would be a useful and, indeed, necessary part of the criminal law system

It is submitted further that the decision in *Humphreys* that issue estoppel should not have a place in criminal proceedings does not seem to take into account the value of the objects issue estoppel would serve in criminal proceedings. Admitted, the application of reciprocity of issue estoppel in criminal proceedings would create undesirable results especially the conflicts with the principles of the presumption of innocence and the burden on the prosecution to prove its case beyond reasonable doubt. But the objects that issue estoppel would achieve out weigh these conflicts.

3.2 Cause of Action Estoppel in Criminal Matters

The application of cause of action estoppel in criminal proceedings has not seen much of its explicit application as cause of action estoppel. Most cases that would have

turned on cause of action estoppel are more often than not resolved by invoking the special pleas of the doctrine of double jeopardy, *autrefois convict* and *autrefois acquit*. This is so because these special pleas are generally concerned with final verdict of the court. Although the two pleas are often associated there is an important distinction between the principles on which they rest.¹¹⁰ *Autrefois acquit* is a form of estoppel; which precludes the state from reasserting guilt once that question has been determined against it.¹¹¹ *Autrefois convict* is based on the maxim *transit in rem judicatum*, it precludes the state from reasserting guilt after a conviction in which its rights had merged.¹¹² Though it is not intended here to discuss these pleas, the question is whether these pleas would offer sufficient protection to the accused so as to be fully substituted for cause of action estoppel in criminal proceedings.

It has been recognised that these special pleas of *autrefois convict* and *autrefois acquit* may not be sufficient and thus it has been held that though an accused ought not be tried for a second offence which is manifestly inconsistent on the facts with either a previous conviction or a previous acquittal, it is clear that the formal pleas which a defendant can claim as of right will not cover all such cases, but instead of attempting to enlarge the pleas beyond their proper scope, it is better that the courts should apply to such cases an avowed judicial discretion based on the broader principles which underlie the pleas.¹¹³ It is the exercise of this discretion that appear to have covered the lacunas in the application of the special pleas in criminal proceedings and thereby condemning and restricting cause of action estoppel to civil proceedings only.

¹¹⁰ Handley, *The Doctrine of Res Judicata*, at 199

¹¹¹ *ibid*

¹¹² *Ibid*

¹¹³ *Connolly v Director of Public Prosecutions* [1964] AC 1254 per Lord Pearce at 1364:

3.3 Conclusion

The chapter has established that the application of issue estoppels in criminal proceeding has generated some considerable uncertainties. In English law the earlier position was that issue estoppel did apply in criminal proceedings.¹¹⁴ This position lasted only for short time. This was because of the practical concerns in the application of issue estoppel which led the courts later to hold that issue estoppel had no place in English criminal law and that the earlier view wrong.¹¹⁵ The decision that issue estoppel has no place in criminal proceeding was followed even in Australia and New Zealand.¹¹⁶ However, the Canadian system still retained the view that issue estoppel applied in criminal proceedings.¹¹⁷

Issue estoppel would serve three purposes, all integral to a fair criminal justice system: first, fairness to the accused who should not be called upon to answer questions already determined in his or her favour; second, the integrity and coherence of the criminal law; and third, the institutional values of judicial finality and economy.¹¹⁸ The objects that issue estoppel would achieve outweigh these conflicts that the concept of reciprocity in the application of issue estoppel would create, and warrant the severing this aspect of mutuality, in criminal proceedings. Issue estoppel is necessary and desirable in criminal proceedings.

The application of cause of action estoppel in criminal proceedings appears to be non-existent. There seem to be consensus among the legal practitioners that the special pleas of double jeopardy, *autrefois acquit* and *autrefois convict*, are sufficient for the protection of the accused.

