C.A. 7/ 64

FRIEDA SHOR

v.

STATE OF ISRAEL AND ANOTHER

In the Supreme Court sitting as a Court of Civil Appeal
[June 21, 1964]
Before Silberg J., Witkon J. and Halevi J.

Torts - vicarious liability - res judicata.

In April 1957, the appellant sued a police sergeant for damages for physical injuries he had caused her. That action was dismissed at first instance on the ground of lack of evidence, and the Court of Appeal refused to interfere with this decision. The appellant then began an action against the respondents as the employers of the sergeant, claiming vicarious liability, in respect of the same alleged injuries. An application by the respondents to dismiss the action in limine as *res judicata* was granted: hence this appeal.

Held. (1) The rule that a judgment as between A and B will not be *res judicata as* between A and C is subject to an exception that where B was an employee directly responsible for the tortious act and C was vicariously liable therefor.

(2) The fact that an employee is held liable in tort will not bar the employer from denying that liability, if the latter was not party to the first trial, whereas if the employee is found to be free of liability. that will enure to the benefit of the employer even if not a party. The reason is that the employee's direct liability is the basis for the derivative liability of the employer and not the reverse. Accordingly the two claims are identical although the parties differ. If there is no direct liability on the part of the employee, there can be no derivative (vicarious) liability on the part of the employer.

Israel cases referred to:

(1) C.A. 126/51, Shlomo Felman v Yachieh Shahav (1952) 6 P.D. 313.
(2) C.A. 143/51, 55/52, *Mayor, Members of the Council and Residents of Ramat Gan and Others v Pardess Yanai Co. Pty. Ltd*. (1956) 10 P.D. 1804.
(3) C.A. 49/63, *Abraham Zucker v Yeshayahu Leibovitz* (1964) 18 P.D. (1) 337.
(4) C.A. 155/50, 159/50, *David Rahamim Mizrahi v Yaacov Rahamim* (1951) 5*P.D.* 540
(5) *C.A.* 534/59, *Escher Cohen v Naomi Cohen* (1960) 14 *P.D.* 1415.
(6) C.A. 395/60, *Roma Amrani v Attorney-General and National Insurance Institution* (1961) 15 P.D. 594.
(7) C.A 286/62, *Shlomo Ma'aravi v Shlomo and Regina Eltars* (1963) 17 P.D. 1350.

American cases referred to:

(8) *Portland Gold Mining Co. v Stratton's Independence,* 158 F. 63 (1907).
(9) *Albert* S. *Bigelow v Old Dominion Copper Mining & Smelting Co.,* 225 U.S. 111 (1912).
(10) *Prichard* v *Nelson et al., 55 F. Sup.* 506 (1942).
(11) *King* v *Stuart Motor Co.,* 52 *F. Sup.* 727 (1943).
(12) *Weekly v Pennsylvania Rly. Co.,* 104 F. Sup. 899 (1952).

The petitioner appeared in person.

Dr. M. *Eltes,* Deputy State Attorney and *Mrs. P. Albeck,* Principal Assistant to the State Attorney for the respondents.

SILBERG J. The only question before us in this appeal is whether the judgment given by the Jerusalem District Court in C.C. 61/57 constitutes *res juditaca* regarding the action commenced by the present appellant in C.C. 211/63.

2. The few necessary material facts are:

(a) In April 1957 the plaintiff filed a claim against Mr. Shmuel Steinfeld, a police sergeant, for the sum of approximately IL 3,200 as tort damages for bodily injury.

(b) The District Court dismissed the claim, holding that the appellant had not proved her claim. The court said *per* Judge Gollan the following:

> "The court which heard the plaintiff testify is not of the opinion that the plaintiff is a liar. A liar is a person who presents facts which do not exist in reality according to the best of his knowledge and who knowingly gives other details of the fact and intentionally changes it, in order to mislead the listener. The court is not of the opinion that the plaintiff belongs to that type of person. But, in the light of the evidence of Dr. Baumatz and Dr. Schlossberg, and of the plaintiff herself, on appearing in court both as plaintiff and as witness and her behaviour, the court is of the opinion that it would not be justifiable to rely on her testimony alone to find against the defendant in this case. Although the court received the impression that the defendant's denial that he touched the plaintiff *in* any way is exaggerated, we have insufficient proof in law of the fact that it was the defendant who caused the plaintiff to break her arm and of the damage which she claims from him."

