

REPUBLIC OF TRINIDAD TOBAGO

IN THE HIGH COURT OF JUSTICE
Sub Registry, San Fernando

H.C.A. No. 1115 of 2000

BETWEEN

KENT HECTOR

Plaintiff

AND

INDRANIE BHAGOUTIE

Defendant

AND

REINSURANCE COMPANY OF
TRINIDAD AND TOBAGO LIMITED

Co-Defendant

JUDGMENT

Before the Honourable Mr. Justice V. Kokaram

Appearances:

Mr. V. Deonarine for the Plaintiff

Mr. R. Maharaj for the Defendant

1. THE PRELIMINARY ISSUE:

7.1 By its notice dated 1st July 2005 the Plaintiff indicated its intention to raise a preliminary issue in this trial. This preliminary issue is set out in the said notice and in the Plaintiff's Re-amended Reply filed on 8th July 2005.

7.2 The preliminary issue to be determined is whether the Defendants, Indranie Bhagoutie and Reinsurance Company of Trinidad and Tobago, are estopped from denying liability in negligence as against this Plaintiff, Kent Hector, arising out of a motor vehicle accident on 10th November 1999 by reason of a judgment made by Myers J on 21st January 2004 in HCA s 449 of 2001 between Fenton Simon, (the Plaintiff in that action) and Kent Hector (the Plaintiff herein), Indranie Bhagoutie (the first Defendant herein), Rajan Bhagoutie, Citizen Insurance Company Limited and Reinsurance Company of Trinidad and Tobago Limited (the second Defendant herein). That action (hereinafter referred to as "HCA 449") was tried and determined in circumstances where there was no appearance of the Defendants herein and Rajan Bhagoutie.

7.3 To that extent the action was tried in the absence of some but not all of the Defendants. The Plaintiff herein appeared and defended the said action. Fenton Simon (the Plaintiff in H.C.A. 449) was the passenger in Kent Hector's vehicle and Mr. Simon's claim in HCA 449 was for damages for injuries and loss sustained from the same motor vehicle accident under consideration in this action as against both the Plaintiff and 1st Defendant in this action as the owner's of the respective motor vehicles involved in this accident. Myers J, upon hearing the evidence of Mr. Simon the passenger and this Plaintiff herein ordered that:

(g) There be judgment for the Plaintiff, Mr. Simon against the 2nd (Indranie Bhagoutie) 3rd and 5th Defendants (Reinsurance Company of Trinidad and Tobago Limited).

- (h) The Plaintiff's claim against 1st (Kent Hector) and 4th Defendants is dismissed
- (i) Damages to be assessed by a master in chambers on a date to be fixed by the Registrar
- (j) The 2nd (Indranie Bhagoutie) 3rd and 5th named Defendants (Reinsurance Company of Trinidad and Tobago Limited) do pay the Plaintiff's costs and 1st (Kent Hector) and 4th Defendants costs in both cases to be taxed in default of agreement.

7.4 The Plaintiff contends that by virtue of this judgment, the Defendant is now estopped from denying negligence or liability in this motor vehicle accident and from contending or raising in this present action the issues as set out in paragraph 5 of the Defence and Counterclaim filed on 5th October 2000 herein. The Plaintiff submitted that to now allow the Defendant to pursue this defence and counterclaim is an abuse of the process of the Court as these were matters that were already the subject of litigation in HCA 449. Indeed, as the Plaintiff correctly submits, there is an overlap between the doctrines of res judicata and "abuse of process." Ultimately this Court is concerned with finality in litigation and will not allow its process to be abused by having a party re-litigate issues that were determined in a prior action. This is a general rule and, as explained below is subject to some exceptions.

