Claim and Issue Preclusion in Civil Litigation in Washington

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The preclusive effect of a judgment is an age-old topic. Why then add more to the existing commentary? Principally, it is because within recent years there have been noteworthy cases and significant developments in the governing principles. The purposes of this article are to recall the orthodoxy of the subject, to note the changes that have been occurring, and to suggest what may be forthcoming.

First, there is the problem of terminology. At times the term “res judicata” is used in the cases and literature to refer to the entire subject of the preclusive effect of judgments, including the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action. In other instances, the term refers only to limitations on the relitigation of a claim, or cause of action. When used in this sense, res judicata is usually further subdivided into “merger” and “bar.” The principles of merger apply when the prior judgment was for the claimant; those of bar apply when the judgment was for the party defending on the claim.

When res judicata refers only to preclusion of the same claim, the term “collateral estoppel” denotes the preclusive principles that apply when the subsequent suit involves a different claim but the same issue. In the rare instance in which the same issue is raised in a later suit on the same claim, and the principles of res judicata do not merge or bar the claim, the term “direct estoppel” is used.¹

Modernly, the principles of merger and bar have been encompassed within the term “claim preclusion.” The principles of collateral estoppel have been encompassed within the term “issue preclusion.”² In this article, the terms claim preclusion and issue preclusion generally will be used to refer to the preclusive effects of judgments. When the term “res judicata” is used, it will refer to merger and bar principles as distinguished from “collateral estoppel” principles.³

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² See Restatement (Second) of Judgments ch. 1 (1982).
³ A similar distinction is stated in Bodeneck v. Cater’s Motor Freight Sys., 198 Wash. 21, 86 P.2d 766 (1939).

At times the terms are used interchangeably. See Wade v. Snohomish County Bonded Escrow, 13 Wn. App. 950, 538 P.2d 571 (1975). Any confusion or wrong usage should not, of course, affect the
Two other prefatory points must be noted. This article concerns the preclusive effects of a judgment within the jurisdiction in which it is rendered, and particularly, within Washington. There will be only incidental reference to the subject of recognition and enforcement of a judgment in other jurisdictions. Further, the concern here is with the preclusive effects of judgments in subsequent civil actions. The problems of "double jeopardy" in criminal law will not be discussed.

The doctrines of claim and issue preclusion have similar purposes. Both seek to put an end to litigation. This, in turn, limits the vexation and harassment of other parties; lessens the overcrowding of court calendars, thereby freeing the courts for use by others; and, by providing for finality in adjudications, encourages respect for judicial decisions.\(^4\)

When the doctrines of preclusion are asserted, what is essentially involved is a conflict between those principles favoring finality and those favoring the allowance of relitigation to assure that a correct result is reached. Within recent times, Washington courts have generally favored finality.\(^5\) Even if the first court was in error, such as perhaps would have justified a reversal on appeal, in a second independent proceeding the predisposition will be in favor of preclusion.\(^6\)

This is not to say that mere similarity in the two proceedings will result in preclusion.\(^7\) While modern judicial development is in favor of finality, there are certain requirements that must be met. And even if met, there will be exceptions and instances in which relitigation will be allowed. The requirements for the preclusion doctrines, and the exceptions thereto, will be developed herein.

Most of the discussion that follows will involve cases rather than statutes or administrative regulations. This is because the law of preclusion is almost entirely court-created.\(^8\) The legislature has contributed very little to the doctrines.\(^9\) Moreover, the preclusion principles apply to judicial-type

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7. See J.M. Weatherwax Lumber Co. v. Ray, 38 Wash. 545, 548, 80 P. 775, 777 (1905), to the effect that the question of former adjudication is one of law for the court.
8. An example of a legislative declaration is WASH. REV. CODE § 26.27.120, entitled, "Binding force and res judicata effect of custody decree." This is part of the Uniform Child Custody Jurisdiction Act, adopted in 1979.
determinations rather than legislative or political decisions. As a gener-
ality, once a judicial judgment is final, the preclusion doctrines apply, or at
least must be considered.

I. RELATED DOCTRINES

Before developing claim and issue preclusion principles, it is useful to
distinguish other related doctrines.

A. Stare Decisis

The doctrine of stare decisis states that when a rule of law is laid down as
applicable to a certain set of facts, the court will apply that rule to other
cases involving identical or substantially similar facts. It matters not that
the later cases involve completely different parties. Although the doctrine
has considerable strength to assure stability and certainty in court-made
law, it of course does not preclude change when reason and policy so
require.

B. Election of Remedies

At one time the doctrine of election of remedies was applied rather
strictly, and the mere commencement of an action might preclude subse-
quently proceedings. While recent cases continue to state that Washington
recognizes the doctrine of election of remedies, the actual results reached
indicate that the doctrine, as such, will seldom have any real impact.

The modern rationale for the election doctrine is the prevention of double
recovery for the same wrong and the prevention of greater recovery than the
value of the harm suffered. To implement this policy, there are three
requirements to bind a party by an election of remedies: (1) there must be

11. See Malo v. Anderson, 76 Wn. 2d 1, 5, 454 P.2d 828, 830 (1969), wherein the court said, "A
supersedes bond does not operate against a judgment but against its enforcement."
13. Pier 67, Inc. v. King County, 78 Wn. 2d 48, 469 P.2d 902 (1970), cert. denied, 401 U.S. 911
14. Eilers Music House v. Douglass, 90 Wash. 683, 156 P. 937 (1916); see also Behneman v.
Schoemer, 141 Wash. 560, 252 P. 133 (1927).
(1979).
of election of remedies" as "a rule of narrow scope." Id. at 49, 483 P.2d at 119.
two or more available remedies; (2) the remedies must be inconsistent with one another; (3) the party to be bound must have chosen one of the remedies. In almost every instance in which the doctrine has been raised in recent decades, one or more of the elements has been found lacking.

The Washington Supreme Court has held that the necessary multiple remedies were not available when the first complaint was based on an erroneous understanding of the facts,\(^\text{17}\) when the first complaint sought a remedy based on an unavailable theory of contract rather than tort,\(^\text{18}\) and when a second suit was against a different party.\(^\text{19}\) To conclude that the election doctrine does not apply when the first complaint is based on erroneous facts, on an erroneous legal theory or on an erroneous choice of parties is to severely limit its application. Another general limiting principle is that a remedy is not deemed available so as to invoke the doctrine when there is a good defense to the first claimed remedy.\(^\text{20}\)

Even if there are multiple remedies, a party is not bound to an election if they are not repugnant and inconsistent with one another. The rule does not apply where the remedies are cumulative and consistent.\(^\text{21}\) Excellent modern examples are a holding that there is no inconsistency in seeking to forfeit the interest of a contract purchaser of land and at the same time seeking damages for conversion of timber from that purchaser,\(^\text{22}\) and a holding of no inherent inconsistency in a request for a variance to escape the harm of a zoning ordinance and an attack on the validity of the ordinance itself.\(^\text{23}\)

Third, to constitute an election, the party to be bound must have chosen one of the available inconsistent remedies.\(^\text{24}\) With the modern liberality

\(^{17}\) *In re* Wilson’s Estate, 50 Wn. 2d 840, 315 P.2d 287 (1957).


\(^{19}\) O’Donoghue v. Riggs, 73 Wn. 2d 814, 816, 440 P.2d 823, 826 (1968), wherein the court said:

“If a party believes he has a claim, but subsequent events prove the claim to be nonexistent, his attempt to assert such claim in court does not constitute an election, barring pursuit of a meritorious claim based on the same facts but against a different party. In such a case, it is immaterial whether the remedy be nonexistent because it develops that the facts are different from what the plaintiff supposed them to be, or whether the law applicable to the facts is found to be other than the claimant supposed.

\(^{20}\) Willis T. Batcheller, Inc. v. Welden Constr. Co., 9 Wn. 2d 392, 115 P.2d 696 (1941). See also Babcock, Cornish & Co. v. Urquhart, 53 Wash. 168, 175, 101 P. 713, 716 (1909), wherein the court stated: ‘‘It seems well settled that the doctrine of election of remedies has no application when the remedy chosen is not available, and we think a remedy is not available when there is a good defense to it.’’


\(^{24}\) In McKown v. Driver, 54 Wn. 2d 46, 337 P.2d 1068 (1959), the court concluded that prosecuting an action to final judgment constituted a choice of one remedy.
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allowed in pleading alternately and inconsistently and in amending the original pleading, the mere commencement of an action should not ordinarily constitute a choice, nor should the pleader be put to a choice.\(^{25}\) If the defendant were in some way to rely detrimentally on the plaintiff’s prayer for relief or to be otherwise prejudiced, the doctrine might be invoked.\(^{26}\) Such an invocation would be most unusual, however.\(^{27}\)

With the severe limitations placed on the doctrine, the tendency to find one or more of the requirements not to have been met, and the general judicial displeasure with the doctrine, one may safely conclude that the concept of election of remedies has little place in modern decisions.\(^{28}\)

C. Preclusion of Inconsistent Positions

Another related doctrine is that a party may not assert a factual contention at variance with a contention made in previous litigation. This doctrine is sometimes referred to as preclusion of inconsistent positions or estoppel against taking inconsistent positions. The purposes of the doctrine are to preserve respect for judicial proceedings without the necessity of resorting to the perjury statutes and to avoid inconsistency, duplicity, and waste of time.\(^{29}\) It has been said to be a rule of procedure based on manifest justice and on considerations of orderliness, regularity, and expedition in litigation.\(^{30}\)

For the doctrine to apply, there must be some act by the party to be bound or precluded. A common example is pleading matters inconsistent with pleadings in a former action between the same parties.\(^{31}\) Doubt has been expressed as to whether reliance and resultant damage must be found for the


\(^{27}\) It has been suggested that an element of ratification or estoppel is involved in most election of remedies cases. See J. Cound, J. Friedenthal & A. Miller, Civil Procedure Cases & Materials 1044 (3d ed. 1980) [hereinafter J. Cound].


