JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 95 of 1987

BEFORE: THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A. (Ag.)

BETWEEN	GLORIA EDWARDS	PLAINTIFF/APPELLANT
AND	GEORGE ARSCOTT	1ST DEFENDANT/RESPONDENT
AND	HERMAN CAMPBELL	2ND DEFENDANT/RESPONDENT

Alvin Mundell and R. S. Pershadsingh, Q.C. for the appellant

D. Scharschmidt, Q.C. for the respondents

July 8 and September 23, 1991

WRIGHT, J.A.:

The point at issue in this appeal is whether the respondents should be allowed to amend their defence to the plaintiff's claim in negligence so as to plead by way of estoppel the judgment in a former case to which the plaintiff was not a party. My first reaction to such a proposition is that it seems inconceivable that justice would either condone or sanction chasing a supplicant from the judgment seat by merely waving in that person's face, as it were, a judgment the result of proceedings in which the supplicant played absolutely no part. Obviously as a stranger to that judgment, this person can reap no fruit therefrom so why should such a judgment be allowed to stand in the way of such a person seeking the judgment which the justice of his case merits?

Arising out of an accident on September 20, 1979, between a motor van number BP892, in which the plaintiff/appellant was a passenger, and a Tanker number BL252, owned by the first defendant/

respondent and driven by the second defendant/respondent, the plaintiff/appellant sustained injuries in respect of which she filed a writ on April 22, 1980, alleging negligence against both defendant/respondents. Paragraph 4 of the defence alleges as follows:

> "The Defendants say that the said collision was caused wholly or in part by the negligence of Mr. Louis Chivas the driver of motor van BP 692 (owned by Albert Edwards) in which the Plaintiff was a passenger and for which collision Albert Edwards and Louis Chivas are liable."

It is pertinent to observe that Louis Chivas has died and that what is pleaded is that he was "wholly or in part" to blame for the collision. On December 2, 1987, Theobalds, J. granted the defendants/respondents leave to amend their defence to add the following:

> "4.(a) The Defendants further say in answer to the Plaintiff's claim herein that as a consequence of the said collision which is the subject matter of this action, the First Defendant commenced an action against the Third Parties in the Supreme Court of Judicature of Jamaica on the 13th day of March, 1980 in Suit No. C.L. A-026 of 1980. The Third Parties entered Appearance and defended the action on the grounds pleaded in the Statement of Claim, so that the issues by the pleadings in that cause was the same or substantially the same as the issues in this action.
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> 4.(b) On the 30th day of November, 1984, the Honourable Mr. Justice Orr hearing all the evidence at the trial of the afore-said action found that the Third Parties were wholly to blame for the said collision and so pronounced Judgment in favour of the First Defendant. This said Judgment still remains in full force.
>
> 4.(c) In the premises, the said Judgment is relevant to the issue of negligence and the Defendants intend to rely thereon in this action and say that the Plaintiff is now estopped from maintaining her claim against the Defendants."

It is this decision which gave birth to this appeal. The grounds of which are as follows:

"1. The learned Judge erred in granting the Defendants/Respondents leave to amend their defence and to stay proceedings as the determination of the issue in the Suit C.L.A. 026 of 1980 has no bearing on the issue in the present case. The Plaintiff/ Appellant in the present case was at no time a party in the suit C.L.A. 026 of 1980.

2. The learned Trial Judge erred in refusing to award costs to the Plaintiff/Appellant herein as the Defendants/Respondents had had sufficient time beforehand to have applied for the amendment which they sought on the 2nd December, 1987."

For the plaintiff/appellant, Mr. Mundell emphasized that she was not even a witness in the previous proceedings nor was she privy to a party in those proceedings. Said he, the Third Party Proceedings issued against Albert Edwards (husband of Gloria Edwards, Louis Chivas and Thomas Thompson) have not been served against any of those parties. So in effect there are no Third Party Proceedings being actively pursued. It was his submission that in order that estoppel by way of res judicata may operate it must be shown that the same issues were adjudicated between the same parties. That not being so the plaintiff/ appellant is entitled to have an adjudication of her case. Reliance was placed on **Marginson v. Blackburn Borough Council** (1939) 2 K.B. 426; **Johnson v. Cartledge and others** (1939) 3 K.B.D. 654; **Townsend v. Bishop** (1939) 1 All E.R. 805; **Randolph v. Tuck** (1962) 1 Q.B. 175. The amendment, he contended, should not have been allowed because it cannot assist the trial judge and would only be a nuisance and of prejudicial value. Moreover, said he, the plaintiff/appellant is unfettered in her capacity to sue as a feme sole.

For his part, Mr. Scharschmidt submitted that new thinking has shifted the emphasis from the parties to the issue involved. This is how he puts it:

"Where an issue has been litigated and decided a Court will not allow the same issue to be raised by different parties where that issue arises out of identical facts and dependent on identical evidence."

He cited in support of this proposition **North West Water Ltd. v.**

Binnie & Partners (a firm) (1990) 3 All E.R. 547. He also contended that Mr. Mundell cannot rely on the cases cited by him because none of the plaintiffs in those cases adopted the course pursued by the plaintiff/appellant which he said is to ignore the defendant already found liable and sue the ones who were absolved of negligence in the first action. If that was his strongest point then the decision would be easy because his contention is clearly not correct. The truth is that the Writ in the instant case was filed on April 22, 1980, whereas the judgment on which it is sought to rely was not delivered until November 30, 1984, i.e. over four years after the Writ was filed during which time the plaintiff/appellant's case could well have been decided.

