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IN DEFENSE OF THE DOCTRINE OF MUTUALITY OF ESTOPPEL

EDWIN H. GREENEBAUM†

Our jurisprudence is being infected by a disease which might go by the term "galloping res judicata." One prominent symptom of this disease is the seemingly ever-increasing abandonment of the requirement of mutuality of estoppel. One wonders at the spectacle of judges in some recent cases punishing losers for the benefit of persons who have risked nothing, but would like to be vicarious winners.

The doctrine of mutuality of estoppel provides, generally, that a judgment in a prior litigation will preclude litigation of matter in a subsequent action only where both parties to that subsequent action are bound by the prior judgment.²

The mutuality of estoppel doctrine has had few unqualified and unashamed defenders,² which is unfortunate since the requirement is sensible and based on significant considerations of fairness.

The argument which follows will explain the considerations which support the mutuality requirement and explore those categories of cases wherein the law has always found exceptions to the mutuality requirement to be necessary. It will be developed, further, that the supposed trend away from mutuality³ is probably more apparent than real,⁴ that the largest portion of cases which have purported to reject the doctrine in fact required no departure at all from traditional precedent and, more critically, that the arguments usually made in rejecting mutuality are superficial and unconvincing.

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1. See RESTATEMENT OF JUDGMENTS § 93 (1942); 1 A. FREEMAN, JUDGEMENTS 929 (1925).

2. They include 1B J. Moore, Federal Practice ¶ 0.412 [1] (1965); Moore and Currier, Mutuality and Conclusiveness of Judgments, 35 Tul. L. Rev. 301 (1961); Seavey, Res Judicata with Reference to Persons Neither Parties nor Privies—Two California Cases, 57 Harv. L. Rev. 98 (1943); Von Moschzisker, Res Judicata, 38 Yale L.J. 299 (1929).


4. See notes 65-70 and accompanying text infra.
The fallibility of the litigation process is the most fundamental basis for the mutuality requirement as well as for all other limitations upon the preclusive effects of judgments; no one should ever undertake to guarantee the accuracy of the results of litigation. For some purposes (to meet due process requirements, for example) the law asks a yes or no question as to whether a party has had an adequate day in court. Days in court, however, in fact vary greatly in quality. Litigation may miscarry in many ways without producing errors sufficient to warrant a new trial. A losing party is generally responsible for his own mistakes and the mistakes of his own counsel, and even mistakes by the court, a jury or the other party will not produce relitigation of the issues if the errors are considered "harmless" when weighed against the desirability of terminating the dispute between the parties and avoiding the harassment and expense of relitigation as between the parties. But such questions might be answered differently vis-à-vis a person who has been put to no expense and who has no strong interest in being able to rely on his dispute as having been resolved.

An additional consideration supporting the mutuality requirement is the problem of rationing litigation resources. A party facing potential

5. *E.g.*, Fed. R. Civ. P. 61:
No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Even between the parties there was something of a sportsmanship principle of an adequate chance at common law, as evidenced, for example, by the broad right of voluntary dismissal without prejudice.

It is the adversary system that we have espoused in our system of justice. The adversary system prevails in many aspects of the life of man but contest rules seldom provide that one contestant must be declared the loser to a competitor that he has never met on the field of contest.

While this court believes that our system of justice has no peer in this fallible world, nevertheless, it is unable to consider that our trial processes unerringly discover Truth. The selection of the judge and jury, the choice of counsel, the availability of witnesses, the manner of the presentation of their testimony, the dynamics of the rapport between witnesses and fact-finder, and the personalities and appearances of the parties as they impress the fact-finder in various ways, are all matters that defy scientific analysis, are affected by fortuitous circumstances and variously determine the outcome of a contest conducted in the courts of this country.
multiple litigation with diverse parties would like to invest resources in each litigation in light of what is at stake in the case, but—absent the requirement of mutuality of estoppel—he may have great difficulty knowing what he stands to win or lose. He may or may not be aware of the potential litigation with other persons, and even if he is, more will be at stake if he loses his case than will be if he wins, because non-parties cannot be adversely affected by litigation results when they have not had their day in court. This factor also reflects on the likelihood of accuracy in the litigation process; if a common party must ration limited resources for the possibility of multiple litigation, his ability to achieve the favorable and, from his viewpoint, correct result in each case will be diminished.

An additional dilemma which sometimes faces a party and which is seriously aggravated if the mutuality rule is not adhered to is choosing whether to acquiesce, without seeking a new trial or appeal, in a judgment based on unfavorable findings of liability but with a favorable amount of damages. For example, in *Berner v. British Commonwealth Pacific Airlines* defendant had suffered an adverse judgment in a prior action regarding its liability for a plaintiff's injuries arising from an airplane crash, but the amount of the verdict was only a fraction of what the plaintiff had demanded and might eventually have recovered had the case been retried. In a later action by other passengers on the defendant's airplane for injuries arising from the same accident, the court held that the defendant should be permitted to acquiesce in the prior judgment without moving for a new trial or taking an appeal without submitting itself to liability to other potential claimants by application of issue preclusion.