¹¹⁴ [1974] 2 ALL ER 142

¹¹⁵ Director of Public Prosecutions v. Humphreys, [1976] 2 ALL ER 497

¹¹⁶ See Rogers v. R, (1994) 42 HCA and R v. Davis [1982] 1 NZLR 58A CA

¹¹⁷ R v. Mahalingan, [2008] 3S.C.R. 316, 2008 SCC 63

¹¹⁸ Ibid. para 38

Chapter Four

Application of the Doctrine of Res Judicata Estoppel

4.0 Introduction

Having established the essential ingredients and objects of the defence of *res judicata* estoppels in Chapters two and three, this chapter will focus on the analysis of whether the Courts have been consistent in the application of the essential ingredients in deciding pleas of *res judicata* estoppels. The chapter will also provide an analysis of the realisation of the rationale of *res judicata* estoppel. Further the chapter will outline the effects on the parties and the Courts of a declaration that the litigation is *res judicata*. The chapter will end with an examination of how the two species of *res judicata* estoppel have been applied in Zambia.

4.1 Consistence in the Application of the law of *Res Judicata* Estoppel

In order to ascertain whether courts have applied the essential ingredients of *res judicata* estoppel with consistency, a number of cases will be examined. The analysis will be divided in two, civil litigation cases and criminal proceedings cases. Further these cases will be divided into issue estoppel cases and cause of action estoppel cases.

4.1.1 Consistence in application of *Res Judicata* Estoppel in Civil Litigation

In chapter two it was established that for both cause of action estoppel and issue estoppel a party setting up *res judicata* by way of estoppel as a bar to his opponent's claim, or as the foundation of his own, must establish that (i) the decision was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was- (a) final and (b) on the merits; (v) it determined the same question as that raised in the latter litigation; and

(vi) the parties to the latter litigation were either parties to the earlier litigation or their privies, or the earlier decision was in *rem*. All these essential requisites must be satisfied.¹¹⁹

4.1.1.1 Consistence in Issue Estoppel in Civil Litigation

In addition to the essential ingredients applying generally to the doctrine of *res judicata* estoppel, there are three conditions laid down for issue estoppel, that is that the facts or question of law must be (i) directly in issue in the case; (ii) actually decided by the tribunal and; (iii) appearing from the judgment itself to be the ground on which it was based..¹²⁰ Insofar as these essential ingredients are concerned there appear to be consistence in the application of issues estoppel in a number of cases.¹²¹

However, there seem to be some inconsistency when the so called extended doctrine of *res judicata* estoppels is considered. This is especially with reference to the proposition that the plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which the parties, exercising reasonable diligence, might have brought forward at the time.¹²² This proposition is inconsistent with the requirement of issue estoppel that the facts or question of law must be (i) directly in issue in the case; (ii) actually decided by the tribunal and; (iii) appearing from the judgment itself to be the ground on which it was based.¹²³ The questions to be answered are whether an issue which might have been brought forward to court, but was not, could be said to be directly in issue and whether where a tribunal actually

¹¹⁹ *Midland Bank Trust Co Ltd v. Green*, [1980] Ch 590 at 607

¹²⁰ Handley, *The Doctrine of Res Judicata*, 90

¹²¹ See *Thoday v. Thoday*, [1964] P 181, CA at 198, per Diplock LJ; *R v Hartington, Middle Quarter Inhabitants* (1855) 4E & B 780 at 794-7; see also *Blair v Curran* (1939) 62 CLR 464 at 510 and *Jaeger Co. Ltd v Jaeger* (1929) 46 RPC 336 at 349

¹²² (1843) 3 Hare 100, 115

¹²³ Handley, *The Doctrine of Res Judicata*, 90

decided on such an issue, judgment could be said to be grounded on such an issue. This inconsistency is as a result of attempts to extend the doctrine of issue estoppel to include the principle of abuse of process, by suggesting that it becomes an abuse of process to raise matters which could and therefore should have been litigated in earlier proceedings.¹²⁴ Thus it is submitted that the so called extended doctrine of *res judicata* is not *res judicata* estoppel as such but a facet of the principle of abuse of process, which is an ally of the double jeopardy principle.

4.1.1.2 Consistence in Cause of Action Estoppel in Civil Litigation

It was established that in case of cause of action estoppel, in addition to the essential ingredients there is a requirement that the judicial decision must be based on the existence or non-existence of the cause of action. That is to say the decision must decide on the existence or non-existence of a factual situation alleged to contain facts upon which a party can attach liability to the other or upon which he can establish a right or entitlement to a judgment in his favour against the other.¹²⁵ The existence of cause of action in civil litigation in most cases does not create any challenge and there is consistence to a larger extent in the application of cause of action estoppel in civil litigation.