The principle relied on by Mr. Mundell is set out in 4 Hals. Vol. 16 paragraph 1526 under the heading **"Estoppel and res judicata"** and is distilled from several cases spanning the nineteenth and twentieth centuries for the most part. The paragraph reads:

> "The most usual manner in which questions of estoppel have arisen on judgments inter partes has been where the defendant in an action raised a defence of res judicata, which he could do where former proceedings for the same cause of action by the same plaintiff had resulted in the defendant's favour, by pleading the former judgment by way of estoppel. In order to support that defence it was necessary to show that the subject matter in dispute was the same (namely that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy or open to controversy in the first suit), that it came in question before a court of competent jurisdiction, and that the result was conclusive so as to bind every other court."

It is patent that the principle is founded upon litigation between the same parties which is not what we are dealing with in the instant case.

The facts in **Marginson v. Blackburn Borough Council** (supra) which, as in the instant case, was concerned with the preliminary question of law, are set out in the headnote as follows:

> "A collision took place between a motor-omnibus belonging to a municipal corporation and a motor-car belonging to M. in which he was being driven by his wife,

"as a result of which she was killed and he was injured and the motor-omnibus ran into and damaged two houses. The owners of the houses, alleging that the damage thereto had been caused by the negligence of the two drivers, brought an action in the county court for damages for negligence against the corporation and M. as the respective principals or employers of the two drivers. The corporation and M. in their defences each denied liability and alleged that the damage was solely due to the negligence of the other's driver. Each of them also served upon the other a third-party notice claiming indemnity or contribution in respect of the damage to the houses. The corporation by their third-party notice further claimed against M. for damage to the motor omnibus. The county court judge held that the drivers of both the corporation and M. were to blame for the injury to the houses and both were liable for the damages in equal shares. He also held that they were both to blame for the injury to the motor-omnibus and that the corporation could not recover any damages from M. in respect of the injury. Subsequently, M. brought an action in the High Court against the corporation, claiming (a) on his own behalf damages for personal injuries, (b) under the Law Reform (Miscellaneous Provisions) Act, 1934, as administrator of his deceased wife for the benefit of her estate damages for the loss of her expectation of life, (c) under the Fatal Accidents Act, 1846, as administrator of his deceased wife damages for her death.

On the trial of a preliminary question of law:-

Held, by the Court of Appeal, that inasmuch as the decision of the county court judge on the claim by the corporation against M. for damages to the motor-omnibus had been that each of these parties was personally to blame, that decision estopped M. in his action in the High Court from maintaining the first of his claims against the corporation - namely, his claim for damages for personal injuries; but that it did not estop him from maintaining the other two claims, which were not made in his personal capacity but in a representative capacity as administrator of his deceased wife.

Bainbrigge v. Baddeley (1847) 2 Phill. 705, 709, and **Leggott v. Great Northern Ry. Co.** (1876) 1 Q.B.D. 599, 602, 606, dicta applied."

Two points call for comment. The first is that this case was decided before the Law Reform (Contributory Negligence) Act, 1945, which

accounted for M. being debarred entirely from pursuing his own claim against the council. The second point is that because of third party notices served by both M. and the council in the earlier proceedings the issue of negligence had been litigated between them in those proceedings. Effectively, therefore, M.'s claim for personal injuries would involve a re-litigation of issues already decided between the same parties which, without any fresh evidence, would fly in the face of the principle "interest reipublicae ut sit finis litium".

The headnote in **Johnson v. Cartledge and others** (supra) sets out the facts as follows:

> "The plaintiff was a passenger in a car driven by the first defendant, C., and was injured in a collision between that car and a taxi-cab driven by a servant of the second defendant, M. He sued both defendants, and recovered judgment against C., whose negligence, the judge found, was the sole cause of the accident. In third party proceedings attached to the action, C. claimed an indemnity from M. under the provisions of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6(1)(c), on the ground that in a previous action in the county court, in which M. had sued C. for the damage to his taxi-cab caused in the same collision, the county court judge had found the negligence of M. to be the sole cause of the accident, and that the matter was, therefore, res judicata:-
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> **HELD** (i) as the defendant M. had not been negligent, he was consequently not a tortfeasor, and therefore the defendant C. could not recover indemnity or contribution from him.
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> (ii) this was not a case of res judicata, as the damage in the two cases was different."

The plaintiff/appellant lays store by the fact that the claim of res judicata was rejected. What is instructive here is that the result of the first case which showed M. to be solely liable did not conclude the issue against him in a subsequent trial involving a different party.

In **Townsend v. Bishop** (supra):

> "The plaintiff, who was the driver of a motor car belonging to his father, claimed damages for personal injuries sustained by reason of a collision

> between that car and a motor lorry. The claim was based on the negligent driving of the lorry, and the defence was one of contributory negligence. The father had claimed damages in a previous action against the present defendant for damage to the motor car, and that action was founded on the same alleged negligence of the defendant, and the defence relied upon was a plea of contributory negligence in the same terms as those in the present action. That action was duly tried and judgment given. It was contended that the doctrine of res judicata applied in this action as, in driving the car, the son was acting as his father's agent:-
>
> **HELD:** as the present action was not one between the same parties as those in the earlier action, the plea of estoppel failed, although the negligence and contributory negligence pleaded in each action were the same."