\(^{31}\) Hedgecock v. Mendel, 146 Wash. 404, 263 P. 593 (1928). The original pleading may have been in proceedings in another state. Witzel v. Tena, 48 Wn. 2d 628, 295 P.2d 1115 (1956).
Recently there has been some indication that reliance and resultant damage are relevant factors, at least if the present adversary was not a party to the prior proceeding.\(^{33}\)

For the doctrine to apply, the positions must be inconsistent in the sense of being diametrically opposed to one another. As an example, a party was not permitted to obtain a default judgment and then in a subsequent action deny that the judgment was taken by default.\(^{34}\) Further, the inconsistency must be as to factual assertions. The doctrine does not require consistency in points of law asserted or prevent a party from proceeding upon inconsistent legal theories.\(^{35}\)

\section*{D. Law of the Case}

Another doctrine should be distinguished, that of “law of the case.” While the term may encompass several concepts,\(^{36}\) in the present context it refers to the concept that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.

The foundation case for modern analysis is \textit{Greene v. Rothschild},\(^{37}\) decided in 1966. Prior to that case, the Washington court had rather rigidly applied the principle that questions decided on the first appeal would not again be reviewed. In \textit{Greene}, the court stated that the doctrine of law of the case is a discretionary rule that should not be applied where it would result in manifest injustice.\(^{38}\) Thus, just as the court is not obliged to perpetuate its own errors under the doctrine of stare decisis when different cases are involved, after \textit{Greene}, the same is true when the error was made on a prior appeal of the same case. As stated in \textit{Greene}:

\[\text{[A] holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest}\]

\begin{itemize}
  \item\(^{35}\) King v. Clodfelter, 10 Wn. App. 514, 518 P.2d 206 (1974). As a comparison, \textit{WASH. SUPER. CT. CIV. R. 8(e)(2)} allows any one pleading to contain alternate statements “regardless of consistency.”
  \item\(^{36}\) See Baumann, \textit{Appeal & Error—Law of the Case—Discretionary Rule}, 2 GONZ. L. REV. 105 (1967).
  \item\(^{37}\) 68 Wn. 2d 1, 414 P.2d 1013 (1966)
  \item\(^{38}\) \textit{Id.} at 8, 414 P.2d at 1015.
\end{itemize}
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injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.\textsuperscript{39}

Such circumstances were found in the particular case.

Since \textit{Greene}, the approach stated therein has been followed. In some instances, the doctrine has resulted in a refusal to reconsider a prior holding;\textsuperscript{40} in others, a clearly erroneous holding has not had such preclusive effect.\textsuperscript{41} Even in its limited discretionary form, the doctrine applies only to questions decided. Thus, matters not discussed or otherwise involved in an appellate decision are not barred by the law of the case doctrine from consideration in a subsequent appeal of the same litigation.\textsuperscript{42}

Since July 1, 1976, there has been a relevant rule of court.\textsuperscript{43} RAP 2.5(c) sets forth two principles that apply if the same case is again before the appellate court. First:

If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

Second:

The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.\textsuperscript{44}

The principles discussed above relate to the effect of appellate holdings. Apparently, the law of the case doctrine does not have general application to trial court rulings.\textsuperscript{45} An exception is that jury instructions by the trial court which are not challenged become the law of the case.\textsuperscript{46}

\textsuperscript{39} \textit{Id.} at 10, 414 P.2d at 1016.
\textsuperscript{40} Pierce County v. Desart, 9 Wn. App. 760, 515 P.2d 550 (1973); Coy v. Raabe, 77 Wn. 2d 322, 462 P.2d 214 (1968).
\textsuperscript{43} WASH. R. APP. P. 2.5(c).
\textsuperscript{44} The law of the case doctrine may still be properly applied under RAP 2.5(c). See \textit{O'Brien v. Franich}, 19 Wn. App. 189, 575 P.2d 258 (1978).

Also, while the appellate court has discretion to overturn a prior holding in the same case, presumably the trial court is bound by an appellate determination in the event of further proceedings before the trial court on remand. See \textit{Bunn v. Bates}, 36 Wn. 2d 100, 103, 216 P.2d 741, 743 (1950).
E. Inconsistent Judgments

One other doctrine might be noted before turning to the principles governing claim and issue preclusion. In the event preclusive principles are not applied, as for example, if there is a failure to raise them and inconsistent judgments result, it is the last judgment that controls. Thus, where a claimant to logs, who had obtained a judgment adjudicating his ownership thereof, elected to relitigate the issue and judgment was entered against him, the first judgment lost its effect and the later judgment controlled thereafter.47

II. CLAIM PRECLUSION

A. Identity

Claim preclusion, more traditionally called res judicata, is a doctrine designed to curtail the relitigation of a claim or cause of action. For the doctrine to apply, there must be substantial identity in the successive proceedings. More particularly, the Washington Supreme Court has stated for almost seven decades that a judgment has claim preclusive effect only if the successive proceedings are identical in four respects: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made.48

Whether the necessary elements are present, and thus whether a judgment has preclusive effect, is to be determined at the time of the subsequent litigation.49 The second court must be advised of the prior proceeding and the burden of pleading "res judicata" is listed among the affirmative defenses.50 The burden of proving that a claim is precluded is upon the party opposing the claim.51

I. Subject Matter Identity

Of the four elements, the first, the same subject matter, has generated the least discussion and the least guidance as to its meaning. The critical factors seem to be the nature of the claim or cause of action and the nature of the

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parties. Seldom is a case decided on the basis of the subject matter element. Rather, that element is found to be present, or, if absent, the court will find that one of the other elements is also missing, with some explanation as to the latter, but not as to subject matter.

The court most often will simply state in a conclusory fashion that there is or is not the same subject matter. This was true in the foundation case, *Northern Pacific Railway Co. v. Snohomish County*, which listed the four elements, and has continued to the present. The most helpful approach to understanding subject matter identity is to note a few of the more recent conclusions.

The court has held that the subject matter in successive proceedings was the same when both actions involved an alleged deprivation of constitutional rights, rights in property allegedly governed by a community property agreement, and the cause of a nosebleed. In contrast, the court concluded that the same subject matter was not involved when the first proceeding was a dissolution action and the second an action to partition undisposed property, when successive actions involved different lots of land, and when, although both lawsuits arose out of the same property transaction, the first was an action for misrepresentation and the second an action for breach of a covenant of title. In none of the cases was there any discussion of the bases for determining the subject matter. In each there was only a conclusion.

Another common feature in the cases is that, after listing the requirements of subject matter and cause of action separately, the court will often unite the two in its discussion. What usually receives specific treatment is the nature of the cause of action or claim. That analysis is more helpful.

2. Claim or Cause of Action Identity

Claim preclusion, or res judicata, precludes the relitigation of the same claim or cause of action. Unlike issue preclusion, which applies only to

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53. 101 Wash. 686, 172 P. 878 (1918).
60. A typical example is Burke Motor Co. v. Little, 39 Wn. 2d 918, 239 P.2d 854 (1952).
issues actually litigated, claim preclusion applies to what might, or should, have been litigated as well as to what was actually litigated, if all part of the same claim or cause of action.\footnote{Res judicata acts to prevent relitigation of claims that were or should have been decided among the parties in an earlier proceeding. In this case, because the applicability of the community property agreement could and should have been determined in the probate of Irene's estate, res judicata prevents the court from now reexamining the distribution in light of the community property agreement. \footnote{A recent statement of the principle is found in Norris v. Norris, 95 Wn. 2d 124, 130, 622 P.2d 816, 820 (1980):}} This does not mean that a claimant must join every claim which is joinable when an action is brought.\footnote{The general doctrine was first reported in Sayward v. Thayer, 9 Wash. 22, 24, 36 P. 966, 966, (1894) as follows:} A judgment upon one claim does not preclude suit upon another independent claim, though both could have been joined originally.\footnote{WASH. SUPER. CT. CIV. R. 18(a) permits joinder of all claims; it does not require joinder.}

Perhaps the simplest illustration of the doctrine is that in which a claimant, after winning or losing the first action, sues a second time. If the claimant prevailed in the first action and then sues again on the same claim, the claim will be precluded under the theory that it is merged in the first judgment, or that the claimant may not split the cause of action. An excellent illustration of the latter theory involved a party to a contract who, after successfully suing for specific performance, was precluded from bringing a subsequent action for damages for delays in performance occurring prior to the institution of the first action.\footnote{Likewise, a judgment for the cancellation of stock fraudulently issued to the defendants and for its issue to the plaintiffs precluded a subsequent damages action for depreciation in value of the stock while wrongfully held by the defendants. Currier v. Perry, 181 Wash. 565, 569, 44 P.2d 184, 186 (1935).} If the claimant is unsuccessful in the first proceeding, the claim will be precluded under the theory that the subsequent action is barred. Thus, a judgment, denying injunctive relief for an alleged contract violation on the ground that mutual mistake

\footnote{A recent statement of the principle is found in Norris v. Norris, 95 Wn. 2d 124, 130, 622 P.2d 816, 820 (1980): Res judicata acts to prevent relitigation of claims that were or should have been decided among the parties in an earlier proceeding. In this case, because the applicability of the community property agreement could and should have been determined in the probate of Irene's estate, res judicata prevents the court from now reexamining the distribution in light of the community property agreement. See also Marino Property Co. v. Port Comm'rs, 97 Wn. 2d 307, 644 P.2d 1181 (1982). The general doctrine was first reported in Sayward v. Thayer, 9 Wash. 22, 24, 36 P. 966, 966, (1894) as follows:}
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had not been established, barred a subsequent action to reform the contract on the ground of mutual mistake.67

Since the preclusive effect of the judgment turns upon the scope of the claim or cause of action, a critical question is what test the court will apply to determine the scope. Initially, two points may be made. In numerous instances it has been held that a change in theories will not justify successive actions. Thus, a second proceeding was not allowed when the first contained a claim for rescission based on fraud, and the second contained a claim for rescission based on inequitable conduct and mistake;68 when the first sought an injunction against the removal of a child, and the second was a habeas corpus proceeding to determine custody;69 when the first sought to recover a half interest in land on the basis of certain wrongful acts by the defendant, and the second asked for all the land because of fraudulent acts by the defendant;70 when the first was a tort claim based on seduction under a promise of marriage, and the second was a contract claim based on breach of promise of marriage;71 and when the first was an action by a vendor of personal property to recover possession on a theory of conditional sale, and the second was an action of replevin on a theory of rescission because of fraudulent representations by the vendee.72 In each instance, whether involving merger or bar, the court held that the change in theory in the second proceeding did not represent a different claim or cause of action. Likewise, it is clear that the availability of alternative remedies does not create several separate claims. A judgment as to one remedy will have claim preclusive effect in subsequent actions seeking other remedies.73

If new theories and new remedies do not create different claims, what, again, is the test? Occasionally, the court will simply state its


70. Kinsey v. Duteau, 126 Wash. 330, 218 P.2d 230 (1950); see also Sweeney v. Waterhouse & Co., 43 Wash. 613, 617, 86 P. 946, 946-47 (1906) (the addition of a theory based on factors existing at the time of the first action did not constitute a new separate cause of action).