The mutuality requirement should also be considered in light of the relation of litigation to other devices for resolving disputes. Litigation is often used by parties to disputes as a strategic tool to help obtain favorable settlements which we naively insist on treating as voluntary. At best, a party facing multiple litigation faces special pressures in settlement negotiations because of the resource problems referred to above; to the extent that mutuality of estoppel is not required, however, his strategic

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7. This article will refer to a litigant who is a party to multiple litigation and against whom a prior judgment is being asserted by a person who was not a party to the prior proceeding as the "common party."

8. Compare the justification by the Advisory Committee of the proposed discovery rule for the federal courts which would permit discovery of limitations of liability insurance: "Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that the settlement and litigation strategy are based on knowledge and not speculation." *Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Rule 26(d) (2) (1967), Advisory Committee's Note.*

9. 346 F.2d 532 (2d Cir. 1965).
problems are seriously aggravated. Even where a party in good faith believes in the merits of his cause, he must calculate the chances that he may lose his case either because the questions are close or because there exist legally irrelevant but practically important sympathetic factors favoring his opponent. Absent mutuality, a common party may be under special pressures to settle unfavorably a first litigation to avoid the chance that his case may control subsequent actions; and of course, absent mutuality, the common party who has already lost a prior case is faced with subsequent settlement negotiations with the balance of power very drastically shifted.

There have always been exceptions to the requirement of mutuality of estoppel. The most consistently recognized exception arises when, because a relation exists between non-common parties, the non-common party to a prior judgment cannot have full benefit of that judgment without holding the common party bound to it in subsequent litigation with the second non-common but related party. The significant relation is most frequently a surety relation. Suppose, for example, that in an automobile collision case a plaintiff brings an action against a servant who was driving his master’s vehicle, asserting that the servant because of his negligence is responsible for the injury. Suppose further that the defendant wins a judgment in his favor based upon an adjudication of the case. A subsequent suit against the master on the doctrine of respondeat superior will be barred by the prior judgment. The most persuasive reason for this result is that if the master suffers injury because of his servant’s breach of duty, the master will have a cause of action for indemnification against his servant or, alternatively, may be subrogated to the rights of the third party. Thus, unless the second suit against the

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13. A surety relation is one where each of two parties is immediately liable to a third party for a debt, but as between the two debtors one of them is ultimately liable. The party ultimately liable is referred to as the principal debtor, the other as the surety. See L. SIMPSON, SURETYSHIP 6-9 (1950).
14. RESTATEMENT OF JUDGMENTS § 96 (1942). It is often stated or assumed that exceptions to the mutuality doctrine involve only application of collateral estoppel, or issue preclusion, but this is in error. In appropriate cases there may be merger, or claim preclusion, as well. Suppose that a claimant potentially has alternative theories of liability which he may assert against both master and servant: for example, negligence and strict liability. If he asserts only one theory against the servant and suffers an adverse judgment on the merits, he should undoubtedly be precluded from pursuing the master on the other theory, even though the rules of collateral estoppel would not apply. See Vestal, Extent of Claim Preclusion, 54 IOWA L. REV. 1, 4-12 (1968).
15. This is a general feature of surety relations. See L. SIMPSON, supra note 13 at 205-37.
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master is barred, the servant may be required to defend himself against liability a second time in spite of his prior victory, and the master may be faced with inconsistent judgments if the servant's second defense is again successful. The law has always accepted the need to avoid this dilemma as more important than the considerations supporting the requirement of mutuality.\textsuperscript{16}

\textit{Bernhard v. Bank of America}\textsuperscript{17} is often thought to be a leading precedent for further exceptions to the mutuality doctrine.\textsuperscript{18} In fact, the \textit{Bernhard} case falls within the exception described above; only the fact situation in \textit{Bernhard} was novel.

