

# Mutuality in *Res Judicata*: The Feeling is No Longer Mutual

AVIN PERSAD-FORD\*

## ABSTRACT

This article argues that English courts should abandon mutuality in *res judicata* cases, thereby expanding *res judicata*'s application. As the Supreme Court summarised in *Virgin Atlantic v Zodiac Seats*, for a court to strike out a pleading or submission on *res judicata* grounds, one of the conditions is that the parties in the previous proceeding and the proceeding at bar must be the same. This article argues that this is an unnecessary condition. It does so in four parts. First, it examines how English courts interpret the *res judicata* doctrine. It distinguishes between 'offensive' and 'defensive' *res judicata* submissions and explains how English courts have traditionally enforced the mutuality requirement, with reference to the most important case in this area, *Hunter v Chief Constable of West Midlands*. Second, it identifies the traditional reasons for preserving mutuality. Third, it explains why mutuality is a problematic concept in English law because courts have failed to identify doctrinal reasons for preserving it and it improperly conflates *res judicata* with abuse of process. Fourth, it explains why non-mutuality *res judicata* is preferred, subject to protections for offensive *res judicata* cases.

## I. INTRODUCTION

At what point is a matter decided, such that repeated attempts to decide the same matter would be unjust? In a courtroom, it is a long-held principle of English law that *res judicata* ('a thing adjudged') will only apply where the parties or their privities in the original proceeding are the same as those in the subsequent proceedings,<sup>1</sup> a principle known as 'mutuality'.

This article argues that English law should abandon mutuality in *res judicata* cases. It does so in four parts. First, it examines how English courts interpret the *res judicata* doctrine. It looks at the leading Supreme Court decision analysing *res*

\* LLB (UCL). I am grateful to the participants of UCL's 2022 Private Law Conference, especially Lady Hale and Anna Pavičić, for their feedback on an earlier draft. Thank you also to DLF's anonymous editors for their comments.

<sup>1</sup> *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 [47].

*judicata*, distinguishes between so-called ‘offensive’ and ‘defensive’ *res judicata* submissions, and considers how English courts have traditionally enforced the mutuality requirement. While English law should abandon mutuality in both ‘offensive’ and ‘defensive’ cases, the former will need to be subject to qualifications. Second, it identifies the traditional reasons for preserving mutuality. Third, it explains why mutuality is a problematic concept in English law through analysis of the leading case on this subject, *Hunter v Chief Constable of West Midlands*.<sup>2</sup> In *Hunter*, Lord Denning MR in the Court of Appeal forcefully argued in favour of non-mutuality *res judicata*. In the House of Lords, however, Lord Diplock reverted to abuse of process.<sup>3</sup> Fourth, it explains why non-mutuality *res judicata* is to be preferred.

## II. *RES JUDICATA*: A PRIMER

The leading modern case discussing *res judicata* is the Supreme Court’s decision in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd*.<sup>4</sup> That case involved a patent dispute between VA (the Plaintiff and Respondent) and PA (the Defendant and Appellant). There, the Court of Appeal held that VA’s patent for an airplane seat design was valid, a judicial declaration for which was ordered on 20 January 2020. PA then sought to vary the order on 1 December 2020, to the extent of arguing that VA had suffered no damages as a result of the infraction. The Court of Appeal dismissed the application, finding it to be an attempt to relitigate the issue of the patent’s validity and thus *res judicata*.

The Supreme Court upheld the Court of Appeal’s decision, finding the issue of the patent’s validity to be *res judicata*. Writing for the majority, Lord Sumption articulated six principles which govern *res judicata* in modern English law, all of which speak to the same broad principle that judgments are final, subject to appeal rights.<sup>5</sup> Where appeal rights are exhausted and an action is decided between two parties, those parties cannot then relitigate the same issues in a further action. While the *res judicata* doctrine may have ‘many rooms under one roof’, as Lord Denning described it,<sup>6</sup> this article does not distinguish between those principles—or ‘rooms’—except where appropriate.