72. Cuschner v. Longbehn, 44 Wash. 546, 87 P. 817 (1906).

73. Bill v. Gattavara, 34 Wn. 2d 645, 209 P.2d 457 (1949) (recovery of treble damages in statutory trespass action precluded an action for unjust enrichment. The court stated, "While several remedies were available to Bill, he still had but one cause of action."). Id. at 651, 209 P.2d at 460. See also Robinson v. Steele, 123 Wash. 282, 212 P. 167 (1923).
However, much more often than with the element of subject matter, the court will include an explanation with respect to the element of cause of action.

A difficulty is that the explanation is not always consistent with previous explanations because there has been no single all-inclusive test. Indeed, the court, quoting from another source, has recently said that the identity of causes of action cannot be determined precisely by mechanistic application of a simple test. The court listed, and applied, four criteria:

1. Whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
2. Whether substantially the same evidence is presented in the two actions;
3. Whether the two suits involve infringement of the same right; and
4. Whether the two suits arise out of the same transactional nucleus of facts.

In another recent case, after noting the multiplicity of tests, the court quoted another source to state that "the claim is the same if the same primary right is violated by the same wrong in both actions, or if the evidence needed to support the second action would have sustained the first action."

There are numerous cases, some very recent and some very old, explicitly relying upon an evidence analysis to determine whether the same claim is involved in successive actions. Another large group of cases, again some old and some new, is explained by an analysis of whether the same rights are involved in both proceedings. Occasionally, the court has

75. Rains v. State, 100 Wn. 2d 660, 664, 674 P.2d 165, 168 (1983) (quoting Abramson v. University of Hawaii, 594 F.2d 202, 206 (9th Cir. 1979)).
76. Id. at 664, 674 P.2d at 168 (quoting Constantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir. 1982), cert. denied, 459 U.S. 1087 (1982) (quoting Harris v. Jacobs, 621 F.2d 341, 343 (9th Cir. 1980))).
applied a test of whether a second proceeding would negate the first.\textsuperscript{80}

Also, occasionally the court has resolved the problem by inquiring whether there were separate wrongs.\textsuperscript{81}

What conclusion is to be drawn from all this? When a court uses a variety of tests, sometimes choosing one and sometimes another, how does it know which to choose? How does counsel know which to rely upon to provide advice? Might it be that over the years, in reality, the court has been concerned with such considerations as whether the facts in the successive actions are pragmatically related, whether the problems can best be resolved in a single proceeding, whether this would conform to the parties’ expectations or common understanding? Might it be that, without expressly saying so and perhaps intuitively, the court has been applying a commonsense, functional approach? Might it be that the court’s true concern is whether it is confronted in the multiple suits with a single transaction or series of related transactions? Would this not explain the felt need for a multiplicity of tests to encompass the immense variety of factors and problems?

If there is validity in these inquiries, a better approach would simply be to state so. This would make clear to all what actually transpires. Perhaps that is what the court had in mind in a recent case when it listed as a relevant consideration, “whether the two suits arise out of the same transactional nucleus of facts.”\textsuperscript{82} Regardless of the court’s intent, this should be the approach.

Where then is counsel to look to provide meaning to the words, “the same transactional nucleus of facts”? In addition to the actual results in past cases, sometimes disregarding the court’s stated explanation, there is available as of 1982 the \textit{Restatement (Second) of Judgments}. Of particular relevance in determining the dimensions of a claim for purposes of merger and bar is the following:

(1) When a valid and final judgment rendered in an action extinguishes the . . . claim pursuant to the rules of merger or bar . . . , the claim extinguished includes all rights . . . to remedies . . . with respect to all or any


\textsuperscript{81} Rader v. Sander, 100 Wash. 403, 171 P. 257 (1918).

\textsuperscript{82} See Marshall v. Champman’s Estate, 31 Wn. 2d 137, 195 P.2d 656 (1948); Morgan v. Hart, 84 Wash. 496, 147 P. 26 (1915).

\textsuperscript{82} Rains v. State, 100 Wn. 2d 660, 674 P.2d 165 (1983).
part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction," and what groupings constitute a "series," are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.83

The discussion to this point might suggest that the principles presented have application only to plaintiffs. Such is not the case, as is readily apparent if one recalls that the policy is to preclude, under prescribed circumstances, the litigation of that which has been litigated or should have been litigated. This policy may properly apply to defendants.

Thus, the failure of the defendant to assert a defense that existed at the time of the first proceeding may preclude later use of the defense.84 A matter raised for defensive purposes may thereafter be precluded if asserted as an affirmative claim.85 Likewise, a failure to make an available defense may preclude later presentation for recovery purposes.86

The content of the present court rule relating to counterclaims is consistent with the cases supporting the prior principles.87 From a pleading perspective, any claim may be stated against an opposing party. With certain qualifications not directly relevant to this discussion, a pleading must state as a counterclaim any claim that the pleader has against any opposing party if that claim arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.88 Such a claim is denominated a compulsory counterclaim.

83. Restatement (Second) of Judgments § 24 (1982). The comments, illustrations and reporter's notes to this and succeeding sections are useful.
85. See Angel v. Lados, 143 Wash. 622, 255 P. 945 (1927); Crabtree v. McDaniel, 143 Wash. 122, 254 P. 1092 (1927); Olson v. Title Trust Co., 58 Wash. 599, 109 P. 49 (1910); Spring Hill Irrigation Co. v. Lake Irrigation Co., 42 Wash. 379, 85 P. 6 (1906).
88. Washington courts have not had occasion to define the terms "transaction" or "occurrence." Presumably the test that will be applied is whether the pleader's claim is logically related to the opposing party's claim. C. Wright, The Law of Federal Courts § 79, at 529 (4th ed. 1983).
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The failure to plead such a claim presumably will preclude the party from bringing an independent action later. Any of several theories might be relied upon to reach this result, including that of res judicata or claim preclusion. Perhaps the best explanation is simply reliance upon the wording of the rule itself. Regardless of the theory, preclusion should follow, as any other result would defeat the purpose of the compulsory provision.

3. Identity of Persons and Parties

In addition to identity of subject matter and cause of action, for claim preclusion to occur there must be identity of "persons and parties" and identity "in the quality of the persons for or against whom the claim is made." The first case to enunciate the four requirements for claim preclusion established that in order to bind a person by a judgment, that person must have been a party, or the person's interest must have been represented by a party.

A common way of stating the principle is that a judgment is binding upon all parties to the litigation as well as upon all persons in privity with such parties. That one is aware of certain proceedings is not enough.

Whether one was a party to a prior proceeding and is thus bound is ordinarily relatively easy to ascertain. More difficult is whether one is "in privity" with a party to a prior proceeding. The court has not attempted an all-inclusive definition; that perhaps would not be possible or even desirable. Rather, the term is used in a conclusory sense. Consequently, the most useful approach is to note categories in which privity has been found.

One category is successors in interest such as purchasers of land or other property and assignees of contract rights. A more general category is

89. J. Cound, supra note 27, at 509-10.
90. Recent statements of the requirements are in Rains v. State, 100 Wn. 2d 660, 664, 674 P.2d 165, 168 (1983) and Mellor v. Chamberlin, 100 Wn. 2d 643, 646, 673 P.2d 610, 612 (1983).
91. Northern Pac. Ry. v. Snohomish County, 101 Wash. 686, 688-89, 172 P. 878, 879-80 (1918). There, the court concluded that the party's interest was adverse to that of both parties in the prior action and consequently res judicata did not apply.
persons whose interests are represented by a party. A third category is those in actual control of the litigation. In addition, there are cases that extend privity to persons who participate in litigation though they are not in actual control. Perhaps most expansive are cases holding that testifying as a witness is at times sufficient.

Perhaps most expansive are cases holding that testifying as a witness is at times sufficient. Only if there is identity of parties, including the privity concept, need one consider the fourth element, identity in the quality of the persons for or against whom the claim is made. In other words, "[t]here can be no identity

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A recent case, Mutual of Enumclaw Ins. Co. v. State Farm Mutual Auto. Ins. Co., 37 Wn. App. 690, 682 P.2d 317 (1984), quoted favorably from the RESTATEMENT (SECOND) OF JUDGMENTS, § 39, as follows: "A person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." Id. at 693, 682 P.2d at 319. This principle was applied in Mutual of Enumclaw Ins. Co. to an insurer who took over the defense of its insured. See also State ex rel. Partlow v. Law, 39 Wn. App. 173, 692 P.2d 863 (1984).

99. See, e.g., Youngquist v. Thomas, 196 Wash. 444, 83 P.2d 337, amended, 196 Wash. 456, 87 P.2d 1120 (1938); Edmiston v. Empire Ice & Shingle Co., 147 Wash. 490, 266 P.2d 703 (1952); Douthitt v. MacCulsky, 11 Wash. 601, 30 P. 186 (1895). To the extent there was absence of control of the litigation in such cases, their soundness is questioned in L. ORLAND, supra note 1, at 415.