Helen Bernhard, a beneficiary of a decedent's estate, had challenged the accounting of the executor on the ground that the executor had improperly withdrawn for his own use funds from an account of the decedent with the Bank of America. The executor's defense to this charge was that the decedent, during her lifetime, had made a gift of the account to him. The issue was adjudicated favorably to the executor, and his accounts were approved. Subsequently, Bernhard obtained for herself an appointment as administratrix for the estate. In this capacity she sued the Bank of America on the same account which had been in dispute in the prior action. The Bank of America successfully pleaded the prior judgment as a bar to the later action. It seems clear that had the former adjudication defense not been allowed in \textit{Bernhard}, and had the bank been held liable on the account, the bank would have had a cause of action against the former executor for indemnification, as subrogated to the rights of the estate, for unjust enrichment or on a kindred theory.\textsuperscript{19} Prohibition of this second, indirect attack on the executor would have been required by precedent.\textsuperscript{20}

The exception to the mutuality requirement under examination, which might for this purpose be referred to as the "related non-common parties exception," may be broader than a surety or indemnity exception and may justifiably include other cases in which there is some relationship between the non-common parties which might require the cleaning up between them of leftover claims involving the same subject matter or in

\begin{itemize}
\item \textsuperscript{16} See Ferrers v. Arden, 78 Eng. Rep. 906 (C.P. 1701); A. FREEMAN, \textit{supra} note 1 at 932-36.
\item \textsuperscript{17} 19 Cal.2d 807, 122 P.2d 892 (1942).
\item \textsuperscript{18} "[I]t is recognized that the widest breach in the citadel of mutuality was rammed by Justice Traynor's opinion in Bernhard v. Bank of America. ..." Zdanok v. The Glidden Co., 327 F.2d 944, 954 (2d Cir. 1964).
\item \textsuperscript{19} See note 15 \textit{supra}; see \textit{RESTATEMENT OF RESTITUTION} §§ 15, 23, 163 (1937); \textit{UNIFORM COMMERCIAL CODE} § 4-407.
\item \textsuperscript{20} Professor Seavey had a different way of reconciling \textit{Bernhard} to prior precedent. Seavey, \textit{Res Judicata With Reference to Persons Neither Parties nor Privies—Two California Cases}, 57 HARV. L. REV. 98, 101 (1943).
\end{itemize}
which one of the non-common parties might be unduly harassed by multiple litigation even though a party to only one of them.

From a prospective viewpoint it will sometimes be difficult to tell which of the related non-common parties is likely to be the principal debtor and which the surety. For example, when the conduct of a servant for which a master is held to be responsible is unauthorized, the servant may be required to indemnify his master, as was suggested in the respondeat superior situation discussed above. In contrast, however, if the servant is found responsible to a third party for acts which have been authorized by his employer, the employer may be required to indemnify his employee. Clearly, it would be undesirable to litigate in suits with the common party relations between the non-common parties with only one of them present, because the absent party would not be bound by such a judgment.

Furthermore, separate suits against related non-common parties may be unduly harassing even though each is involved as a party in only one suit. An employee will probably be involved in the suit against his master at least as a witness and will perhaps be otherwise obligated to cooperate in the defense. Or, where the motor vehicle owned by the master has been damaged in a collision when the servant was driving, the servant may similarly be involved in the master's litigation attempting to recover property damage from the common party. The desirability of avoiding such harassment suggests giving the benefits of the prior judgment to the prior non-party even if his involvement was not of the kind or extent which would make him a privy to that judgment.

As this related non-common party exception moves to its outer limits, the balance of considerations for and against the mutuality requirement in the context of each case becomes less clear; as a result precedent has gone both ways. Most commonly, alleged tortfeasors have been given the benefit of prior judgments for persons sought to be held vicariously liable based upon issues which exonerate the actors; but even in this the

21. See note 14 and accompanying text supra.
24. Compare Adriaanse v. United States, 184 F.2d 968 (2d Cir. 1950) (plaintiff libellant's suit for personal injuries against United States, owner of vessel, barred where plaintiff had lost earlier suit against steamship company, general agent of United States) with Mackris v. Murray, 397 F.2d 74 (6th Cir. 1968) (liability in administratrix's suit against driver whose auto had collided with auto driven by deceased not established by judgment adverse to defendant in property damage suit by deceased's employer-owner of auto).
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authorities are not unanimous. 25

A balancing, case-by-case approach in this fringe area could be undertaken. This approach would give rise to such questions as: what control did the various parties have over the scope of the action by way of joinder of parties, by use of counterclaims and declaratory judgments; what control did the parties have over the time and place of litigation 26 and what is the impact in the immediate case of the various factors which have been identified as supporting the mutuality requirement in general? One should be warned, however, that case-by-case balancing without giving general rules regarding when the mutuality requirement will be departed from raises serious problems for the predictability and reliability of judgments. 27

The other exception to the requirement of mutuality which has been recognized with some frequency is that a convicted criminal defendant may be bound by findings necessary to the determination of his guilt in subsequent civil litigation with private parties. 28 This exception may be justified by the high burden of persuasion required in criminal litigation, the more acute embarrassment of inconsistent results in this area or some public policy reason.

Until recent years, most cases recognizing exceptions to the requirement of mutuality fell into one or another of these traditional categories.

