

The Downside of Preclusion: Some Behavioural and Economic Effects of Cause of Action Estoppel in Civil Actions

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Article abstract

The primary objective of the present article is to draw attention to the drawbacks of preclusion, especially of the rules of cause of action estoppel. The article challenges the traditional assumption that the rule of cause of action estoppel increases efficiency by introducing some economic and behavioural effects of the rule, especially the effects of the rule against splitting a single claim or cause of action.

Analysis of the effects of cause of action estoppel has three major methodological goals: (a) to re-examine the rule in light of the behaviour modification model, (b) to evaluate the economic efficiency of the rule and its effect on the cost of litigation, and (c) to consider the influence of the rule on the chances of reaching a settlement.

The article discusses the problematic incentives of litigating parties under the current Anglo-American rule of cause of action estoppel, and some of its harmful effects on the conduct and cost of litigation as well as on the chances of reaching a settlement. The article shows that, in many cases, the cause of action estoppel rules have undesirable effects on the conduct of litigation, including stimulating overlitigation in the initial action. Furthermore, the rule against splitting a single cause of action does not always contribute to an economically efficient legal system, and reduces the chances of reaching a settlement, which has a harmful effect on both the economic and behavioural aspects of litigation. By contrast, allowing the splitting of a single cause of action can significantly increase the litigants' incentives to settle, providing the parties with opportunities for employing useful settlement strategies.

THE DOWNSIDE OF PRECLUSION: SOME BEHAVIOURAL AND ECONOMIC EFFECTS OF CAUSE OF ACTION ESTOPPEL IN CIVIL ACTIONS

*Yuval Sinai**

The primary objective of the present article is to draw attention to the drawbacks of preclusion, especially of the rules of cause of action estoppel. The article challenges the traditional assumption that the rule of cause of action estoppel increases efficiency by introducing some economic and behavioural effects of the rule, especially the effects of the rule against splitting a single claim or cause of action.

Analysis of the effects of cause of action estoppel has three major methodological goals: (a) to re-examine the rule in light of the behaviour modification model, (b) to evaluate the economic efficiency of the rule and its effect on the cost of litigation, and (c) to consider the influence of the rule on the chances of reaching a settlement.

The article discusses the problematic incentives of litigating parties under the current Anglo-American rule of cause of action estoppel, and some of its harmful effects on the conduct and cost of litigation as well as on the chances of reaching a settlement. The article shows that, in many cases, the cause of action estoppel rules have undesirable effects on the conduct of litigation, including stimulating overlitigation in the initial action. Furthermore, the rule against splitting a single cause of action does not always contribute to an economically efficient legal system, and reduces the chances of reaching a settlement, which has a harmful effect on both the economic and behavioural aspects of litigation. By contrast, allowing the splitting of a single cause of action can significantly increase the litigants' incentives to settle, providing the parties with opportunities for employing useful settlement strategies.

L'objectif principal de cet article est d'attirer l'attention sur les inconvénients de la préclusion, surtout en ce qui a trait aux règles entourant l'irrecevabilité résultant de l'identité des causes d'actions (IRICA). Cet article remet en question le postulat traditionnel selon lequel la règle de l'IRICA augmente l'efficacité en introduisant des effets économiques et comportementaux, surtout ceux qui interdisent la scission d'une seule demande ou cause d'action. L'analyse des effets de la règle de l'IRICA comporte trois objectifs méthodologiques principaux : (a) réexaminer la règle à la lumière du modèle des effets sur le comportement, (b) évaluer l'efficacité économique de la règle et de ses effets sur le coût des litiges et (c) étudier l'influence de la règle sur les chances d'en arriver à un règlement hors cour.

Cet article aborde les problèmes rattachés aux incitatifs des parties en litige sous la règle anglo-américaine de l'IRICA actuelle, ainsi que certains des effets néfastes de la règle sur la conduite et les coûts du litige et sur les chances d'en arriver à un règlement hors cour. L'auteur démontre que dans de nombreux cas, les règles entourant l'IRICA ont des effets indésirables sur le déroulement des litiges, y compris les procédures excessives lors de l'action initiale. De plus, la règle interdisant la scission d'une même cause d'action ne contribue pas toujours à augmenter l'efficacité économique du système juridique et réduit les chances d'en arriver à un règlement hors-cour, ce qui nuit tant à l'aspect économique que comportemental du litige. Par contre, le fait de permettre la scission d'une même cause d'action peut augmenter de façon significative les incitatifs des parties pour s'entendre sur un règlement hors cour, leur donnant des occasions d'utiliser des stratégies de règlement utiles.

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Introduction

There are legal barriers for relitigation created in final judgments, represented by the rules of *res judicata*, “a matter that has been adjudicated.”¹ A classical common law doctrine, *res judicata* (RJ) is applied in the legal systems of England,² the United States,³ and Canada.⁴ However despite these legal barriers to relitigation, an opinion exists that the doctrine of RJ is a necessary “product of the adversary system of litigation,”⁵ and that “[o]ur legal system could not exist without *res judicata*.”⁶ Many have shown that “every legal system has produced a body of *res judicata* law,”⁷ and made unequivocal statements to that effect.⁸

¹ Fleming James Jr, Geoffrey C Hazard Jr & John Leubsdorf, *Civil Procedure*, 5th ed (New York: Foundation Press, 2001) at 673.

² See e.g. George Spencer Bower, *The Doctrine of Res Judicata*, 2d ed by The Right Honourable Sir Alexander Kingcome Turner (London, UK: Butterworths, 1969); Neil Andrews, *Principles of Civil Procedure* (London, UK: Sweet & Maxwell, 1994) at 501-13 [Andrews, *Principles*]; Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 2d ed (London, UK: Sweet & Maxwell, 2006) ch 24. at para 24.1ff.