(c) The appellant appealed against judgment to the Supreme Court in C.A. 35/58 (unpublished) and her appeal was dismissed. The Court said:

> "We do not think that we can as appeal judges interfere with the learned judge's assessment of the appellant's testimony, based as it is, at least partially, on the impression that she made in the witness box. It follows that the principal proof falls away and therefore her claim has to fail, as the judge decided."

(d) Afterwards the appellant submitted a new claim in C.C. 211/63 in the Jerusalem District Court for the same injurious act, but this time the defendants were the State of Israel and the Inspector-General of Police, the cause of action was the vicarious liability of the

employers of Sergeant Steinfeld, and the amount claimed was IL 30,000. The defendants applied by way of motion, asking for the claim to be struck out *in limine* under rule 21a of the Civil Procedure Rules, 1938, on the ground that the judgment mentioned in (a) above constitutes *res judicata* in respect of the second claim. The court accepted the argument and struck out the claim *in limine,* and against that the appellant now appeals.

3. The arguments *of* the appellant are principally two:

(a) The learned judge disregarded the rule decided in *Felman* v. *Shahav* (1), which she claims, is that any judgment which does not determine a positive finding, does not constitute *res judicata* in respect of a new claim. All which the court decided there in File 61/51 was that the appellant had not proved her claim, that is to say, it "found" that it could not make "a finding", and obviously there is nothing here to constitute *res judicata.*

(b) The judgment which was given in the previous case does not constitute *res judicata* in respect of the second claim, since the parties in the first case *are not identical* with those in the second, hence the application in the new case has not yet been decided.

4. As to the first argument, the learned appellant erred and did not really understand what was said in *Felman* (1). There the Supreme Court distinguished between a plea of real *res judicata* based on article 1837 of the *Mejelle,* and a plea of "estoppel by matter of record" based on the Common Law. When a defendant in the second case relies on the fact that the same question has already been dealt with and decided in the previous case between the same parties and pleads the Common Law estoppel, the plea will not be heard unless the determination of the question ended with a positive finding and not in "I did not find anything". But when the plea is that *a real decision* has already been given on the same application, now brought once again in the second case, then there is no practical difference at all whether the application was previously dismissed because of a positive finding of the judge, or whether it was dismissed because it was not proven. Article 1837 of the *Mejelle* does not recognise this distinction. The outcome, therefore, is that the principal question before us is the accuracy or inaccuracy of the second argument of the appellant. For should we hold the two claims identical, that will obviously serve as a complete answer, to the first argument as well.

5. And as to the second argument, it is true that the rule is that no judgment given in a case between A and B constitutes *res judicata* in respect of a claim between A and C. But "one cannot learn anything from generalities", because there is no rule which does not have its exception (other, perhaps, than this rule itself). And the exception to the above rule is when B was an employee directly responsible for the injurious act, and C is vicariously liable for that act. Here the law is as follows: if B is found liable, the judgment is not *res judicata in* respect also of C, but if he is not found liable, then the non-liability also constitutes *res judicata* in respect of a subsequent claim made against C, the employer. Preliminary support for that is found in the judgment of Sussman J. in *Ramat Gan* v. *Pardes Yanai* (2) at 1813, which was cited by the learned District Court judge and which reads as follows:

> "When we say that the above rule of 'reciprocity' directs us to reject the plea of *res judicata,* it did not escape us that sometimes a party can enjoy the fruits of a previous case, and if the opposite were decided, then the judgment would not concern him. What is involved are cases in which a person's liability is only derived from that of another, such as the responsibility of an employer for the act of his employee. The employee's liability in a claim for damages will not prevent the employer from denying the responsibility of the employee, where the employer was not a party in the first case, whilst exoneration of the employee in the case will also clear the employer from liability, even if he was not a party."