100. Though it is not clear whether witnesses were actually deemed to be "in privity," they were held bound in Bacon v. Gardner, 38 Wn. 2d 299, 229 P.2d 523 (1951); Briggs v. Madison, 195 Wash. 612, 82 P.2d 113 (1938); American Bonding Co. v. Loeb, 47 Wash. 447, 92 P. 282 (1907); and Shoemaker v. Finlayson, 22 Wash. 12, 60 P. 50 (1900). See also Desimone v. Spence, 51 Wn. 2d 412, 415 n.3, 318 P.2d 959, 961 n.3 (1955) ("The witness is bound by the judgment to the same extent as a party."); Fies v. Storey, 37 Wn. 2d 105, 112, 221 P.2d 1031, 1034 (1950) ("It is true, as argued by appellant, that a judgment rendered may be res judicata against a witness who testified in the action. Appellant cites authorities to this effect, but, in these authorities, the subject matter of the actions was identical and was the only matter contested in the proceedings."). Again, L. ORLAND, supra note 1, at 416, is critical, absent control.

Compare Dunlap v. Wild, 22 Wn. App. 583, 591 P.2d 834 (1979), which involved the question of whether a witness might benefit by a judgment rather than the question of whether the witness was bound. The court stated:

In order for res judicata to apply there must be identity of the parties to the current adjudication with those in the prior adjudication . . . . Wild was a key witness in the arbitration proceeding, but he was never made a party to it nor is he in privity with a prior party. Therefore, he cannot claim that the arbitration proceeding is res judicata to the present suit. Dunlap, 22 Wn. App. at 588, 591 P.2d at 837. Because of the rejection of the mutuality requirement, the witness did benefit by the application of collateral estoppel.
of quality if there is no identity of parties.” Few cases seem to have turned upon the absence of the fourth element alone, and, consequently, there is little guidance as to the exact meaning of the “quality” factor. Presumably, it would come into play in situations where the named parties are the same, but one or the other acts in a different capacity in the two proceedings.

It was earlier suggested that a pragmatic, functional approach should be invoked to determine whether separate claims or causes of action are involved. A similar analysis should be applied to determine whether there is an identity of parties and their “quality.” There is recent supportive authority.

In *Rains v. State*, an action was first brought under 42 U.S.C. § 1983 against named members of the state public disclosure commission. Plaintiff claimed a deprivation of constitutional rights. Following a judgment for the defendants, plaintiff filed a second complaint for violation of 42 U.S.C. § 1983, with the state and the commission named as defendants. The court held the doctrine of res judicata applied. Though the parties were somewhat differently named in the two suits, the court concluded that they were “qualitatively” the same. The suit against the commission members was in reality a suit against the state. Quoting from another source, the court said, “Identity of parties is not a mere matter of form, but of substance . . . . [P]arties nominally different may be, in legal effect, the same.”

Though the case involved the particular question of whether there was the necessary identity between state officials and the state, the approach potentially has a broader application.

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102. In Bordeaux v. Ingersoll Rand Co., 71 Wn. 2d 392, 429 P.2d 207 (1967), the court concluded there was a lack of identity of quality between the persons and parties to the two proceedings, as prescribed by the fourth concurrence of identity, since the first proceeding was “nonadversary” involving a “protector,” whereas the second involved an “avowed adversary.” Id. at 397-98, 429 P.2d at 210. But the court had already determined there was lack of identity of persons or parties (the third necessary concurrence), thereby negating a need to fully consider the fourth.
103. An example might be a case such as Flessher v. Carstens Packing Co., 96 Wash. 505, 165 P. 397 (1917), in which an individual first sued as guardian ad litem for his daughter for personal injuries to her and then sued to recover expenses incurred for medical and nursing care of the child. The court held there was no preclusion as there were two different causes of action.
104. 100 Wn. 2d 660, 674 P.2d 165 (1983).
106. In another recent case, Mellor v. Chamberlin, 100 Wn. 2d 643, 646, 673 P.2d 610, 612 (1983), the court concluded that while the identity of the parties was the same, their “quality” differed as the causes of action changed in the two suits from misrepresentation to breach of covenant of title.
B. Final Judgment on the Merits

Assuming the necessary identity in the two proceedings, there is the question of what determinations have claim preclusive effects. For res judicata principles to apply, there must be a final judgment on the merits.  

Whether such a judgment exists poses no problem in the great majority of cases. Occasionally, however, there is an issue of whether a determination is final or on the merits.

An excellent recent example is *Leija v. Materne Brothers, Inc.*

Plaintiff instituted a wrongful death action alleging breach of contract or negligence. She moved for a partial summary judgment on the contract claim. The motion was denied and the first suit was then voluntarily dismissed. Plaintiff brought a second action for wrongful death, again alleging breach of contract and negligence. Defendant raised the defense of res judicata, which the trial court sustained. This was held to be error since the denial of plaintiff’s motion for partial summary judgment was not a dismissal of plaintiff’s claim. The denial meant only that plaintiff was not entitled to a summary judgment. Since there was not a final judgment on the merits in the first action as to the contract, there was no claim preclusion.

When an order is clearly intended to be interlocutory in nature, res judicata does not apply. Thus, finality was lacking for claim preclusion purposes when there was only an oral announcement of a decision in the first action, when findings were still being prepared in the first proceeding, when findings of fact and conclusions of law had been made but no judgment had been entered, and when the order in question was one denying a motion for a preliminary injunction.

Even though a determination is final on a particular point, the decision may not reach the merits of the controversy. As an example, the dismissal of an action on the ground that it was prematurely brought, the claim not yet having accrued, was not a judgment on the merits nor a bar to another

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108. Thus, an unappealed determination of the extent of a worker’s disability was final and binding as to his condition at that time. *Quine v. Department of Labor & Indus.*, 14 Wn. App. 340, 342–43, 540 P.2d 927, 929 (1975).
111. Magee v. Risley, 82 Wash. 178, 143 P. 1088 (1914).
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...action after the necessary time had elapsed.\textsuperscript{115} Although it is for the court in the second proceeding to decide whether a claim is precluded,\textsuperscript{116} this decision is aided if the first court clearly states whether it intends its determination to have preclusive effect. Thus, a judgment expressly providing that it is without prejudice should not have preclusive effect.\textsuperscript{117} Conversely, a judgment stated to be "with prejudice" indicates that it is intended to be on the merits.\textsuperscript{118}

If such clarification as to intent is lacking, it is important to recall that res judicata is an affirmative defense with the burden of proof resting upon the party pleading the defense.\textsuperscript{119} Consistent with this, the court has stated that if there were two questions in the original proceeding, upon either of which the judgment could have rested, with one going to the merits and the other not, the disposition of the case will generally be considered to have rested upon the issues which did not go to the merits, in the absence of any finding as to the ground for the decision.\textsuperscript{120} There is other authority, however, to the effect that if a former judgment is pleaded as a bar, and there is nothing in the judgment pleaded which indicates that the case was not tried and decided upon the merits, the burden is upon the party asserting that the decision was not on the merits to so establish.\textsuperscript{121} To avoid such difficulties, the intended effect should be stated in the judgment.

A somewhat different problem is illustrated by \textit{Gable v. Allen}.\textsuperscript{122} An action for breach of promise of marriage was decided against the plaintiff on the alternate grounds that she did not attach any credit to the defendant's promise, and hence could not predicate any action upon it, and that, if she did attach credit to it, the time for performance had not arrived and her action was premature. In short, the decision was based upon two alternative grounds, one on the merits and the other not. The court held that in such a situation there is a decision on both grounds, although either alone would

\textsuperscript{115} State \textit{ex rel.} Hamilton v. Cohn, 1 Wn. 2d 54, 62–63, 95 P.2d 38, 42 (1939). The particular issue of prematurity would, of course, presumably be precluded.


\textsuperscript{117} Fidelity & Deposit Co. v. Port of Seattle, 106 F.2d 777, 781 (9th Cir.), \textit{cert. denied}, 309 U.S. 661 (1939); Russell v. Leslie, 142 Wash. 60, 252 P. 151 (1927); Case v. Knight, 129 Wash. 570, 225 P. 645 (1924); A.H. Averill Mach. Co. v. Allbritton, 51 Wash. 30, 97 P. 1082 (1908) (former judgment dismissed for want of sufficient evidence); Bates v. Drake, 28 Wash. 447, 68 P. 961 (1902) (even if first court erred in refusing to give judgment on merits).


\textsuperscript{120} State \textit{ex rel.} Hamilton v. Cohn, 1 Wn. 2d 54, 63, 95 P.2d 38, 43 (1939).

\textsuperscript{121} Sweeney v. Waterhouse & Co., 43 Wash. 613, 616, 86 P. 946 (1906).

\textsuperscript{122} 25 Wn. 2d 186, 169 P.2d 699 (1946).
have been sufficient to support judgment, and a subsequent action based upon the same cause of action was precluded.\textsuperscript{123}

If a final judgment on the merits is entered by the trial court, a question may arise as to its effect during the pendency of an appeal. While there is some difference of opinion across the country, in Washington the rule is that an appeal does not suspend or negate the preclusive aspects of the trial court judgment.\textsuperscript{124}

The preceding general principles will be applied to resolve questions of the existence of a final judgment on the merits. To note a few of the more common areas posing the problem will be useful. Judgments entered on the basis of the consent of the parties,\textsuperscript{125} or as a result of compromise or settlement,\textsuperscript{126} have been given res judicata effect. Similarly, a default judgment has claim preclusive effect as to issues that were or might have been raised.\textsuperscript{127}

Voluntary dismissals are governed principally by a court rule.\textsuperscript{128} Thereunder, it is directed that the court shall dismiss an action when all parties so stipulate in writing or upon motion of the plaintiff at any time before the plaintiff rests at the conclusion of his opening case. Ordinarily, such a dismissal is without prejudice and thus does not bar a subsequent proceeding on the same claim.\textsuperscript{129} After the plaintiff rests his opening case, the plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.\textsuperscript{130} At this point in the proceedings, the trial court may in its discretion direct that the dismissal be without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.