³ The modern approach to RJ in the United States finally emerged in the *Restatement (Second) of Judgments* § 27 (1980) [*Restatement*], which addresses the preclusive effects of judgments in civil actions. Preclusive effects are limitations on the opportunity in a second action to litigate claims or issues that have been or could have been litigated in a prior action. In general, these limitations include the rules of claim preclusion and issue preclusion, and the concept of “privity”. See generally Allan D Vestal, *Res Judicata/Preclusion* (New York: Matthew Bender, 1969) [Vestal, *RJ/Preclusion*]; Warren Freedman, *Res Judicata and Collateral Estoppel: Tools for Plaintiffs and Defendants* (New York: Quorum Books, 1988); Robert C Casad, *Res Judicata in a Nutshell* (St Paul, Minn: West Publishing, 1976); Robert C Casad & Kevin M Clermont, *Res Judicata: A Handbook on Its Theory, Doctrine, and Practice* (Durham, NC: Carolina Academic Press, 2001); David L Shapiro, *Civil Procedure: Preclusion in Civil Actions*, Turning Point Series (New York: Foundation Press, 2001); James, Hazard & Leubsdorf, *supra* note 1 at 671-712.

⁴ See Donald J Lange, *The Doctrine of Res Judicata in Canada*, 2d ed (Markham, Ont: Butterworths, 2004) at 4-10.

⁵ Bower, *supra* note 2 at para 14.

⁶ Casad & Clermont, *supra* note 3 at 5 (answering the question whether we would be better off without RJ).

⁷ *Ibid* at 5.

⁸ For instance, AC Freeman maintains that “[t]he doctrine of *res judicata* is a principle of universal jurisprudence forming part of the legal systems of all civilized nations” (*A Treatise of the Law of Judgments*, 5th ed by Edward W Tuttle (San Francisco: Bancroft-Whitney, 1925) vol 2 at 1321). Another scholar, Eliahu Harnon, writes: “It may be assumed that the need for finality of judgment is recognized by many, if not by all, systems of law” (“*Res Judicata and Identity of Actions: Law and Rationale*” (1966) 1:4 *Isr LR* 539). Others write, “It seems clear that the adjudicative process would fail to serve its social and economic functions if it did not have [the support of RJ]” (James, Hazard & Leubsdorf, *supra* note 1 at 674).

In an earlier article I challenged some of these assumptions by presenting a comparative analysis of RJ and showing that some legal systems do not accept the main tenets of RJ.⁹ Furthermore, I demonstrated that there are good reasons for rejecting RJ, and that the rules of RJ raise many difficulties and have numerous drawbacks.¹⁰ For the purpose of furthering my argument, much of the beginning and subsequent framework of this article is heavily related to my previous article—which should help to situate this article within the pretences of that piece.

The primary objective of the present article is to draw attention to some behavioural and economic effects of the rule of cause of action estoppel in civil actions. According to the rule of cause of action estoppel, litigants are barred from pressing their suit if the cause of action touches upon a matter that has been adjudicated in a previous proceeding. In other words, a party may not ordinarily assert a civil action arising from a transaction for which it has already prosecuted such a cause of action, whether or not the two lawsuits entirely correspond to each other. Cause of action estoppel is also “referred to as ‘the rule against splitting a [single] cause of action’.”¹¹ A plaintiff who asserts only part of a single cause of action is said to have split the cause of action, and cause of action estoppel prevents the subsequent assertion of the remainder. In the present article I focus on the effects of cause of action estoppel, especially on the effects of the rule against splitting a single cause of action on the conduct of litigation, on the cost of litigation, and on the chances of reaching a settlement.

The rule of cause of action estoppel and the rule against splitting a single cause of action are considered by many as a fundamental contribution to the efficiency of judicial proceedings. Robert C. Casad, one of the leading scholars of RJ, emphasizes this point:

Modern procedure seeks to maximize the efficiency of judicial proceedings by encouraging the presentation of all claims that can conveniently be tried together in the framework of a single lawsuit.¹²

This traditional approach assumes that an efficient judicial system should seek to include all actions and remedies in a single cause of action.

⁹ Yuval Sinai, “Reconsidering *Res Judicata*: A Comparative Perspective” 21:2 *Duke J Comp & Int’l L* 353 [Sinai, “Reconsidering RJ”].

¹⁰ Some of the difficulties have already been mentioned, see e.g. Edward W Cleary, “*Res Judicata* Reexamined” (1948) 57:3 *Yale LJ* 339; Casad & Clermont, *supra* note 3 at 33-34. The present article introduces a larger number of policy considerations in its critique of the rules of RJ.

¹¹ James, Hazard & Leubsdorf, *supra* note 1 at 676, citing Charles E Clark, *Handbook of the Law of Code Pleading*, 2d ed (St Paul, Minn: West Publishing, 1947) ch 7 at 472-88.

¹² *Supra* note 3 at 26.

The present article challenges the traditional assumption by introducing some of the economic and behavioural effects of the rule of cause of action estoppel, which have not been considered in earlier studies.¹³ Note that this article does not engage in formal economic modelling, but uses the incentive-based economic methodology. The article discusses the problematic incentives for litigating parties under the current rule of cause of action estoppel, and some of its inadvisable effects on the conduct of litigation, on the cost of litigation, and on the chances of reaching a settlement.

Reform of the rules for civil litigation is currently in the forefront of Canadian provincial policy-makers' discussions, however, since there is little related literature specific to Canada, the present article relies mostly on US scholarship and on the Woolf Report in the United Kingdom.¹⁴

Part I, largely a repetition of an exposition from my previous article, presents an overview of the broad-scope common law model of RJ and the main arguments in favour of the rules of cause of action estoppel.