An Editorial Note sought to explain the position thus:

> "The contention in the present case is that the son was the father's agent, and that, therefore, they were in law one person, the principal being liable for the negligent acts of the agent. For this reason, it was said that the two actions were really between the same parties, and that, therefore, the doctrine of res judicata applied, as the question of fact at issue had already been adjudicated upon between the parties. This argument is, however, rejected, and, the action being between different parties, although the same facts had to be adjudicated upon, there was no estoppel."

In the latex case of **Randolph v. Tuck** (supra) the principle contended for by the plaintiff/appellant was very much alive -

> "The plaintiff received injuries on 19 July, 1957 when riding in a car owned and driven by the first defendant which collided with a car owned by the second defendants and driven by their servant the third defendant. In a county court action heard on 13 July 1958, in which the first defendant had sued the second and third defendants for damages for his own personal injuries he was found wholly to blame. The plaintiff issued her Writ on 15 October 1959 and on 1 January 1960 the second and third defendants by third-party notice claimed indemnity from the first defendant in the event of their being found liable to pay damages to the plaintiff. The claim

"was based on the Law Reform (Married Woman and Tortfeasors) Act 1935. They pleaded that the issue between them and the first defendant had been determined by the county court judge and that his decision was binding on the first defendant. The plaintiff's action was heard on 6 February 1961, when Lawton J held that the damage suffered by the plaintiff was caused by the negligence of both the first and third defendants and that they were equally to blame.

HELD, in the third-party proceedings: (1) The second and third defendants were not entitled to claim indemnity as persons entitled to be indemnified under the Law Reform (Married Women and Tortfeasors) Act 1935, s 6(1)(c) since to do so would be to base a cause of action on an estoppel by record. At common law this cannot be done and s 6(1)(c) does not allow that which common law would not. (2) The first defendant was not estopped by the judgment in the county court from denying his own sole responsibility for the damage suffered by the plaintiff, since the precise issue decided in the county court was not the same as in the plaintiff's action. In the county court the issue decided was that the damage suffered by the first defendant was caused, not by any breach of duty owed him by the third defendant, but by his own failure to take proper care for his own safety. In the present action the issue decided was whether the damage suffered by the plaintiff had been caused by breach of duty owed to her by the first or the third defendant or either of them. These duties were similar but nevertheless separate and distinct (**Hay (or Bourhill) v. Young**, p 6, above). Moreover the extent of the respective responsibilities of the first and third defendants for the damage suffered by the plaintiff, ie blameworthiness as distinct from causation, had never been before the county court. (3) **Marginson v. Blackburn Borough Council** (p 670, above) was distinguished on the ground that in that case the county court judge had made a separate decision in the damage claim between Marginson and the bus company. **Bell v. Holmes** (above) not followed."

The emphasis continued to be the determination of the same issues between the same parties. Effect was given to this principle in **Tebbutt v. Haynes and another** (1981) 2 All E.R. 238 in which a wife was estopped for seeking to obtain a larger share in a house which, in proceedings initiated by her and in which her husband's mother

was allowed to intervene, had been declared to belong to the mother except to the extent to which the husband had contributed to its purchase.

Then came **North West Water Ltd. v. Binnie & Partners (a firm)** (supra), in which Drake, J., after reviewing several older cases including cases referred to earlier in this judgment, opted for what he called the broad approach which places emphasis not on the parties but on the issues. This is how he puts it at page 552 of his judgment:

> "Much of the argument before me turned on the limits which should be put on the application of issue estoppel. Consideration of the authorities reveals two schools of thought on this. One approach is what I will call the broad one which holds that the true test of an issue estoppel is whether for all practical purposes the party seeking to put forward some issue has already had that issue determined against him by a court of competent jurisdiction, even if the parties to the two actions are different. The conflicting approach is to confine issue estoppel to that species of estoppel per rem judicatam that may arise in civil actions between the same parties or their privies: See, for example, Lord Diplock in **Hunter v. Chief Constable of West Midlands** [1981] 3 All E.R. 727, [1982] AC 529."
>
> [Emphasis supplied]

So far my reasoning has been predicated by what Drake, J. has chosen to call the conflicting approach but unless his development of the point in any way alters his bold statement of the broad approach then it appears to me that the broad approach cannot affect the plaintiff/appellant because she is not seeking to "put forward some issue already determined against her or her privies by a court of competent jurisdiction". Indeed, no court has up to now in relation to the matter before the Court determined any issue concerning her. She did not appear even as an agent. The Court in **Townsend v. Bishop** (supra) refused to debar a son suing in his own capacity after he had lost in his capacity as an agent.

A look at the facts of the **North West Water** (supra) case will, I think, demonstrate that those pronouncements which were necessary for the determination of the case were well-founded. As

they appear in the headnote to the case, the facts are as follows:

> "A water authority commissioned a firm of consultant engineers to design and supervise the construction of an underground tunnel link and valve house to take water from one river to another by means of 12-km tunnel and pumping system. The scheme prompted protests from local residents which caused the plaintiff to arrange a meeting of the local residents at the valve house in order to demonstrate the operation of the scheme. During the meeting an explosion occurred because, unknown to anyone, the valve house had filled with methane gas which ignited. Six people were killed and the rest injured. A number of victims or their personal representatives brought an action (the first action) claiming damages for personal injury or death against the water authority, the contractors who constructed the system and the consultant engineers. By their defence the water authority claimed that the explosion had been caused by the consultant engineers' negligence. At the trial of the action the judge held that all three defendants were to blame and apportioned liability between them as to 55% against the consultant engineers, 30% against the water authority and 15% against the contractors. All three defendants appealed to the Court of Appeal, which allowed the appeals of the water authority and the contractors and held that the consultant engineers were wholly to blame. In separate proceedings (the second action) the water authority issued proceedings against the consultant engineers seeking to recover the damage to the tunnel system caused by the explosion, estimated to be £2m. The water authority alleged that the damage had been caused by the consultant engineers' negligence and/or breach of contract in designing and/or constructing and/or supervising the link system and further alleged that as between the water authority and the consultant engineers the issue of negligence had been decided in the first action and was res judicata and that the consultant engineers' defence denying negligence was an abuse of process and should be struck out. The question whether the consultant engineers were estopped from denying negligence and whether their defence should be struck out was tried as a preliminary issue.
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> **Held** - Where an issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow that issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same

> "evidence, since not only was the party seeking to re-litigate the issue prevented from doing so by issue estoppel but it would also be an abuse of process to allow the issue to be re-litigated. It followed that since the issue of negligence had already been determined against the consultant engineers in the first action they were estopped from denying negligence and further it would be an abuse of process if they were to be permitted to deny negligence. Their defence denying negligence would accordingly be struck out (see p 552 c, p 553 f g, p 555 a b, p 558 b c and p 561 b to g, post).
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> **Marginson v Blackburn BC** [1939] 1 All ER 273, **Bell v Holmes** [1956] 3 All ER 449, **Randolph v Tuck** [1961] 1 All ER 814, **Wood v Luscombe (Wood, third party)** [1964] 3 All ER 972, **Craddock's Transport Ltd. v Stuart** [1970] NZLR 499 and **Hunter v Chief Constable of West Midlands** [1981] 3 All ER 727 considered."

It is worthy of note, as I have pointed out earlier, that the thrust of the amendment is against the third parties Albert Edwards, Louis Chivas and Thomas Thompson against whom, with the exception of Thomas Thompson against whom action was withdrawn, there had been a finding of sole responsibility for the collision. Note that Gloria Edwards was not named among them. In the instant case there are for all practical purposes no third parties because although Third Party Proceedings were issued, the parties were never served. Therefore, the case is now a straight issue between Gloria Edwards and the two defendants/respondents and I am greatly exercised without success to identify a legitimate avenue by which anything decided between strangers to this action can debar the plaintiff.

In the **North West Water** (supra) case it is correct to say that the parties had not in the title to the previous action been pitted against each other. They were both defendants alongside the contractors, each of whom fought to avoid being found liable. The initial finding and apportionment of liability against them was re-assessed by the Court of Appeal who found **Binnie** solely responsible. In essence, therefore, although the case did not begin as a contest between **North West Water** on the one hand and **Binnie** on the other the conclusion carried that effect, namely, that on the question of

liability for the explosion **North West Water** was absolved from liability and **Binnie** alone stood condemned. And this was in an action in which conceivably both parties would have spared no efforts to escape condemnation. In those circumstances, it would be impermissible for **Binnie** to contend again as against **North West Water** that **Binnie** was not liable. To be debarred in the instant case, the plaintiff/appellant would have to be made to stand in the shoes of **Binnie**, a position for which she clearly does not qualify. But it is interesting to note the method by which Drake, J. arrived at his conclusion. Even after reviewing the authorities and opting for the broad approach he found that his decision could not fail even if the broad approach was wrong because the conflicting approach would come to his rescue. This is how he concluded his judgment at page 561:

> "In my judgment, this broader approach to a plea of issue estoppel is to preferred. I find it unreal to hold that the issues raised in two actions arising from identical facts are different **solely** because the parties are different or because the duty of care owed to different persons is in law different. However, I at once stress my use of the word 'solely'. I think that great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel or abuse of process. Before doing so the court should be quite satisfied that there is no real or practical difference between the issues to be litigated in the new action and that already decided, and the evidence which may properly be called on those issues in the new action.
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> I have already decided, when considering abuse of process, that in the present case no such real or practical difference does exist.
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> Thus on the broader approach to issue estoppel, which in my judgment should be applied, I hold that Binnies are estopped from denying negligence in the present action.
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> Even if I am wrong about the limits to issue estoppel and the true limit is in fact the narrower one, that is to say that favoured by Goff LJ in **McIlkenny v. Chief Constable of West Midlands Police Force** [1980] 2 All ER 227, [1980] 1 QB 283 and Lord Diplock on the appeal to the House of Lords [1989] 3 All ER 727, [1982] AC 529, I would still hold that Binnies are in this case caught by issue estoppel. This is because I find that the issues arising

> "in the present action have already been decided and that in practical terms they have been decided between the same parties, the water authority and Binnies. The absence of third party or contribution notice does not affect my finding on this for I think the reality is that all issues concerning negligence were in fact litigated before Rose J and decided by him and subsequently by the Court of Appeal.
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> For these reasons I find in favour of the water authority and hold that Binnies' denial of negligence should be struck out as an abuse of the process of the court under RSC Ord 18, r 19, alternatively under the inherent jurisdiction of the court. I further hold that Binnies are estopped from denying negligence on the ground that the issue has already been decided against them in the Lancaster action.
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> In my judgment the proceedings between these two parties have reached the stage where it can emphatically be said that it is in the public interest that there should be a finish to this litigation."