7.5 This is exactly the point where there is a divergence of views between the parties. The Defendants contend that, in spite of the Court having heard the evidence from the passenger and the Plaintiff herein in HCA 449, there has been no determination on the merits in that action. Attorney for the Defendant submits that the Defendants had simply failed to appear at the trial in H.C.A. 449 and that the judgment that was entered against the Defendants was for all intents and purposes a default judgment. See Order 35 rule 1 of the R.S.C. (1975). It is a procedural judgment and cannot ground any

estoppel against these Defendants from litigating the question or issues in this action of whether the first Defendant or the Plaintiff was negligent in this motor vehicle accident.

0.0 It is important to note that the nub of the Defendant's argument, that the judgment of Myers J in HCA 449 was not one on the merits, relies on the non-appearance of these Defendants at the trial of HCA 449 and that these Defendants were not given a hearing nor were the facts as alleged by the Defendants fully investigated or ventilated. Further Attorney for the Defendants contends that the parties and issues in both actions are different. The Defendants however did not elaborate on the new issues being raised in this action save that it is a determination of the duty of care owed between two drivers and not as between a passenger and driver.

0.0 The Defendants submitted that an attempt was previously made to set aside the judgment in HCA 449 pursuant to Order 35 r 2. However it was conceded that the application was subsequently withdrawn.

0.0 The Defendant having accepted the judgment in HCA 449, this Court must now decide the impact the determination of HCA 449 has on the issues to be tried in this action and whether the Plaintiff can successfully invoke the doctrine of res judicata in relation to the Defendant's defence. Indeed, the Defendants accepted that should this Court find that the judgment in HCA 449 was on the merits then the plea of res judicata will succeed.

2. RES JUDICATA:

2.1 The principle of res judicata prevents a party to litigation from raising a second time a cause of action or issue which has already been litigated and adjudicated upon. Drake J in *NW Water Limited v Binnie and Partners*¹ highlights the wide import of the terminology of res judicata:

“In many of the older cases the terms “res judicata” “issue estoppel” and “cause of action estoppel,” “estoppel by record” or

“collateral estoppel” were sometimes used loosely and the distinction between them was not always clear. The modern tendency has been to use “res judicata” comprehensively to cover all those terms of estoppel.”

- 2.2 Indeed, res judicata whether “cause of action estoppel” or “issue estoppel” is based on the fundamental principle that it is in the public interest in seeing an end and finality to litigation and that it is unjust for a man to be vexed twice with litigation on the same matter. The classic statement on this subject often relied upon is found in the judgment of Sir James Wigram VC in ***Henderson v Henderson***²:

“.....where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence, or even accident, omitted as part of their case. The plea of res judicata applies, except in special cases, not only to points upon an opinion and pronouncement of a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

[1990] 2 ALL ER 547¹

² (1843) 3 Hare 100,115

7.1 Indeed based on this statement in *Henderson* there has sprung authority for the view that there is a wider application of res judicata in the context of the abuse of the process of the Court. In *NW Water Limited*

"The power to strike out all or part of a parties case as an abuse of process of the court whether under Order 18 r 19 or under the inherent jurisdiction of the court may be and sometimes has been used for reasons similar to those which give rise to issue estoppel. Indeed it is clear that in circumstances where the narrow definition of issue estoppel is applied and the court reject the plea of issue estoppel it may nevertheless have no doubt that the issues between the parties have already been decided so that it would amount to an abuse of process to permit the part seeking to relitigate them to do so."

See *McInney v Chief Constable of West Mindalnd Police Force*.³ See also *Thomas v the Attorney General* (no 2).⁴ Lord Jauncey of Tullichettle stated:

"The principles applicable to a plea of res judicata are not in doubt and have been considered in detail in the judgment of the Court of Appeal. It is in the public interest that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in

³ [1980] Ch 506 at 537.

relation to the same issue. The principles applies not only where the remedy sought and the grounds therefore are the same in the second action as in the first but also where, the subject matter which could have been but were not raised in the first action.