Part II introduces some of the behavioural effects of cause of action estoppel. The main argument is that the rules of cause of action estoppel—and especially the rule against splitting a cause of action—have not been formulated consistently with the behaviour modification model and with the desirable atmosphere of co-operation proposed by the new procedural reforms. Consequently, in many cases the effect of the cause of action estoppel rules on the conduct of litigation is undesirable and injurious. For example, the cause of action estoppel stimulates overlitigation of the initial action. Among its other aggravating effects are increased plaintiff incentives to assert meritless claims and remedies in court. The cause of action estoppel also discourages the plaintiff from using legitimate strategic considerations.

Part III addresses the economic efficiency of the rules of cause of action estoppel in general. The main argument is that the rule against splitting a cause of action does not always contribute to an economically efficient legal system. The observations in Subsection B lead to the conclusion that under broad-scope cause of action estoppel fewer claims are submitted to the court, but the cost of every claim is much higher than that of an average claim under a narrow claim preclusion policy, which can have an adverse effect on access to judicial decision-making. *Ex ante*

¹³ English jurists have voiced criticisms of the doctrine of RJ, but the principal questions they raised concern the individual aspects of the doctrine and matters of detail, rather than the doctrine as a whole (see e.g., Bower, *supra* note 2 at paras 11-13). In his 1948 article, Cleary initiated a re-examination of RJ (*supra* note 10), but the conceptual difficulties of the doctrine have yet to be examined thoroughly.

¹⁴ *Infra* note 65.

considerations of broad-scope cause of action estoppel can prevent plaintiffs from submitting their claims to the court because of the need to claim all remedies in one cause of action, which could increase trial costs to a level that may prevent litigants from submitting their claims at all. Furthermore, cause of action estoppel is liable to cause parties to include possible claims that they may be unwilling to forgo but are hesitant to press, which can also result in increased costs of litigation, both private and public. It seems that the aggravating effects of cause of action estoppel significantly increase both private and public litigation costs.

Part IV analyzes the effects of the rule against splitting a cause of action on the chances of reaching a settlement. The main argument is that in many ways this rule decreases the chances of reaching a settlement, which has an injurious effect on both the economic and behavioural aspects of litigation. By contrast, in many cases, allowing cause of action splitting is liable to significantly increase the litigants' incentives to settle.

Part V outlines the basic elements needed for redesigning the rules of cause of action estoppel, arguing that the scope of cause of action estoppel should be narrowed. The article concludes by proposing to abolish the strict and broad rule against splitting a cause of action that is being applied in contemporary common law, and instead argues in favour of a more lenient and flexible rule.

I. Cause of Action Estoppel: Foundations and Justifications

A. *Overview of the Rules of Res Judicata*

The term *res judicata* refers to the various ways in which one judgment exercises a binding effect on another. The rules of RJ have undergone a significant change in scope.¹⁵ In the old common law, its scope was quite narrow. A judgment entered in a case on one form of action did not prevent litigants from pursuing another form of action, although only one recovery was permitted for a single loss.¹⁶ Following changes to the rules of litigation, as part of the evolution of modern procedure, the rules of RJ are now being applied in a wider scope. As the relevant literature asserts:

A party should not be allowed to relitigate a matter that it already had opportunity to litigate. As the rules of procedure have expanded the scope of the initial opportunity to litigate, they have invited a corresponding expansion of the extent to which that opportunity

¹⁵ See James, Hazard & Leubsdorf, *supra* note 1 at 674-75.

¹⁶ See OL McCaskill, "Actions and Causes of Action" (1925) 34:6 Yale LJ 614 at 638-40.

forecloses a subsequent opportunity. As we shall see, this is the clear tendency in the modern law of *res judicata*.¹⁷

As applied in common law systems, the doctrine of RJ has two main forms: in England¹⁸ and Canada¹⁹ they are called “issue estoppel” and “cause of action estoppel”; in US terminology they are referred to as “issue preclusion” (traditionally known as “collateral estoppel”) and “claim preclusion”.²⁰ As I quoted in my previous article, the House of Lords explained these two forms, as they are applied in English common law, as follows:

Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. ... [T]he bar is absolute in relation to all points decided unless fraud or collusion is alleged.²¹

Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.²²

English law contains an important requirement that both cause of action and issue estoppels apply not only to points that have actually been decided but also to points “which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”²³ As emphasized by Zuckerman, “The bar to advancing an identical cause of action is absolute.”²⁴

¹⁷ James, Hazard & Leubsdorf, *supra* note 1 at 674-75 [footnote omitted]. *Ibid* at n 6 suggests a comparison between Ernst Schopflocher (“What is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?” (1942) 21:4 Or L Rev 319) and the *Restatement* (*supra* note 3, § 24). James, Hazard & Leubsdorf (*supra* note 1 at 674-675) point to Allan D Vestal (“Res Judicata/Claim Preclusion: Judgment for the Claimant” (1967) 62:3 Nw UL Rev 357) for additional reference.

¹⁸ See e.g. Andrews, *Principles*, *supra* note 2 at 503.

¹⁹ See Lange, *supra* note 4 at 1.

²⁰ See e.g. Vestal, *RJ/Preclusion*, *supra* note 3 at 13-15.

²¹ *Arnold v National Westminster Bank Plc*, [1991] 2 AC 93 at 104, [1991] 2 WLR 1177 (HL (Eng)) [*Arnold*]. See also NH Andrews, “Case and Comment” (1991) 50:3 Cambridge LJ 379 at 419.

²² *Arnold*, *supra* note 21 at 105.

²³ *Henderson v Henderson*, [1843] 3 Hare 100 at 115, 67 ER 313 (ChD), cited in Andrews, *Principles*, *supra* note 2 at 504. For an application of this requirement see *Skuse v Granada Television Ltd*, [1994] 1 WLR 1156 at 1162-64 (QB).

