

## ABUSE OF PROCESS SAVAGES CRIMINAL ISSUE ESTOPPEL

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### I. INTRODUCTION

If the truth be known, issue estoppel as a common law concept applicable to criminal proceedings has thrived for only a short period. Its heyday in Australia spanned no more than 30 years and remained unassailed essentially only during the period of the Dixon High Court.<sup>1</sup> The 1956 High Court case, *Mraz v R (No 2)* undoubtedly represents the high water mark for criminal issue estoppel.<sup>2</sup> *Rogers v R* (“*Rogers*”), delivered by the High Court in September 1994, represents an all time low.<sup>3</sup>

The inherent discretionary power to prevent abuse of the court process began its modern ascendancy in Anglo-Australian jurisprudence in 1964 when its use was suggested by a number of the Law Lords in *Director of Public Prosecutions v Connelly*.<sup>4</sup> In 1980 the High Court’s exercise of the discretion in *Barton v R* represented the first of a string of modern decisions on the power.<sup>5</sup> Since that

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1 See *R v Wilkes* (1948) 77 CLR 511; *Kemp v R* (1951) 83 CLR 341; *Mraz v R (No 2)* (1956) 96 CLR 62. See also *R v Cleary* [1914] VLR 571 at 577 and cases from Australian State courts cited by Gibbs J in *R v Storey* (1978) 140 CLR 364 at 385-6.

2 *Ibid.* In *R v O’Loughlin; ex parte Ralphs* (1971) 1 SASR 219 at 222 in a judgment noted for its perceptive analysis of pleas in bar principles, Bray CJ stated that it was undoubted that issue estoppel existed as a rule in criminal cases.

3 (1994) 181 CLR 251.

4 [1964] AC 1254.

5 (1980) 147 CLR 75. Note also *Clyne v NSW Bar Association* (1960) 104 CLR 186 at 201.

time the Court has reconsidered the scope of the power on many occasions, extending it in novel directions<sup>6</sup> and defining its (few) limitations.<sup>7</sup> The majority in the High Court case of *Walton v Gardiner* accepted as axiomatic that the discretion to prevent an abuse of the court process could (and should) supplement the rule against double jeopardy where the legal limitations of that rule created an injustice.<sup>8</sup> During the 1940s and 1950s the technicalities and difficulties of applying issue estoppel were noted, but its rightful place in the criminal process was never seriously questioned. By the 1970s however, doubts regarding the suitability of issue estoppel in criminal law had caused the doctrine to disappear from English common law.<sup>9</sup> These doubts brought an end to the doctrine as a consideration in criminal litigation in New Zealand in the following decade.<sup>10</sup>

*Rogers* represents a conjunction of two trends - the ascendancy of the abuse of process discretion and the decline in acceptance of criminal issue estoppel. Minority statements in the 1978 High Court case of *R v Storey* ("*Storey*") marked a cautionary note regarding the role of criminal issue estoppel in Australia.<sup>11</sup> Even so, the majority position in *Rogers* which replaces the doctrine of criminal issue estoppel with the 'abuse' discretion has come as a surprise. *Rogers* indicates that the negative views expressed in *Storey* regarding criminal issue estoppel represent far more than a cultural cringe acceptance of the House of Lords position in *R v Humphrys*.<sup>12</sup>

The majority opinion in *Rogers' case* is accompanied by strong dissenting voices.<sup>13</sup> The question remains whether the divisions in *Rogers* indicate that issue estoppel lies cruelly wounded - but not necessarily beyond resuscitation. Is it premature to shed a tear for issue estoppel? Or is it now time for the epitaph to be written?<sup>14</sup> If it is, criminal issue estoppel will be sadly missed.

### A. *Rogers v R*

In *Rogers* Mason CJ, and a joint judgment of Deane and Gaudron JJ made up the majority opinion. Their Honours held that issue estoppel should not be considered part of criminal law. Their Honours concluded that the gap exposed by the departure of issue estoppel could be adequately filled by the discretionary power to prevent abuse of the court process. In *Rogers* this discretionary power had the effect of staying proceedings in a pending trial.

6 *Dietrich v R* (1992) 177 CLR 292 probably representing the most ground breaking direction.

7 See for example *Grassby v R* (1989) 168 CLR 1.

8 (1993) 177 CLR 378.

9 *R v Humphrys* [1977] AC 1. The inapplicability of criminal issue estoppel was mooted in 1964 by Devlin LJ in *Connelly* note 4, *supra* at 1254, 1345.

10 *R v Davis* [1982] 1 NZLR 584; cf Canada: *Duhamel v R* (1984) 14 DLR (4th) 92.

11 Note 1 *supra* at 371-4 per Barwick CJ, 379-89 per Gibbs J and 400-1 per Mason J.

12 Note 9 *supra*.

13 In *Storey* note 1 *supra* Murphy (at 413-4), Aickin (at 416-7) and Stephen JJ (concurring with Aickin J) recognised the applicability of issue estoppel in criminal proceedings. Justice Jacobs applied a concept bearing analogies to issue estoppel and *autrefois acquit* (at 407).

14 JR Forbes, "Criminal Issue Estoppel - An Ambiguous Epitaph" (1980) 11 *University of Queensland Law Journal* 168; P Mirfield, "Shedding a Tear for Issue Estoppel" [1980] *Criminal Law Review* 336.

Justice Brennan (as he then was) and McHugh J delivered dissenting judgments. Both Justices disagreed with the majority view that issue estoppel was inappropriate in the criminal litigation sphere. Justice Brennan held that issue estoppel applied to the facts in *Rogers* and his Honour ruled that the prosecution was estopped from asserting a fact (the voluntariness of a confession) which the trial judge had ruled in the accused's favour in an earlier trial. Justice McHugh disagreed with Brennan J. His Honour held that the issue in question was a mere evidentiary issue and thus the doctrine did not bar the prosecution. Further, his Honour considered that there was no justification for staying the proceedings as an abuse of process. Justice McHugh was the only member of the Court to dismiss the appeal.

The facts of the case were as follows. In August 1988 Rogers made various inculpatory statements concerning eleven robberies in four (signed) records of interview. Three of the records of interview (numbers one, two and four) were tendered in the first trial (the 1989 trial) on four counts of armed robbery. The trial judge ruled them inadmissible on the ground of involuntariness. Rogers was convicted of the two counts referable to the fourth record of interview and acquitted of the other charges. To all intents and purposes all four records of interview were made under the same circumstances. Hence, if the third record of interview had been tendered at the 1989 trial it would, no doubt, have attracted the same judicial ruling. In the second proceedings (in 1992) the Crown proposed to tender the third and fourth records of interview in support of seven additional counts of armed robbery.<sup>15</sup> The trial judge ruled these records of interview voluntary and admissible. At issue on appeal was whether these records of interview could be relied upon in the 1992 trial. The charges were different to those determined in 1989 and so the pleas in bar (autrefois acquit and autrefois convict) were inapplicable. Further, the 1989 ruling on the involuntariness of the confession was not within *res judicata* principles. The appellant claimed that the prosecution was barred from relitigating the question of voluntariness by virtue of issue estoppel. In the alternative, it was claimed that the 1992 proceedings were an abuse of process.

According to Mason CJ, the availability of *res judicata*, the pleas in bar, the rule against double jeopardy and the doctrine of abuse of process made the introduction of issue estoppel into the criminal law unnecessary. Additionally, the introduction of issue estoppel was undesirable because its inherent complexities would further convolute the criminal law. Justices Deane and Gaudron acknowledged that autrefois acquit and related doctrines might not completely cover the operation of the principles which reflect "the unassailable nature of an acquittal and the need for consistency [of verdicts]." However, such shortcomings did not justify the importation of issue estoppel into criminal proceedings.<sup>16</sup> Their Honours stated that transporting issue estoppel into criminal proceedings "could well impede the development of coherent principles which recognise and allow for the distinct

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15 There was an eighth count of armed robbery as well.