4.1.2 Consistence in application of *Res Judicata* Estoppel in Criminal law

4.1.2.1 Consistence in Issue Estoppel in Criminal Proceedings

After the decision in *Humphreys*,¹²⁶ there has been consistent rejection of issue estoppel among countries whose judicial system borrows heavily from the English legal system. Countries such as Australia and New Zealand have abandoned their

¹²⁴ (1843) 3 Hare 100, 115

¹²⁵ William David Carlisle *Wise v. E.F. Hervey Limited* (1985) Z.R.179 (S.C.)

¹²⁶ [1976] 2 ALL ER 497

earlier proposition that issue estoppel applied in criminal proceedings.¹²⁷ Zambia, appear to have adopted the position in the English law that issue estoppel does not apply to criminal proceedings.¹²⁸ It is argued that issue estoppel in criminal proceedings took the form of double jeopardy of which *autrefois acquit* and *autrefois convict* are offspring and these principles are adequate in protecting the accused.¹²⁹ Thus there is consistence amongst such countries in holding the view that issue estoppel does not apply in criminal proceedings.

However, there is the case of Canada and some American states which have taken the view that issue estoppel serves important goals in the criminal process; goals that are not fully achieved by other doctrines and rules of evidence.¹³⁰ They hold that an accused should not be required to defend himself against the same allegations twice; that inconsistent findings on matters of fact are abhorrent to the criminal law; and that finality and economy are important institutional values in the administration of justice.¹³¹ Further that adequate protection of these goals requires, at a minimum, a rule that issues determined in one criminal trial cannot be relitigated in a subsequent criminal trial.¹³² Therefore there is a clear divergence between these two legal systems. To borrow Lawton J's words it is deplorable that there were divergences between countries under the common law system on this point.¹³³

4.1.2.2 Consistence in Cause of Action Estoppel in Criminal Proceedings

It has been established that the application of cause of action estoppel in criminal proceedings appears to be non-existent. There seem to be consensus among the legal

¹²⁷ See *Rogers v. R*, (1994) HCA 42 and *R v. Davis* [1982] 1 NZLR 58A, CA

¹²⁸ No authority was found on this point but most legal practitioners held this view citing *Humphreys*.

¹²⁹ [1976] 2 ALL ER 497

¹³⁰ *Grdic v. The Queen*, [1985] 1 S.C.R. 810

¹³¹ *R v. Mahalingan*, [2008] 3 S.C.R. 316, 2008 SCC 63, para 47

¹³² *Ibid.*

¹³³ [1964] AC at 1267

practitioners that the special pleas of double jeopardy, *autrefois acquit* and *autrefois convict*, are sufficient for the protection of the accused. It has been held that the methods for safeguarding an accused against double jeopardy were in general adequate for his protection and that the rule against double jeopardy has some of its offspring the pleas of '*autrefois acquit*' and '*autrefois convict*', or to use another language and a lot more words, '*Nemo bis vexari pro eadem causa*' and '*Nemo bis puniri pro uno delicto*'.¹³⁴ Thus it is difficult to discern and conclude whether there is consistence in the application of cause of action estoppel in criminal proceedings.

4.2 Effect of the Court's declaration of *Res Judicata* Estoppel.

The general rule is that, if a court of competent jurisdiction has reached a final and conclusive decision on the merits of a case, it is against public policy to allow it to be reopened, save on an appeal, even if that decision appears to be wrong in the light of the law as then understood or as subsequently evolved and clarified by judicial decision. The injustice and inconvenience which would flow from allowing re-litigation usually outweigh the injustice of leaving even an erroneous decision undisturbed.¹³⁵ Thus the plea of *res judicata* estoppel is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation. The decision of the lowest civil tribunal, if conclusive at all, is conclusive in the very highest.¹³⁶ The decision disposes, once and for all, of the matters decided, so that except on appeal they cannot afterwards be relitigated between the same parties or their privies.¹³⁷

¹³⁴ [1976] 2 ALL ER 497 at 533 per Lord Edmund.