The ratio of this exception is patent. The direct responsibility of the employee is the basic foundation of the derivative responsibility of the employer: without an agent there is no principal. Hence *there exists here identity between the two claims,* although the names of the parties differ.

But why does the idea not operate equally when the employee is found liable in the first case: The answer is, in my opinion, practical and simple. If the employer is made liable, without any new judgment, on the basis of the employee's liability as found in the previous judgment, the door will be opened to collusion and fraud. The employee will connive with

the injured plaintiff, be found liable and divide with the plaintiff the spoil obtained from the claim against the employer. This apprehension naturally does not exist when the employee is not found liable. Thus we return to the basic idea, that when the ground gives way (the claim against the employee) the supercumbent building also collapses (the claim against the employer).

This special exception was recently confirmed by *Sussman J., Landau J.* and *Halevi J.* in *Zucker* v. *Leibovitz* (3). It has also been adopted in American case law, where in a series of decisions it has been held that the general principle that a person cannot take advantage of a judgment by way of estoppel unless he would be involved in the judgment, if the opposite had occurred, but subject to several exceptions, one of which is that in claims for damages, when the defendant's responsibility necessarily depends on the guilt of another who is the immediate tortfeasor, and in the previous claim against the latter for the same act, it was held that he is not guilty, then the defendant can derive benefit from that judgment as estoppel. although he would not have been involved, if the opposite had occurred: *Portland Gold Mining Co.* v. *Stratton's Independence* (8).

The *Portland* case, which was mentioned also in the above judgment of Sussman J., is the first case which summarises the law current in earlier American cases and was followed in later cases: *Bigelow* v. *Old Dominion Copper Co.* (9), cited in *Prichard* v. *Nelson* (10) at 510; cf. *King* v. *Stuart Motor Co*. (11) at 729-30; *Weekly* v. *Pennsylvania R. Co.* (12) at 900.

> ...
> "If a defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel."
>
> (30A *Am. Jur*., *Judgments,* para. 425; 52 *Am. Jur*., *Torts,* para. 129; cf. 50 C.J. *Sec.,* para. 757, at p. 279.)

I have restricted myself to the question which directly concerns the case before us. whether a judgment *exonerating* the employee serves as *res judicata* in an action against the employer; I have not touched upon other aspects of the question, such as how a condemnatory judgment is treated and how the concept of *res judicata* works between joint tortfeasors; the latter question was dealt with extensively by Halevi J. in *Zucker* (3). In English case law, to the best of my knowledge, there is no express decision regarding the question arising before us, although there is case law on the relationship of *res judicata* between joint tortfeasors.

I have seen no need to enter into the remaining submissions of the appellant because they are without substance.

In my opinion therefore the appeal is to be dismissed without costs.

HALEVI J.. In *Zucker* (3), we held in an "opposite" case (where *the employer* was first sued for vicarious liability for the wrongful act alleged against his employee and the plaintiff failed to prove the wrongful act) that the plaintiff was free to sue the employee for committing the act and to try and prove it, and the judgment given in favour of the employer does not constitute *res judicata* as regards the employee which bars the action against him. In the present case. however, in which *the employee* was first sued for a wrongful act attributed to him by the plaintiff (the appellant) and she failed to prove the act, we rule that the appellant is not at liberty to sue the employers (the respondents) for vicarious liability, and that the judgment in favour of the employee constitutes *res judicata* which bars the action against them. What is the reason for the difference in law between this case and its opposite?