The Privy Council subsequently elucidated and relied upon this wide principle of res judicata in ***Administrator General v Stephens***⁵ focusing on the underlying principles of the doctrine which in so doing in effect renders the technical terminologies of cause of action or issue estoppel a distinction without a difference:

“The ground upon which their Lordships uphold the decision of the Court of appeal is neither that which is technically known as “cause of action estoppel” nor “issue estoppel” but it is founded upon the same principles, namely that there must be an end to litigation. There comes a time when it is oppressive to allow a party to litigation to re-open a matter that has been judicially determined against him at an interlocutory stage of the proceedings. That time has been reached in these proceedings, they have occupied the time of the courts in Jamaica over the last ten years and must now be brought to an end in accordance with the judgment of the Court of Appeal.”

- 7.2 The Court must therefore be mindful of the proper use of its process and indeed the power to prevent the abuse of the Court’s process is applied in much wider circumstances than issue or cause of action estoppel.

⁴ (1990) 39 WIR at 385

⁵ (1992) 41 WIR at 243

7.3 To efficiently carry out this exercise, the Court must therefore be free to examine the pith and substance of the claims raised and the practical setting within which litigation is conducted. There is merit in the underlying social policy of the doctrine of res judicata based on the inherent undesirability of protracted litigation, the need for economy of court time, the risk of inconsistent decisions and the desirability of stable judicial decisions from essentially the same factual matrix.⁶ Indeed in this jurisdiction, the Courts supervising the adversarial system as it exists under the Rules of Supreme Court 1975 are growing intolerant of protracted litigation.

7.4 At the same time the Court must exercise great caution before finding that a defence raised is res judicata in the broad or narrow definition. It is a drastic step indeed to deprive a litigant of his opportunity to put his case or litigate his defence. However, examining the Plaintiff's preliminary issue with the broader lens of an abuse of process it becomes a compelling argument, which the Defendant will be hard pressed in the circumstances of this case to defeat.

3. APPLICATION TO DEFAULT JUDGMENTS;

7.1 It must be stated at the outset that this case is unique in that at the trial of HCA 449 there was the non appearance of some but not all of the Defendants and the trial proceeded on the basis of the evidence adduced by those Defendants present. No authority was referred to this Court which matches this factual matrix.

7.2 In any event, the Court does not agree with the Defendant that a default judgment is not a judgment on the merits and cannot give rise to an estoppel. The correct proposition is that a judgment or order obtained by default will unless and until set aside conclude between the parties matters expressly decided by its operative and declaratory parts. It is final for this purpose. See *Linprint Pty v Hexham Textiles Pty Ltd*,⁷ *Re South*

⁶ See "Res Judicata and Double Jeopardy" Paul a. Mc Dermont [1999] page 20

⁷ (1991) 23 NSWLR 508 at 517

*American and Mexican Company*⁸ See also HCA s 50 of 1987 *Zainool Mohammed and ors v Capital Insurance Company Limited*.

7.3 It is also capable of giving rise to an estoppel and is treated as a specie of consent order. “*There is no doubt that by the law of England..a default judgment is capable of giving rise to an estoppel per rem judicatum. The question is not whether there can be such an estoppel, but rather what the judgment prayed in aid should be treated as concluding and for what conclusion it is to stand*”. See *New Brunswick*⁹ See also pg 35 per Lord Wright: “*A judgment by default if not set aside by the Court on a proper application under the rules of court is binding on the parties (which term may in this as in other cases include privies) and constitutes res judicata in respect of the matter directly decided .*”

7.4 Indeed there is a distinction between a dismissal of a Plaintiff’s action and a default judgment entered for a Plaintiff on his claim or Defendant on his counter claim. In the former, there is a bare dismissal without more. In the latter the party is put to proof on the allegations made in its claim and one can identify the matters that were actually decided. It is in this context that *Armour v Bale*¹⁰ must be understood. In that case the Court was careful to point out that in the absence of the Plaintiff there is no judgment for the Defendant in the proper sense of the term, the Defendant has not proven anything. The action is simply dismissed, it has not gotten off the ground. This is the proper meaning of the term “the defendant is entitled to judgment dismissing the claim.” See paragraph 35/1/2 1995 Supreme Court Practice. It is not necessary for this judgment to determine the extent to which a dismissal for want of prosecution can give rise to an estoppel as discussed in *Au Yeung Sir Tung* [1974] HRLR 157 referred to by the Plaintiff but its reasoning is useful.