I make the comment, and I think not inappropriately, that whatever the prospects of the broader approach are likely to be those prospects did not receive a fillip from the **North West Water** (supra) case. It must be obvious that if the broader as well as the narrower approach can produce the same result then the one is only as broad as the other is narrow.

My concern expressed at the outset of this judgment receives support from the need for caution expressed by Drake, J. when a court contemplates shutting out a party from putting forward his case on the ground of issue estoppel. Indeed, nothing has transpired to affect my stated stance. I am satisfied that Ground 1 of the Grounds of Appeal, which challenges the grant of the amendment and the stay of proceedings, succeeds.

Ground 2 complains about the denial of costs to the plaintiff/appellant. As I pointed out earlier, this action was pending since April 1980 and eventually came on for trial on December 2, 1987, on which day the application for amendment occasioning an adjournment was made. The material put forward in the amendment was in being since the trial of the previous case in November, 1984. Accordingly, there was abundant time in which the amendment could have been sought in

advance of the trial date. In those circumstances, to deny the plaintiff/appellant her costs is difficult to accept and it enures to the credit of Mr. Scharschmidt that he never said one word in defence of the order regarding costs. However, such considerations are now of no moment.

In the result, therefore, I would allow the appeal and set aside the orders made in the Court below. The appellant is to have the costs of appeal and costs in the Court below to be taxed if not agreed.

MORGAN, J.A.:

This is an appeal from an order made by Theobalds, J. on a Notice of Motion to amend the defence which application was granted with costs in the cause

It concerns a running-down action. The plaintiff/appellant by her Statement of Claim alleges that the first and second defendants as owner and driver of a Tanker licence number BL252 by their negligence on the 20th September, 1979, caused a collision with a motor van licence number BP892 in which she was a passenger causing injuries to her.

The defendants have denied the negligence and alleged that the collision was caused by the negligence of the driver of the said motor van BP892 one Louis Chivas, since deceased. Albert Edwards, the owner of the motor van and husband of the plaintiff/appellant, was added to the action along with Chivas as third parties but was never served.

Before this matter came up for hearing, Writ number C.L. A026 (the first action) was filed in which the respondent Arscott as plaintiff claimed against Albert Edwards and Chivas in negligence for damages to his motor vehicle arising out of the same accident of the 20th September, 1979. This first action was heard by Orr, J. in the Supreme Court and judgment was entered for the plaintiff (Arscott) against the defendants who were found wholly to blame.

It is to be noted that this claim of Gloria Edwards is against the successful party in the first action and whereas her claim is one of personal injury, the issue as between the parties in the first action was one of damage to property already decided by a competent court, at which hearing she was not a party.

However, with this previous judgment in their favour, the defendant/respondent herein successfully sought by Notice of Motion to amend the defence as follows:

> "4.(a) The Defendants further say in answer to the Plaintiff's claim herein that as a consequence of the said collision which is the

" subject matter of this action, the First Defendant commenced an action against the Third Parties in the Supreme Court of Judicature of Jamaica on the 13th day of March, 1980 in Suit No. C.L. A-026 of 1980. The Third Parties entered Appearance and defended the action on the grounds pleaded in the Statement of Claim, so that the issues by the pleadings in that cause was the same or substantially the same as the issues in this action.

4.(b) On the 30th day of November, 1984, the Honourable Mr. Justice Orr hearing all the evidence at the trial of the aforesaid action found that the Third Parties were wholly to blame for the said collision and so pronounced Judgment in favour of the First Defendant. This said Judgment still remains in full force.

4.(c) In the premises, the said Judgment is relevant to the issue of negligence and the Defendants intend to rely thereon in this action and say that the Plaintiff is now estopped from maintaining her claim against the Defendants."

The plaintiff/appellant's ground of appeal was that the learned trial judge erred in granting leave to amend, as the determination of the first action had no bearing on the issue in this action.

Mr. Mundell argued that in order for estoppel to arise it must be shown that persons who plead must have been parties to the first action. The plaintiff/appellant, Gloria Edwards, was not a party, or privy thereto, not a witness, there was no judgment which involved her and she was entitled to have her claim litigated.

Mr. Scharschmidt in reply submitted that there are two schools of thought on this aspect of the law. There is a narrow approach in use but a broader approach is now preferred and where an issue has been litigated and decided a Court will not allow the same issue to be raised by different parties where that issue arises out of identical facts and is dependent on identical evidence. He further submitted that the issue concerning the Court was negligence and that issue having been decided by a competent court in the first action, the defendants now wish to rely on it in this second action. He urged that the

judgment of Orr, J. cannot now be ignored. To do so would lay a Court open to come to a conclusion opposite to that decision and would conflict with the principle that there should be an end to litigation.

The question, therefore, raised in this matter is whether the plaintiff/appellant is estopped in an action for personal injuries by reason of the fact that the issue of negligence had already been litigated by a competent court in a first action joined between the respondent owners and the third parties. If this is so then the motion ought to be denied, if it fails then an estoppel is created and the motion ought to be granted.

Issue estoppel supports the principle that it is desirable that a person should not be pursued in litigation with regard to a matter that has already been decided. For such a plea to succeed the principle has been that there must be in existence a final judgment by a Court of competent jurisdiction, where there is co-existing the same parties or their privies the same damages and the same question of law or fact. This is supported by several authorities. **Marginson v. Blackburn Borough Council** (1939) 2 K.B. 426, said to be the first in which the Court applied issue estoppel to prevent an issue being re-litigated, illustrates the principle. In that case there was a collision between the Council's bus and **Marginson's** motor car in which he was a passenger being driven by his wife who died in the accident. This collision caused damage to a building and the owners of the building sued both parties in negligence. Both drivers were found equally to blame. **Marginson** thereafter claimed against the Council for:

(a) Damages for personal injuries to himself.