¹³⁵ *Staffordshire County Council v. Barber* [1996] 2 All ER 748

¹³⁶ This is in contrast with the principle of *stare decisis* where the decision of the lower court does not bind the higher court.

¹³⁷ Handley, *The Doctrine of Res Judicata*, at 1

4.3 Application of *Res Judicata* Estoppels in Zambia

The doctrine of *res judicata* estoppel has been applied in mainly civil matters in Zambia. Below is an examination of some of the cases in which the doctrine as been applied. In *Musakanya Valentine Shula and Edward Jack Shamwana v. Attorney General*,¹³⁸ which was an application for habeas corpus the same matter was brought before the High Court by way of notice of motion judgment was delivered dismissing the petitioner's applications.¹³⁹ The petitioners then sought fresh application. A preliminary issue was raised on behalf of the State to the effect that the fresh petitions were barred on the doctrine of *res judicata*. The petitioners submitted that the doctrine of *res judicata* was not an absolute rule of law, the courts had discretion and there were exceptions to this general rule. The second submission was that latter court was not sitting like an ordinary court; it was sitting as a constitutional court and therefore a special one and had never been evoked before. In addition it was submitted that although the parties were the same and issues were similar, the petitioners were not suing in the similar capacities. It was also the petitioners argument that *res judicata* applied only to facts and not to law and that the present proceedings were on law.

It was held, inter alia, there is a strict rule of law that one cannot bring another action against the same party for the same cause,¹⁴⁰ and that *res judicata* was a strict rule of law and that the courts had no discretion on these issues. It is submitted that this proposition is correct but only insofar as cause of action estoppel is concerned. It has been established that *res judicata* in its cause of action estoppel form, is an absolute bar to re-litigation,¹⁴¹ with no exception for special circumstances,¹⁴² and that although issue estoppel also creates an absolute bar to re-litigation there are

¹³⁸ (1981) Z.R. 221

¹³⁹ Ibid.

¹⁴⁰ Thoday v. Thoday [1964] P 181, CA. per Diplock LJ

¹⁴¹ Bradford & Bingley Building Society v. Seddon [1999] 4 All ER 217

¹⁴² Ibid

exceptions in special circumstances.¹⁴³ But the determination of the special circumstances invariably is at the discretion of the judicial tribunal. Therefore, the generalisation that *res judicata*, is a strict rule of law and that the courts had no discretion on these issues, is a very wide and misleading proposition only correct with respect to cause of action estoppel and not issue estoppel. This misleading proposition is likely to arise where a judicial tribunal proceeds, as was the case here, to apply the doctrine of *res judicata* estoppel without distinguishing between cause of action estoppel and issue estoppel. The distinction between the two species is of potential importance because the former creates an absolute bar whereas the latter does not.¹⁴⁴

On the question of the court being different from the court that decided the previous proceedings it was held that there was no special court created and that the powers which latter court could exercise over the matter had already been exercised by the earlier court. It is submitted that the court here missed an opportunity to emphasise that in determining the nature of tribunal envisaged under *res judicata* estoppel it is enough if the tribunal exercised judicial functions under the law, whether invested with permanent jurisdiction or only with temporary authority to adjudicate on a particular dispute, or group of disputes. On the argument that the parties in the present proceedings were not of similar capacities the court found it fascinating as the petitioners had not shown that they were presenting the present petition under any other capacity other than that they were the victims of the infringement of their constitutional rights. This appears to suggest that the parties could possibly be in different capacities in which case *res judicata* estoppel could not apply. Such a

¹⁴³ [1999] 4 All ER 217

¹⁴⁴ [2011] UKSC 1

proposition would be in conflict with the established rule that the parties to the latter litigation were either parties to the earlier litigation or their privies.¹⁴⁵