Recent amendments to the class action provisions of the Federal Rules of Civil Procedure 29 have attempted to abrogate what may be identified as having been an additional exception to the mutuality requirement. In this regard certain precedents in the federal courts which antedated the amendments by only a short time and which represented novel departures from the mutuality requirement will, if adhered to, be in derogation of the class action reform. In particular, the prior rule, as applied, permitted a "spurious" class action in which the interests of the class members were not related in such a way that a judgment adverse to the class could be binding on class members who had not appeared in the


27. See also note 62 and accompanying text infra.


Some precedents, however, had permitted members of such a class to intervene in the action after a determination of liability favorable to the class had been made in order to allow the class members to obtain their individual relief. The possibility of this "one-way intervention" made it very difficult for a party opposing a "spurious" class to know what was at stake in the action and similarly made it very difficult to settle such a case. The 1963 reform adopted by the Supreme Court was that in actions which could be conducted usefully as class actions, but in which res judicata effects could be applied under the prior rule only to those persons appearing in the action, members of the class are to be given notice of the pending action and are then to be bound by the judgment entered unless they notify the court by a date given in the notice that they prefer not to participate in the pending case. Thus, one-way intervention is eliminated and mutuality of estoppel reinstated.

Two leading cases which if adhered to will be in derogation of this reform are *Zdanok v. The Glidden Co.* and *United States v. United Airlines.* In *Zdanok,* employees of The Glidden Company were pursuing their individual claims against their employer arising from an alleged breach of their collective bargaining agreement. In this class action on behalf of approximately 160 employees, the employer was held bound by a previous decision in which five different employees had pursued their claims arising from the same events. In the later action the employer sought to introduce more extensive evidence bearing on the contractual relation than had been introduced in the prior hearing, but the court held the contractual obligation conclusively determined by the prior decision. In *United Airlines,* an action involving numerous claims arising from a mid-air collision of a commercial passenger plane and a military aircraft, the defendant airline was held bound by an adverse determination regarding its liability for injuries arising from the collision in a prior action in which it had been sued by numerous other claimants. These precedents seem to sanction a new kind of one-way intervention; if they are followed, it is difficult to see why potential members of a class would ever include themselves in a class action.


32. 327 F.2d 944 (2d Cir. 1964).

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EVALUATION OF ARGUMENTS ADVANCED AGAINST THE MUTUALITY REQUIREMENT

The stated assumptions and principles upon which the cases departing, or purporting to depart, from the mutuality requirement are based seem to be on the whole superficial and unsupported. Justice Traynor in the Bernhard case dismissed mutuality in a single sentence: "No satisfactory rationalization has been advanced for the requirement of mutuality." The considerations discussed in the first part of this article supporting the requirement were not identified, much less evaluated, in the opinion. The cases which have followed have done little better, often being satisfied to cite Bernhard and other cases which fall predominately within the traditional exceptions to the mutuality requirement.

The mutuality requirement, according to cases in the developing Bernhard tradition, must be abrogated because it is in derogation of the

34. 19 Cal. at 812, 122 P.2d at 895.
35. See cases cited note 69 infra.

To establish that there has been long standing dissatisfaction with the mutuality requirement, Bernhard and several other cases have cited Jeremy Bentham's great work on judicial evidence; J. BENTHAM, Rationale of Judicial Evidence in 6 & 7 WORKS OF JEREMY BENTHAM (Bowring ed. 1843). This reliance on Bentham is particularly inappropriate. Bentham's treatise is a discourse on evidence and his basic position is that all evidence should be admitted unless its admission would itself cause undue hardship by way of expense, delay, vexation, or other collateral prejudice. "Evidence is the basis of justice: exclude evidence, and you exclude justice." Id. 7 at 384. Bentham deplored exclusionary rules, including an established rule preventing the use of previous judgments as evidence, absent mutuality. (See RESTATEMENT OF JUDGMENTS § 93, Comment b (1942).)

Another curious rule is, that, as a judgment is not evidence against a stranger, the contrary judgment shall not be evidence for him. If the rule itself is a curious one, the reason given for it is still more so: 'Nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary;' a maxim which one would suppose to have found its way from the gaming table to the bench.

J. BENTHAM, supra 77 at 171. But reasoning which moves from a proposition that a prior judgment should be usable as evidence, a form of "adscititious" evidence in Bentham's vocabulary, to a rule that the prior judgment should be grounds to exclude evidence is a mode of thought which Bentham also ridiculed.

One remarkable circumstance is, that the whole body of the rules of law relating to the subject are, with a very small number of exceptions, exclusionary. Even a decision given in a former cause is said not to be evidence; and then it is that decision which is excluded: or it is said to be conclusive evidence; and then an exclusion is put upon the whole mass of evidence, howsoever constituted, which might have been capable of being presented on the other side.