16 Note 3 *supra* at 278.

character of...[criminal] proceedings". In other words, issue estoppel as it manifests itself in civil litigation, is inappropriate in the criminal process.

The majority did not leave the appellant without recourse. Chief Justice Mason followed Deane and Gaudron JJ in allowing the appeal on the basis of abuse of process:

the statements which the prosecution wishes to tender in the appellant's forthcoming trial are, so far as voluntariness is concerned, exactly the same as those tendered in the 1989 proceedings. In the circumstances, tender of the records of interview constitutes a direct challenge to the 1989 determination which was a final determination, or became so, once verdicts were returned. The challenge is one which invites "the scandal of conflicting decisions". And it jeopardises public confidence in the administration of justice. ... [A] determination that the confessions were made voluntarily would undermine the incontrovertible correctness of the verdicts of acquittal returned in 1989; equally, there would be a shadow over any conviction on the charges in the present indictment if confessional statements are admitted in evidence notwithstanding the earlier judicial determination that the circumstances in which they were made did not support a finding of voluntariness.<sup>17</sup>

The language and reasoning in this statement resonates with that used to describe the policy founding the rule against double jeopardy.<sup>18</sup> Nevertheless, the majority determination clearly establishes that this rule should not embrace issue estoppel.

## B. Criminal Issue Estoppel - A Survey of Issues

For those who accept criminal issue estoppel, they do so as a doctrine which classically stands between the state and the accused. Criminal issue estoppel comes within the embrace of the principles which operate to prevent an accused being placed twice in jeopardy. At their most fundamental, these principles operate to prevent multiple prosecutions of a vexatious and persecutory nature. It is clearly oppressive and unconscionable to require an accused person to defend him or herself against allegations which traverse issues previously raised by the Crown.<sup>19</sup> The concerns underpinning criminal issue estoppel embody notions which are fundamental to a just and humane criminal justice system.<sup>20</sup>

Until the recent signs of decline, criminal issue estoppel was identified as a concept strongly rooted in Australian jurisprudence. For this reason it is not easy to identify why the doctrine of criminal issue estoppel has failed to thrive here. *Rogers* does not appear to reflect a 'political' change of heart. Issue estoppel is implicitly a doctrine protective of accused's rights. Judgments which reflect a highly protective outlook towards the rights of the accused have been a marked

17 *Ibid* at 280 per Deane and Gaudron JJ.

18 See for example *R v El-Zarw* [1994] 2 Qd R 67 and generally J Hunter, "History of the Rule Against Double Jeopardy" (1984) 4 *Journal of Legal History* 3.

19 It may not make the hearing itself unfair, but to proceed with a prosecution traversing an issue which has received an adverse ruling against the prosecution previously, is abusive of the processes of the court. See below at Part IV.

20 On the policy considerations that link issue estoppel and the rule against double jeopardy, see *Rogers* note 3 *supra* at 265 per Brennan J at 277 per Deane and Gaudron JJ and the judgment of Aickin J generally in *Storey* note 1 *supra* at 417-24. On such policy considerations reflecting the discretion to prevent abuse of process, see *Bryant v Collector of Customs* [1984] 1 NZLR 280 at 284.

feature of the Mason High Court.<sup>21</sup> A large number of these rights-orientated decisions have focused on the notion of fairness in the trial process and the need for courts to be protective on behalf of an individual facing the might of the state. Further, the Mason High Court has reflected a strong reformist trend - a willingness to modify inadequacies or archaisms in the law to ensure both just determinations and the maintenance of a judicial system of high integrity.<sup>22</sup> Hence, to the extent that transporting civil issue estoppel into the criminal process involves dragging with it an inappropriate baggage of technicalities, the extensive remediation powers of the High Court would seem to invite a ready solution.

Cases such as *R v Wilkes*,<sup>23</sup> *Kemp v R*<sup>24</sup> and *Mraz v R (No 2)*<sup>25</sup> reveal none of the doubts that have been expressed by the High Court in more recent times. Perhaps one of the most peculiar aspects of the about-face represented by the later cases of *Storey* and *Rogers*, is that there has been little condemnation of the earlier judgments or rebuke for ill-considered conceptual analysis.<sup>26</sup> There has not even been a substantial retraction of principle. Indeed the majority view in *Rogers* accepts the underlying principles, but rejects the mechanism necessary to enforce those principles.

There are a number of reasons why issue estoppel is considered ill-conceived in criminal matters. The poor definition of issues by criminal pleadings<sup>27</sup> and the inappropriateness of mutually applying the doctrine to both parties (the state and the accused) are the two most commonly voiced concerns. An additional concern relates to the technical nature of issue estoppel. Criminal issue estoppel sceptics accept that issue estoppel quite properly thrives in civil litigation, but dispute its translation to the criminal sphere.<sup>28</sup> In addition, it is stated that criminal procedure is sufficiently served by *res judicata*, the pleas in bar (autrefois acquit and autrefois convict) and the doctrine of abuse of process, such that criminal issue estoppel is unnecessary. The following analysis explores the demise of criminal issue estoppel and the (almost parallel) flourish which has accompanied the rediscovery of the doctrine of abuse of process in recent years.

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21 See for example *George v Rockett* (1990) 170 CLR 104; *McKinney v R* (1991) 171 CLR 468; *Plenty v Dillon* (1991) 171 CLR 635; *Dietrich v R* note 6 *supra*; *Jago v District Court (NSW)* (1989) 168 CLR 23; *Walton v Gardiner* note 8 *supra*.

22 For example, *Walton v R* (1989) 166 CLR 283; *R v Benz* (1989) 168 CLR 133; *Pollitt v R* (1992) 174 CLR 558.

23 Note 1 *supra*.

24 *Ibid.*

25 *Ibid.*

26 With the exception of the undesirability of adopting in a criminal context principles underlying civil issue estoppel.

27 Special verdicts are generally considered undesirable; see *Director of Public Prosecutions v Stonehouse* [1978] AC 55 at 73; *R v Matusевич* [1976] VR 470 at 482; WR Cornish, *The Jury*, Penguin Press (1971) p 122.

28 See *Storey* note 1 *supra* at 395 per Mason J; *Rogers* note 3 *supra* at 419 per Mason CJ.

## II. ARE CRIMINAL AND CIVIL ISSUE ESTOPPEL RELATED - OR JUST GOOD FRIENDS?

In *R v Wilkes* Dixon J accepted as axiomatic that criminal issue estoppel was the same as civil issue estoppel. On the assumption that the same pre-conditions were met, his Honour concluded:

I see no reason why the ordinary rules of issue estoppel should not apply. Such rules are not to be confused with those of *res judicata*, which in criminal proceedings are expressed in the pleas of *autrefois acquit* and *autrefois convict*. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between the parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation.<sup>29</sup>

There are in fact good reasons why “the ordinary rules of issue estoppel” should not apply to criminal cases. These reasons are a mixture of logistical application and philosophical differences. Before these reasons are explored further, it will be helpful to sketch out the basis for issue estoppel and *res judicata* with respect to civil matters.