The other argument advanced by the petitioners was that the doctrine of *res judicata* only applied to facts and not law and that what was raised here was law. The court could not accept this reasoning and took the view that it could not be said that only facts would bind the parties thereto and not the law. This is in conformity with the proposition as established in chapter two that whether the decision was of an issue of fact, law or both fact and law, whether the jurisdiction was original or appellate, and a decision resulting from an equal division on the tribunal such a decision still establishes *res judicata* estoppel.¹⁴⁶ In conclusion other than the court's generalisation that *res judicata* is a strict rule of law and courts had no discretion on these issues, being very wide and a misleading proposition, and the court's ambiguous proposition on the question of different capacities, which appeared to suggest that the parties could possibly be in different capacities in which case *res judicata* estoppel could not apply, the courts application of *res judicata* estoppel was consistent with the established principles. The major concern is the application of the doctrine of *res judicata* estoppel without distinguishing between cause of action estoppel and issue estoppel. This anomaly has created a lot of difficulties in the application of the doctrine of issue estoppel in Zambia, as exemplified in the following case.

In *Anz Grindleys Bank (Zambia) Limited v. Chrispin Kaona*¹⁴⁷ it was held that though the question of whether the respondent had been on illegal strike had already been determined in affirmative by the industrial Relations Court between the same parties, the issue of reinstatement was not *res judicata* because in order for a defence

¹⁴⁵ Handley, *The Doctrine of Res Judicata*, 17

¹⁴⁶ *Ibid*

¹⁴⁷ (1995) S.J. SCZ Judgment No. 12 of 1995

of re-judicata to succeed, it is necessary to show not only that the cause of action was the same but also that the plaintiff has had no opportunity of recovering in the first action that which he hoped to recover in the second;¹⁴⁸ and that since the first application was on behalf of the Trade Union, it did not allow for the making of an order of reinstatement, which could only be made after a complaint. Again, with due respect, had the court explicitly stated that it was dealing with case of issue estoppel and had it outlined the essential ingredients of issue estoppel it would have been established that the three conditions laid down for issue estoppel ought to have been satisfied, that is that the issue of reinstatement should have been (i) directly in issue in the case; (ii) actually decided by the tribunal and; (iii) appearing from the judgment itself to be the ground on which it was based. These conditions were not met. However, though it was not explicit that these conditions were not met, the decision that the issue of reinstatement was not *res judicata* was correct.

In a recent case of *Allan Mulemwa Kandala v. Zambia National Commercial Bank Plc*¹⁴⁹ the applicant was granted an injunction which was later discharged and the action was dismissed. On appeal the Supreme Court granted a stay without setting aside the High Court order discharging the injunction. The matter was later struck off the active cause list. Thereafter the plaintiff commenced another action and again applied for an injunction over the same property against the same defendant. The defendant argued that the issue of an injunction was *res judicata*. It was held that the narrow issue of the injunction under the earlier cause was decided between the same parties over the same subject matter and it was the same parties and the same subject matter in the latter case and therefore insofar as the application for an injunction was concerned the matter was *res judicata* and could not be relitigated upon. The question

¹⁴⁸ Halsbury's Laws of England (Third Edition) Volume 15 par. 358

¹⁴⁹ 2010/HPC/0766 (unreported)

that arises with this decision is whether in the earlier cause the decision to discharge the injunction was on the merits; it determined the same question as that raised in the latter litigation; and appeared from the judgment itself to be the ground on which it was based.

In the earlier cause the court in discharging the injunction held that the plaintiff had no proper legal right and therefore the case was not an appropriate case in which to grant an interim injunction.¹⁵⁰ Therefore, the decision to discharge the injunction in the earlier cause was on the merits and in fact it was the sole ground of the judgment; the plaintiff had no proper cause of action. The latter application was also based on the same factual situation containing the same facts upon which the plaintiff was claiming a right or entitlement to a judgment in his favour against the defendant. Thus the issue of injunction was indeed *res judicata*. It is submitted that in fact the court should have declared that plaintiff was caught up by cause of action estoppel because the later cause was based on the same factual situation which contained facts that the earlier court held not to have revealed any proper cause of action. Generally, while the Zambian Courts have appreciated the doctrine of *res judicata* estoppel, it is submitted with due respect, that the approach of neither stating whether the court is dealing with cause of action estoppel or issue estoppel nor highlighting the essential ingredients of *res judicata* estoppels makes it difficult for one to discern from the judgments the points on which the decision was held *res judicata*.