(b) Damages under the Law Reform Act for the loss of expectation of life of his wife.

(c) Damages under the Fatal Accidents Act as Administrator of his deceased wife's estate.

It was held by the Court of Appeal that inasmuch as the decision of the county court judge on the claim by the Council against **Marginson**

for damages in the first action had been that each of them was personally to blame, with respect to the second action, **Marginson** was estopped from making the first claim, i.e. for personal injuries, but as of the other two claims, because they were made in a representative capacity as administrator of the deceased's estate and not in his personal capacity he was entitled to maintain them.

In **Johnson v. Cartledge and Matthews (Matthews, Third Party)** (1939) 3 All E.R. 654 a collision occurred between cars driven by the first defendant and the servant or agent of the second defendant. The plaintiff, who was a passenger in the first defendant's car, was injured and filed an action against both parties. In a previous action in which the first defendant had sued the second defendant for damages to his car, the second defendant was found negligent and to be the sole cause of the accident. The first defendant, contending that the issue of negligence between them was res judicata, issued Third Party Proceedings and sought an indemnity from **Matthews** under the provisions of the Law Reform (Married Women or Tortfeasor) Act section 6(1)(c), which is in all respects similar to our section 3(1)(c) Law Reform (Tortfeasors Act), and reads:

> "Where damage is suffered by any person as the result of a tort whether a crime or not...
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is or would if sued have been liable in respect of the same damage."

Cassels, J. held at page 656 that the third party was not a tortfeasor, that **Matthews** could not recover and went on to say:

> "...it is quite clear that the parties must be the same and the damage must be the same and the issues of law and of fact must be the same before the question of res judicata can be successfully raised."

He found that the damages on the one hand were for personal injuries and on the other hand damage to property and he was not estopped.

So as between **Marginson's** (supra) case and **Johnson's** (supra) case estoppel did not operate as in the case of **Marginson** he was suing in a different capacity from the first action, and in the case

of **Johnson** he was claiming different damages. This Mr. Scharschmidt refers to as the "narrow approach".

At the time of hearing of **Johnson's** (supra) case, other cases had already been heard in different Courts arising out of the same accident resulting in one or the other of the parties being found negligent. This provoked the following observation of Cassels, J.:

> "The point was certainly one of interest. It would seem almost to add a new terror to litigation which may arise out of a collision between vehicles upon the highway. Whether or not steps will be taken to prevent a multiplicity of cases arising out of the same incident I do not know, but it seems lamentable that it should be possible for so many different courts to be engaged at different times in different places considering the unfortunate results of the negligent driving of a motor car."

It is correct that since this observation there has been some other thoughts on the law on this topic - the broader approach.

Counsel for the respondents relied heavily on **North West Water Ltd. v. Binnie & Partners (a firm)** (1990) 3 All E.R. 547. This was a claim for negligence. The defence denied liability. Thereupon the Water Authority applied to strike out the defence as disclosing no reasonable defence or an abuse of the process of the Court as liability had already been determined in previous proceedings.

The Water Authority had commissioned **Binnie**, a firm of consultant engineers, to design and supervise the construction by contractors of an underground tunnel and pumping system to take water from the river to another point. There was some disapproval by the residents and at the invitation of the Water Authority they attended a meeting on site where the Authority would demonstrate the scheme. While there an explosion occurred which killed and injured persons present. Resulting actions were brought by victims and their personal representatives naming the Water Authority, the engineers and the contractors who were found jointly negligent in different degrees. On appeal it was held that the consultant engineers were wholly to blame. The Water Authority then sued the consultant engineers in this action (the second action) for negligence and breach of contract; the defendants

denied the negligence; the Water Authority sought to strike out the defence on the ground that the issue of negligence was res judicata.

The question arose whether the consultant engineers were estopped from denying negligence. The action was heard by Drake, J. and the headnote reads:

> "Where an issue had for all practical purposes been decided in a court of competent jurisdiction the court would not allow that issue to be raised in separate proceedings between different parties arising out of identical facts and dependent on the same evidence, since not only was the party seeking to re-litigate the issues prevented from doing so by issue estoppel but it would also be an abuse of process to allow the issue to be re-litigated. It followed that since the issue of negligence had already been determined against the consultant engineers in the first action they were estopped from denying negligence and further it would be an abuse of process if they were to be permitted to deny negligence. Their defence denying negligence would accordingly be struck out."

The consideration here is that an estoppel can arise where there are proceedings in the second action between different parties out of identical facts and evidence.

Reference was made by Mr. Scharschmidt to paragraph 1530 of Halsbury's Law of England (4th Ed.) page 1039 which reads:

> "**Issue estoppel.** An estoppel which has come to be known as 'issue estoppel' may arise where a plea of res judicata could not be established because the causes of action are not the same.
>
> A party is precluded from contending the contrary of any precise point which, having once been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action, provided it is embodied in a judicial decision that is final, is conclusive in a second action between the same parties and their privies. This principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law. The conditions for the application of the doctrine have been stated as being that (1) the

> "same question was decided in both proceedings; (2) the judicial decision said to create the estoppel was final; and (3) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies."