In civil proceedings if a “judicial determination directly involve[s] an issue of fact or of law...that [issue] cannot afterwards be raised between the same parties or their privies”.<sup>30</sup> The precision of civil pleadings in isolating issues in dispute make issue estoppel in a civil context relatively unproblematic. The High Court case of *Chamberlain v Deputy Commissioner of Taxation*<sup>31</sup> illustrates the strong claim staked out by finality in litigation, even where the merits of the case scream for adjudication.<sup>32</sup> In *Chamberlain* the parties had been negotiating an alleged debt of \$255,579.20 relating to the payment of outstanding taxes. In response to an initiating process which misplaced the decimal point and claimed only one tenth of the sum (\$25,557.92) Chamberlain entered into a consent judgment. In due course the Deputy Commissioner sought to claim the outstanding 90 per cent (\$230,021.28) of the original amount sought. At issue was whether the consent judgment precluded the respondent recovering the remainder of the alleged debt.

The High Court determined that *res judicata* prevented the second action. The cause of action merged once the consent judgment was obtained. This concept of merger is at the essence of *res judicata*:

The point of the present appeal is that the respondent brought an action against the appellant and recovered judgment against him. He obtained a judgment of the court in which *the cause of action upon which he relied merged, thereby destroying its independent existence* so long as that judgment stood. And, so long as that judgment stands, it is not competent for the respondent to bring further proceedings in respect of the same cause of action. It is no answer to say that the court might, if appropriate, stay the second action as an abuse of process. ... So long as the respondent chooses,

29 Note 1 *supra* at 518-9.

30 *Blair v Curran* (1939) 62 CLR 464 at 531 per Dixon J, quoted approvingly by Deane and Gaudron JJ in *Rogers* note 3 *supra* at 433.

31 (1988) 164 CLR.

32 Note also the subsequent determination in the Federal Court ruling that Chamberlain was guilty of professional misconduct: *Chamberlain v Law Society (ACT)* (1993) ALR 54.

as he does, to take no step to set aside the judgment and to raise no issue in the second action as to the circumstances in which that judgment was obtained, he must accept the consequences of *res judicata*. There is nothing...that precludes the operation of that doctrine. The matter is not one for the discretion of the court; by operation of law the cause of action relied upon by the respondent has ceased to exist.<sup>33</sup>

*Res judicata* is recognised in criminal cases as well as civil. *Sambasivam v Public Prosecutor, Federation of Malaya* remains the leading case in criminal law:

The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim '*res judicata pro veritate accipitur*' is no less applicable to criminal than to civil proceedings.<sup>34</sup>

Those who have adopted the view that criminal issue estoppel has never truly existed tend to argue that cases labelled as issue estoppel are really instances of *res judicata*.<sup>35</sup> Such characterisations are not that surprising. Once it is recognised that issue estoppel is not a 'true estoppel',<sup>36</sup> it is patent that the same policy considerations that give rise to *res judicata* also underpin issue estoppel.

If issue estoppel is confined to an issue of fact or law directly involved in a judicial determination..., to a matter which has been put in issue and determined..., or to an essential element of the cause of action or defence in proceedings in which judgment has been entered...then, it is justified by the same policy considerations that give rise to *res judicata*.<sup>37</sup>

If *res judicata* applies in both civil and criminal jurisdictions, and issue estoppel shares a common policy base to *res judicata*, it is but a small step to accept that issue estoppel can be transported from the civil arena to the criminal domain. However, commonality of policy orientation and the ability of *res judicata* to straddle the jurisdictions are not necessarily sufficient bases for transporting the civil doctrine of issue estoppel into the criminal sphere. On a practical level, the precision of civil pleadings in isolating issues in dispute make the application of issue estoppel relatively uncontentious. Criminal pleadings do not isolate issues. Where a court wishes to determine whether an issue in a criminal trial was determined in favour of the accused it must examine beyond the pleadings and judgment.

The question of mutuality is not a question of mechanics. It reflects the philosophy of issue estoppel. In civil matters *res judicata* and issue estoppel operate equally upon all parties who might wish to relitigate a matter. There is general unanimity that, should issue estoppel be transported to the criminal sphere, the civil requirement of mutuality should not apply. Mutuality would permit the

33 Note 31 *supra* at 510-11 per Deane, Toohey and Gaudron JJ (emphasis added).

34 [1950] AC 458 at 479.

35 For example, see the judgments of Barwick CJ and Gibbs J in *Storey* note 1 *supra*. Note that in *R v El-Zarw* note 18 *supra* Ambrose J determined that fine distinctions were best ignored.

36 *Rogers* note 3 *supra* citing *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 284; *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33; *Van Gervan v Fenton* (1992) 175 CLR 327.

37 *Rogers* note 3 *supra* at 274-5 per Deane and Gaudron JJ (case citations omitted) citing *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 602-4.

Crown to rely on a previous conviction, say for assault, when prosecuting the same accused for another crime arising from the assault. The most recent consideration of this concern was in the Tasmanian case of *R v Owen* where Crawford J considered a Crown submission based on *res judicata* and issue estoppel.<sup>38</sup> Owen was convicted on a driving charge. The issue before Crawford J was whether Owen could be barred in subsequent perjury proceedings from denying that he was the driver. Crawford J considered the divided opinion in *Storey* regarding the application of issue estoppel in criminal proceedings. He also addressed the civil *res judicata* and issue estoppel requirement that for such principles to apply the parties to both sets of proceedings must be identical (because, in the case before him, the Crown had not been a party to the earlier summary matter). Because the two parties were not the same, Crawford J concluded that Owen was not estopped from presenting facts inconsistent with his conviction. Justice Crawford was unduly cautious. Once one acknowledges that criminal issue estoppel is not a species of its civil counterpart, slavish adherence to the same requisites is unnecessary.<sup>39</sup>

The need for finality in litigation and the prevention of inconsistent verdicts are considerations common to civil and criminal litigation. Finality of litigation is a dominant concern in civil *res judicata* (and issue estoppel).<sup>40</sup> However, in criminal litigation protecting the individual from oppressive prosecutions dominates *res judicata* and double jeopardy principles. Civil finality mechanisms also protect parties. However, they are not premised on an acknowledgment of an inherent imbalance of power between the parties.

### III. CRIMINAL ISSUE ESTOPPEL

[T]he very principle of issue estoppel...is to treat an issue of fact or law as settled once for all between the parties if it is distinctly raised and if the judgment pronounced implied its determination necessarily as a matter of law.<sup>41</sup>

Criminal issue estoppel is a relatively recent phenomenon.<sup>42</sup> Commentators generally agree that it did not achieve any kind of recognisable maturity until the

38 (Unreported, Supreme Court of Tasmania, 22 September 1993). Justice Crawford held that on any version of Owen's testimony he was guilty of perjury.

39 See *Storey* note 1 *supra* at 380 per Gibbs J, at 413-4 per Murphy J; *Rogers* note 3 *supra* at 267 per Brennan J. Those who have dismissed the applicability of issue estoppel in criminal matters, often cite the inappropriateness of mutuality as reason for their rejection: see Barwick CJ at 374. See also *R v Hogan* [1974] QB 398, overturned in *R v Humphrys* note 9 *supra*; JC Smith, "Commentary" [1974] *Criminal Law Review* 248 at 249 and JR Forbes, "Short-Circuiting the Criminal Trial: The Rise of Criminal Issue Estoppel" (1970) 7 *University of Queensland Law Journal* 418 at 426.

40 See *Carl Zeiss Stiftung v Raynor & Keeler Ltd (No 2)* [1967] AC 853 at 909 per Reid LJ, at 935-6 per Guest LJ.

41 *Mraz v R (No 2)* note 1 *supra* at 70 per the Court.