4.4 Realisation of the Rationale of *Res Judicata* Estoppels

It has been established that the rationale of the doctrine of *res judicata* estoppel is two fold, the interest of the community in the termination of disputes, and in the finality

¹⁵⁰ 2008/HPC/0273 (unreported)

and conclusiveness of judicial decision and the second being the right of the individual to be protected from vexatious multiplication of suits and prosecutions.¹⁵¹ The question now is whether this rationale has been realised. The answer is neither a categorical affirmation nor negative. There are cases in which the courts have properly identified themselves to this rationale and others have adopted the extended version to include curtailing of abusing of the court process through re-litigation. Therefore, the rationale of *res judicata* estoppel may be said to be partially realised.

4.5 Conclusion

This chapter has established that there appear to be consistency in the application of issue estoppel in a number of cases.¹⁵² However, there seem to be some inconsistency when the so called extended doctrine of *res judicata* estoppel, which extends the doctrine of *res judicata* estoppel to abuse of process, is considered. The existence of cause of action in civil litigation in most cases does not create any challenge and there is consistency to a larger extent in the application of cause of action estoppel in civil litigation. It has also been established that the English position is that issue estoppel has no place in criminal proceeding while the Canadian view is that issue estoppel serves important goals in criminal process.

The decision declaring the matter *res judicata*, even of the lowest civil tribunal, if conclusive at all, is conclusive in the very highest¹⁵³ and the decision disposes once and for all of the matters decided, so that except on appeal they cannot afterwards be

¹⁵¹ Handley, *The Doctrine of Res Judicata*, 5

¹⁵² See *Thoday v. Thoday*, [1964] P 181, CA at 198, per Diplock LJ; *R v Hartington, Middle Quarter Inhabitants* (1855) 4E & B 780 at 794-7; see also *Blair v Curran* (1939) 62 CLR 464 at 510 and *Jaeger Co. Ltd v Jaeger* (1929) 46 RPC 336 at 349

¹⁵³ This is in contrast with the principle of *stare decisis* where the decision of the lower court does not bind the higher court.

relitigated between the same parties or their privies.¹⁵⁴ Further it has been established that generally, while the Zambian Courts have appreciated the doctrine of *res judicata* estoppel, the approach of the courts of neither stating whether the court is dealing with cause of action estoppel or issue estoppel nor highlighting the essential ingredients of *res judicata* estoppels makes it difficult for one to discern from the judgments the points on which the decision was held *res judicata*. Lastly it may be concluded that the question of whether the rationale of *res judicata* estoppel has been realised could neither be a categorical affirmation nor negative. The rationale of *res judicata* estoppel may be said to be partially realised.

¹⁵⁴ Handley, *The Doctrine of Res Judicata*, 1

Chapter Five

General Conclusions and Recommendations

5.0 Introduction

This research¹⁵⁵ had ten research questions or specific objectives. It was intended to highlight and critically analyse the essential ingredients necessary for the defence of *res judicata*. It was also envisaged to investigate the effects of the rule of *res judicata* as cause of action estoppel or issue estoppel on the parties and the Courts; here it was desired to investigate whether any of the two species of *res judicata* created a strict rule of law whereby Courts had no discretion on its application and further whether there could be exceptional situations in which the rule of *res judicata* could be waived. The research was further aimed at critically examining the rationale of the defence of *res judicata* estoppel as cause of action estoppel or issue estoppel and the extent to which this had been appreciated in Zambia. This Chapter now presents the summary of conclusions on these specific objectives; and general recommendations.

5.1 Summary of Conclusions

5.1.1 Definition of Res Judicata Estoppel

Res judicata estoppel generally arises where a final judicial decision has been pronounced on the merits by a judicial tribunal with jurisdiction over the parties and the subject matter, any party to such litigation, as against any other party is estopped in subsequent litigation from disputing such decisions on the merits, whether it be used as the foundation of an action, or as a bar to any claim, indictment, affirmative defence or allegation, provided the party entitled raises the point at the proper time.¹⁵⁵

Res judicata estoppel is divided into cause of action estoppel and issue estoppel.