In saying this, enough has already been said to satisfy anyone, who has assented to what was said in a former chapter concerning adscititious evidence, that nearly the whole of the established rules on this subject, except to the extent of the single and very limited case in which it was there seen that the exclusion is proper, are bad. Accordingly, the rule that a judgment directly upon the point is conclusive in any future cause between the same parties, is a good rule—it is almost the only one that is.

Id. at 170 (emphasis added).
ideal of a "prompt and nonreptitious judicial system." Justice can be accomplished, it is asserted, by res judicata doctrine, which states only two requirements for preclusion: "There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling." The following paragraphs will attempt to analyze and criticize this argument.

The evil perceived by courts which have rejected the mutuality requirement is multiple litigation, lasting over extended periods of time, running up unnecessary expense, congesting court dockets and possibly resulting in inconsistent judgments. But from whose viewpoint is there multiple litigation? Certainly, the party asserting the estoppel in these cases is not so harassed. He has not been previously a party, has been put to no prior expense and has not hazarded anything in a former litigation. Statutes of limitations exist to give him the protection provided by the law against suits commenced too late. Neither is the party asserting the estoppel potentially subject to inconsistent judgments; or if he is, the case will fall into the uncontroversial exceptions to the mutuality requirement. The only possible answer is that preclusion is established in these cases not to protect a party to the litigation, but to protect the supposed interests of the courts and the public.

Is it fair to assume, as many cases seem to, that the mutuality requirement results in an increased burden on the court system? No one has ever really evaluated the extent to which the potential multiple litigation actually takes place, as opposed to being weeded out by the settlement and statute of limitation processes, or whether permitting multiple litigation is actually more costly. It may be that a party facing multiple litigation without the protection of the mutuality requirement may litigate his first action more fully than he otherwise would, thus increasing expense. The result might even be an unwanted appeal or a new

37. Id. at —, 246 N.E.2d at 729.
38. See notes 11-28 and accompanying text supra.
39. This is the only answer, that is, unless one believes that a class of litigants, e.g., plaintiffs in personal injury actions, should be able to win as easily as possible. This position has not been advanced by the courts and is not sought to be refuted here. But see note 50 and accompanying text infra.
trial, in fact contributing to docket crowding.\textsuperscript{41} Court congestion and expense to the public are statistical matters. The field of vision is distorted if only isolated cases of actual multiple litigation are examined. It is only in such cases, of course, that the mutuality question is raised. It also seems not to be appreciated that prior trials will have some effect on subsequent settlements and litigation even without total preclusion, in that parties will have had experience regarding the persuasiveness of their cause in court. If prior judgments were freely usable as evidence, the inhibiting effect would be even greater.\textsuperscript{42} Even assuming increased expense to the public, the decisions have not undertaken to balance that cost against the factors supporting the mutuality requirement.\textsuperscript{43}

One reason that multiple litigation may be viewed as an over-estimated evil is that there is very little motivation for it. It is an added expense to the parties as well as to the courts, and contemporary procedural devices give a party an opportunity to control the relevant scope of litigation no matter what his procedural posture by use of joinder, counter-claims, demands for declaratory relief, intervention, objections to the absence of necessary parties and discovery.\textsuperscript{44} Judges can seek to protect the courts' and public's interests by giving advice and enlightening the parties regarding their self-interest; and in an era of pre-trial conferences, a somewhat more aggressive attitude in such matters would seem acceptable. Only three factors might inhibit a potential common party from joining all his potential opponents in one suit: jurisdiction or joinder limitations, lack of foreseeability or knowledge of litigation with non-parties, or perceived strategic advantage. Jurisdiction and joinder limitations are not the fault of the party, and he should not be punished for something over which he has no control.\textsuperscript{45} Lack of foreseeability or

\begin{itemize}
  \item \textsuperscript{42} See J. BENTHAM, note 35 supra.
  \item \textsuperscript{43} But the doctrine of judicial finality is not a catch-penny contrivance to dispose of cases merely for the sake of disposition and clear up dockets in that manner. The cost of maintaining all of our judicial establishments, federal and state, is an extremely small item in maintaining our governments; and this country can afford to provide the necessary courts and judges to dispose of legitimate litigation in an orderly and proper manner. Indeed, it cannot afford to do otherwise. Hence a case on behalf of the public interest is not made out merely by asserting that abandonment of the doctrine of mutuality will decrease litigation. The real issue is whether that method of minimization is a proper one.
  \item \textsuperscript{44} Discovery is included in this list because of the need to become informed if the other devices are to be effectively used.
  \item \textsuperscript{45} Even the Federal Rules of Civil Procedure place some restrictions on the joinder of parties. Rule 20 permits the joinder of plaintiffs or defendants when their
\end{itemize}
knowledge of potential multiple litigation is less likely in an era of
discovery and with an experienced judge willing to give advice. In any
case, it does not seem fair, in accordance with accepted policy con-
siderations, to bind a party to collateral effects of litigation if he cannot
reasonably foresee what is at stake. And finally, if the party believes he
will have a better chance in the absence of the additional party or in a
less complex litigation, and if the trial judge is unable to dissuade him of
this, then it seems somewhat strong-armed for the law to say definitively
that something else is a "full and fair" opportunity to litigate.