The effect of involuntary dismissals also requires initial reference to a court rule.\textsuperscript{131} The relevant rule provides that a civil action shall be dismissed, without prejudice, for want of prosecution if the claimant neglects to note the action for hearing within one year after any issue of law or fact has been joined. This is initiated by motion of the adversary. The same rule

\textsuperscript{123} Compare Restatement (Second) of Judgments § 20 comment (e) (1982).
\textsuperscript{124} Riblet v. Ideal Cement Co., 57 Wn. 2d 619, 621, 358 P.2d 975, 977 (1961); Seattle Nat'l Co. v. Gilmore, 167 Wash. 102, 9 P.2d 95 (1932).
\textsuperscript{125} LaBire v. Department of Labor & Indus., 14 Wn. 2d 407, 128 P.2d 308 (1942); Winton Motor Carriage Co. v. Blomberg, 84 Wash. 451, 147 P. 21 (1915).
\textsuperscript{126} In re Phillips' Estate, 46 Wn. 2d 1, 278 P.2d 627 (1955).
\textsuperscript{127} Baskin v. Livers, 181 Wash. 370, 374, 43 P.2d 42, 43 (1935).
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provides for dismissal for want of prosecution, again without prejudice, in all civil cases wherein there has been no action of record during the twelve months just past. This is implemented by notice from the clerk of the superior court.

The pertinent subsection of the rule concludes, “[u]nless the court in its order for dismissal otherwise specifies, . . . any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.”

Older authority concluded that a judgment was on the merits if entered following the granting of a demurrer for failure to state facts sufficient to constitute a cause of action. On the basis of the provision quoted above, presumably the same result will now be reached in the event of a dismissal for failure to state a claim upon which relief can be granted. In view of the liberal provisions for amending a complaint, such a result is appropriate.

C. Character of the Tribunal

The discussion to this point might suggest that it is only a determination by a court which will have preclusive effect. It is true that if the necessary prerequisites are met, the decision of any court at any level may preclude further litigation. Thus, when a plaintiff successfully sued in a justice court for damages to her automobile resulting from a traffic accident, she was thereafter precluded from suing in a superior court for her personal injuries in the same accident.

Assuming that the necessary conditions are met, however, the decisions of tribunals other than courts may have preclusive effect. A decision by an administrative agency may be binding if that was the intention of the legislature in creating the agency. A common example has been determinations by the Department of Labor and Industries of individual

132. With respect to dismissals for lack of jurisdiction, see Peacock v. Piper, 81 Wn. 2d 731, 504 P.2d 1124 (1973), and In re Cogswell’s Estate, 189 Wash. 433, 65 P.2d 1082 (1937).

133. See Metropolitan Life Ins. Co. v. Davies, 2 Wn. 2d 155, 159–60, 97 P.2d 686, 688 (1940); Comyns v. Painter, 172 Wash. 283, 19 P.2d 1104 (1933); Kinsey v. Duteau, 126 Wash. 330, 218 P. 230 (1923) (even if ruling on the demurrer was error which would have resulted in reversal had there been an appeal); State ex rel. Schmidt v. Superior Court, 62 Wash. 556, 114 P. 427 (1911).


135. Id. R. 15.


137. Spokane & Inland Empire R.R. v. Spokane County, 75 Wash. 72, 81, 134 P. 688, 692 (1913).
controversies arising under the Worker's Compensation Act.\textsuperscript{138} In addition, the court has held that the award of an arbitrator may preclude further litigation.\textsuperscript{139} The major concern is whether the particular body acted in a judicial or quasi-judicial capacity.

Also of consequence is the subject matter jurisdiction of the tribunal. Even a superior court judgment may have less preclusive effect if the court is acting in a situation in which its jurisdiction is limited. Perhaps the best known instance is that of an unlawful detainer action wherein the superior court's jurisdiction is limited to issues incident to the right of possession. Issues not so related are not precluded from being asserted in a later ordinary civil action.\textsuperscript{140} Another example is a potential counterclaim that is beyond the monetary jurisdiction of a justice court. The failure to assert the counterclaim does not preclude a separate action later.\textsuperscript{141}

In short, one may not conclude that the preclusion doctrines apply only to decisions by courts nor, on the other hand, that those doctrines apply in the same fashion to all decisions of all courts. The character of the tribunal is a relevant, but not necessarily controlling, factor.

\section*{D. Qualifications to Claim Preclusion}

As noted earlier, within recent times there has been strong sentiment in favor of finality. This is viewed as serving the interests of society and the parties in bringing an end to litigation. Thus, a subsequent change in a judicial interpretation of applicable law does not affect the res judicata effect of judgments entered under the prior law. This is so even though other persons similarly situated who did not pursue court actions benefit fully from the new judicial interpretation. If prior judgments could be modified to conform with subsequent changes in judicial interpretations, there might never be an end of litigation.\textsuperscript{142}

Nevertheless, even if there is identity in the successive actions, a final judgment on the merits, and a proper tribunal, claim preclusion does not automatically follow. While there are strong policies arguing for finality, there are other, equally strong and possibly countervailing, policies in the

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\item \textsuperscript{138} LeBire v. Department of Labor & Indus., 14 Wn. 2d 407, 128 P.2d 308 (1942) (decision by department that arthritic condition was not due to injury precluded further litigation upon the question of the cause of the condition).
\item \textsuperscript{139} Dunlap v. Wild, 22 Wn. App. 583, 591 P.2d 834 (1979).
\item \textsuperscript{141} Centennial Flouring Mills Co. v. Schneider, 16 Wn. 2d 159, 167, 132 P.2d 995, 997 (1943); see also State \textit{ex rel.} Alaska Pac. Navigation Co. v. Superior Court, 113 Wash. 439, 194 P. 412 (1920).
\item \textsuperscript{142} Columbia Rentals, Inc. v. State, 89 Wn. 2d 819, 823, 576 P.2d 62, 65 (1978).
\end{itemize}
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Res judicata is a court-created concept and is subject to flexible, pragmatic application. The fact that the party to be bound could not have appealed the prior judgment, or that the earlier decision was by another court on a question concerning a problem that is peculiarly within the province of the second court, may result in no preclusive effect. If the claim had not fully ripened so that complete recovery was not possible in the first action, a second proceeding may be permitted. Another limitation is that where the parties have been induced by fraud not to bring into the original action all the matters that might have been therein litigated, they are not then precluded from introducing those matters in a subsequent lawsuit. Mistake induced by the other party is similarly treated.

In each of the above instances, an independent factor, such as the nature of the proceedings, of the claim, or of the actions of the other party, resulted in a qualification or amelioration of the usual preclusion principles. The court's concern with reaching a just result in a particular instance prevailed over the desire for finality. Other notable examples exist.

Howell v. Hunters Exchange State Bank involved the foreclosure of a chattel mortgage upon property in one county. In a later action, foreclosure was sought upon property in another county. The plaintiff could have proceeded against all the property in one action, and the court stated that there had been a splitting of the cause of action. The court further noted, however, that it might enforce or refuse to enforce the rule against splitting of causes of action as the justice of the particular case required. It appeared that the two proceedings had actually resulted in less expense than would have been true had one been instituted, and that such expense was one that would have been borne by the objecting party, the mortgagor. Consequently, the objecting party had not been harmed, and the rule against splitting was not invoked.

143. As to the inability to appeal, see United States v. 111.2 Acres of Land, 293 F. Supp. 1042 (E.D. Wash. 1968), aff'd, 435 F.2d 561 (9th Cir. 1970). As to the local problem, see Tacoma v. Taxpayers of Tacoma, 49 Wn. 2d 781, 307 P.2d 567 (1957), rev'd, 355 U.S. 888 (1957). Both cases involved issue preclusion, but similar policies might apply to claim preclusion problems.

144. Two cases involving breach of covenants of title illustrate the point. Mellor v. Chamberlin, 100 Wn. 2d 643, 673 P.2d 610 (1983); Harsin v. Oman, 68 Wash. 281, 123 P. 1 (1912).


147. 149 Wash. 249, 270 P. 831 (1928).

148. The court also stated that the action was one in equity. Plaintiff was the mortgagor who brought the action to restrain the mortgagee bank from proceeding with the second foreclosure. The bank in its answer sought foreclosure. The trial court sustained the right to foreclose and was affirmed on appeal. Surely, it would have made no difference if the second proceeding had simply been by the bank, as plaintiff, to foreclose. Further, surely it ought make no difference whether the action is characterized as one in equity or law. In either instance, the preclusion principles should be applied to accomplish justice. See L. ORLAND, supra note 1, at 422.

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Another example involved two successive condemnation actions for a private way of necessity against the same owner.\textsuperscript{149} The court stated that the rule against splitting was primarily for the benefit and protection of the defendant. The court further stated that instances arise where its non-enforcement will work no particular injury to the defendant and where its enforcement may cause serious loss and damage to the plaintiff. Such an instance was found here. While the owner would be inconvenienced by having to appear twice, the expenses would be borne by the condemnor, there were justifiable reasons for two general condemnation proceedings, and the claimant might suffer serious loss if it could not condemn. Again, justice prevailed over strict rules of res judicata.

A final illustration involved defendants who obtained a deed to certain land from the plaintiff, immediately mortgaged it to a third person, and then, instead of giving the plaintiff any security for the unpaid balance, left the state with the borrowed money. The plaintiff instituted two actions, the first to recover damages in the amount of the mortgage and the second to cancel the deed. The deed cancellation action was completed first with judgment for the plaintiff. The trial court also found for the plaintiff in the damages action, but on appeal this was reversed. The court held that the plaintiff had divided a single cause of action, and that this was not permissible. Despite an acknowledgment that this was "a provoking case," and a seeming reference to the defendant as a "rascal" and one of the "meanest," res judicata principles precluded the damages recovery.\textsuperscript{150} Upon rehearing, the court reversed its position.\textsuperscript{151} The court stated that the defendant should have interposed in the second action the pendency of the first action or moved for consolidation of the two. Not having done so, the defendant had waived its objection. Further, and particularly relevant here, the court stated that the first judgment was res judicata only as to matters actually tried and decided, and that the only harm to defendant was being vexed by two actions. But, of course, res judicata encompasses not only what was litigated but what might have been litigated as part of the original cause of action. Also, a principal objective of the doctrine is to prevent double vexation.