⁸ [1895] 1 Ch 37. See also Spence, Bower and Turner, Res Judicata 3rd ed pg paragraph 163

⁹ [1939] AC 21.

¹⁰ [1891] 2 Q.B. 235

- 7.5 An estoppel based on a default judgment is appropriately not given generous operation but must be carefully limited to the matters that were actually decided. They must be carefully scrutinized for the purpose of ascertaining the essence of what they must necessarily have decided and they can estop only for what must “necessarily and with complete precision” have been determined. These principles are distilled from the authorities of *New Brunswick* and *Kok Hoong*¹¹ and *Carl Zeiss*¹². If the identical question arose in the first action and must necessarily have been decided with complete precision as the foundation of the default judgment then while it stands that question is concluded between the parties.
- 7.6 The conjoint effect of these authorities suggests that some of the underlying philosophies for this limited application of the doctrine of estoppel to default judgments are:
- (g) To allow default judgments to give rise to an estoppel for all purposes is inconsistent with the considerations of justice and good sense, which are the foundations of the doctrine of res judicata.
 - (h) A party should not gain an advantage by the procedural default of another party.
 - (i) A requirement for the ventilation of issues before the Court will minimize speculation as to the issues that were actually determined by the Court.
- 7.7 Each case therefore turns on a proper appreciation of the nature of the former action and the judgment entered on the facts as pleaded and found to be proven. In applying the doctrine of res judicata to default judgments therefore the Court will be engaged in an exercise of determining what exactly was decided in the former action, examining the issues that are presently in dispute and determining whether those issues were decided completely by the former action. For instance in *New Brunswick* the default judgment in the former action did not estop the Defendant from contesting the validity of the bond

¹¹ [1964] AC 1010

¹² [1967] 1 AC 853

as it was setting up a new issue in relation to a separate contract which was not before the former Court.

7.8 There is no need to extend the application of the doctrine beyond this analysis in relation to default judgments. Insofar therefore that one of the criteria for establishing res judicata is that there must be a judgment on the merits, a default judgment in the circumstances outlined above qualifies as same. Indeed a decision which determines an issue otherwise on procedural grounds is a decision on the merits although it may not determine all the issues in controversy.¹³

7.9 The Defendant relied on *Swift v Charles Mc Eneraney & Co* (1970) 16 WIR 391 for the contention that a default judgment or that the judgment of Myers J in HCA 449 made in the absence of the Defendants in this action was a procedural judgment or a judgment in default which is not capable of giving rise to an estoppel. *Swift* however is not an authority for any such proposition. *Swift* considered the position of a judgment entered in default of appearance of a plaintiff. This is not the case of a party being put to proof of its allegations against another party who elects not to appear at a trial which is what obtains in this action. Indeed the reference by Mc Shine CJ to *Armour v Bate* is to underscore the fact that a dismissal for want of appearance is not a judgment on the merits. The Court has not engaged itself on the merits. Indeed there is no judgment for the Defendant as the onus of proof remains on the Plaintiff. The action is simply dismissed. This is vastly different to HCA 449 in which Myers J was actively engaged on the case as made out by the passenger and the defence of this Plaintiff. Myers J was engaged in a judicial exercise and a decision was rendered in accord with the evidence led before the Court. Indeed it is therefore logical to conclude as the Court of Appeal did in *Swift* that where a court merely records an event as that of judgment in default of appearance it has acted administratively under the Rules and not judicially. *Swift* is not to be relied upon for any wider principle such as a default judgment cannot give rise to

an estoppel. To do so will be to contradict the judgments of *New Brunswick and Kok Hoog*.¹⁴ McShine CJ concludes that it is always a question in each case whether the circumstances give rise to the plea of res judicata.