²⁴ Zuckerman, *supra* note 2 at para 24.65. The author comments further: “Neither the discovery of new evidence that could not have been known before, nor a change in the law

The Canadian legal system accepts similar definitions and distinctions between issue and cause of action estoppel.²⁵ Key concepts governing cause of action estoppel in Canadian courts²⁶ are similar to the English principles: the plaintiff must present the subject matter of the entire case relating to the cause of action at one time—once and for all—and any remedy following from the cause of action is based on that subject matter. The same principle applies to the defendant.²⁷ As I wrote in my previous article, all subject matter germane to the claim or defence that could have been presented in the first action by exercising reasonable diligence, but was not, is estopped in a second action.²⁸ In Canada, Lange explains that “[d]ecisions of cause of action estoppel defining the term ‘cause of action’ apply the generally accepted definition of ‘cause of action.’ A cause of action is the facts which give a person a right to judicial relief against another person.”²⁹

In my previous article I also discussed similar parallels in the US legal system. I wrote that in US terminology, “claim preclusion” refers to “the effects of the former judgment when the second action proceeds on all or part of the claim that was the subject of the first action.”³⁰ The “bar” of a judgment annuls the entire cause of an action or claim, including items that were not raised in the former action.³¹ But what does the term “claim” mean for RJ purposes? There is a difference between the old view

since the first decision, can justify reopening an adjudicated cause of action. The only way of reviving the cause of action is by having the original judgment set aside on grounds of fraud” (*ibid* [footnote omitted]).

²⁵ Lange, *supra* note 4.

²⁶ The key principles were quoted with approval in *Laufer v Canadian Investment Protection Fund*, 2004 CanLII 31862 at para 7 (Ont Sup Ct). For related leading decisions, see Lange, *supra* note 4 at 125. For the key principles of issue estoppel, see *ibid* at 25.

²⁷ In other words, the defendant must present both the entire defence related to the subject matter at one time, once and for all, and any related counterclaim that does not form a separate and distinct cause of action.

²⁸ A separate and distinct cause of action, however, is not governed by the cause of action estoppel and need not be brought in the same action, either as a claim by the plaintiff or as a counterclaim by the defendant. Another key principle is that the cause of action estoppel applies to the same parties and their privies, in the second action and in a second proceeding that is not an action.

²⁹ *Supra* note 4 at 139. For the meaning of a cause of action and of a separate and distinct cause of action in the context of the Canadian cause of action estoppel, see *ibid* note 4 at 139-43.

³⁰ James, Hazard & Leubsdorf, *supra* note 1 at 675.

³¹ The US Supreme Court formulated the concept of claim preclusion as follows: “[A] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Allen v McCurry*, 449 US 90 at 94, 101 S Ct 411 (8th Cir 2000).

and the modern one.³² The present trend in the United States is to regard a “claim” in factual terms and make it coterminous with the *transaction* irrespective of whatever substantive theories or forms of relief flowing from those theories may be available to the plaintiff; irrespective of what or how many primary rights may have been infringed upon; and however different the evidence needed to support the theories or rights may be.³³ The transaction is the basis of the litigative unit or entity, and it cannot be divided. In the words of Casad and Clermont, “The modern, so-called transactional, view of *res judicata*, dictates that the plaintiff *should* in a single lawsuit fully litigate all grievances arising from a transaction, just as the plaintiff *may* do under the modern rules of procedure.”³⁴ According to Casad and Clermont, the rationale of this transactional perspective “is that this view increases efficiency, with an acceptable burden on fairness.”³⁵

I also wrote that the concept of claim preclusion is also referred to as “the rule against splitting a [single] cause of action.”³⁶ The bar of a judgment for the defendant extinguishes the entire cause of action or claim, including items of the claim that were not raised in the former action.³⁷ The plaintiff can no longer sue on the original cause of action or any item of it even if that item was omitted from the original action.³⁸ A second effect of RJ, referred to in the United States as “issue preclusion”, “is that an issue determined in a [prior] first action may not be relitigated when the same issue arises in a later action based on a different claim or demand.”³⁹

The present article deals mainly with cause of action estoppel. As we have seen, in common law systems a plaintiff who obtains a judgment on a cause of action cannot initiate a second action on the same cause of action, although some exceptions to the general rule have been carved out in

³² As described by Casad & Clermont: “The old view, to which some jurisdictions still adhere, defined cause of action more narrowly in terms of a single legal theory or a single substantive right or remedy of the plaintiff. The modern view is that a claim includes all theories’ bestowal of rights on the plaintiff to remedies against the defendant with respect to the *transaction* from which the action arose” (*supra* note 3 at 62).

³³ See *Restatement*, *supra* note 3, § 24.

³⁴ Casad & Clermont, *supra* note 3 at 62.

³⁵ *Ibid.*

³⁶ James, Hazard & Leubsdorf, *supra* note 1 at 676, citing Clark, *supra* note 11, ch 7 at 472-88.

³⁷ See *Restatement*, *supra* note 3, § 17 cmt b.

³⁸ See *ibid.*, § 17 cmt a.

³⁹ James, Hazard & Leubsdorf, *supra* note 1 at 676.

unusual circumstances.⁴⁰ For example, in the United States, rules 59 and 60 of the *Federal Rules of Civil Procedure* describe various circumstances in which an American federal court may reopen a case in order to correct a mistake.⁴¹ There are also seven exceptions to the general rule mentioned in the *Restatement*.⁴²

B. Justifications

The justification of the common law rules of RJ has been debated extensively by legal scholars.⁴³ In Anglo-American legal systems, this justification is usually based on two theories:⁴⁴ the general public interest in ending disputes that have already been litigated by establishing the finality of judicial decisions,⁴⁵ and the individual's right to protection from repetitive litigation.⁴⁶

Another public interest commonly used to justify RJ is the need to end litigation in order to ensure the economic efficiency of the courts and the speedy termination of lawsuits—and thus avoid squandering court resources and imposing unnecessary costs on litigants.⁴⁷ Litigating the same

⁴⁰ See *Restatement*, *supra* note 3, § 26; For a description of the US approach, see Vestal, *RJ/Preclusion*, *supra* note 3 at 103; Casad & Clermont, *supra* note 3 at 85-106. For a description of the approach taken in England, see Bower, *supra* note 2 at paras 190-92, 455-58. And for a description of the Canadian approach, see Lange, *supra* note 4 at 231-84.