Another factor which has motivated some courts to reject the
mutuality requirement is the possibility of inconsistent results, "which
are always a blemish on a judicial system. . . . [I]t is difficult to tolerate
a condition where, on relatively the same set of facts, one fact-finder, be it
a court or jury, may hold the driver liable, while the other exonerates
him."47

While inconsistent results may be a "blemish," it is very doubtful
that the few cases where the mutuality rule permits multiple litigation,
where multiple litigation in fact occurs and where inconsistent judgments
are actually rendered as a result are sufficient to increase substantially
this particular embarrassment. After all, if the common party had been
fortunate enough to prevail on the critical issue in the prior judgment,
the law permits him to be subjected to inconsistent results.

Even those most enthusiastic about abrogating the mutuality re-
quirement have admitted that inconsistent results ought to be tolerated in
"anomalous" cases.48 The "multiple-claimant anomaly" has been stated
most lucidly by Professor Brainerd Currie.49 He posed a case in which
fifty passengers have been injured in a railroad derailment:

claims or defenses arise out of "the same transaction, occurrence, or series of transactions
or occurrences and if any question of law or fact common [to them] will arise in
the action." There have been cases which have construed this rule narrowly in circum-
stances where the mutuality doctrine might have potential application. See, e.g., Sun-X
(W.D. Wis. 1964).

It has been suggested that the mutuality doctrine should be manipulated and
applied in accordance with whether its application in particular circumstances would
encourage the joinder of parties. See Semmel, Collateral Estoppel, Mutuality and
Joinder of Parties, 68 COLUM. L. REV. 1457, 1471 (1968). How complicated the applica-
tion of such a principle and how unpredictable the results of its application in particular
cases would be, it is submitted, is suggested by Professor Semmel's own analysis. Id.
at 1475-79.

46. See The Evergreens v. Nunan, 141 F.2d 927, 929 (2d Cir. 1944).
47. Schwartz v. Public Administration 24 N.Y.2d 65, 246 N.E.2d 725, 730-
49. Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine,
9 STAN. L. REV. 281 (1957).
Suppose, that twenty-five passengers, in twenty-five separate actions, all fail to establish negligence on the part of the railroad. Then passenger No. 26 wins his action. Are we to understand that the remaining twenty-four passengers can plead the judgment in the case of No. 26 as conclusively establishing that the railroad was guilty of negligence, while the railroad can make no reference to the first twenty-five cases which it won?

There is only one possible answer to this question: no such absurdity would be tolerated for a moment. . . .

If we are unwilling to treat the judgment against the railroad as res judicata when it is the last of a series, all of which except the last were favorable to the railroad, it must follow that we should also be unwilling to treat an adverse judgment as res judicata even though it was rendered in the first action brought, and is the only one of record. Our aversion to the twenty-sixth judgment as a conclusive adjudication stems largely from the feeling that such judgment in such a series must be an aberration, but we have no warrant for assuming that the aberrational judgment will not come as the first in the series. . . . Over and over again it has been demonstrated that, in the use of [the doctrine of collateral estoppel], courts must be alert to the danger that its extension by merely logical processes of manipulation may produce results which are abhorrent to the sense of justice and to orderly law administration.

Actually, there is no need to rely on the possibility that the favorable judgment is aberrational; the case is just as strong if it is assumed possible that about half the cases will go each way. But is it really more "anomalous" for a common party to be bound by a single unfavorable result where there may be fifty potential opponents than it is for him to be bound to an unfavorable result where there are only two? The most
basic support for the mutuality requirement is, after all, the possibility of inconsistent results in multiple litigation plus the inability to say with confidence that the first is more likely correct; that is, the fallibility of the litigation process. Inconsistent results may be embarrassing to a degree, but it is much more disastrous to pretend to an infallibility which does not exist and to sacrifice justice, as perceived by its victims, to a compulsion for tidiness.

It is asserted, however, that the public owes a litigant only a single "full and fair opportunity" to litigate an issue, and that the proposed test will apply preclusion only where the common party has had such a day in court. There are four areas of difficulty with this branch of the argument: there is considerable ambiguity in what is meant by "full and fair opportunity;" there is considerable doubt whether in actual practice the courts are giving this ideal more than lip service; if taken seriously, the question of full and fair opportunity would itself be a difficult and expensive issue to try fully and fairly; and, finally, introducing this vague standard for litigation preclusion considerably lessens the predictability of res judicata results in this area.