The true explanation for the result was that it was unjust to apply the usual preclusion concepts in the particular case. As the dissent had said in the first hearing, to find for the defendants was to send them forth "free with $1,400 of ill-gotten gains" with the court assisting the defendants to

\textsuperscript{149} State ex rel. White Pine Sash Co. v. Superior Court, 145 Wash. 576, 261 P. 110 (1927).
\textsuperscript{150} Brice v. Starr, 90 Wash. 369, 372, 156 P. 12, 14 (1916).
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effectuate “a palpable though round-about grand larceny.” Upon reflection, the court was not prepared to do this, and consequently it granted a rehearing and reversed its position.

This is as it should be. Even at the expense of some predictability, there will be instances when more important policies should prevail than those supporting the claim preclusion doctrine.

III. ISSUE PRECLUSION

The orthodox statement is that the doctrine of collateral estoppel differs from res judicata in that, instead of preventing a second assertion of the same claim or cause of action, collateral estoppel prevents a second litigation of issues even though a different claim or cause of action is asserted. More modernly, then, just as res judicata has come to be called claim preclusion, collateral estoppel has come to be called issue preclusion.

In one sense res judicata is the more comprehensive doctrine since it bars an entire claim and not just a particular issue. In another sense, collateral estoppel is the broader as it applies to subsequent actions involving different claims. The two doctrines are alike in that both are intended to prevent relitigation.

Both are also alike in that they may apply to decisions by entities other than courts. Like res judicata, in appropriate circumstances collateral estoppel can prevent relitigation of issues determined by an administrative agency acting in a judicial capacity. The applicability of collateral estoppel depends upon a number of factors, including “(1) whether the agency acting within its competence made a factual decision; (2) agency

153. See also United States v. 111.2 Acres of Land, 293 F. Supp. 1042, 1049 (E.D. Wash. 1968), aff’d, 435 F.2d 561 (9th Cir. 1970) (no preclusion when “injustice would result”); Weidlich v. Independent Asphalt Paving Co., 94 Wash. 395, 406, 162 P. 541, 545 (1917) (no preclusion “in the interests of justice and certainty”).
156. In the unusual instance in which the same issue is raised in a later suit on the same claim and the principles of res judicata do not merge or bar the claim, the term “direct estoppel” is applied with respect to the issue. See L. ORLAND, supra note 1, at 399.

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and court procedural differences; and (3) policy considerations."\textsuperscript{159} Likewise, an arbitrator's award can have collateral estoppel effect if the necessary requirements are met.\textsuperscript{160}

As previously noted, this article is concerned with preclusion problems in civil litigation. Preclusion problems that arise in a criminal context are beyond its scope, except as they may bear upon the outcome in a civil proceeding. Such may be the case in the event of a criminal prosecution followed by a civil suit.

In \textit{Seattle-First National Bank v. Cannon}\textsuperscript{161} the defendants were convicted in federal court of conspiracy and of aiding and abetting embezzlement of funds from a bank. The bank then brought a civil action to recover the money. The trial court granted a summary judgment against the defendants based upon their criminal conviction. The court held that they were collaterally estopped from denying that they wrongfully took funds from the bank. On appeal the findings of conspiracy and of aiding and abetting in embezzlement were affirmed. The doctrine of collateral estoppel was applicable since the defendants had been accorded all the procedural protections of a criminal trial, including a higher burden of proof than that in the later civil action.\textsuperscript{162}

Compare \textit{Beckett v. Department of Social and Health Services}.\textsuperscript{163} The defendant was acquitted of grand larceny in a proceeding in which she was charged with the fraudulent receipt of public assistance monies. Subsequently a civil fraud proceeding was instituted. The court held that collateral estoppel did not apply since the failure to meet the "beyond a reasonable doubt" standard in the criminal action did not mean that the "clear, cogent, and convincing" standard could not be met in the later civil action.\textsuperscript{164}

\textsuperscript{159} See State v. Dupard, 93 Wn. 2d 268, 275, 609 P.2d 961, 964 (1980) (public policy dictated that parole board revocation hearing decision not have collateral estoppel effect in criminal prosecution proceeding).


\textsuperscript{161} 26 Wn. App. 922, 615 P.2d 1316 (1980).

\textsuperscript{162} Compare the older case of Priest v. American Smelting & Ref. Co., 409 F.2d 1229 (9th Cir. 1969).


\textsuperscript{164} Similarly, because of the different burdens of proof, collateral estoppel did not apply in a parole revocation proceeding based on the same factual circumstances that had resulted in an acquittal in a prior criminal prosecution. Standlee v. Smith, 83 Wn. 2d 405, 518 P.2d 721 (1974); see also Standlee v. Rhay, 557 F.2d 1303 (9th Cir. 1977). Cf. State v. Dupard, 93 Wn. 2d 268, 609 P.2d 961 (1980) (state not collaterally estopped in criminal case from relitigating issue previously decided in favor of defendant at parole revocation hearing).
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When issue preclusion is asserted, the Washington court will usually open its discussion with the statement that affirmative answers must be given to four questions before collateral estoppel is applicable:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?165

If the other questions are answered in the affirmative, the requirement of a final judgment on the merits should be applied in a pragmatic, flexible fashion. One must keep in mind that the problem here is one of issue preclusion, not claim preclusion. If a particular issue has been decided in a proceeding in which the person to be bound was a party, or in privity, and if injustice will not be done by invoking preclusion, the lack of a technically final judgment should not control. A recent case supports this approach: after reciting the four questions, the court concluded that a final adjudication of rights is more important than a final decree.166

The other three questions require more extended treatment. One additional introductory inquiry must be noted, however. Does the doctrine of collateral estoppel preclude an issue in a conclusive or a prima facie sense? While there is of necessity built-in flexibility in the application of the relevant considerations for determining whether an issue is precluded, the preclusion must be conclusive. The first determination either establishes a conclusion or it does not; it does not simply tend to support a conclusion. Again, a recent case is in accord with this position.167

A. Same Issue

As indicated previously, for collateral estoppel to apply, the issue decided in the prior adjudication must be identical with the one presented in

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Occasionally, the requirements for collateral estoppel and res judicata will be confused. See In re Estate of Rynning, 1 Wn. App. 565, 569, 462 P.2d 952, 954-55 (1969), wherein the court stated that for either doctrine to be applicable, there must be a concurrence of identity of subject matter, cause of action, persons and parties, and the quality of the persons for or against whom the claim is made.


the immediate action.\textsuperscript{168} The party asserting collateral estoppel has the burden of showing such identity.\textsuperscript{169} The burden was found to have been met when in two successive actions an issue was whether certain land was in a natural water drainage course,\textsuperscript{170} whether a doorway was negligently maintained,\textsuperscript{171} and whether a lease was valid.\textsuperscript{172}

In comparison, the burden was not met when in the two actions the meaning of a term arose in different contexts;\textsuperscript{173} when the first action involved a city’s alleged duty to issue a permit and the second the city’s alleged liability for negligence in issuing an invalid permit;\textsuperscript{174} when the first action included a finding of “fraud” and “wrongful” conduct in a civil sense, but the second involved a question as to the truth of incriminating slanderous statements of theft and embezzlement;\textsuperscript{175} and when the first action concerned whether the driver of a vehicle was acting within the scope of his employment, whereas the second involved the question whether the use of the car was with permission of the owner within the meaning of an insurance policy.\textsuperscript{176} Although not a common occurrence, Washington courts have held that collateral estoppel should not apply when the first court clearly indicates that it does not intend to foreclose a particular issue.\textsuperscript{177}

Recall that the doctrine of res judicata precludes not only what was litigated, but what might have been litigated, if the latter is part of the same claim or cause of action. Collateral estoppel applies to other claims, but

\begin{itemize}
\item \textsuperscript{168} A recent case discussing the principle is Malland v. Department of Retirement Sys., 103 Wn. 2d 484, 694 P.2d 16 (1985).
\item \textsuperscript{170} Island County v. Mackie, 36 Wn. App. 385, 675 P.2d 607 (1984) (in first action party as plaintiff was unsuccessful in seeking injunction to prevent flow of water over his land; in second suit as defendant he was required to pay damages when he used self-help to block flow).
\item \textsuperscript{171} Sample v. Chapman, 7 Wn. App. 129, 497 P.2d 1334 (1972) (plaintiff, unsuccessful in a suit against tenant, precluded on issue in subsequent action against landlord).
\item \textsuperscript{172} Dolan v. Smith, 25 Wash. 2d 214, 65 P. 190 (1910) (under a one-year lease, landlord who lost in action for second month’s rent was precluded in second action at end of year).
\item \textsuperscript{173} Luisi Truck Lines v. Washington Utils. & Transp. Comm’n, 72 Wn. 2d 887, 895, 435 P.2d 654, 659–60 (1967) (first action involved meaning of term “fruit and vegetables” as applied to right to haul canned goods, whereas second related to fruit and vegetables immersed in brine, refrigerated, or in other semi-processed condition).
\item \textsuperscript{174} Haslund v. City of Seattle, 86 Wn. 2d 607, 547 P.2d 1221 (1976).
\item \textsuperscript{175} Roper v. Mabry, 15 Wn. App. 819, 551 P.2d 1381 (1976) (court stated that the elements, proof, and nature of civil fraud for breach of a fiduciary duty are not identical to those of larceny, theft, or embezzlement; thus issues not identical for collateral estoppel purposes).
\item \textsuperscript{177} In re Richland Hyatt House, Inc., 18 Wn. App. 426, 430, 568 P.2d 825, 827 (1977); see also Wilber v. Western Properties, 22 Wn. App. 458, 589 P.2d 1273 (1979); Curtis v. Crooks, 190 Wash. 43, 66 P.2d 1140 (1937).\end{itemize}
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precludes only those issues that have actually been litigated and determined. At times, it will be clear that an issue was not litigated. An excellent illustration is a judgment entered upon stipulated findings of fact and embodying a settlement of the parties. At other times, it is not clear whether an issue was actually litigated. If a verdict or judgment is ambiguous or indefinite, or if there is uncertainty as to whether an issue was previously litigated, collateral estoppel will not be applied to that issue.