### A. *RES JUDICATA*: SHIELD, SWORD, OR BOTH?

Doctrinal arguments in favour of amending *res judicata*’s mutuality requirement differ depending on how parties invoke the *res judicata* doctrine. Generally, a party does so either offensively or defensively. In an offensive situation, party A succeeded against party B in an earlier case and wants to enforce that decision

<sup>2</sup> *Hunter v Chief Constable of the West Midlands* [1980] QB 283 (CA).

<sup>3</sup> *Hunter v Chief Constable of the West Midlands* [1982] AC 529 (HL).

<sup>4</sup> *Virgin Atlantic* (n 1).

<sup>5</sup> *ibid* [17].

<sup>6</sup> *Hunter* (n 2) 317.

against party C in a later case. In a defensive situation, party A lost against party B in an earlier case and party C wants to enforce that decision against party A in a later case. English courts should remove *res judicata*'s mutuality requirement for offensive and defensive cases, subject to safeguards for offensive cases.

## B. THE MUTUALITY REQUIREMENT IN MODERN ENGLISH LAW

There is little jurisprudence on mutuality in English law. Where the courts speak to mutuality, the courts struggle to defend mutuality's place beyond simply affirming that it is the law. In *Virgin Atlantic*, for example, Lord Neuberger described the potentially 'anomalous' consequences of mutuality as still 'a clear and principled application of the fundamental rule'.<sup>7</sup> In fairness to his Lordship, mutuality was not a central issue of dispute in *Virgin Atlantic*, so it made little sense to analyse the matter at great length.

Five earlier cases dealt with mutuality more extensively,<sup>8</sup> the most important of which is *Hunter*. There, the plaintiffs were alleged members of the Irish Republican Army who had been convicted in earlier criminal proceedings for bombing a hotel. The plaintiffs argued during their earlier criminal proceedings that the police beat confessions out of them. The trial judge rejected this contention, finding the confessions to be voluntary. The plaintiffs then sued the Chief Constable of the West Midlands Force (the force that detained the plaintiffs) under section 48 of the Police Act 1964, which would impose liability on the Chief Constable for any misconduct carried out by his or her constables.<sup>9</sup> According to the plaintiffs, the constables assaulted, battered, threatened, and harassed them while in the constables' custody.

The Court of Appeal for the civil matter affirmed the trial judge's decision dismissing the plaintiffs' claim.<sup>10</sup> The Court, however, was divided in its reasons for doing so. Lord Denning preferred non-mutuality *res judicata*, Goff LJ preferred abuse of process, while Sir George Baker would have dismissed the plaintiffs' claim on both non-mutuality and abuse of process grounds. While Goff LJ sympathised with the defendant's submission that Sir Edward Coke's *Commentaries*—from which the mutuality rule originates—was unpersuasive on this point, '[the] repeated pronouncements in the House of Lords and... the length of time that the rule of mutuality... has been considered part of English law'<sup>11</sup> precluded his Lordship from finding there to be non-mutuality *res judicata*. The House of Lords upheld

<sup>7</sup> *Virgin Atlantic* (n 1) [47].

<sup>8</sup> *Carl Zeiss Stiftung v Raynor & Keeler Ltd (No 2)* [1967] 1 AC 853 (HL); *Gleeson v J Wipphell & Co Ltd* [1977] 1 WLR 510 (Ch); *Hunter* (n 3); *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132 (CA); and *North West Water Authority v Binnie & Partners* [1990] 3 All ER 547 (QB).

<sup>9</sup> Police Act 1964, s 48.

<sup>10</sup> *Hunter* (n 2).

<sup>11</sup> *ibid* 330.

the Court of Appeal's decision but only based on Goff LJ's reasoning.<sup>12</sup> Mutuality's place in English law was thus affirmed.