42 However, some have traced its origins from the civil doctrine of issue estoppel, which dates back to the eighteenth, nineteenth or early twentieth century. Issue estoppel is first described in a judgment of Higgins J in *Hoysted v Federal Commissioner of Taxation* (1921) 29 CLR 537 at 561. For a full account of the origins and early development see M Buist, "The Jurisprudence of Issue Estoppel" (1966-7) 2 *New Zealand Universities Law Review* 43.



mid-twentieth century and that this maturity was first and foremost in Australia.<sup>43</sup> The development of the doctrine has been hampered by the difficulty of sufficiently isolating issues in criminal cases. As a consequence, very few criminal cases have given rise to a successful claim of issue estoppel.

Before tackling the conceptual concerns associated with criminal issue estoppel it is appropriate to illustrate the doctrine's operation by reference to two classic illustrations. The first is the Tasmanian case of *R v Flood* where the accused was charged with two sets of offences: escaping from gaol and the commission of other offences whilst at large.<sup>44</sup> The charge of unlawful escape was heard first. The prosecution alleged that the accused had escaped from gaol one night and gone on a nocturnal spree of criminal misconduct before returning to his cell by morning. The jury accepted the accused's denials and acquitted him. Second proceedings for the offences committed during the clandestine excursion were part heard. On receipt of the acquittal for the first charge, directed verdicts of not guilty were entered on the ground that the prosecution was estopped from asserting that the defendant was at large from gaol at the relevant time.<sup>45</sup>

The leading case<sup>46</sup> of issue estoppel is *Mraz v R (No 2)* ("*Mraz*").<sup>47</sup> For some, the compelling analysis in *Mraz* is in itself a basis for retaining the notion of criminal issue estoppel.<sup>48</sup> *Mraz* was charged with felony murder. The prosecution case was that *Mraz* had caused the death of the victim during or immediately after raping her. The jury acquitted *Mraz* of murder, but convicted him of manslaughter. This conviction was quashed on appeal on the basis of a misdirection by the trial judge. The appeal court determined that on the evidence there was no basis for ordering a new trial. *Mraz* was then charged with rape. On appeal to the High Court, Dixon CJ (giving the judgment of the Court) concluded that the jury in the felony murder trial must have believed that *Mraz* did not rape the woman. This conclusion was drawn because at the trial *Mraz* had conceded that death had occurred during or shortly after sexual intercourse. Rape was the only felony alleged by the Crown to be associated with the death of the victim. Thus, the Court held it was possible to conclude that the sole issue upon which the jury determined the charge of felony murder was whether the sexual intercourse constituted rape. On this basis the Court deduced that the jury's acquittal of felony murder implicitly negated guilt of rape.

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43 The judgment of Dixon J in *R v Wilkes* note 1 *supra* is generally considered the starting point of the doctrine as an established entity.

44 [1956] Tas SR 95. Note that in *Storey Gibbs J* concluded that *Flood* was not a true issue estoppel case because the issue was evidentiary rather than a determination of law or fact: note 1 *supra* at 386. On this distinction which excludes evidentiary issues from the doctrine see also *Storey* at 416 per Aickin J (quoting from *Blair v Curran* note 30 *supra* at 533 per Dixon J) and *Rogers* note 3 *supra*.

45 For a similar simple illustration of criminal issue estoppel see *O'Mara v Litfin; ex parte O'Mara* [1972] QWN No 32.

46 Though note a number of subsequent judgments have doubted that *Mraz* was an issue estoppel case: see for example *Storey* note 1 *supra* at 374 per Barwick CJ and at 401 per Mason J; *R v Humphrys* note 9 *supra* at 35-8 per Lord Hailsham; cf *Storey* note 1 *supra* at 388 per Gibbs J and at 422 per Aickin J; *Rogers* note 3 *supra* at 284 per McHugh J.

47 Note 1 *supra*.

48 See for example, McHugh J in *Rogers* note 3 *supra* at 284.

The High Court case of *R v Storey* was not a classic issue estoppel scenario. However, the case is important in the history of criminal issue estoppel in Australia because it was the first occasion upon which the High Court expressed doubts regarding the applicability of issue estoppel in criminal proceedings. Two defendants were charged with forcible abduction of a woman with intent to carnally know her, a charge of theft, and two charges of rape and aiding and abetting rape. According to the Crown case, the defendants had met the woman at a railway station and had forced her at gunpoint to go with them to a park where they raped her. At this trial the defendants were acquitted of abduction and theft and the jury was unable to agree on the rape charges. The abduction charge contained two legal elements: forcibly taking away and a contemporaneous intent to carnally know the victim. A complicating feature in *Storey* is that Barwick CJ was the only member of the Bench to find that a single issue in the abduction charge had been isolated in the first trial.<sup>49</sup> All the other Justices proceeded upon the assumption that both elements of abduction were placed before the jury at the first trial.

The accused were retried on the rape charges and convicted. In support of the rape allegations at the second trial the Crown led evidence of the woman's abduction from the railway station. The defence submitted that this evidence should have been barred by virtue of the earlier acquittals. The Crown responded that as no precise issue had been found in the defendants' favour at the first trial, no such bar operated. The High Court held that the case did not attract the doctrine of issue estoppel, nor was any analogous double jeopardy principle in issue. However, on a principle related to *autrefois acquit* and *res judicata*, the evidence of the abduction should have been admitted only on the condition that adequate judicial guidance was given to the jury regarding the inviolability of the earlier acquittal.<sup>50</sup> A determination of the adequacy of the judicial guidance was the main distinguishing feature in the High Court judgments.<sup>51</sup>

### A. Isolating Issues

There is general consensus that it is difficult to isolate issues for estoppel purposes in criminal cases. This difficulty raises two relevant considerations:

- the extent to which there can be an examination beyond the record of the issues determined in the earlier proceedings; and
- the kind of issue which attracts an estoppel.

An inquiry into whether an issue has been judicially determined should not become a re-hearing of the case - after all, this is the evil which the doctrine is

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49 Note 1 *supra* at 370. Chief Justice Barwick held that issue estoppel was inapplicable in criminal procedure because the beyond reasonable doubt burden of proof on issues to be proved by the Crown meant that an acquittal reflected a failure to establish the issue to the requisite standard - not a determination in the accused's favour. It is an entirely unconvincing analysis which, if taken further, would challenge the legitimacy of *autrefois acquit*. The argument is founded entirely on logic - but neglects the policy considerations underpinning double jeopardy protections.

50 Justice Jacobs differed in his analysis on this point.

51 Justices Stephen, Mason and Aickin held that the judicial guidance was inadequate. Chief Justice Barwick and Murphy J held that the direction was adequate. Justice Jacobs held the evidence to be inadmissible.

seeking to prevent. In *Mraz* the Dixon High Court stated that a determination of an issue is by inquiry into the record only - that is, the pleadings and the verdict.