The quoted passage spoke of two tests for res judicata generally, one of them being the full opportunity. Speaking of this requirement as one generally applicable to res judicata cases suggests that no more is intended than the minimum due process standards applicable in any case where a party relies on a prior judgment. It has been suggested already that the balance of values is very different as between a party who has ventured nothing and a party who has reliance and repose interests in a judgment, because he has made an investment and was put in jeopardy in obtaining it.

While more than minimal due process is probably intended, courts which have departed from the mutuality requirement appear to give this standard only superficial attention. For example, some cases have suggested that where a relatively small amount is at stake in a prior proceeding, a common party may not exert his best efforts, but in Zdanok v. The Glidden Co. defendant was held to a judgment adjudicating five claims (presumably of approximately equal amounts) in a subsequent

52. See note 37 and accompanying text supra.
53. See note 6 and accompanying text supra.
54. A comprehensive list of the various factors which enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the confidence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation. Schwartz v. Public Administrator, 24 N.Y.2d 65, 246 N.E.2d 725, 729 (1969).
55. 327 F.2d 944 (2d Cir. 1964). See also note 32 and accompanying text supra.
proceeding involving 160; the court dismissed the argument of unfairness, saying that it was inapplicable because the common party was fully aware at the time of the prior trial that the larger number of claims were pending in another suit, which is at least partially beside the point in that the problem of allocating litigation resources is as acute whether the larger claim is foreseeable or not. It is unfair to require a party to litigate as though 165 claims are at stake when he has the opportunity to win with respect to only five.

Schwartz v. Public Administrator is a more extreme example. This was an appeal in three cases, each of which gave rise to the same question:

Should a judgment in favor of a passenger in an action against the operators of two colliding vehicles give rise to an estoppel, which would bar a subsequent action by one of the drivers against the other for his own personal injuries or property damage?

The court held that if the prerequisites for collateral estoppel were otherwise present, lack of mutuality of estoppel would not prevent preclusion unless the common party was able to show affirmatively (that is, with the burden of persuasion on the party resisting preclusion) that he had not previously had a “full and fair opportunity” to litigate the issue. The common parties in these cases attempted to make that demonstration by reference to two factors. First, there is special sympathy for plaintiffs in personal injury actions, where the juries surely realize that defendants are insured. Secondly, the representation which the common parties had in the prior action was provided by attorneys selected by their insurer and may have been inadequate because of conflicts of interest. For example, in a given case an insurer may be more interested in seeing that co-defendants also suffer adverse judgments than in exonerating the insured. In any case their former attorneys were not ones of the common parties’ choice. The court held these factors inadequate to show lack of a full opportunity on the strength of the argument that the common parties could have neutralized the prejudice and been represented by an attorney of their own choice if they had filed counter-claims for their own injuries in the prior actions (theoretically permissive counter-claims). One of the plaintiffs argued that he had refrained from filing a counter-claim in the

58. 24 N.Y.2d. at ——, 246 N.E.2d at 727.
prior action in reliance on precedents which were presently being overruled, believing that he would have a better chance in a separate litigation. This reliance interest was held not reasonable or worthy of protection because of the unsettled nature of the law on mutuality of estoppel. Another plaintiff argued that he was not permitted to file a counter-claim in the prior action because he was subject to compulsory arbitration under the uninsured motorist provision of his insurance policy. This was held to make no difference, however, because the plaintiff had "offered nothing which would indicate that he was actually prejudiced by his inability to join his claim to the prior action." How he could have done this without examining the jurors, or even psychoanalyzing them, in regard to the process of their reaching a decision, the court does not say. Further, the court does not account for the fact that in actions where there are several attorneys, each with rights to examine and cross-examine the witnesses, the attention which the jury will give to the arguments of each party is diminished.

A vigorous dissenting opinion argued that a passenger who is injured in a collision is "in a preferred litigation position" when he asserts "his claim against the [insurers] of both owners and of both drivers," because of the natural sympathies for a plaintiff and the potential efforts of each defendant to exonerate himself at the expense of the other, a plaintiff's verdict was almost inevitable "barring some odd miscarriage." One need not be as certain about the inevitability of plaintiff's recoveries in personal injury litigation, as is this dissenter, to concede the prejudicial factors which he identifies.

No more than superficial attention is likely to be given the supposed standard of full opportunity to litigate because to take it seriously would be unsatisfactory. It would involve the dissection of the prior trial and

60. 24 N.Y.2d at ——, 246 N.E.2d at 730.
61. Id. at ——, 246 N.E.2d at 732-33 (dissenting opinion):

The experience of the profession is that a passenger in a vehicle who is injured in a collision should assert his claim against the carriers of both owners and of both drivers and thus be in a preferred litigation position in which, barring some odd miscarriage, it is next to impossible to lose.