⁴¹ *Federal Rules of Civil Procedure*, as amended 1 December 2010 (111th Cong, 2nd Sess). Similar rules abide in most, perhaps all, state courts. Also notice the law-equity distinction and the willingness of American “chancellors” to correct mistakes in the ancient tradition of Chancery. For the rise of equity and the chancellor's decree in the United States, see James, Hazard & Leubsdorf, *supra* note 1 at 16-22.

⁴² *Supra* note 3, § 26: Exceptions to the general rule concerning splitting.

⁴³ See e.g. Allan D Vestal, “Rationale of Preclusion” (1964) 9:1 Saint Louis ULJ 29 [Vestal, “Rationale”]; Harnon, *supra* note 8 at 542-50; Bower, *supra* note 2 at paras 10-15; Vestal, *RJ/Preclusion*, *supra* note 3 at 7-12; Cleary, *supra* note 10; Andrews, *Principles*, *supra* note 2 at 511; Richard A Posner, “An Economic Approach to Legal Procedure and Judicial Administration” (1973) 2:2 J Legal Stud 399 at 444-45; Casad & Clermont, *supra* note 3, ch 3 at 29ff; James, Hazard & Leubsdorf, *supra* note 1 at 671-74; Lange, *supra* note 4 at 4-9.

⁴⁴ See e.g. Bower, *supra* note 2 at para 10; Vestal, “Rationale”, *supra* note 43; Vestal, *RJ/Preclusion*, *supra* note 3 at 8-10; James, Hazard & Leubsdorf, *supra* note 1 at 675.

⁴⁵ See e.g. *Carl Zeiss Stiftung v Rayner & Keeler Ltd* (1966), [1967] AC 853 at 933, [1966] 1 All ER 536 (HL (Eng)). In England, Lord Simon of Glaisdale expressed this idea in *The Amphill Peerage* (1976), [1977] AC 547 at 575-76, [1976] 2 WLR 777 (HL (Eng)).

⁴⁶ This rationale of RJ was formulated more than four centuries ago by Lord Coke in the *Ferrer's Case*, [1597] 6 Co Rep 7a at 8b-9a, 77 ER 263 (KB). Traditionally, Canadian courts also base RJ on these two policy considerations, see Lange, *supra* note 4 at 4-6.

⁴⁷ These policy considerations have also been expressed by Canadian courts, see *ibid* at 7.

matter more than once defeats this purpose.⁴⁸ As shown in Part III, however, RJ does not always improve judicial efficiency and in many cases the doctrine causes additional costs that should be taken into consideration.

English jurist, Neil Andrews, sums up the traditional Anglo-American rationale and justification of RJ as a “principle of finality” that avoids dragging disputes, “greater legal expense”, “scarce ‘judge-time’”, “inconsistent decisions”, and “hardship on the victorious party” that might occur upon the reopening of a case.⁴⁹ These policies raise issues of private justice between the parties, ensuring that the judgment would not be undermined by later proceedings, and protection of the parties from delay tactics. There have also been public policy arguments made on behalf of RJ.⁵⁰

II. The Behavioural Effects of the Rule Against Splitting a Single Cause of Action

A. *The Behaviour Modification Model Perspective*

In my last article I also wrote of Kenneth Scott’s two models of the civil process: the conflict resolution and the behaviour modification model.⁵¹ The conflict resolution model regards civil process primarily as a method of achieving a peaceful settlement of private disputes.⁵² In the interests of preserving the peace, society offers a mechanism for impartial resolution of personal grievances through the courts, as an alternative to forcible self-help.⁵³ I wrote that, by contrast, the behaviour modification model regards the courts and the civil process as a way of altering behaviour by exacting a price for undesirable behaviour.⁵⁴ The emphasis, in this case, is not on the resolution of the immediate dispute but on its effect on the future conduct of others.⁵⁵ Scott argues that of the two models, “The

⁴⁸ See Vestal, “Rationale”, *supra* note 43 at 31-32; Vestal, *RJ/Preclusion*, *supra* note 3 at 10-12.

⁴⁹ Andrews, *Principles*, *supra* note 2 at 511.

⁵⁰ *Ibid.*

⁵¹ Kenneth E Scott, “Two Models of the Civil Process” (1975) 27:3 *Stan L Rev* 937.

⁵² *Ibid* at 937-38.

⁵³ *Ibid.*

⁵⁴ *Ibid* at 938-39.

⁵⁵ *Ibid.*

Conflict Resolution Model is in the ascendant, and its implications seem to be carrying the day, at least in the federal courts.”⁵⁶

Scott urges a more careful consideration of the claims and implications of the behaviour modification model.⁵⁷ Indeed, the behaviour modification model stands as an alternative—or possibly a supplement—to the more prevalent account of litigation, which maintains that the objective of litigation is to facilitate the civilized resolution of disputes. At this point it should be stressed that the present article does not ignore the conflict resolution model, and in our proposal of a new model in Part V below, I argue that a “minimal concept of *res judicata*” should apply because it is desirable from the perspective of the conflict resolution model. Furthermore, Part V presents an argument regarding the significance of issue estoppels, which should—in my opinion—apply anyway, even if we reconsider the need for a broad-scope rule of cause of action estoppel. It should be clear, therefore, that I do not argue against all the elements of RJ, but instead for its correct application. Nevertheless, as Scott suggests, we should also consider the implications of the behaviour modification model in the context of the rules of cause of action estoppel.