¹⁵⁵ Spencer, *The Doctrine of Res Judicata*, 4

5.1.2 Essential Ingredients of Res Judicata Estoppel

The essential ingredients to be established in setting up *res judicata* by way of estoppel as a bar to an opponent's claim, or as the foundation of a claim are that (i) the decision was judicial in the relevant sense; (ii) it was in fact pronounced; (iii) the tribunal had jurisdiction over the parties and the subject matter; (iv) the decision was (a) final and (b) on the merits; (v) it determined the same question as that raised in the latter litigation; and (vi) the parties to the latter litigation were either parties to the earlier litigation or their privies, or the earlier decision was in *rem*. All these essential requisites must be satisfied.¹⁵⁶ However, in case of cause of action estoppel, in addition to the essential ingredients highlighted above, the judicial decision must be based on the existence or non-existence of the cause of action. Whereas in issue estoppel additionally the following conditions must be satisfied; that is that the facts or question of law must be (i) directly in issue in the case; (ii) actually decided by the tribunal and; (iii) appearing from the judgment itself to be the ground on which it was based.

5.1.3 Res judicata a Substantive and Strict Rule of Law

Res judicata estoppel is a rule of substantive law as opposed to being procedural rule and it is a strict rule of law except in special circumstances under issue estoppel. Cause of action estoppel is of such uncontrollable credit and verity that no party may presume to impeach it and a decision in favour of the plaintiff is of such an exalted nature that it extinguishes the original cause of action and bars the successful party from afterwards attempting to resuscitate what has been extinguished.¹⁵⁷

¹⁵⁶ *Midland Bank Trust Co Ltd v. Green*, [1980] Ch 590 at 607

¹⁵⁷ Handley, *The Doctrine of Res Judicata*, 1

5.1.4 The rationale of the Doctrine of Res Judicata Estoppel

The rationale of the doctrine of *res judicata* estoppel is two fold, the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decision and the second being the right of the individual to be protected from vexatious multiplication of suits and prosecutions.

5.1.5 Res Judicata Estoppel Applicable to Criminal Law

It has been established that the application of issue estoppels in criminal proceeding has generated some considerable uncertainties. In English law the earlier position was that issue estoppel did apply in criminal proceedings¹⁵⁸ and that it applied with mutuality¹⁵⁹ subject to its necessary limitations and provided its difficulties could be overcome.¹⁶⁰ This position lasted only for short time. This was because of the practical concerns in the application of issue estoppel such as how to discern what issues were conclusively determined from the pronouncement of guilty or not guilty, secondly whether issue estoppel was to apply to issues resolved on the basis of reasonable doubt and thirdly whether issue estoppel applied with mutuality in criminal proceedings. Because of these concerns it was held, and it is still the position, that issue estoppel had not and never had a place in English criminal law and that the earlier view that issue estoppel applied criminal proceedings was wrong.¹⁶¹ The decision that issue estoppel has no place in criminal proceeding was followed even in Australia and New Zealand.¹⁶²

¹⁵⁸ [1974] 2 ALL ER 142

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Director of Public Prosecutions v. Humphreys, [1976] 2 ALL ER 497

¹⁶² See Rogers v. R, (1994) 42 HCA and R v. Davis [1982] 1 NZLR 58A CA

However, the Canadian system still retained the view that issue estoppel applied in criminal proceedings.¹⁶³ The Canadian system hold that issue estoppel serves three purposes, all integral to a fair criminal justice system: first, fairness to the accused who should not be called upon to answer questions already determined in his or her favour; second, the integrity and coherence of the criminal law; and third, the institutional values of judicial finality and economy.¹⁶⁴ Admitting that the application of reciprocity of issue estoppel in criminal proceedings created conflicts with the principles of the presumption of innocence and the burden on the prosecution to prove its case beyond reasonable doubt, the Canadian system had severed the aspect of mutuality, in the sense of reciprocity.¹⁶⁵ On the other hand the application of cause of action estoppel in criminal proceedings appears to be non-existent. There seem to be consensus among the legal practitioners that the special pleas of double jeopardy, *autrefois acquit* and *autrefois convict*, are sufficient for the protection of the accused.¹⁶⁶