Further, actual litigation and determination of an issue is not enough. The issue must have been material and essential to the first controversy. The requirement of actual litigation of an essential issue provides some assurance that the issue received the attention of the parties and the judge in the first proceeding, thereby justifying its conclusive effect in the second.

In some recent cases the analysis has been in terms of ultimate versus evidentiary facts. Relying upon the original Restatement of Judgments, the court has stated that the doctrine of collateral estoppel applies to determinations of ultimate facts but does not extend to evidentiary facts. Ultimate facts

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The principle is excellently stated in McGee v. Wineholt, 23 Wash. 748, 751, 63 P. 571, 571 (1901): As was said by the court of appeals of New York in People v. Johnson, 38 N.Y. 63 [97 Am. Dec. 770], "And, although a decree in express terms professes to affirm a particular fact, yet, if such fact was immaterial, and the controversy did not turn upon it, the decree will not conclude the parties in reference to that fact." It is clear that the issue tendered was not material in the action to foreclose the mortgage, as its maintenance was not an essential to the right of appellant to foreclose.


183. The foundation case is Seattle-First Nat'l Bank v. Kawachi, 91 Wn. 2d 223, 588 P.2d 725 (1978). The court quoted from the ReSTATEMENT OF JUDGMENTS § 68 (1942), as follows: (1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . . . (2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause.
facts are said to be facts directly at issue in the first controversy upon which
the claim rests; evidentiary facts are facts that may be in controversy in the
first action and are proven but that are merely collateral to the claim
asserted.\textsuperscript{184}

An obvious difficulty is what does all of this mean. One approach is to
note the results in three cases using the terminology. In the first case, the
original action involved a 1967 transaction. For the purpose of showing the
relations between the parties, evidence was introduced relating to some
transactions in 1961 and 1962. Following a judgment for the defendant,
suit was brought on the 1961 and 1962 transactions. Several reasons were
stated for the conclusion that the first judgment had no preclusive effect.
One was that any finding upon the 1961 and 1962 matters was upon a
question that was evidentiary rather than ultimate.\textsuperscript{185}

In the second case, an issue as to the propriety of a method of accounting
was decided in a federal securities action. Subsequently, there was a
shareholder’s action to enforce an arbitration clause to settle a dispute as to
the method of accounting. Collateral estoppel was denied because it was
said to be unclear that the first determination involved an ultimate fact.\textsuperscript{186}

The third case involved a criminal conviction in federal court of conspir-
acy and of aiding and abetting embezzlement of funds from a bank.
Subsequently, the bank sued the defendants to recover $43,000, the amount
allegedly embezzled. The determination that the defendants were guilty of
conspiracy and of aiding and abetting in embezzlement was said to involve
ultimate facts. However, though the federal district court had required
restitution of a specific sum, and the federal court of appeals had recited a
figure of $43,000 in its opinion, the amount of damages was held to be
evidentiary and not within the doctrine of collateral estoppel.\textsuperscript{187}

In each of the three cases, the rationale is stated largely in conclusory
terms with little additional explanation. As mentioned, this approach was
based on the original \textit{Restatement of Judgments}. As of 1982, there is now a
\textit{Restatement (Second) of Judgments}. Its approach is different.\textsuperscript{188}

\begin{flushright}
\textsuperscript{188} See \textit{Restatement (Second) of Judgments} § 27 comment j (1982).
\end{flushright}
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One reason for rejecting the original Restatement’s approach is the difficulty in distinguishing ultimate facts from evidentiary facts. Further, even if a fact is categorized as evidentiary, great effort may have been expended by the parties in seeking to persuade the judge of its truth or falsity, and it may have been regarded as a key issue in the dispute. Based on such considerations, the appropriate question, as stated in the Restatement (Second) of Judgments, is not whether ultimate or evidentiary facts are involved, but whether the issue was actually recognized by the parties as important and by the judge as necessary to the first judgment. If so, the determination should be conclusive, with an important qualification being whether the significance of the issue for purposes of the subsequent action was sufficiently foreseeable at the time of the first action.189

In reality, the Washington cases are perhaps implicitly based on such an analysis. If not, they should be. When the opportunity presents itself, the approach of the Restatement (Second) of Judgments, or something comparable, should be adopted.190 This approach is clearer and more meaningful than the “ultimate fact” versus “evidentiary fact” approach. Consequently, it is much more useful for counsel in predicting results and in providing sound advice.

One remaining question is how to determine whether there has been actual litigation and decision of an essential issue. The burden of establishing that such occurred rests with the party asserting collateral estoppel.191 Ordinarily, reference to the record of the prior litigation will provide the answer.192 For example, the pleadings may aid in ascertaining what issues were involved, though other parts of the record may establish that a particular issue raised in the pleadings was not actually litigated.193 In addition to the pleadings, the court has looked to rulings on the admissibility of certain evidence,194 the contents of jury instructions,195 the prior judgment itself,196 and appellate opinions in the prior litigation.197

189. Other potential qualifications and exceptions are stated in id. § 28.
190. Id. § 27 comment j (1982) has a useful citation of relevant cases, texts, and articles.
192. The court in Beagles v. Seattle-First Nat'l Bank, 25 Wn. App. 925, 932, 610 P.2d 962, 966 (1980), stated: “When collateral estoppel is asserted as a bar, the record of the prior action must be before the trial court so that it may determine if the doctrine precludes relitigation of the issue in question.”
193. See Dolby v. Fisher, 1 Wn. 2d 181, 95 P.2d 369 (1939) (no evidence introduced on issue raised in the pleadings).
In a case tried to the judge without a jury, the court's findings may be very useful. The same is true in a jury-tried case if there is a special verdict or a general verdict accompanied by answers to special interrogatories. On the other hand, a general verdict alone will often leave unanswered the question of which issues were decided by the jury. Lastly, there is authority that extrinsic evidence may be considered to establish the issues litigated and determined in the prior proceeding.

B. Persons Bound

Assuming a final judgment on the merits in the first action and an identity of issue in the two proceedings, the third question is whether the party against whom preclusion is asserted was a party or in privity with a party to the prior adjudication. A negative answer will generally result in no collateral estoppel. One who was a party to the prior proceeding, whether as a claimant or as a defending party, will usually be bound, assuming the other requirements are met. Similarly, one will be bound if in privity with a party. For collateral estoppel purposes, privity has been found between a vendor and a purchaser of real property, between the original owner of property and some other successor in interest, between a guardian and her ward, and between the named party and another who actually conducted or controlled the litigation.

200. State v. Funkhouser, 30 Wn. App. 617, 627, 637 P.2d 974, 979 (1981), suggests that other parts of the record, such as the pleadings, evidence, and instructions, may at times aid in deciding what issues were determined by a general verdict.
In a few instances issue preclusion has been applied to bind one who was not a party nor in privity with a party. A recent case so concluded in holding that in some circumstances a witness in an action may be bound by the judgment.\textsuperscript{208} Another instance is that in which the so-called "vouching in" doctrine applies.

In some situations a third person may be liable to reimburse or indemnify a defendant for its liability to a claimant. At times it will be possible to join the third person as a party to the original action.\textsuperscript{209} In other instances such joinder will not be feasible, as for example, if the third person is not subject to the jurisdiction of the court.

A possible alternative may be the "vouching in" of the third person. If the defendant gives proper and timely notice of the proceedings and tenders the opportunity to defend, the third person will be bound by any judgment upon the question of the defendant's liability to the original plaintiff.\textsuperscript{210} The question of the third person's liability to indemnify the defendant will require subsequent determination.\textsuperscript{211} However, in a later action against the third person (the vouchee), collateral estoppel will apply to issues determined in the first proceeding, assuming that the usual requirements are met.\textsuperscript{212} The end result will be issue preclusion as to a person not a party nor meeting the usual concepts of privity.

Circumstances justifying application of the "vouching in" doctrine are, of course, somewhat out of the ordinary. Even more unusual is Kyreacos v. Smith.\textsuperscript{213} A Seattle police detective was convicted of first degree premeditated murder. Thereafter, the widow of the victim, individually and as executrix of her husband's estate, brought a wrongful death action against the detective and the City of Seattle. On her claim that the city was liable

\textsuperscript{208} In Hackler v. Hackler, 37 Wn. App. 791, 795, 683 P.2d 241, 243 (1984), the court stated as follows:

Thus the Hacklers are correct in their assertion that collateral estoppel does not apply to them by reason of privity, as that concept is usually understood. This, however, is not the end of the matter, because there is an exception to the requirement that one be a party or in privity with a party to the prior litigation.

One who was a witness in an action, fully acquainted with its character and object and interested in its results, is estopped by the judgment as fully as if he had been a party.

\textsuperscript{209} This might be done by joining the third person as a third-party defendant under WASH. SUPER. CR. CIV. R. 14.


\textsuperscript{213} 89 Wn. 2d 425, 572 P.2d 723 (1977).
under the doctrine of *respondeat superior*, summary judgment was entered for the city. The trial court held that the criminal conviction was conclusive in the civil case on the issue of whether the detective was acting within the scope and course of his employment by the city in killing the plaintiff’s husband.

The supreme court affirmed and held that the commission of premeditated murder by the detective precluded any possibility that he was acting within the scope and course of his employment.\(^{214}\) The court acknowledged that the plaintiff was not a party nor in privity with a party in the criminal case, but concluded that there was no injustice or prejudice to the plaintiff despite a “lack of identity, mutuality, in the criminal case.”\(^{215}\) The court noted that there has been an erosion in the doctrine of mutuality.\(^{216}\) This is true, as will be developed in detail in the succeeding section.