The present section sheds light on the behavioural effects of cause of action estoppel. The main argument is that the rules of cause of action estoppel, especially the rule against splitting a single cause of action, have not been shaped consistently with the behaviour modification model, and therefore in many cases their effect on the conduct of litigation is undesirable. Furthermore, in Parts III and IV, I suggest that these behavioural effects are also liable to increase the cost of litigation and reduce the chances of reaching a settlement.

B. Stimulating Overlitigation in the Initial Action

1. Aggravating Effects

The rule of cause of action estoppel is often interpreted as a prohibition against splitting a single claim or cause of action.⁵⁸ According to the American authors, James, Hazard, and Leubsdorf, “[I]f the plaintiffs fail to include any part of a single demand or cause of action in the first action, they cannot, after judgment, bring another action to claim the omitted part, whether as an item of damage or a ground of recovery.”⁵⁹ In par-

⁵⁶ *Ibid* at 950.

⁵⁷ *Ibid*.

⁵⁸ See James, Hazard & Leubsdorf, *supra* note 1 at 685.

⁵⁹ *Ibid*.

ticular, in the United States the rule stated in the *Restatement* § 24 exerts pressure on the plaintiff to present all material relevant to the claim in the first action, which is similar to the coercion of the defendant to produce all defences at once.⁶⁰ The material to be presented roughly comprises “evidence” (connoting facts); “grounds” (facts grouped under a legal characterization); “theories of the case” (premises drawn from the substantive law); and “remedies or forms of relief” (measures or kinds of recovery). In most common law systems, a plaintiff who obtains a judgment on a claim cannot initiate a second action on the same claim, although as mentioned above, some exceptions to the general rule have been carved out in unusual circumstances.⁶¹

Insisting on the inclusion of all distinct claims in one action has some disadvantages, as litigants are encouraged to argue each point with greater intensity for fear of the future effects of RJ.⁶² In other words, the rule of cause of action estoppel forces plaintiffs to include all the claims and remedies that may be developed from one cause of action, which significantly aggravates the dispute between the parties and forces them to litigate their potential claims to the utmost.⁶³ By contrast, under a more flexible system—such as the model presented in Part V—that allows splitting a cause of action, plaintiffs are not forced to press their claims to the extreme.

The aggravating effects of cause of action estoppel contribute to unpleasant relations between the parties, which is an undesirable consequence by the standards of new procedural reforms that emphasize the importance of co-operation and of reasonable relations between the parties. As Zukerman explains, “The Civil Procedure Rules 1998 (CPR), which came into effect on April 26, 1999, have transformed English civil procedure. ... [These new rules have produced] a fundamental change in English litigation culture.”⁶⁴ The CPR largely implement the recommendations made by Lord Woolf in his reports on access to justice intended to

⁶⁰ *Supra* note 3; *ibid.*, § 18.

⁶¹ See *ibid.*, § 26; For a description of the US approach see Vestal, *RJ/Preclusion*, *supra* note 3 at 103; Casad & Clermont, *supra* note 3 at 85-106. For a description of the English approach, see Bower, *supra* note 2 at 190-92, 455-58. For a description of the Canadian approach see Lange, *supra* note 4 at 231-84.

⁶² See James, Hazard & Leubsdorf, *supra* note 1 at 687.

⁶³ *Ibid.* See also Geoffrey C Hazard, Jr, “An Examination Before and Behind the ‘Entire Controversy’ Doctrine” (1996) 28:1 Rutgers LJ 7; Howard M Erichson, “Of Horror Stories and Happy Endings: The Rise and Fall of Preclusion-Based Compulsory Party Joinder Under the New Jersey Entire Controversy Doctrine” (1999) 9:3 Seton Hall Const LJ 757.

⁶⁴ See generally Zuckerman, *supra* note 2 ch 1 at para 1.1; *Civil Procedure Rules 1998* (UK) [CPR].

remedy the shortcomings of the old system.⁶⁵ CPR 1.4(2) lists the objectives of good case management.⁶⁶ The first objective states that the court must encourage “the parties to co-operate with each other in the conduct of the proceedings.”⁶⁷ Zuckerman elaborates: “[The parties] must respond positively to reasonable requests for information and to invitations to settlement negotiations, and they are encouraged to agree [on] as many aspects of the litigation process as possible.”⁶⁸ The duty to co-operate is considered to be one of the most significant cultural changes provided by the CPR.⁶⁹ Lord Justice Brooke drew attention to this aspect: “The whole thrust of the CPR regime is to require the parties to behave reasonably towards each other in the conduct of the litigation.”⁷⁰ The CPR stipulates that the duty to co-operate begins before the start of proceedings, as it demands compliance with pre-action trial protocols.⁷¹ Zuckerman explains that “[t]he aim of the pre-action protocols is to reverse the former culture of litigant warfare.”⁷²

It could be argued, therefore, that the rule against splitting a cause of action does not contribute to the desired change in culture mentioned above, but rather preserves the former culture of litigant warfare.⁷³

2. The Effect of the Rule on the Plaintiff’s Incentives to Sue

What are the effects of the rule against splitting a single cause of action on the plaintiff’s incentives to sue? I answered this question in my last article by writing that on the one hand, there is no doubt that without a broad-scope cause of action estoppel, the chances of parties litigating endlessly are greater. Therefore an argument can be made that, without cause of action estoppel, the plaintiff may have an incentive to sue the defendant again and again. This is not the only argument in favour of the

⁶⁵ UK, *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* by The Right Honourable the Lord Woolf (London, UK: Woolf Inquiry Team, 1995); UK, *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* by The Right Honourable the Lord Woolf (London, UK: HMSO, 1996) [Woolf, *Final Report*].

⁶⁶ *Supra* note 64.

⁶⁷ See *ibid* at 1.4(2)(1).

⁶⁸ See Zuckerman, *supra* note 2 at para 1.100 [footnote omitted].

⁶⁹ *Ibid* at para 1.101. Also, see generally *ibid* at paras 1.98-1.112.