### III. DOCTRINAL ARGUMENTS IN FAVOUR OF PRESERVING MUTUALITY

Although English courts have not spoken extensively about a justification for preserving mutuality, academic commentators have filled the void. There appear to be five arguments in favour of preserving mutuality's central role in *res judicata*. The arguments range from principled, to policy-based, to personal. Adrian Zuckerman argues from a principled perspective. According to Zuckerman, because most judgments are *in personam*—that is, they bind the parties or their privities to the decision—it would be wrong to extend *res judicata* to bind parties who were not a party to the proceeding. That would make an *in personam* judgment *in rem*—that is, speaking to a state of legal affairs that would bind the whole world.<sup>13</sup>

Turning to the policy-based arguments, Fred Bartenstein suggests that the doctrinal arguments in favour of *res judicata* as a whole—the costs and vexation of multiple lawsuits, conserving judicial resources, and preventing inconsistent decisions—are weaker in offensive non-mutual *res judicata* cases.<sup>14</sup> This is so because a defendant in a later case may believe they can persuade a court where a separate defendant in an earlier case failed to do so on the same issue. Marvin Frankel then argues that an adversarial trial's inherent weaknesses may result in a court in the first case wrongly deciding an issue. A party in a subsequent case may be 'stuck' with what was decided in the first case.<sup>15</sup> Finally, as Jack Ratliff argues, non-mutuality would not guarantee consistent verdicts where its application would be unfair to the defendant in the subsequent proceeding.<sup>16</sup> An example of this situation may be a personal injury jury trial in which there are multiple potential claimants and one defendant. The claimants' lawyers might try the claimant with the most severe injuries first to win a higher damages award for the first claimant that subsequent claimants would point to in their own trials.<sup>17</sup>

On a more personal level, as Garry D Watson argues in the *Canadian Bar Review*, Lord Denning might have been driven by personal animus in *Hunter*.<sup>18</sup> There, his Lordship referred to the plaintiff bombers as being 'bad persons' who

<sup>12</sup> This article's final two sections explain why, although Goff LJ's reasoning (as endorsed by the House of Lords) is the authority for mutuality, Lord Denning's reasoning should be preferred.

<sup>13</sup> Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (4th edn, Sweet & Maxwell 2021) para 26.100.

<sup>14</sup> Fred Bartenstein Jr, 'The Mutuality Requirement in Res Judicata and Estoppel by Record' (1940) 2 Washington and Lee Law Review 233, 249.

<sup>15</sup> Marvin E Frankel, 'The Search for Truth: An Umpireal View' (1974–75) 123 University of Pennsylvania Law Review 1031, 1035–1041.

<sup>16</sup> Jack Ratliff, 'Offensive Collateral Estoppel and the Option Effect' (1988) 67 Texas Law Review 63, 70.

<sup>17</sup> Garry D Watson, 'Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality' (1990) 69 Canadian Bar Review 623, 634.

<sup>18</sup> *ibid* 638.

had been found guilty of ‘a most wicked murder’, then engaged in ‘gross perjury’ by pleading that they gave false confessions.<sup>19</sup> Lord Denning also used that opportunity to state that ‘[b]eyond doubt, *Hollington v Hewthorn*... was wrongly decided’.<sup>20</sup> *Hollington v Hewthorn* was another case that dealt with mutuality in *res judicata*. Lord Denning was the losing counsel in that case, in which the court upheld mutuality’s role.

This paper focuses on the policy-based arguments. While Zuckerman’s argument has doctrinal appeal, it is suggested that the expediency and cost savings on the judicial system that non-mutuality would bring outweighs any doctrinal appeal, especially for defensive *res judicata* cases. There, a plaintiff seeks to relitigate issues that were already decided against her. For offensive *res judicata* cases, meanwhile, this paper advocates for sufficient guardrails that should protect non-parties to the initial proceeding without turning a party from the initial proceeding’s right to a right *in rem*.