But 'justice' in the sense that one or the other driver might have some serious injury and a good claim to be compensated from the proceeds of the universal coverage suggests that the preferred position of the passenger should not be permitted to impair a driver's claim. He can assert it as a cross-claim in the passenger's action, but the jury must be told that if the passenger recovers against both drivers neither can recover against the other and so the drivers' actions are in practice more subordinated if not submerged in the passenger's action by the method of litigation.

When the situation is seen whole this is unfair because only those in this kind of disadvantageous litigation position, and only because of that position, are frequently denied recovery which people able to assert their own claims in uncomplicated procedure will have.
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all circumstances surrounding it, inviting the presentation of extensive evidence which would have bearing on the standard, which itself would be extremely difficult to define with clarity. As said before, days in court vary greatly in quality; surely this is an area of infinite shades of gray. Thus, not only would determination of the issue be expensive and difficult, but also very doubtful to predict. It seems unquestionable that stare decisis and certainty are more important in the area of judgment reliance than in any other area of procedure.62

In the long run the courts which have rejected mutuality may have lost more than they have gained, both in the expense of litigation and the reliability of judgments, all to combat an evil which has not been clearly demonstrated to exist to a burdensome extent.

CONCLUSION

Because of the confidence with which respected judges63 have rejected mutuality, it has become popular to say that a party should have only a single opportunity to litigate an issue unless in a special context there is good reason otherwise. This attitude runs counter to the most basic principle of modern procedural reform: presumptively, disputes should be resolved according to as fully an informed judgment as possible regarding the merits of the parties' positions, and litigation of the merits should be precluded only for pressing reasons.64

62. See Spettigue v. Mahoney, 8 Ariz. App. 281, —, 445 P.2d 557, 564 (1968): Perhaps none of the apprehensions above expressed themselves in the record before us now and were we inclined to decide this case on the basis of whether 'justice' will have been accomplished, it would be a close question as to whether the defendant here should be denied another day in court on the issue of liability. In his recantation, this is the only limitation Currie would place upon the Bernhard doctrine—that it not be applied ‘to work injustice.’ See, Currie, Civil Procedure: The Tempest Brews, 53 Cal. L. Rev. 25, 37 (1965). Such an approach is a tempting simple way to solve all of the cases that might come before this court. But, in our view, this panacea is the antithesis of our system of justice, which has been the skeletal structure about which the world's finest civilization has developed. Concepts of 'justice' vary from man to man and from time to time and we can conceive of no more pernicious an evil than for an appellate court to lay down law in high-sounding language but in such broad terms that its application to the particular case cannot be determined with any degree of certainty until the highest court in the particular judicial hierarchy has made its august pronouncement as to what is 'justice.'

63. Among them are Justice Traynor in Bernhard, Judge Friendly in Zdanok and Judge Hastie in Bruzewski v. United States, 181 F.2d 419 (3d Cir. 1950).

64. See C. CLARK, CODE PLEADING 71 (1947): It is to be hoped that this development [continuing procedural reform] may have some effect of combating what may be best described as procedural particularism—the resort to a rule of procedure, often subconsciously created or inflated for the occasion, as a short cut to doing justice in a particular case. This is an inveterate tendency of our law, and, indeed, is to be expected to some extent at least, since procedure must always be subordinated to the achieving of
The current state of the law can only be described as unsettled. In recent years a few cases have rejected mutuality outright,65 while others have stood by the traditional doctrine.66 In the middle, some cases seem to say that the mutuality doctrine is so outmoded that it should be applied only in anomalous cases,67 while others suggest that great care should be taken that departure from mutuality in particular cases will not produce injustice.68 Some cases have purported to reject mutuality in cases where it was not necessary to the result,69 a few have failed to apply the mutuality restriction to an appropriate case without comment.70 Many of the cases in their evaluation of precedent have failed to make any distinction between holding and dicta.

“Mutuality” has become a bad word in this modern age, and certainly there are mutuality doctrines of various kinds which have little to recommend them. In the area of judgments, however, rejection of mutuality has been based on arguments which are more obvious than sound. Judgments are a product which litigants purchase with investments of time and money, for the most part in a rational way with the advice of counsel. Parties regulate themselves for purposes of economy, and it has never been demonstrated that the courts and public have a greater interest in reducing the cost of litigation than do the parties themselves. There is something tidy and law-and-orderish about asserting that a party is entitled to only a single adequate opportunity to litigate an issue. But the law of res judicata exists to protect winners, not to punish losers, and the

courts will be well advised to assess the value of the mutuality doctrine with greater sympathy than they have shown it in recent years. The mutuality of estoppel requirement, with its traditional exceptions, has served justice well in the past, and there is no reason why it should not continue to do so.