The relevance of such erosion is not clear, however. The mutuality doctrine or its rejection is of consequence in determining who may benefit from a judgment. The problem in *Kyreacos*, however, was one of who was bound by a judgment. The result of holding that the widow was bound cannot be explained by the ordinary principles of collateral estoppel, nor by recognized exceptions. That *Kyreacos* will have any broad impact is doubtful, and it is best to regard it, as did the court, as “a most unique case which must be confined to its peculiar facts and to its procedural posture.”\(^{217}\)

On occasion, collateral estoppel has been denied between persons who were parties to both proceedings. If the parties were not adversaries in the first proceeding, there was no preclusion.\(^{218}\) Some older cases looked to the pleadings to determine if such adverseness was present.\(^{219}\) Others seemed more concerned with the realities of the litigative process than with the technicalities of pleading.\(^{220}\) And most recently the presence or absence of adverseness, in and of itself, has seemed to be of little consequence. Rather, the question has been whether the party to be bound had the motivation and the opportunity to fully and fairly present its position in the first proceeding.\(^{221}\) If the answer is yes, collateral estoppel may apply

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\(^{214}\) Id. at 427, 572 P.2d at 724.

\(^{215}\) Id. at 428, 572 P.2d at 724.

\(^{216}\) Id., 572 P.2d at 724.


\(^{219}\) Sanders v. Sheets, 142 Wash. 155, 159, 252 P. 531, 533 (1927); Bollong v. Corman, 117 Wash. 336, 201 P. 297 (1921).


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despite the lack of adverseness. This seems correct. With the relaxation of
the mutuality doctrine, it is now possible for a stranger to benefit by a
judgment. It is certainly proper, then, under appropriate circumstances, for
one party to benefit against another, even though they were not adversaries
in the first action.

C. Doing Justice

In determining the propriety of invoking issue preclusion, the last
question the court will ask is whether application of collateral estoppel will
work an injustice on the party against whom the doctrine is invoked. The
question raises numerous considerations, one of which is what persons
should be allowed to benefit by a judgment. More particularly, should one
who was not a party, or in privity thereto, benefit?

Until the last two decades, the general answer was in the negative. This
was because of the requirement of mutuality. It was said that just as a
stranger was not bound by a judgment, likewise the stranger should not be
permitted to benefit. The estoppel had to be mutual.222

There were exceptions. These principally centered around the situation
in which a claimant unsuccessfully sought recovery from one allegedly
primarily liable and then brought another action against one derivatively
liable. Though, because of lack of privity, the latter would not have been
bound had the first judgment been for the claimant, courts held that such a
party could benefit from the judgment. The doctrine of mutuality did not
apply.223 Otherwise, the person derivatively liable would be denied the
possibility of indemnity, or the one primarily liable would be required to
reimburse the one derivatively liable, even though the one primarily liable
had already been exonerated. Either alternative was deemed unacceptable.
Situations in which the mutuality doctrine was deemed inappropriate
included those of principal-agent,224 employer-employee,225 and master-
servant.226

222. Leading Washington cases generally supporting the requirement of mutuality were Bordeaux
v. Ingersoll Rand Co., 71 Wn. 2d 392, 429 P.2d 207 (1967); Owens v. Kuro, 56 Wn. 2d 564, 354 P.2d

223. See Gerritsen v. City of Seattle, 164 Wash. 459, 465-66, 2 P.2d 1092, 1094 (1931). Likewise,
the person derivatively liable might rely upon a judgment against the primary party as being the limit of

224. Greene v. Rothschild, 68 Wn. 2d 1, 402 P.2d 356, 414 P.2d 1013 (1965, 1966); see also W.G.


The first major break in the orthodoxy of mutuality was suggested in *Henderson v. Bardahl International Corp.* The court stated, “We recognize that there are many cases where the issues of mutuality, privity, and the offensive-defensive distinction should not be permitted to obstruct the application of collateral estoppel by judgment.” The clear intent was that collateral estoppel might apply despite the fact that the person relying on the doctrine was a non-party, not in privity with a party, and regardless of whether the non-party was relying upon the prior judgment for defensive or recovery (offensive) purposes.

The court actually resolved the problem before it on other grounds. Nevertheless, the language in *Henderson* served as the base upon which subsequent cases rejected application of the mutuality doctrine.

What was dictum in *Henderson* became holding in *Lucas v. Velikanje.* The plaintiff first instituted an action to set aside a trust. She was unsuccessful because a jury determined that there had been no fraud in the execution of the trust. Thereafter, the plaintiff instituted a second action against a different defendant, an attorney, claiming malpractice for failure to discover fraud. The court held that the issue of fraud was precluded in the second proceeding. Since there was no fraud, there could be no malpractice in failing to discover it. In effect, one who would not have been bound by the first judgment had it been adverse was allowed to benefit when it was favorable. Mutuality was not required.

In that particular case collateral estoppel was successfully invoked by a stranger for defensive purposes. Other, more recent, cases have reached a similar result.

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229. The court in *Henderson* preceded the quoted textual language with the observation that there were earlier cases in which Department of Labor & Industries determinations were used offensively and defensively in actions by employees and employers. Offensive examples cited were Miller v. St. Regis Paper Co., 60 Wn. 2d 484, 374 P.2d 675 (1962), and Prince v. Saginaw Logging Co., 197 Wash. 4. 84 P.2d 397 (1938). *Henderson,* 72 Wn. 2d at 116 n.12, 431 P.2d at 966 n.12. A defensive example was Shoopman v. Calvo, 63 Wn. 2d 627, 388 P.2d 559 (1964). *Henderson,* 72 Wn. 2d at 116 n.12, 431 P.2d at 966 n.12.

230. The court followed the quoted textual language with the statement: “However, it is unnecessary to consider those issues in the present case, intriguing as they may be, because we are convinced that the trial court properly found collateral estoppel by judgment inapplicable.” *Henderson,* 72 Wn. 2d at 116, 431 P.2d at 966. The court held that collateral estoppel was inapplicable because the first judgment was ambiguous, the same issue was not necessarily decided in the two actions, and to apply collateral estoppel would work an injustice.


232. Chronologically, these cases have included Sample v. Chapman, 7 Wn. App. 129, 497 P.2d 1334 (1972) (invitee’s unsuccessful action against tenant collaterally estopped invitee in second action against lessor; person estopped was plaintiff in both proceedings); Simpson Timber Co. v. Actna Casualty & Sur. Co., 19 Wn. App. 535, 576 P.2d 437 (1978) (manufacturer who was held liable for
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What of the possibility of a stranger invoking issue preclusion for offensive purposes? The dictum in the original *Henderson* case stated that there are many instances in which the "offensive-defensive distinction" should not be permitted to obstruct the application of collateral estoppel.\(^{\text{233}}\) Cases since then have so held in allowing a stranger to benefit in an offensive context.\(^{\text{234}}\)

There is then considerable authority in Washington dispensing with the requirement of mutuality. The specific factors to be considered and the circumstances in which a stranger will be allowed to benefit remain to be worked out in greater detail. Of vital concern is whether the person who will be bound had the motivation and the opportunity to present the case fully and fairly in the first proceeding.\(^{\text{235}}\) More fundamentally, what is involved is whether the application of collateral estoppel in favor of a stranger will work an injustice.

That, again, is the last question the court will ask, not just with respect to the narrow problem of mutuality, but the entire concept of issue preclusion. Cases, from the very old to the most recent, have turned on that question.

In resolving the question, courts have considered many diverse factors, some rather specific and others very general. These have included such considerations as whether the first judgment was appealable,\(^{\text{236}}\) whether there has been a major factual change since the first proceeding,\(^{\text{237}}\) whether

\(^{\text{233}}\) Actually, *Henderson v. Bardahl Int'l Corp.*, 72 Wn. 2d 109, 431 P.2d 961 (1967), itself involved an attempted offensive use. While unsuccessful, it was not for that reason, but rather because the issues were not the same in the two proceedings and application of collateral estoppel would work an injustice.


\(^{\text{236}}\) United States v. 111.2 Acres of Land, 293 F. Supp. 1042 (E.D. Wash. 1968), *aff'd*, 435 F.2d 561 (9th Cir. 1970). *Cf.* *Dolan v. Scott*, 25 Wash. 214, 65 P. 190 (1901). Another factor of consequence in the former case was that preclusion would have resulted in a party being affected differently than others on the same facts.

preclusion would mislead or confuse a jury,\textsuperscript{238} whether the principal issues upon which liability is premised have been fairly and fully litigated in the former action,\textsuperscript{239} whether the first determination was manifestly erroneous,\textsuperscript{240} and whether, overall, there would be patent injustice.\textsuperscript{241}

The point is well illustrated by \textit{Kennedy v. City of Seattle}.\textsuperscript{242} In the first action the city prosecuted Kennedy in a municipal court for a criminal misdemeanor violation of a houseboat ordinance. The case was dismissed following a ruling that the ordinance was unconstitutional. Kennedy then brought an action seeking a declaratory judgment that the ordinance was unconstitutional and contended that the city was collaterally estopped on the issue. The state supreme court held that the constitutionality of the ordinance should not be determined by an unappealed municipal court ruling and that the relitigation of such an important public question should not be foreclosed by collateral estoppel. The court stated that to reach such a result would be "manifestly unjust."\textsuperscript{243}

Once again, this is as it should be. There is danger that in seeking to relieve the crowded dockets and backlog of litigation, courts will too readily turn to the rules of res judicata and collateral estoppel. It is critical to remember that the doctrines of claim and issue preclusion are court-created concepts. Accordingly, they can be adjusted to accommodate whatever considerations are necessary to achieve the final objective—doing justice.

\textsuperscript{240} Henderson v. Bardahl Int'l Corp., 72 Wn. 2d 109, 431 P.2d 961 (1967).
\textsuperscript{242} 94 Wn. 2d 376, 617 P.2d 713 (1980).
\textsuperscript{243} On the merits the ordinance was in part sustained and in part held unconstitutional.