#### IV. PROBLEMS WITH MUTUALITY

Despite the arguments in favour of preserving mutuality, English courts have adopted a non-mutuality-*res-judicata*-by-stealth approach by affixing an abuse of process label to the analysis. It is welcome that the courts realise that the benefits of non-mutuality *res judicata* outweigh the benefits of preserving mutuality. Less welcome is shifting the burden to abuse of process, which is so for two reasons.

##### A. NO PRINCIPLED BASIS

First, there is no principled reason for doing so. Goff LJ’s criticism of non-mutuality *res judicata* relies on authority that itself merely restates the rule of mutuality without examining its justification. Such authority admittedly came from pre-eminent jurists, to say nothing of Goff LJ’s own reputation. But His Honour’s analysis is left wanting. He begins by citing a commentary by Sir Edward Coke: ‘First, that every estoppel ought to be reciprocal, that is, to binde both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel’.<sup>21</sup> Goff LJ correctly acknowledges the defect in Sir Edward Coke’s statement—that ‘it is not a reason why estoppels must be mutual, but the consequence of that condition if it exists’.<sup>22</sup> Although His Honour noted the ambivalence of that statement, he did not substitute his own rationale for originally adopting the rule in Sir Edward Coke’s time.

Goff LJ then cites *Mills v Cooper* (Diplock LJ), *R v Humphreys* (Viscount Dilhorne), and *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (Lord Reid, Lord Guest, and

<sup>19</sup> *Hunter* (n 2) 323–24.

<sup>20</sup> *ibid* 320.

<sup>21</sup> *ibid* 328.

<sup>22</sup> *ibid*.

Lord Upjohn) as authority for the reasons for preserving mutuality.<sup>23</sup> In each cited case, however, the jurists merely state the rule. They do not examine *why* the rule exists. An examination of each of these three cases shows the extent to which the courts did not consider mutuality.

In *Mills v Cooper*,<sup>24</sup> an information was preferred against a defendant in a criminal proceeding for being a gypsy, under section 127 of the Highways Act 1959, in December 1965. The magistrates' court dismissed the information because there was no evidence to suggest that the defendant was in fact a gypsy. In March 1966, however, the information was re-sworn based on new evidence. On appeal, the question for the Divisional Court was whether this was issue estoppel. The Court upheld the preferring of the information on the March 1966 because, according to the Court '[i]t cannot be said that "once a gypsy always a gypsy"'.<sup>25</sup>

Importantly, mutuality was not a deciding factor in *Mills*. Diplock LJ did, however, state that one of the differences between *res judicata* in civil proceedings and *autrefois* acquit or *autrefois* convict in criminal proceedings is the requirement for mutuality in *res judicata*.<sup>26</sup> His Lordship did not, however, analyse why mutuality should be a requirement for *res judicata* in civil proceedings but not for *autrefois* acquit or *autrefois* convict in criminal proceedings. In fact, his Lordship specifically held that 'it is unnecessary in the present appeal to inquire into the precise limits of the wider application of the rule against double jeopardy to situations in which the pleas of *autrefois* convict and *autrefois* acquit are not strictly available...'<sup>27</sup>

In *DPP v Humphrys*,<sup>28</sup> the defendant was charged with driving a motorcycle with a suspended license. He was acquitted at trial because the prosecution could not prove the driver's identity as being the defendant's. The defendant said during cross-examination that he never drove in 1972. The defendant was then charged with perjury for this statement. The arresting officer from the first trial was the prosecution's witness in the second trial, allowing the officer to give evidence in the second trial about the defendant's identity as the motorcycle driver—that is, the issue from the first trial. The question for the House of Lords was whether this was issue estoppel.

The House held that it was not issue estoppel because the concept does not—and should not—apply to criminal law. According to Viscount Dilhorne, issue estoppel should not apply to criminal matters because, for the defendant in a jury trial, it would be impossible to decide if a jury's acquittal in a first trial was an affirmative finding on an issue or a finding that the Crown failed to discharge its

<sup>23</sup> *ibid* 329–31.