⁷⁰ *Baron v Lovell* (1999), [2000] PIQR 20 at 27, CPLR 630 (EWCA (CivD), cited in Zuckerman, *supra* note 2 at para 1.100.

⁷¹ See *ibid* at para 1.104.

⁷² *Ibid*.

⁷³ It also dramatically reduces the chances of reaching a settlement, as shown in Part IV.

cause of action estoppel rule, which presumes that plaintiffs are naturally inclined to be vexatious litigants. To the extent that the rationale is incentive based (as opposed to based on fairness or expectations), the intent is to create an incentive to address all issues arising from a single interaction between the parties in a single hearing, including all the necessary facts that can be found, and avoiding the risk of, say, inconsistent factual findings or verdicts.

On the other hand, the preceding discussion suggests another major effect of the rule against splitting a cause of action—namely, that the plaintiff may have a strong incentive to sue for all the potential claims and remedies that can be included in one cause of action. This is because plaintiffs know that if they fail to include any part of a demand or cause of action in the first lawsuit, then they cannot bring another action to claim the omitted part after judgment has been pronounced.

Where I differ in the present analysis is by pointing out that a similar effect, in many ways, can be found in criminal cases. Kate Stith analyzes some of the consequences of the asymmetry in the right to appeal in criminal cases.⁷⁴ Under the asymmetric system of criminal appeals in the United States, acquittals are not appealable but convictions are.⁷⁵ This system indiscriminately skews legal errors toward the prosecution's side, and reduces the probability of conviction for both guilty and innocent defendants.⁷⁶ Stith argues further that prosecutors are likely to respond strategically to the possibility of selection effects by raising issues that otherwise would not be pursued, thereby achieving a more symmetric distribution of disputes on appeal and reducing selection effects.⁷⁷ She reasons that “[i]n particular, the possibility of pro-defendant selection effects resulting from a skewed distribution of disputes on appeal may lead prosecutors to counteract this skew by asserting meritless claims in the trial court.”⁷⁸

Returning to what I wrote in my previous article, in many ways, it is possible to consider the rule against splitting a single cause of action as an asymmetric rule that has a potential for pro-defendant selection effects

⁷⁴ Kate Stith, “The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal” (1990) 57:1 U Chicago L Rev 1. See also Uzi Segal & Alex Stein, “Ambiguity Aversion and the Criminal Process” (2006) 81:4 Notre Dame L Rev 1495.

⁷⁵ See Wayne R LaFave et al, *Criminal Procedure*, 5th ed (St Paul, Minn: Thomson West, 2009) at 1201-04, 1222-26.

⁷⁶ Stith, *supra* note 74 at 17-27.

⁷⁷ *Ibid* at 29-32.

⁷⁸ *Ibid* at 29.

resulting from the defendant's protection against multiple actions. The pro-defendant effects may lead plaintiffs to counteract the skew by asserting meritless claims and remedies in court, because they know that they have only one chance of suing for the claims and remedies that may be developed from one cause of action. As illustrated in the following subsection, cause of action estoppel is liable to cause parties to include possible claims that they may be unwilling to forgo, but also hesitant to press.⁷⁹

Note, however, that there are other considerations that affect the plaintiff's incentives to sue, such as expected litigation costs.⁸⁰

C. *The Plaintiff's Strategic Considerations*

At any given point in the dispute, the plaintiff may be interested in only one claim or remedy, but because of cause of action estoppel, the plaintiff may be forced to sue for all potential claims and remedies in one action. If plaintiffs were permitted to initially sue for only a portion of the the remedies in a first action, without the risk of preclusion looming over the other remedies, they may later in a second action forgo the other remedies, or these may become irrelevant with time.

Usually the plaintiffs' strategic considerations do not allow them to split a cause of action, although this may be permitted in rare and specific circumstances—as in the seven exceptions to the general rule mentioned in the *Restatement* § 26.⁸¹ The second exception refers to cases in which the court, in the first action, has expressly reserved the plaintiff's right to maintain the second action.⁸² For example in cases of restitution relief, after a plaintiff fails in a breach of contract action:

⁷⁹ James, Hazard & Leubsdorf, *supra* note 1 at 687.

⁸⁰ Part III addresses the way in which litigation costs affect the conduct of litigation. At the same time, one could ask: What about the costs and risks of filing meritless claims? If they are truly meritless, would the plaintiff not fear retaliation from the court (either in costs or in the form of a negative attitude on the part of the judge)? In economic terms, if the claim has a negative net present value (NPV), the fact that the claimant would not be able to file it in the future will not persuade him to file it today. In other words, the argument is that a net benefit must potentially flow from the claim for it to be filed at any time.

⁸¹ *Supra* note 3 (exceptions to the general rule concerning splitting).

⁸² This exception is explained in *ibid.*, § 26 cmt b:

Express reservation by the court (Subsection (1)(b)). It may appear in the course of an action that the plaintiff is splitting a claim, but that there are special reasons that justify his doing so, and accordingly that the judgment in the action ought not to have the usual consequences of extinguishing the entire claim; rather the plaintiff should be left with an opportunity to litigate in a second action that part of the claim which he justifiably omitted from the

Ordinarily the plaintiff avoids any question of being precluded from a remedy through merger or bar by seeking all plausible remedies at the outset of the action, proving his full case, and securing the recovery to which he is entitled on the facts. If the plaintiff fears that he may suffer in a strategic sense from mingling his case for breach of contract with his alternative case for restitution, he may apply to the court for the clear separation of the issues for trial.⁸³

It appears, therefore, that the court can authorize cause of action splitting, but in practice, as Casad and Clermont emphasize, it does so only “when special circumstances justify a second action.”⁸⁴ Moreover, the possible reservation of the action for restitution relief after the plaintiff fails in their action for breach of contract, does not contradict the major arguments against splitting a cause of action because it is regarded as a specific exception, rationalized by the nature of contract law,⁸⁵ rather than as a legitimization of the plaintiff’s strategic considerations in general. The Supreme Court of Canada also held that discretion may be exercised in the application of both issue and cause of action estoppels.⁸⁶ But in prac-

first action. A determination by the court that its judgment is “without prejudice” (or words to that effect) to a second action on the omitted part of the claim, expressed in the judgment itself, or in the findings of fact, conclusions of law, opinion, or similar record, unless reversed or set aside, should ordinarily be given effect in the second action.