What the applicant needs to do here is to exclude the possibility, a mere logical possibility, that the foundation of the verdict was the denial of an element that on the facts was not denied and could not be denied. ... It is quite consistent with the indictment and the verdict to exclude the possibility in question. There is no reason why, in order to ascertain the issue which in truth was found, matters of this kind should not be taken into consideration by the court when deciding the validity of a plea of issue estoppel. It is by no means the same thing as going into evidence to the course of the previous trial for the purpose of showing that what in point of law must be covered by the verdict or finding was in fact not considered at all. That is to run counter to the very principle of issue estoppel, which is to treat an issue of fact or law as settled once for all between the parties if it is distinctly raised and if the judgment pronounced implies its determination necessarily as a matter of law.<sup>52</sup>

For some, the sophistication of the *Mraz* (analysis sets intellectual barriers sufficient to justify excluding issue estoppel from the criminal sphere.<sup>53</sup> Justice Gibbs in *Storey* accepted without qualification that it was permissible "to determine from an examination of the proceedings at the trial, or from other material, what issues were necessarily determined by a general verdict".<sup>54</sup> A relatively unrestricted<sup>55</sup> examination of the previous trial is consistent with the kind of inquiry which other double jeopardy style mechanisms require.<sup>56</sup>

In *Rogers* Brennan J held that accepting that issue estoppel applied to *any kind of issue* finally determined by a court of competent jurisdiction carried an implicit acceptance that the inquiry into isolating an issue could extend beyond the formal record.<sup>57</sup> For Brennan J, such an inquiry represented a point of distinction between issue estoppel and *res judicata*:

[o]nce it is found necessary to go behind the meagre record of a criminal trial in order to ascertain the basis of a verdict, the applicable doctrine is issue estoppel, not *res judicata*.<sup>58</sup>

## B. A Rule of Evidence or a Rule of Procedure?

In *Rogers* McHugh J ruled that issue estoppel had no application to the case because the rulings in the first trial were of an evidentiary nature only. This view that issue estoppel is limited to "a [factual or legal] issue fundamental to the decision arrived at' and that it is inapplicable to "matters of law or fact which are

52 Note 1 *supra* at 70.

53 See for example *Storey* note 1 *supra* at 745 per Gibbs J; *R v Humphrys* note 9 *supra* at 49 per Edmund-Davies LJ.

54 *Storey* note 1 *supra* at 380. See also the judgment of Jacobs J in *Storey*. See also *Port of Melbourne Authority v Anshun Pty Ltd* note 37 *supra* at 602 per Gibbs CJ, Mason and Aickin JJ where the same broad approach is advocated with regard to civil issue estoppel.

55 See also *Ashe v Swenson* 397 US 436 (1970) at 444 permitting scrutiny of "the pleadings, evidence, charge, and other relevant matter...[to] conclude whether a rational jury could have grounded the verdict upon an issue other than that which the defendant seeks to foreclose from consideration."

56 *Gushue v R* (1980) 16 CRNS (3d) 39.

57 Note 3 *supra* at 268 (dissenting).

58 *Ibid* at 264.

[merely] subsidiary or collateral”<sup>59</sup> derives from the requirements of civil issue estoppel.<sup>60</sup>

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. True...it has the effect of preventing the party ‘estopped’ from calling evidence to show that the assertion which is the subject of the issue estoppel is incorrect, but that is because the existence of the issue estoppel results in there being no issue in the subsequent civil proceedings to which such evidence would be relevant. Issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation. That general rule...[is] modified [in criminal cases] by the distinctive character of criminal as compared with civil litigation. Here it takes the form of the rule against double jeopardy.<sup>61</sup>

It has been suggested that issue estoppel is applicable only where it is referable to an ultimate issue or a fact in issue (as opposed to a fact relevant to a fact in issue).<sup>62</sup> A common argument raised to support this contention is that where an issue is tangential to the focus of the first trial there is a significant danger that the parties will not have concentrated their efforts on the point. In other words, the finding on the issue may not reflect the merits of the case. These concerns misconceive the function of issue estoppel and consequently place an unduly onerous demand upon a claimant.<sup>63</sup> Additionally, once it is accepted, as it surely is, that mutuality is not a viable consideration in criminal issue estoppel, then these concerns lose substantial force. Arguably, wherever it is possible to sufficiently isolate an issue as established in the defendant’s favour, there is sufficient basis to bar a subsequent adjudication of the issue. Justice Brennan set as a base requirement that the issue be “necessary to” or “the legal foundation of”, the decision.<sup>64</sup> This standard seems less demanding and far more appropriate than the more legalistic tests articulated in earlier decisions.<sup>65</sup>

### C. Protecting the Conclusiveness of an Acquittal

*R v El-Zarw* is one of the most recent Australian appellate criminal issue estoppel decisions - and possibly the last to accept an issue estoppel claim.<sup>66</sup> The claim arose in relation to a Crown prosecution for perjury which followed an unsuccessful murder prosecution. At the second trial, to prove the falsity of El-Zarw’s previous testimony the Crown relied upon the same body of evidence which had failed to convince the jury at the first trial. The Queensland Court of Criminal Appeal ruled that the perjury convictions arising from the second prosecution should be quashed because the verdicts were based on substantially

59 *Blair v Curran* note 30 *supra* at 533.

60 See *Brewer v Brewer* (1953) 88 CLR 1 at 15 per Fullagar J; *Thoday v Thoday* [1964] P 181 at 198 per Diplock LJ; *Carl Zeiss Stiftung v Raynor & Keeler Ltd No 2* [1967] 1 AC 853 at 916-7 per Reid LJ; *Blair v Curran* note 30 *supra* at 533 per Dixon J.

61 *Mills v Cooper* [1967] 2 QB 459 at 469 per Diplock LJ. Note that a decade after *Mills* the House of Lords ruled issue estoppel inapplicable in criminal cases: *R v Humphrys* note 9 *supra*.

62 See the judgment of Jacob J *R v Storey* note 1 *supra* at 410 which supports the broad approach applying functional considerations.

63 See the discussion below at D.

64 *Storey* note 1 *supra* at 262.

65 For example *Blair v Curran* note 30 *supra* at 510.

66 Note 18 *supra*. Note that the Court of Criminal Appeal judgment was handed down in late 1991.

the same evidence which had founded the previous acquittal. This inconsistency in verdicts made the subsequent verdicts unsafe and unsatisfactory. Justices Ambrose and Mackenzie each delivered substantial judgments canvassing the role of issue estoppel in criminal cases and the applicability of *res judicata* to criminal law. In neither judgment is issue estoppel doubted. However, both judges express difficulty in determining the precise boundaries of criminal issue estoppel. Justice Ambrose determined that it would be fruitless to resolve whether it was *res judicata* or issue estoppel that applied to the case. His Honour and MacKenzie J both accepted that the principles underpinning the concepts were breached by the inconsistency in verdicts. This inconsistency was based on the substantial sameness of certain Crown evidence directed to a particular fact in both trials. The Court quashed the convictions and entered verdicts of acquittal. Essentially, the Court employed the strategy of cutting through the unnecessary legalism brought to issue estoppel via its civil origins. To do so and determine a case on principle - without reference to discretionary powers is to be applauded.

The incontrovertibility of a verdict is embedded in the doctrine of issue estoppel. In *R v Wilkes* Justice Dixon's description of criminal issue estoppel provides a useful reference point regarding this incontrovertibility and the role of issue estoppel. The following passage arises in the context of a discussion of the relative rarity of criminal issue estoppel:

There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. *The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding.* But if such a condition of affairs arises I see no reason why the ordinary rules of issue estoppel should not apply. ... Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between the parties. It depends upon well-known doctrines which control the relitigation of issues which are settled by prior litigation.<sup>67</sup>

Where a matter does not proceed to a verdict, then the case for issue estoppel is slim.<sup>68</sup> However, as Dixon J indicated, once an issue has been determined by a verdict, issue estoppel should bar relitigation. If it were not so, the subsequent proceedings may conclude the issue differently. That difference would inevitably cast a shadow upon the verdicts in one or both of the proceedings. For example, in *Rogers* where the appellant was acquitted on some counts and convicted upon others in the 1989 trial, the admissibility of the records of interview in the 1992 trial would cast doubt on the 1989 acquittals. If the 1992 trial concluded by acquitting the accused on all counts, this finding would cast doubt on Rogers' 1989 convictions.<sup>69</sup>

As Brennan, Deane and Gaudron JJ expressly acknowledge in *Rogers*, the pleas in bar and *res judicata* do not exhaust the criminal law principles embodied in the maxims *res judicata pro veritate accipitur* and *nemo debet bis vexari pro eadem causa*.<sup>70</sup> Indeed in *Storey Gibbs, Jacobs, Aickin JJ* (with Stephen J concurring)

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67 Note 1 *supra* at 518-9.