<sup>24</sup> *Mills v Cooper* [1967] 2 QB 459 (QB).

<sup>25</sup> *ibid* 468.

<sup>26</sup> *ibid* 469.

<sup>27</sup> *ibid*.

<sup>28</sup> *DPP v Humphrys* [1977] AC 1 (HL).

onus of proof.<sup>29</sup> Importantly, mutuality was irrelevant to Viscount Dilhorne's finding.

The only points at which Viscount Dilhorne addressed mutuality were to agree with Diplock LJ's finding in *Mills*<sup>30</sup> and to say that issue estoppel 'must apply equally to both parties, to the Crown and the defendant, as it does to the parties in civil litigation'.<sup>31</sup> It is trite that mutuality applies to *autrefois convict* or *autrefois acquit* in criminal proceedings because the parties to criminal litigation (the Crown and the accused) are fixed. Such is not the case in civil litigation. Again, however, like Goff LJ in *Hunter*, Viscount Dilhorne in *Humphreys* adopts Diplock LJ's *ratio* from *Mills* without analysing the requirement for mutuality in civil proceedings.

Finally, in *Carl Zeiss Stiftung v Rayner & Keeler Ltd*, CZS, an East German corporation sued CS, a West German corporation, in England and in West Germany to prevent CS from selling goods in England and West Germany with an identical name to those that CZS sold in those jurisdictions. CS applied before the Federal Supreme Court of West Germany to strike CZS' claim on the grounds of CZS' solicitors not being instructed by an internationally recognised government. CS were successful before the West German court because, according to the Court, CZS was not properly before the Court because its supposed agent—the 'Council of the District of Gera'—was not an internationally recognised government. CS then moved to dismiss the English action on the grounds of *res judicata* based on the West German court's decision.

The House of Lords dismissed the *res judicata* argument, partly because of a lack of mutuality between the West German and English proceedings. Lord Reid, Lord Guest, and Lord Upjohn delivered judgments on this point. Importantly, none of their Lordships analysed why mutuality between the West German and English proceedings were important. Instead, the crux of the analysis on this point focused on whether there was any privity between the Council of the District of Gera in the West German proceedings and the solicitors that CZS instructed in the English proceedings. The closest that their Lordships came to analysing why mutuality is important was to say that a person in a later proceeding must have had 'a community or privity of interest' to a party in an earlier proceeding.<sup>32</sup> This, however, was only in the context of parties in an earlier action and their privities in a later action. It did not address the issue of where the parties themselves were the same in both actions. Additionally, justifying mutuality on the grounds of there being 'a community or privity of interest' is subject to the same criticism as Sir Edward Coke's statement that Goff LJ cited in *Hunter*—it is a consequence instead of a reason.

<sup>29</sup> *ibid* 20–21.

<sup>30</sup> *ibid* 19–20.

<sup>31</sup> *ibid* 20.

<sup>32</sup> *Carl Zeiss* (n 8) 936 (Lord Guest).

## B. INVOKING ABUSE OF PROCESS IN NON-ABUSIVE CASES

Once courts started conflating non-mutuality *res judicata* with abuse of process, they exercised their inherent procedural powers to invoke the abuse of process doctrine in non-abusive cases. *Hunter* is a good example of the negative consequence of doing so.