5.1.6 Consistence in Application of *Res Judicata*

Insofar as application of the essential ingredients are concerned there appear to consistence in the application of issues estoppel.¹⁶⁷ However, there seem to be some inconsistency when the so called extended doctrine of *res judicata* estoppels, which extends the doctrine of *res judicata* estoppel to abuse of process, is considered.¹⁶⁸ The existence of a cause of action in civil litigation in most cases does not create any challenge and there is consistence to a larger extent in the application of cause of action estoppel in civil litigation. It has also been established that there is currently

¹⁶³ R v. Mahalingan, [2008] 3S.C.R. 316, 2008 SCC 63

¹⁶⁴ R v. Mahalingan, [2008] 3S.C.R. 316, 2008 SCC 63, para 38

¹⁶⁵ Ibid

¹⁶⁶ [1976] 2 ALL ER 497 at 533 per Lord Edmund.

¹⁶⁷ See *Thoday v. Thoday*, [1964] P 181, CA at 198, per Diplock LJ; *R v Hartington, Middle Quarter Inhabitants* (1855) 4E & B 780 at 794-7; see also *Blair v Curran* (1939) 62 CLR 464 at 510 and *Jaeger Co. Ltd v Jaeger* (1929) 46 RPC 336 at 349

¹⁶⁸

two schools of thought on the application of issue estoppel in criminal litigation. The English position that issue estoppel has no place in criminal proceeding and the Canadian view that issue estoppel, as modified, serves important goals in criminal process. There is a clear divergence between these two legal systems.

5.1.7 Effect of Declaration of *Res Judicata*

It has been established also that the decision declaring the matter *res judicata*, even of the lowest civil tribunal, if conclusive at all, is conclusive in the very highest¹⁶⁹ and that the decision disposes once and for all of the matters decided, so that except on appeal they cannot afterwards be relitigated between the same parties or their privies.¹⁷⁰

5.1.8 *Res Judicata Estoppel in Zambia*

Further it has been established that generally, while the Zambian Courts have appreciated the doctrine of *res judicata* estoppel, the approach by the courts of neither stating whether the court is dealing with cause of action estoppel or issue estoppel nor highlighting the essential ingredients of *res judicata* estoppels makes it difficult for one to discern from the judgments the points on which the decision was held *res judicata*.

5.1.9 Realisation of Rationale of *Res Judicata Estoppel*

Lastly it may be concluded that the question of whether the rationale of *res judicata* estoppel has been realised could neither be a categorical affirmation nor negative. The rationale of *res judicata* estoppel may be said to be partially realised.

¹⁶⁹ This is in contrast with the principle of *stare decisis* where the decision of the lower court does not bind the higher court.

¹⁷⁰ Spencer Bower, Turner and Handley

5.2 Recommendations

5.2.1 Application of Issue Estoppel to Criminal Proceedings

It is recommended that issue estoppel be advocated for in Zambia to apply to criminal proceedings as is the case in the Canadian criminal system.

5.2.2 Res Judicata Estoppel in Zambia

It is also recommended that the Courts in Zambia on decisions of *res judicata* estoppel must adopt the approach whereby a distinction is made between issue estoppel or cause of action estoppel and the relevant ingredients upon which the decision is anchored are outlined.

5.2.3 Research on Principles Double Jeopardy and Abuse of Process by Relitigation

It is further recommended that a similar study be undertaken to highlight the essential ingredients of the principles double Jeopardy and abuse of process by re-litigation, so as to distinguish them from, or establish their relationship with, the doctrine of *res judicata* estoppel.

5.3 Conclusion

This research highlighted and critically analysed the essential ingredients necessary for the defence of *res judicata* estoppel. It investigated the effects of the rule of *res judicata* estoppel on the parties and the Courts. The research also investigated and analysed the application of *res judicata* estoppel in criminal matters. The research further critically examined the rationale of the defence of *res judicata* as cause of action estoppel or issue estoppel and the extent to which this had been appreciated in Zambia. The research achieved its set objective by answering all its research questions or specific objectives.

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