68 See *R v Blair* (1985) 1 NSWLR 584.

69 This point is made in general terms by Deane and Gaudron JJ in *Rogers* note 3 *supra* at 280.

70 The judgment of the Chief Justice implicitly recognises the same principle: *ibid* at 256-7; see also 264-5 per Brennan J.

accepted that the pleas in bar and *res judicata* did not satisfy the claims of the appellant, but (barring Jacobs J, who would have excluded the evidence) their Honours ruled that the acquittal for abduction could be adequately protected from subsequent challenge by judicial direction to the jury.

In sum, the weight of recent judicial authority in Australia supports the maintenance of a certain level of protection for a previous acquittal. Issue estoppel provides an exacting level of protection - it prevents the issue being canvassed in any way in a competent court. In *Storey* the High Court considered that judicial guidance to the jury was sufficient protection. In *Rogers* the majority considered that the exercise of the discretionary protection to stay proceedings was preferable to applying issue estoppel.

#### D. Issue Estoppel - An Artificial Doctrine?

Having acknowledged that there is a need for *some* protection to effect results akin to issue estoppel, the point of distinction in *Rogers* between the majority judgments of Mason CJ, Deane and Gaudron JJ and that of Brennan J lie in the acceptance or the rejection of issue estoppel as the mechanism for establishing this protection.

The argument that issue estoppel is an artificial doctrine gives expression to the concern that an adjudication upon the merits of a case may be avoided by an application of the estoppel. In other words, an adjudication which determined a particular issue in the accused's favour may deny a subsequent prosecution upon that issue despite overwhelming evidence contradicting the earlier determination. The characterisation of this aspect of issue estoppel as 'artificial' is problematic. As Brennan J pointed out in *Rogers*,

where successive verdicts can be shown to be inconsistent in fact though not in form, it would be a reproach of the criminal law if it were unable to prevent the conviction of a person for conduct in respect of which that person had been found not guilty.<sup>71</sup>

If the Crown fails on a particular issue in a criminal trial then there is a strong public policy claim that it should remain bound by the ruling in much the same way that the pleas in bar and *res judicata* ignore the merits of the earlier adjudication, but focus on the fact of the determination. If the prosecution has lacked the requisite degree of fervour, then it is bound by such languidity; if it considered the issue too remote, yet it was sufficiently central to require a determination, then it is bound by its misjudgment. Indeed, even where the first determination is faulty through no error of the prosecution, as long as all avenues of appeal have been exhausted, the decision must stand. The plea of *autrefois* acquit operates with equal force irrespective of whether the prosecution fails to lead evidence, fights the case hard or suffers incorrect evidentiary rulings which are beyond appeal. These policy considerations apply equally to civil issue estoppel and *res judicata*. They should also apply to criminal issue estoppel. In the civil arena *Chamberlain* is recent proof that such concerns operate as the price one pays for finality.<sup>72</sup> The disparity in resources and strength between the state

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<sup>71</sup> *Ibid* at 264-5.

<sup>72</sup> Note 31 *supra*.

and the accused gives further force to the principle of finality. Finality embodies protection from vexatious prosecution. Focus on the Crown's failure to address an issue with due diligence ignores the position of the accused. Where the defence has marshalled all its resources, called all available witnesses and presented legal argument there is no valid case to justify a re-run of the issue to enable the prosecution to have a second bite at the cherry. If an issue is of sufficient merit to justify future litigation, then its resolution in an earlier trial should be undertaken with due professionalism and focus. Failure to do so is a waste of court time, of prosecution resources and, most importantly, is insensitive to the strain placed on an accused by a multiplicity of allegations. Finally, as Brennan J pointed out in *Rogers* should relitigation be permitted and inconsistent rulings or verdicts delivered, the notion that the criminal trial is a lottery would be difficult to dispel.

#### IV. ABUSE OF PROCESS

The existence of a judicial discretion to stay proceedings which are considered abuses of court process has been long recognised:

[F]rom early times (I rather think, though I have not looked at it enough to say, from the earliest times) the Court had inherently in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing - the Court had the right to protect itself against such abuse; ...it was done by the Court informing its conscience upon affidavits, and by a summary order to stay the action which was brought under such circumstances as to be an abuse of the process of the Court; and in a proper case they did stay the action.<sup>73</sup>

Lord Blackburn was speaking specifically of civil cases. However, it is clear that he was not attempting to limit his observations to excluded criminal proceedings, nor have subsequent courts adopted such a limitation.<sup>74</sup> The 1964 House of Lords case of *Connelly v Director of Public Prosecutions*<sup>75</sup> marked judicial reaffirmation of the power to control abuses of court process following a long period of relative inactivity.<sup>76</sup> Since *Connelly* there has been a plethora of cases, particular in Australia.<sup>77</sup> In the past 30 years the inherent judicial power to prevent court

73 *Metropolitan Bank Ltd v Pooley* (1885) 10 App Cas 210 at 220-21 per Blackburn LJ. See also PH Winfield, *The History of Conspiracy and Abuse of Legal Procedure*, Cambridge University Press (1921); PH Winfield, *The Present Law of Abuse of Legal Procedure*, Cambridge University Press (1921); R Pattenden, "The Power of the Courts to Stay a Criminal Prosecution" [1985] *Criminal Law Review* 175; RG Fox, "Criminal Delay as Abuse of Process" (1990) 16 *Monash University Law Review* 64; ALT Choo, *Abuse of Process and Judicial Stays of Criminal Proceedings*, Clarendon Press (1993).

74 Note 4 *supra*.

75 *Ibid.* The Court divided on the scope of the power.

76 According to Pearce LJ in *Connelly* the case of *Wemyss v Hopkins* (1875) LR 10 QB 378 was an early application of this power.

77 See *Barton v R* note 5 *supra*; *Herron v McGregor* (1986) 6 NSWLR 246; *Levinge v Director of Custodial Services* (1987) 9 NSWLR 547; *R v Basha* (1989) 39 A Crim R 337; *Adler v District Court (NSW)* (1990) 19 NSWLR 317; *Williams v Spautz* (1992) 174 CLR 509; *Jago v District Court (NSW)* note 21 *supra*; *Walton v Gardiner* note 8 *supra*; *R v Connell (No 3)* (1993) 8 WAR 542; *R v Taouk* (1992) 65 A Crim R 387; *Dietrich v R* note 6 *supra*; *Ridgeway v R* (1995) 129 ALR 41. For the position in the England, see *R v Horseferry Road Magistrates' Court; ex parte Bennett* [1994] 1 AC 42.

processes from abuse has developed into an extremely versatile adjunct to traditional procedural rules. In Australia, much of this development has taken place in the past five years and the spread of issues attracting the abuse discretion is broad indeed. In *Barton's case* the High Court stayed proceedings for indictable offences where the Crown sought to proceed to trial without full committal proceedings.<sup>78</sup> In *Williams v Spautz* the Court stayed proceedings brought for an improper purpose;<sup>79</sup> and in *Dietrich v R* the Court determined that where an accused is compelled to meet serious indictable offences without legal representation, the trial judge has the power (and indeed the duty) to stay proceedings rather than permit an unfair trial.<sup>80</sup> Pre-trial delay may justify a stay of proceedings;<sup>81</sup> so may a multiplicity of charges or a repetition of prosecutions,<sup>82</sup> or even an unlawful or improper extradition of the accused.<sup>83</sup> As we have seen, since the House of Lords decision of *Humphrys* criminal issue estoppel has been in serious danger in Australia.<sup>84</sup> The discretion to prevent abuse of process has been waiting in the wings to replace criminal issue estoppel at least since 1964. *Rogers* indicates majority support for just such a move.