When the parties in *Hunter* argued their case before the House of Lords, Lord Diplock requested that the appellants' counsel direct their submissions towards abuse of process instead of non-mutuality.<sup>33</sup> His Lordship stressed that the case turned on whether Goff LJ's interpretation of abuse of process was correct, and that the disagreement between Goff LJ and Lord Denning at the Court of Appeal was a matter 'not of substance but of semantics'.<sup>34</sup>

The difference between non-mutuality and abuse of process is more substantive than semantical. Lord Sumption alluded to the difference in *Virgin Atlantic*:

The focus in *Johnson v Gore-Wood* was inevitably on abuse of process because the parties to the two actions were different... *Res judicata* and abuse of process are juridically very different. *Res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive.<sup>35</sup>

The first sentence reflects the judiciary's current view of mutuality. It does so, however, without any doctrinal support. While Lord Sumption then properly distinguishes between *res judicata* and abuse of process based on the latter's requirement for abusive conduct, his Lordship does not explain what constitutes 'abuse', such that a matter would be settled on abuse of process grounds instead of *res judicata*. This is key. As Matthew Dyson and John Randall argue, it is to preclude 'truly abusive claims', where the claim is brought for an 'improper purpose'.<sup>36</sup>

In *Hunter*, for example, the plaintiffs had both proper and improper purposes in bringing their claim. The plaintiffs had a proper claim against the Home Office because the Home Office acknowledged it was liable to the plaintiffs for the officers' conduct during the interrogations. The Home Office should therefore not

<sup>33</sup> Watson (n 17) 638.

<sup>34</sup> *Hunter* (n 3) 540.

<sup>35</sup> *Virgin Atlantic* (n 1) [25].

<sup>36</sup> Matthew Dyson and John Randall, 'Criminal Convictions and the Civil Courts' (2015) 74 Cambridge Law Journal 78, 101. See also *Crawford Adjustors (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366 [62] (Lord Wilson).



have been able to benefit from a claim struck on abuse of process grounds. The plaintiffs would have then been entitled to damages from the Home Office. Lord Denning sought to preclude this possibility by finding the matter to be non-mutuality *res judicata* by ignoring the plaintiff's purposes. The focus would have strictly been on the issue in dispute in the criminal proceeding and the civil trial. His Lordship held:

[T]he real reason why the claim was struck out was because the self same issue had previously been determined against the party by a court of competent jurisdiction. What is that but issue estoppel?... The truth is that as of the date of those cases the doctrine of issue estoppel had not emerged as a separate doctrine. So the courts found it necessary to put it on "abuse of the process of the court". Now that issue estoppel is fully recognized, it is better to reach the decision on that ground: rather than on the vague phrase "abuse of process of the court". Each doctrine is based on the same considerations and produces the same result.<sup>37</sup>

Despite Lord Denning's confidence that abuse of process and *res judicata* would produce the same result, they did not in this case. Before the House of Lords, Lord Diplock dismissed the claims against the Home Office *and* the police because his Lordship found the claim against the latter to be improper. The Court found that the plaintiffs, in continuing their action against the police, were indirectly trying to overturn their criminal convictions through a civil procedure, an improper purpose to which abuse of process would have applied.<sup>38</sup> It is submitted that to extend the abuse of process doctrine to non-abusive cases, as Lord Diplock did with the plaintiff's claim against the Home Office, is a mistake when it vitiates a claim with a proper purpose. The clear solution would have been to find that cause-of-action estoppel applied to the plaintiff's invalid claim against the police, thereby dismissing it, while allowing the valid claim against the Home Office to continue.

Later cases rely on *Hunter* as authority for invoking abuse of process where *res judicata* does not apply. These cases, however, fail to analyse fully the House of Lords' reasoning in *Hunter* and how it only partially engages with the Court of Appeal's analysis. In *LA Micro Group (UK) Ltd v LA Micro Group Inc*, Sir Christopher Floyd, writing for a unanimous Court of Appeal, held that:

In cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter's case* [1982]

<sup>37</sup> *Hunter* (n 2) 322.

<sup>38</sup> *Hunter* (n 3) 541. See also Brian Hillard, 'Soldiers of Nothing' (1990) 140 *New Law Journal* 160.