What is important in this passage is that the emphasis is on "issues" and not "parties", and the principle includes and affects their "privies". The plaintiff/appellant, Gloria Edwards, was the wife of Albert Edwards, the owner of the motor van, who was unsuccessful in the first action. She was a passenger, was injured and, indeed, must have had some interest in the outcome of that litigation but on neither of those two limbs could she be regarded as a privy of a party to the proceedings in the first action to be so affected by the decision. To be a "privy" her husband's success or failure in the action must have conferred a benefit or imposed an obligation on her. (See **Carl-Zeiss-Stiftung v. Rayner & Keeler Ltd. (No. 3)** (1969) 3 All E.R. 897 at page 912. In my view, Mrs. Edwards is not a "privy" as there is no material on which any such conclusion could be based.

The passage from Halsbury's (supra) states the conditions for the application of the doctrine of estoppel. Drake, J., however, in **North West Water Ltd. v. Binnie** (supra) page 552 in the course of his judgment supports the submission of Mr. Scharschmidt that there are two schools of thoughts thus:

> "One approach is what I will call the broad one which holds that the true test of an issue estoppel is whether for all practical purposes the party seeking to put forward some issue has already had that issue determined against him by a court of competent jurisdiction, even if the parties to the two actions are different. The conflicting approach is to confine issue estoppel to that species of estoppel per rem judicatam that may arise **in** civil actions between the same parties or their privies: see, for example, Lord Diplock in **Hunter v. Chief Constable of West Midlands** [1981] 3 All E.R. 727"
>
> [Emphasis mine]

The first approach as stated in the Water Authority case boils down to one of "issues" and differs from the approach in **Marginson's**

(supra) case, a case which was considered and reviewed by Drake, J. along with other like cases in his judgment.

In considering the principle of the narrow approach, Lord Denning, M.R. did, in **McIlkenny v. Chief Constable of the West Midlands** (1980) 2 All E.R. 227 at 237 (C.A.), pose the practical test of a motor vehicle running into and injuring one hundred people on a pavement, whether the driver would be permitted, after being found negligent in one action, to defend ninety-nine separate actions. It is noted that in that theoretical case inasmuch as their Lordships unanimously agreed that an attempt to re-litigate was an abuse of the process of the Court one member answered in the affirmative for the reason that they were different parties to whom different duties were owed.

Mr. Mundell for the appellant does not contend that the issues are different or that a different duty of care is owed. Rather he contends that the parties are different and the plaintiff/appellant should not be put out of Court without the opportunity of being heard as a witness and that she is entitled to have her case adjudicated. He relies on **Marginson** (supra) and other similar authorities for support. Mr. Scharschmidt on the other hand contended that the emphasis must be on the issues; that the issues are the same notwithstanding it is now a different party; it is a re-litigation of facts already decided by a competent court.

Mr. Mundell submitted that this action has no relation to the previous case. In so far as that submission is concerned, it relates only to the fact that there are now different parties. As to the issues, he has neither denied nor admitted them as being the same and to move from the narrow approach to the broader approach, this is a crucial issue. The defendants now seek to amend and plead that they were the same issues or substantially the same. On what basis did the learned trial judge find negligence as between the parties in the first action? In the present proceedings we are quite unaware. Mrs. Edwards, as a passenger, may for her part be aware of evidence which was not before the Court or evidence which ought not to have been before the Court in the first action. To so find in this case,

the issues ought to be aired or the records perused then a decision made. In **Marginson's** (supra) case it was held that the Court was entitled to have regard to the reasons for the judge's findings in order to ascertain fully the questions of law and fact which was decided (Slesser, J. page 431). Unfortunately, we have not been afforded that privilege.

In some circumstances a principle admits of easy application in others less so. Much can be said for the broader approach and I particularly desire to adopt the language of Drake, J. in the **Water Authority** (supra) case at page 561 which conveys a fair interpretation of the view that it is unacceptable in matters of law that there should be parallel proceedings in which the same issues are raised leading to different and inconsistent results and anything that will diminish a multiplicity of actions and the cost of litigation should be taken into account. It reads:

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

In the **Water Authority** (supra) case it was, however, unnecessary to consider this approach as the parties were the same in both actions, albeit in different roles. Each party was able to present its case, and so in a second action it would necessarily be a repetition of the same evidence on which all issues were already decided. The application to strike out was sought on the basis of "issue estoppel" but the Court granted leave to amend to include "an abuse of the process of the Court". It then struck out the defence on the latter basis and also

found on the "issue estoppel" that all the issues had been decided in the first action.

That decision was clearly on the issues. This case, however, differs in that the defendant has relied solely on "issue estoppel", also that there was one party only who was involved in the previous action. Drake, J. expressed the need for great caution to be exercised in shutting out a party from putting forward his case and in so doing I give consideration to the fact that Mrs. Edwards has not yet had a chance to have liability for the injuries she sustained litigated and it is my view she should not be deprived of her right to do so. She may well raise issues not previously advanced in evidence - in the nature of fresh evidence. The justice of her case should not be made to rely upon what a stranger to her case may have said in another case.

It is in my opinion clear that each case must be considered according to its own circumstances. The evidence called on issues, consequently, as between the first and second, is not sufficiently clear to consider application of the broader approach as urged by counsel neither is an examination of the record undertaken to satisfy the Court that a fair and full opportunity of all the issues was presented during litigation. In my judgment, the narrow approach should be applied in this action. Estoppel does not, therefore, arise, the parties being different. For these reasons the Motion for Leave to Amend should have been denied.