4. **APPLICATION TO RUNNING DOWN ACTIONS:**

- 7.1 It is accepted that in negligence cases where motor vehicle collisions are concerned questions of issue estoppel between co-defendants may be complicated by the fact that different defendants may owe different duties of care to different persons. Negligence cannot be analyzed *in vacuo*.
- 4.2 There are two schools of thought in analyzing what precisely has been decided in a previous action for the purposes of invoking the res judicata doctrine in running down actions. The first is the robust approach in seeking to answer the question: who caused the collision? The second is a more theoretical analysis to determine the respective duties of care and if the two duties cannot be formulated with precision no issue estoppel arises. See *Craddock Transport Limited v Stuart* [1970] NZLR 499.
- 4.3 In *Wall v Radford* [1991] 2 All ER 750 Popplewell J held that where two vehicles collided resulting in injury to a passenger in one of the vehicles then even though each driver owed a separate duty to the other driver from that owed to the passenger, the duty itself was not in any way different since the facts giving rise to a breach of duty were identical and liability for it was identical and although owed to a different person it was the same duty namely a duty to take reasonable care. “*It followed that a decision on the respective drivers’ liability in an action brought by the passenger was conclusive of the drivers’ liability in an action brought by the passenger was conclusive of the drivers liability inter se with the result that they were estopped from relitigating their liability inter se in a second action.*”

¹³ See Spencer (ibid) page 175 paragraphs 174 and 175.

¹⁴

7.1 Accordingly on the force of this authority, HCA 449 resolved the issue of the duty of care owed by and liability of both drivers/owners inter se. The Defendants will therefore be estopped from re litigating this issue in this action.¹⁵

7.2 However this Court finds the alternative argument advanced by Popplewell J more compelling in resolving this present action:

“There is in my judgment also another way of approaching this case...The object of the courts must be to do justice between the parties with expedition and without undue technicality. I ask myself what justice is there allowing the relitigation of identical facts which have already been decided? The answer to both those questions is plain/ what power then does the court have to ensure justice with expedition? It seems to me to lie in the inherent jurisdiction of the court to prevent an abuse of its process...”

4.6 The argument advanced by Popplewell J was that to hold otherwise would permit a situation where a passenger in bus A sues the driver of another bus B and, the court finds both drivers equally to blame: *“Is it supposed that a court will then allow the drivers inter se to litigate their responsibility up and down the country in respect of the other 99 passengers in the hope that a judge can be found who will vary that apportionment to their advantage. Such a result offends common sense and justice.”* This is a compelling argument. It is consistent with this Court’s analysis of the doctrine of res judicata and is applicable to the facts of this case.

5. HCA 449 of 2001:

7.1 In HCA 449, the passenger/plaintiff, Fenton Simon alleged that both the Plaintiff and the Defendant in this case were responsible for the motor vehicle accident and claimed damages and consequential loss.

¹⁵ The application of the doctrine of issue estoppel.

7.2 Both Defendants' denied liability. However they both contended that the other driver/owner was responsible for the accident. In both Defences filed by Kent Hector and Indrani Bhagoutie and Reinsurance Company of Trinidad and Tobago Limited they alleged that the accident was due entirely or in part by Indrani Bhagoutie or Kent Hector. In paragraph 5 of the Defence in HCA 449 of 2001 Ms Bhagoutie sets out in identical terms the particulars of negligence set out in paragraph 5 of the present action to wit:

- () Driving at an excessive speed;
- () Driving on the wrong side of the road and there colliding with the Defendant;
- () Failing to see motor vehicle registration PBD 3323 turning or attempting to turn from SS Erin Road into Mohess Road in sufficient time avoid the said collision or at all;
- () Failing to give the said PBD 3323 any or any sufficient time to turn into Mohess Road in safety;
- () Failing to give any or any adequate warning of his approach;
- () Overtaking or attempting to overtake PBD 3323 without first ascertain or ensuring that it was safe so to do (and when it was unsafe and dangerous so to do.);
- () Failing to pay any or any sufficient heed to the signal given by the driver of the said PBD 3323;
- () Failing to have or to keep any or any proper control of the said PBG 3317;
- () Failing to stop, to slow down, to swerve or in any other way so to manage or control the said motor vehicle as to avoid the said collision.

4.0 That matter came up for trial before Myers J on 21st January 2004. On that day there was no appearance of the 2nd 3rd and 5th named Defendants. However both the Plaintiff and Mr. Hector and his insured appeared. The trial commenced with the Plaintiff and Mr. Hector giving evidence. The Court upon deliberating upon the pleadings and the evidence adduced ruled in favor of the Plaintiff and Mr. Hector.

7.4 It is clear that the live issues for the Court in HCA 449 to deliberate upon and determine are as set out in the pleadings . This much the Defendant’s attorney at law admits. Indeed to determine for the purposes of res judicata the effect of an order the Court its entitled to look at the proceedings in HCA 449. In ***Greehalgh v Mallard*** [1947] 2 AER 225 at 257 Somervell LJ stated:

“I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the court to allow a new proceeding to be started in respect of them.”

In ***Nellie Roberts***, Hamel Smith J added this guide:

“I would think that I would be correctly stating the law if I added to what is said above that proposition of fact, not merely arising incidentally but necessary to the decision of the court, is as much concluded between the parties as the title itself which the judgment establishes. I would go further and say that the judgment is binding on the parties, not only as to the actual decision but as regards the findings of fact on which it is founded.”

See also HCA 1630 of 1992 ***Nathaniel Joseph v Ramdath Sooknanan***.

7.5 The issues to be determined in HCA 449 were inter alia: (a) whether the Plaintiff herein was wholly or partly negligent and/or responsible in law for the motor vehicle collision (b) whether the Defendant herein was wholly or partly negligent and/or responsible in law for the motor vehicle collision (c) whether the Plaintiff herein drove at an excessive speed, drove on the wrong side of the road, failed to see the Defendants’ vehicle turning or attempting to turn from SS Erin Road into Mohess Road in sufficient time to avoid the collision, whether the Plaintiff failed to pay any heed to the signal of the Defendants’ servant or agent; whether the Plaintiff was overtaking the Defendant’s vehicle when it

was unsafe or dangerous to do so (d) whether the Defendant her servant or agent herein failed to keep a proper look out for the Plaintiff's vehicle; failed to give any warning of the Defendant's motor vehicle intended manoeuvre; whether the Defendants' vehicle was driven without due care and attention. It is noted the Myers J tried only the issue of liability and not damages in HCA 449.

7.6 In essence, the effect of the order in HCA 449 therefore is to hold the present Defendants wholly negligent and responsible in respect of the collision which is in issue in this case. That they failed to have proper regard for the motor vehicle driven by this Plaintiff and that the Defendants' vehicle was driven without due care and attention.

7.7 At the same time by necessary implication the judgment absolved this Plaintiff, Mr. Hector, of liability in the accident and that the accident did not occur in the manner as alleged by these Defendants but as alleged and proven on the evidence by the passenger and Mr. Hector at the trial. This is what has been necessarily and with complete precision been decided in the judgment of Myers J.

6. RELITIGATION OF HCA 449:

7.1 In this present action the Plaintiff's claim against the Defendants for damages is for personal injuries and consequential loss caused by the negligence of the Defendant, Indranie Bhagoutie, her servant and/or agent in the management and/or control of motor vehicle registration number PBD 3323 along the S.S. Erin Road in the vicinity of Mohess Road, Debe on or about the 10th day of November 1999.