AC 529, Lord Hoffmann in the *Arthur J S Hall* case [2002] 1 AC 615 and Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter's* case. Both or either interest may be engaged.<sup>39</sup>

*Arthur* and *Johnson* may be distinguished from *Hunter*. The issue in *Arthur* was whether the law of negligence included ‘advocates’ immunity’ if a court had jurisdiction to dismiss a matter on abuse of process grounds. Mutuality was not before the House in *Arthur* because the same parties were involved in both proceedings. In *Johnson*, the House of Lords applied the *Henderson v Henderson* principle to preclude a solicitors’ firm from raising a defence in an individual’s subsequent proceeding against them for negligence that the solicitors should have raised in that individual’s company’s earlier proceeding against the firm. Although, like *Hunter* at the Court of Appeal, this was a case to which mutuality would have been relevant, unlike *Hunter* at the Court of Appeal, the House did not discuss mutuality in *Johnson*.

## V. A PROPOSAL FOR REFORM: NON-MUTUALITY

Removing the mutuality requirement from *res judicata* would bestow significant benefits on parties in later proceedings without unduly affecting the *res judicata*’s doctrinal principles. Whether for defensive or offensive *res judicata*, non-mutuality offers three benefits. First, it would reduce the risk of inconsistent judgments while giving parties their day in court. In *Hunter*, for example, the plaintiffs would have been able to proceed with their claim against the Home Office because it was brought with a proper purpose. Only the claim against the police would have been dismissed on abuse of process grounds.

Second, it would spare a party the cost of litigating an issue that has already been decided. Legal fees in the UK are not cheap. The guideline hourly rates for solicitors published in the White Book’s most recent edition range between £126 to £512.<sup>40</sup> To put those rates in context, as one Lord Justice of the Court of Appeal acknowledged in a recent decision, a party spending £900,000 in costs for a one-day appeal in the Commercial Court was ‘modest by the standards of commercial cases’.<sup>41</sup> Limiting such costs on parties should be encouraged where the matters to be litigated were already decided in earlier proceedings.

Third, it would protect an already overburdened court system against parties clogging dockets with re-litigation. The average time for an English court to hear a small claim is currently 52 weeks, a 28% increase from 2019, and the wait is

<sup>39</sup> *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2021] EWCA Civ 1429, [2022] 1 WLR 336 [44].

<sup>40</sup> Coulson LJ (ed), *Civil Procedure* (Sweet & Maxwell 2022) para 44SC.31.

<sup>41</sup> *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 466 [7] (Males LJ).

74 weeks for a multi-track claim, up 18% from 2019.<sup>42</sup> By one estimate, each court day costs the Treasury approximately £2,692.00.<sup>43</sup> Courts should welcome any measure that cuts down on expenditure of money for or time, whether for the litigants or the public as a whole, if that measure does not unduly affect a party's rights.

Removing mutuality does not unduly affect a party's rights in defensive cases. As the previous sections explained, English courts will already preclude a party from advancing a claim or submission against a third party. The only problem is they improperly do so under the guise of abuse of process, where there is no abusive element in any party's conduct. A shift to non-mutuality would have the added benefit of redirecting abuse of process' focus to 'abusive' cases.

There are, however, two risks with removing mutuality for offensive *res judicata* specifically. First, without guardrails, a court would prevent a new defendant in a subsequent proceeding from presenting its own case if the plaintiff in the subsequent proceeding prevailed in the earlier proceeding. That would be a step too far. This article therefore recommends adopting a rule like that found in section 11 of the Civil Evidence Act 1968,<sup>44</sup> except it would apply to all judgments, not just criminal judgments applied in civil proceedings. That is, for offensive *res judicata*, the judgment in the earlier proceeding would be *prima facie* evidence in the subsequent proceeding, subject to the defendant's rebuttal. Such a solution would strike a fair balance between preserving *res judicata*'s doctrinal benefits (lower costs to parties, preservation of judicial resources, and consistent findings) while allowing a defendant who was uninvolved in the earlier proceedings their day in court.