The reason is that the vicarious liability of the employer springs from the employee's liability, and the employee's liability does not spring from the employer's liability. This substantial difference has two consequences:

(a) American jurists and courts are united in the view that a judgment which, on the merits of the case, exonerates a person from a wrongful act attributed to him by the plaintiff, bars an action of the same plaintiff against another person, which is based exclusively on the

vicarious liability *of* the second defendant for the wrongful act, for which the first defendant was acquitted. Although had the first defendant *been* held liable, the judgment would not be evidence, and needless to say *res judicata,* against the second defendant, because the judgment would be *res inter alios acta* and "one cannot render a person liable except in his presence". An act may, however, be done in favour of *a* person even when he is not present (*Baba Metzia*, 12b), and therefore the reciprocity rule may be departed from for reasons of "public order": *interest rei publicae ut sit finis litium.* The plaintiff has had his "day in court", and not having proved the wrong in his action against the direct actor, he is not to be permitted to try his luck again in an action against the person vicariously liable. Added to these principal considerations, there is the further consideration in most cases that it would not be justified to expose the first defendant. already exonerated in the plaintiff's claim, to a claim for indemnity on the part of the second defendant. in the event of the latter being condemned to pay damages to the plaintiff for the same wrongful act, of which the first defendant was cleared. For all of these reasons, we regard the rule, that a judgment which exculpates the immediate actor from a wrongful act, is *res judicata* for the person vicariously liable. a reasonable and just development of the Common law and we in fact adopt it.

As to the "opposite" question. whether a judgment in favour of the person vicariously liable is also *res judicata* for the immediate actor, lawyers and the courts in the United States have not yet reached an unanimous view. At least one of the aforementioned considerations - exposing the first successful defendant to a claim for indemnity by the second defendant - does not generally apply to the "opposite" case. In *Zucker* (3), we left the question open for the time being.

(b) The specific Israeli case law (which in my opinion has no parallel at all in English and American judgments) that limits the action of "estoppel by *res judicata"* to "a positive finding", as distinct from "lack of finding". is important (or might be important) only in the "opposite" case and does not apply to the "direct" case dealt with here. I will explain,

I shall not resort to article 18 37 of the *Mejelle,* because with all respect I join in the opinion of Landau J. in *Mizrahi v. Rahamim* (4), that this article "has become obsolete". But I actually come to the same conclusion as my learned colleague, Silberg J., on the basis

of the Common law distinction between res *judicata* as a "bar" and *res judicata* as "collateral estoppel". See *Freeman, Law of Judgments* (5th ed.) Vol. II, paras. 546, 676; *Restatement of Law of Judgments* sec. 68, p. 293. The difference is, briefly and in so far as it concerns us here, that any judgment on the merits of the case in favour of a defendant, be "its findings" or "lack of findings" what they are, will "bar" every further action by the plaintiff against the detendant for the same cause of action, and will serve as a complete defence to the action. Furthermore, "collateral estoppel" is set up by the express or implicit decision of the judgment as to the facts in dispute between the parties; that decision will serve as "an estoppel" between the parties in any further case, no matter what the cause of action may be. An exception: a decision of a court under its "incidental" jurisdiction, under sec. 35 of the Courts Law, 1957, in a matter under the "exclusive jurisdiction of another court or tribunal": such decision is only valid "for the purposes of that matter" and cannot serve as "collateral estoppel"; *Cohen* v. *Cohen* (5); *Restatement.* para. 71 p. 326. Another exception is created by Israeli case law *(Felman* (1); *Amrani* v. *Attorney-General* (6): *Ma'aravi* v. *Attorney General* (7); *Zucker* (3) etc.). which limits the applicability of "collateral estoppel" to "a positive finding", as distinguished from "lack of a finding". This last distinction does not apply to "barring" operation of a judgment (or, in the case of a judgment in favour of the plaintiff as a "merger"), as appears, with difference in terminology only, from the observations of Silberg J. in *Felman* (1) at 324 and of Berinson J. in *Amrani* (6) at 599.

In the case before us, the judgment in favour of the employee acts as a "bar" in favour of the employer. The vicarious liability of the employer springs from the principal liability of the employee, and when there is no such principal liability there is no attached (vicarious) liability. No "finding" or "lack of finding" in the judgment, but the very exculpation of the employee of commission of the wrongful act against the plaintiff-appellant removes the ground from under the claim which is based on vicarious liability for the same wrongful act, and serves as a full defence to the respondents. Accordingly the appeal should be dismissed.

WITKON J I concur with the conclusion reached by my respected colleagues.

Appeal dismissed.

Judgment given on *June 21, 1964.*