7.2 The Plaintiff's pleaded version of how the accident occurred is the same as in HCA 449.

- 7.3 The Defendants contest this issue of liability on the facts as set out in its Defence and counterclaim dated 5th October 2000 in identical terms as the facts as pleaded in HCA 449.
- 5.0 The pleading by the Defendant of negligence on the part of the Plaintiff, which was the same pleading in HCA 449, is also the fulcrum and pivot of the Defendant's counterclaim dated 5th October 2000.
- 5.0 The Plaintiff has already had to defend his interests against an allegation of negligence both on the part of the passenger of his vehicle and of these Defendants in HCA 449. He has successfully defended himself in that case after the Court had the opportunity to hear his evidence. This was not a simple case of the non appearance of a Plaintiff and thereby an action is dismissed with out a hearing, and it is more than just a case of a Defendant failing to appear and the Plaintiff proving his case. Here a co defendant failed to appear when the live issue before the Court was the extent to which this accident was caused by the negligence of either of these two drivers or both of them. The Court heard the evidence and found these Defendants in the action liable in negligence. It is noteworthy that the Court also ordered these Defendants to pay the Plaintiff his costs of that action and that a notice of full satisfaction has since been filed in HCA 449.
- 5.0 The Defendant attempted to set aside the judgment but withdrew the application for whatever reason. What is the Court to infer from such an action? It is reasonable to assume that the first Defendant has for her own reasons accepted the verdict that she was negligent and or by her negligence caused damage to the passenger sitting in the Plaintiff's motor vehicle as a consequence of the collision. Taking the common sense approach it is difficult to see what more the Defendant is going to say in this action which is not a fact that was in issue in HCA 449. Indeed there are no new facts nor new issues for determination.

7.7 Attorney for the Defendant could not tell this Court what were the practical as opposed to theoretical differences between the two sets of litigation save for there was no full investigation of the Defendant's case in the previous action. Further no new facts or issues were properly identified to this Court as desirable for full ventilation in this case. As far as the record is concerned and in light of the analysis above, there was a previous judgment on the merits. In light of this and the absence of any evidence to show a practical difference between the two sets of litigation the Court is entitled to adopt the broader approach to issue estoppel. It is unrealistic to hold in the circumstances of this case that the issues raised in the two actions arising from the same set of facts are different because the parties are differently constituted. The Court is entitled to hold that the issues for practical purposes are the same, that there must be an end to litigation and it is an abuse of the process of the Court to allow this Defendant to relitigate these issues in this action.

7. CONCLUSION:

7.1 The judgment of Myers J was a final judgment and one which is capable of giving rise to an estoppel. The issue of the negligence of the Defendants was necessarily decided by the previous judgment. It will be an abuse of the process of the Court to allow the Defendants to relitigate this issue in this action through the vehicle of paragraphs 4 and 5 of its Defence and Counterclaim.

7.2 For these reasons outlined above, based on the circumstances of this case, the plea of res judicata in this case is a good plea. The Court upholds the preliminary objection.

7.3 It is interesting to note at this juncture that HCA 449 was commenced subsequent to this present action even though it was heard before this trial. To avoid questions such as the preliminary issue under consideration arising in the future to cases such as these, it is recommended that more efficient case management is needed either by consolidating

these matters or developing a test case procedure where parties can agree to adopt certain positions upon the conclusion of one trial.

7. **ORDER:**

7.0 The preliminary objection is upheld.

7.0 There be judgment for the Plaintiff.

7.0 The Defendant's Counterclaim is hereby dismissed.

7.0 The Plaintiff's assessment of damages is adjourned for consideration at a Pre-Trial Review fixed for

7.0 The Defendants shall pay the Plaintiff's costs of this application certified fit for advocate Attorney-at-Law.

Dated this 24th day of March, 2006.

Vasheist Kokaram

Judge.