The second risk is the so-called 'wait-and-see' approach that a subsequent plaintiff may use to gain an unfair advantage against a defendant. In *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd*,<sup>45</sup> for example, two plaintiffs brought separate actions against Oceanus. The allegations were that Oceanus was contractually obligated to each plaintiff to pay for damages pursuant to a shipping contract. Oceanus responded that an insurance agent misrepresented the plaintiffs' financial status to Oceanus. Oceanus sought to have both claims consolidated but failed. It then lost at trial against the first plaintiff. The second plaintiff argued in the subsequent trial that Oceanus could not raise the misrepresentation defence again because it failed in the first trial. The Court, however, held that there was no *res judicata* because it was the second plaintiff's own conduct in opposing consolidation that precipitated Oceanus raising the misrepresentation defence twice.

<sup>42</sup> Ministry of Justice, 'Civil Justice Statistics Quarterly: October to December 2021' (*Gov.uk*, 3 March 2022) <<https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2021>> accessed 12 December 2022.

<sup>43</sup> The Law Society of England and Wales, 'Cost of a Day in Court—New Analysis by the Law Society' (*The Law Society of England and Wales*, 27 July 2018) <<https://www.lawsociety.org.uk/topics/research/cost-of-day-in-court-new-analysis-by-law-society>> accessed 2 March 2023.

<sup>44</sup> Civil Evidence Act 1968.

<sup>45</sup> *Bragg* (n 8).

Courts may curtail this abusive conduct by imposing requirements on both the subsequent plaintiff and the subsequent defendant. For the plaintiff, where she is aware of the earlier action and a court would have been likely to grant consolidation of the earlier and subsequent action had she sued at the time of the earlier action, then the court should require her to do so. This would be keeping in the *Henderson v Henderson*<sup>46</sup> principle's spirit, which requires a party to present its whole case in the earlier case and, absent special circumstances, precludes that party from raising new arguments about the same matter in a subsequent case. The United States imposes such a condition on plaintiffs.<sup>47</sup> For the defendant, if a subsequent action was pending at the time of a former action, the subsequent plaintiff should be entitled to rely on non-mutuality *res judicata* if the defendant did not request consolidation in the earlier proceeding.

## VI. CONCLUSION

*Res judicata* is an ancient principle in English law. The mutuality requirement, while newer, is still accepted as settled law. Without any meaningful reform of the law in this area, however, Jeremy Bentham's warnings from the nineteenth century about mutuality's shortcomings would remain as relevant as ever today:

There is reason for saying that a man shall not lose his cause in consequence of the verdict given in a former proceeding to which he was not a party; but there is no reason whatever for saying that he shall not lose his cause in consequence of the verdict in a proceeding to which he was a party, merely because his adversary was not. It is right enough that the verdict obtained by A against B should not bar the claim of a third party, C; but that it should not be evidence in favour of C against B, seems the very height of absurdity (Original emphasis).<sup>48</sup>

An analysis into why the mutuality requirement exists reveals its shortcomings, insofar as the mutuality requirement impedes *res judicata*'s benefits: consistent adjudication, lower costs to parties, and a lesser burden on the legal system. Courts seem to recognise those shortcomings too, which is perhaps why they are so willing to expand the abuse of process doctrine that, as this article argues, properly belong to *res judicata*'s domain. It is especially worrisome that the leading case in this area has now granted courts permission to find abuse of process in matters where there is no 'abusive' conduct. The better approach is therefore to remove the mutuality requirement, subject to protections for offensive *res judicata* positions.

<sup>46</sup> *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313.

<sup>47</sup> See, for example, *Parklane Hosiery Co v Shore* 439 US 322 (1979).

<sup>48</sup> Jeremy Bentham, 'Rationale of Judicial Evidence' in John Bowring (ed), *Works of Jeremy Bentham* (Athlone Press 1843) 171.