It is intrinsic to the function of courts exercising a supervisory role over the criminal justice system "to prevent anything which savours of abuse of process":

Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come before them? ... The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.<sup>85</sup>

Staying proceedings (or quashing a conviction) because a trial fails to meet a basic standard of fairness (as described below by Gaudron J) is only one part of this protective role of the court. There are at least two central notions raised in determining abuse of process:

- that the proceedings as constituted would be unfair; and/or
- that the proceedings would be vexatious or oppressive.

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78 *Barton v R* note 5 *supra*.

79 Note 77 *supra*.

80 *Dietrich v R* note 6 *supra*.

81 *Jago v District Court (NSW)* note 21 *supra*.

82 *Walton v Gardiner* note 8 *supra*; *Connelly v Director of Public Prosecutions* note 4 *supra*.

83 *R v Horsferry Road Magistrates' Court; Ex parte Bennett* note 77 *supra*; *Levinge v Director of Custodial Services* note 77 *supra*.

84 JR Forbes note 14 *supra* at 170. *Connelly v Director of Public Prosecutions* note 4 *supra*, gave an early indication of the trend where the House of Lords introduced abuse of process considerations to supplement double jeopardy protections: per Devlin and Pearce LJ; cf Morris and Hodson LJ. There was divided support for the *Connelly* view in *R v Humphrys* note 9 *supra* per Salmon and Edmund-Davies LJ.

85 *Connelly* note 4 *supra* at 1354 per Devlin LJ. The extent to which a magistrates' court can exercise these supervisory powers is not entirely clear. The power to prevent abuse of process which would otherwise cause a trial to be unfair exists in all courts: see *Dietrich* note 6 *supra*. However, in *Grassby* the High Court ruled that in committal proceedings a magistrate has no power to exercise the abuse of process discretion to stay proceedings: see note 7 *supra*. See generally ALT Choo note 73 *supra* at 141-4. M Aronson and B Dyer, *Judicial Review of Administrative Action*, Law Book Co (in preparation) ch 6.



Concern for the second consideration arises through the general brief of appellate courts to exercise a supervisory role over the criminal justice system to ensure that the system is used in a manner that reflects its high integrity.

### A. Fairness

In relation to the fairness consideration, the following passage from the judgment of Gaudron J in *Dietrich* is an articulate statement of the driving concerns:

It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law. The expression 'fair trial according to law' is not a tautology. In most cases a trial is fair if conducted according to law, and unfair if not. If our legal processes were perfect that would be so in every case. But the law recognises that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with law. Thus, the overriding qualification and universal criterion of fairness.

The fundamental requirement that a trial be fair...is not one that impinges on the substantive law governing the matter in issue. It may impinge on evidentiary and procedural rules; it may bear on when and where a trial should be held; in exceptional cases it may bear on whether a trial should be held at all. Speaking generally, the notion of 'fairness' is one that accepts that, sometimes, the rules governing practice, procedure and evidence must be tempered by reason and commonsense to accommodate the special case that has arisen because, otherwise, prejudice or unfairness might result. Thus, in some cases, the requirement results in the exclusion of admissible evidence because its reception would be unfair to the accused in that it might place him at risk of being improperly convicted, either because its weight and credibility cannot be effectively tested or because it has more prejudicial than probative value and so may be misused by the jury. In other cases, the procedures may be modified, for example, to allow evidence to be given through an interpreter, or to allow for special directions to counteract the effect of pre-trial publicity or even something said or done in the trial itself. Sometimes the venue may be changed to counteract some perceived difficulty in obtaining a fair trial in the area in which the offence was committed; in other cases proceedings may be adjourned, for example, to enable evidence to be checked or to allow for pre-trial publicity to abate. The examples are not exhaustive. They are, however, sufficient to show that the requirement of fairness is, and, in various different contexts, has been recognised as, independent from and additional to the requirement that a trial be conducted in accordance with law.

The requirement of fairness is not only independent, it is intrinsic and inherent. According to our legal theory and subject to statutory provisions or other considerations bearing on the powers of an inferior court or a court of limited jurisdiction, the power to prevent injustice in legal proceedings is necessary and, for that reason, there inheres in the courts such powers as are necessary to ensure that justice is done in every case. Thus, every judge in every criminal trial has all powers necessary or expedient to prevent unfairness in the trial. Of course, particular powers serving the same end may be conferred by statute or confirmed by rules of court.<sup>86</sup>

*Dietrich* is classically representative of the 'abuse' power being exercised to protect an accused from an unfair trial. *Dietrich* was required to proceed to trial without legal representation on a serious indictable offence. He had been unable to arrange representation through legal aid authorities and his request for adjournment was denied. His request for permission to have assistance from a

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86 (1992) 177 CLR 292 at 362-4 (footnotes deleted).

fellow prisoner was also denied, with the trial judge ruling: “You can take your own notes. A table will be provided, or facilities will be provided; paper will be provided; a pen will be provided...”. A flavour of the distress suffered by Dietrich is evidenced in the following interchange between the judge and Dietrich:

‘Mr Dietrich, you are appearing for yourself; is that correct?’

Mr Dietrich replied: ‘I cannot appear for myself, I’m not legally minded.’

He added: “I don’t understand the system, what is going to happen to me, and I’ve got no idea.”

Later he said: “I don’t want to show any disrespect to this court. I’m not emotionally and mentally fit to conduct my own trial, and I don’t want to take the brunt of...I know my own character, I know what’s going to happen, and it’s going to look bad in front of the jury and I’m not prepared to take that chance. I’ll just sit here mute.”<sup>87</sup>

As Gaudron J noted: “[t]his exchange is eloquent of the central and inevitable problems confronting an accused person who must present his own defence. He is doubly disadvantaged, first by lack of knowledge and, then, by the stress of the occasion”. Other cases in which unfairness has formed the basis for consideration of abuse of process concerns include *R v Morgan*,<sup>88</sup> *Jago*<sup>89</sup> and *Barton*.<sup>90</sup> Notions of fairness must be tempered by an acknowledgment of the imperatives which underpin criminal prosecutions. Consequently, in evaluating matters of fairness in the context of the ‘abuse’ discretion a court must keep in mind the public interest in the expectation that those charged with offences will be brought to trial.<sup>91</sup>

A stay to prevent proceedings which otherwise would transgress the spirit of *res judicata* or the policies underpinning the rule against double jeopardy do not depend on unfairness. Where the fact of relitigation is in issue it is generally not suggested that the merits of the case will not be aired in a just and proper manner. The claim of abuse rests on the assertion that the proceedings per se are vexatious or oppressive. It is the fact of the proceedings (or an aspect of them, as in *Rogers*) rather than an inherent unfairness, that founds the abuse claim.