By reason of the conclusion to which I have arrived, Ground 2 seems no longer relevant. I would say, however, that costs are in the discretion of the Court and costs also follow the event. The Motion to Amend the Defence was contested and the defendants having succeeded they were entitled to costs. The Court then proceeded to adjourn the hearing for other pleadings resulting from the order to be filed. This was a hearing date and the plaintiffs, having come prepared to have the matter heard, were entitled to the costs of an adjournment not occasioned by any default on their part. In such circumstances, where both parties have a valid claim to costs, it is

my opinion that in ordering costs in the cause the judge's exercise of his discretion ought not to be faulted.

Accordingly, I would allow the appeal and substitute an order dismissing the motion with costs to the appellant.

BINGHAM, J.A. (AG.)

I have availed myself of the opportunity of reading in draft the judgments prepared in this matter by Wright and Morgan JJ.A.. They have sought to identify and to deal at some length with issues which arose on appeal.

They have both dealt fully with the arguments advanced by counsel and reviewed the authorities cited in support of their respective propositions. In this regard, therefore, I do not propose to cover the ground which they have already traversed unless it is unavoidable.

The grounds of appeal being advanced by the appellants were that:-

> "1. The learned Judge erred in granting the Defendants/Respondents leave to amend their defence and to stay proceedings as the determination of the issue in Suit C.L.A. 026/80 has no bearing on the issue in the present case.
>
> 2. The learned Trial Judge erred in refusing to award costs to the Plaintiff/Appellant herein as the Defendants/Respondents had had sufficient time beforehand to have applied for the amendment which they sought on 2nd December, 1987."

In so far as the amendment granted to the defence by the learned judge below sought to raise the issue of estoppel, and having regard to the principles applicable as providing the basis for such a plea, the fact that the claim instituted by the appellant was between different parties meant that an essential element to enable such a plea to be advanced by way of a defence was therefore lacking. As the respondents are here relying upon a plea of estoppel res judicata in which by the amendment sought and granted they were contending that the previous action had been litigated to a finality, they had to show that "the parties must be the same, and the damage must be the same and the issues of law and of fact must be the same before the question of res judicata can be successfully raised." Per Cassels J in Johnson v. Cartledge and Matthews (1939)

3 K.B.D. 654 at p. 656 H.

North West Water Limited v. Binnie and Partners (1990) 3 All E.R. 347 which was relied on by learned counsel for the respondents as supportive of the broader approach to the question of estoppel cannot assist the respondents. Drake, J., in upholding the plea of estoppel was on much firmer grounds as although the parties were different, they were not unrelated having been involved in the previous action. In this regard, the learned judge in this case fell into error therefore in granting the amendment sought.

There remains, however, an aspect of these proceedings now to be litigated which calls for some comment. This has to do with the fact that the previous claim in C.L. 60 A 026 which was heard by Orr, J., and which is now the subject of an appeal, the same issue of negligence now being canvassed in this matter was determined. The defendants in this claim were exonerated from any blame at that hearing. The parties found to be negligent of whom one is the husband of the plaintiff, [illegible] against in this action.. Although third party proceedings were taken out to bring them into the suit, they have not been served.

It is not unknown in these courts for there to be parallel claims brought in cases arising out of a motor vehicle collision and involving one or more vehicles, such actions are launched claiming damages to the vehicles as well as for personal injuries arising out of the collision. Where this situation occurs by agreement, the claim relating to the drivers and owners of the respective vehicles is litigated as a test action in order to determine the substantive issue of liability in negligence. Dependent upon the outcome, the claims for personal injuries then follow as a matter of course usually by way of assessment of damages. If no agreement is reached as to the course to be followed, section 458 of the Civil Procedure Code applies. Order 4 rule 10 of the Supreme Court Practice (U.K.) allows for such actions to be consolidated at the

stage of the hearing of the summons for directions. This is in keeping with the principle that claims involving substantially the same issues ought to be dealt with at the same hearing. This avoids a multiplicity of suits being litigated as well as the extra legal costs attendant thereon. It also prevents the kinds of abuses of the judicial process to which Cassels, J. alluded in **Johnson v. Cartledge and Matthews** 3 K.B.D. 654 and which facts in that case prompted the learned judge to remark that:-

> "It would seem to add a new terror to litigation which may arise out of a collision between vehicles upon the highway. Whether or not steps will be taken to prevent a multiplicity of cases arising out of the same incident I do not know, but it seems lamentable that it should be possible for so many different courts to be engaged at different times in different places considering the unfortunate results of the negligent driving of a motor car."

It certainly could not have escaped the attention of the attorneys-at-law representing the parties to the action before Orr, J., that the appellant's claim for personal injuries relating as it did to the same subject matter and arising as it did out of the same incident could conveniently have been consolidated. For reasons best known to themselves they allowed the claim in C.L. 80 A 026 to proceed to trial on its own. It is of interest to note that the writ and statement of claim in that matter was filed on 13th March, 1980, whereas the writ and statement of claim which is now the subject matter of this appeal was lodged on 22nd April, 1980.

Having regard to the reasoning and conclusions reached by my brethen, I too, for the reasons given at the commencement of this judgment, join in agreeing with the decision at which they have arrived on the main issue as set out in ground 1.

On the secondary issue (ground 2) as to the order for costs made below, however, I am in agreement with the views as expressed by Wright, J.A. and the order as proposed by him.