## B. Vexatious or Oppressive Proceedings

The list of ‘abuse’ cases based on this ground is extremely long.<sup>92</sup> Often, though not exclusively, the basis for determining that proceedings amount to an abuse of process relates to an assessment of the propriety of the motivation to prosecute:

An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve or when the process is incapable of serving the purpose it is intended to serve. The purpose of criminal

87 Note 6 *supra* at 367 per Gaudron J.

88 (1993) 30 NSWLR 543 at 554 per Mahoney J.

89 Note 21 *supra*.

90 Note 5 *supra*. See also *Basha* note 77 *supra*.

91 See *Jago* note 21 *supra* at 33; *Rogers* note 3 *supra* at 420 per Mason CJ.

92 For recent examples see *Ridgeway v R* note 77 *supra*; *Walton v Gardiner* note 8 *supra* (relating to disciplinary proceedings); *Williams v Spautz* note 77 *supra*; *R v Horseferry Road Magistrates’ Court; Ex parte Bennett* note 77 *supra*. A less recent, but notorious case is *Hunter v Chief Constable, West Midlands Police* [1982] AC 529 (Birmingham six civil action held to be an abuse of process because it was a collateral attack on their earlier conviction for 21 murders).

proceedings, generally speaking, is to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment. When criminal process is used only for that purpose and is capable of serving that purpose, there is no abuse of process. ... When process is abused, the unfairness against which a litigant is entitled to protection is his subjection to process which is not intended to serve or which is not capable of serving its true purpose.<sup>93</sup>

As we have seen, it is well accepted that the principles underpinning the rule against double jeopardy may be broader than their legal expression in the pleas in bar and *res judicata*. It is also well accepted that the shortfall in the law can be met by the court's inherent powers. In *Connelly*, one of the early modern 'abuse' cases, a number of the Law Lords expressed the view that, where the letter of the law failed, the spirit of the rule against double jeopardy could be effected by the 'abuse' powers.<sup>94</sup> In 1978 in *Storey* the High Court ruled that no principle of law prevented the tendering of evidence relating to a charge upon which the appellants had been previously acquitted. However, by majority the Court determined that the conclusiveness of that acquittal should be protected - not by staying proceedings, but by judicial direction to the jury. In 1992 the High Court in *Walton v Gardiner* stayed proceedings on the basis that they constituted an abuse of process.<sup>95</sup> The Court applied principles springing from notions embedded in the rule against double jeopardy. These precedents indicate that the majority view in *Rogers* that 'abuse' powers can apply in relitigation settings is not novel:

tendering of the confessions by the prosecution was vexatious, oppressive and unfair to the appellant in that it exposed him to relitigation of the issue of the voluntariness of the confessional statements.... This issue had been conclusively decided in the appellant's favour because the confessions...were made at the same time and in exactly the same circumstances as the confessions that were the subject of the *voir dire* [in the first proceedings]. Relitigation in subsequent criminal proceedings of an issue already finally decided in earlier criminal proceedings is not only inconsistent with the principle that a judicial determination is binding, final and conclusive ..., but is also calculated to erode public confidence in the administration of justice by generating conflicting decisions on the same issue. These considerations necessarily prevail over any competing public interest in the securing of convictions against the appellant.<sup>96</sup>

The novelty in *Rogers* is that the 'abuse' mechanism has been extended, not to fill a gap in the law, but to replace a legal right with a discretionary protection.

## V. CONCLUSION

The High Court's recognition of a greatly increased utility for the abuse of process discretion and the Court's judicial innovations as displayed in cases such as *McKinney*<sup>97</sup> and the hearsay cases<sup>98</sup> hold the key to explaining the High Court's

93 *Jago v District Court (NSW)* note 21 *supra* at 47-8 per Brennan J, quoted by Brennan J in *Ridgeway* note 77 *supra* at 60-1.

94 Note 4 *supra*.

95 Note 8 *supra*.

96 Note 3 *supra* at 256 per Mason CJ.

97 Note 21 *supra*.

98 Note 22 *supra*.

shift from *Mraz* to *Rogers*. Issue estoppel is a highly technical, legalistic device. As with the pleas in bar and *res judicata* its operation is defined by legal principles which are highly precise in their nature and unbending in their application. The pleas in bar, *res judicata* and issue estoppel do not address the merits of a case or the justice of the previous adjudication. These doctrines operate entirely independently of such concerns. These doctrines reject the right for the Crown to bring additional prosecutions because the fact of the proceedings grounds the oppression. There are other public interest concerns: that the subsequent proceedings might produce inconsistent verdicts, that the prosecution may be motivated to prosecute as a means of going behind an earlier verdict (typically an acquittal).

These same public interest concerns are addressed by the discretionary power to prevent abuse of the court's process. Hence the key. A discretionary power is flexible. It adjusts to the merits of the case at hand, and requires no technical considerations. This flexibility makes it a far more attractive mechanism from the judicial perspective. From the defence perspective, the discretionary nature of the protection is highly problematic. With flexibility one inevitably loses certainty.

The replacement of criminal issue estoppel with the discretionary power to stay proceedings (or quash a conviction) removes one of the relatively few rights accruing to an accused person in a criminal trial. It replaces that right with a discretionary protection. The nebulous character of the discretion - seen as its strength by many - is also its weakness. An accused person must, by dint of analogy to double jeopardy or issue estoppel cases and principles, or by a tangible display of the potential unfairness of the situation, persuade the trial judge to accede to the defence submissions. Issue estoppel operates as of right. If the estoppel submission fails at first instance, the claim is appealable with reference to the legal components that establish the operation of the bar. If the abuse of process claim fails at first instance, the discretionary style of the determination makes an appeal more burdensome for the defence.

Where what is at issue is a conclusion reached pursuant to a rule or principle of law, the appellate court will not hesitate to substitute its own conclusion if it disagrees with that reached by the trial court. It is immaterial that the trial court may have, in reaching its conclusion, taken all relevant factors into account and left irrelevant factors out of consideration. However, where a decision is reached pursuant to judicial discretion and this decision is the subject of an appeal, the appellate court will interfere with the decision only in limited circumstances.<sup>99</sup>

An appeal court will interfere with a trial judge's exercise of discretion only where the judge has given none, or insufficient, weight to the considerations which should have informed the decision, or where the trial judge has been influenced by irrelevant considerations, or where the judge mistakes the facts.<sup>100</sup>

The more discretionary principles and judicial warnings replace mandatory exclusions and bars in the jurisprudence of criminal procedure, the less superior courts have the opportunity to supervise proceedings in trial courts according to

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99 ALT Choo note 73 *supra* p 138.

100 *R v Glennon* (1992) 173 CLR 592 at 600 per Mason CJ and Toohey J. See also the UK cases collected in ALT Choo *ibid* pp 138-9 (in particular *R v Mackie* (1973) 57 Cr App R 453).

the precepts and principles expressed in appellate decisions. One applauds the expansion of the abuse of process discretion as a supplement to the existing legal mechanisms protecting accused persons from unfairness and oppression. A humane and fair system of justice should incorporate sufficient flexibility to permit the filling of any 'cracks' in its protective structures. *Rogers* does not fill a crack. It introduces a discretion to replace a legal right. The dispute is not a question of whether legalism should triumph over justice. The case of *El-Zarw* indicates that complex legal rules can be applied by reference to the principles which underpin them.<sup>101</sup> The laws encompassing the rule against double jeopardy - which prior to *Rogers* included issue estoppel - have ancient origins which seek to redress an inherent imbalance between the parties in the prosecution process.<sup>102</sup> These are not trivial concerns and should not be the subject of discretionary protections. The passing of criminal issue estoppel will be mourned.

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101 Note 18 *supra*.

102 J Hunter note 18 *supra*.