⁸³ *Ibid.*, § 25 cmt h.

⁸⁴ Casad & Clermont, *supra* note 3 at 101. The author gives an example of such special circumstances: “[S]uch as when only at trial could the plaintiff’s counsel perceive the breadth of the claim” (*ibid.*).

⁸⁵ As explained in the *Restatement*, *supra* note 3, §25 cmt h:

When an enforceable contract has existed between plaintiff and defendant, and the plaintiff asserts that he has performed in accordance with the terms of the contract, but that the defendant has failed to perform his corresponding duties, the remedies or forms of relief that can typically be claimed by the plaintiff are recovery of the value of the defendant’s promised performance less the value of any as yet unperformed part of the plaintiff’s promised performance (called an action for breach of contract), or recovery of the value of what the plaintiff has given in performance of the contract (called an action for restitution). The plaintiff may pursue both remedies alternatively in one action, but whether he chooses to do so or sues for only one of the two remedies, a judgment in the action which extinguishes the claim under the rules of merger or bar precludes the plaintiff from another action on the same transaction.

For the application of claim preclusion in breach of contract cases, see also James, Hazard & Leubsdorf, *supra* note 1 at 692-93.

⁸⁶ See generally *Danyluk v Ainsworth Technologies*, 2001 SCC 44 at para 33, [2001] 2 SCR 460; rev’g (1998), 42 OR (3d) 235, 167 DLR (4th) 385 (CA); *Toronto (City) v Canadian Union of Public Employees, Local 79* (2001), 55 OR (3d) 541 at 572, 205 DLR (4th) 280 (CA) [*Toronto*], aff’d 2003 SCC 63 at paras 23-32, [2003] 3 SCR 77. See also Lange, *supra* note 4 at 172-74.

tice, the scope of discretion appears to be limited,⁸⁷ and the concern for judicial finality usually prevails when considering the exercise of discretion.⁸⁸

In what follows, I argue that in many cases in which the plaintiff has legitimate strategic considerations, the public interest and that of the litigants is best served by allowing the plaintiff to split the cause of action.

An Israeli Supreme Court ruling illustrates a typical case in which the strategic interest of the plaintiff is not to sue immediately for all the remedies in one action, but rather to retain the option to sue for some of the remedies in a later action.⁸⁹ The case of *Stefania Hotel Ltd v. Miller Estate* involved the breach of a contract that obligated a company to purchase land and build a structure on it.⁹⁰ The plaintiff wished to split the cause of action and only claim for enforcement or imposition in the first claim, and in a later action sue for other remedies such as compensation for the damages incurred because of the breach of contract.⁹¹ Justice Haim Herman Cohn stated that a plaintiff's business objectives should be met if they have received an order to enforce their contract—as adequate compensation occurs through the incurred profits. But in the case of the respondent becoming victorious, a plaintiff often avoids the additional risk or cost of filing a second suit for compensation for the breach of contract. As such, he wrote that “if for some reason the court dismisses the enforcement-of-contract suit but at the same time finds that the contract does bind the respondents, then I cannot see a reason why the plaintiff would be unable to sue for compensation later on.”⁹²

In the case of *Stefania Hotel*, the Israeli court legitimized the plaintiff's strategic considerations.⁹³ It makes sense in this case because the plaintiff's main claim was enforcement, and although he had no clear intention to sue for compensation, he wanted to save the option to do so in a later action—“just in case”. Both the public interest and the defendant's inter-

⁸⁷ See *ibid* at 173 (analyzing the decision of *Toronto*, *supra* note 86).

⁸⁸ See *Lange*, *supra* note 4 at 174.

⁸⁹ In secular Israeli law it is the common law, broad-scope concept of RJ that usually applies. See *Harmon*, *supra* note 8 at 541.

⁹⁰ CA 329/73 *Stefania Hotel Ltd v Miller Estate*, [1974] IsrSC 28(1) 19 at 20, paras 5-6 (Israeli Supreme Court sitting for the Civil Court of Appeal) [*Stefania Hotel*] [translated by author]. For a discussion of the effects of this theory on Israeli law, see Benjamin Rotenberg, “Splitting Remedies” (in Hebrew) (1987) 16 *Mishpatim* 390 at 397.

⁹¹ *Stefania Hotel*, *supra* note 90.

⁹² *Ibid*.

⁹³ The legal basis of the decision is the court's authority to allow splitting the remedies flowing from one cause of action according to Rule 45 of the *Civil Law Procedure Regulations 5744-1984*, 7th ed (Haifa: AG Publications, 2005).

est were thereby served because, in light of the permission given to the plaintiff to split the cause of action, the claim for enforcement could prove to be sufficient. By contrast, if splitting the cause of action had not been permitted, the plaintiff may have been forced to sue for a remedy that he did not really desire. In other words, we see again that cause of action estoppel is liable to cause parties to include possible remedies that they may be unwilling to forgo but are also hesitant to press.

To summarize, because the cause of action estoppel rule requires the plaintiff to engage in “kitchen sink” pleading, litigants must argue more points, each point with greater intensity. A more focused action, concentrating on the more meritorious causes of action, would minimize the stimulation that might otherwise occur. However, this state of affairs should be treated as a hypothesis, not as an empirical fact.⁹⁴

Another important consideration mentioned in *Stefania Hotel* is that a permission to split a cause of action causes the first action to become an *evaluation stage* that provides litigants with an accurate judicial evaluation of their chances at later stages.⁹⁵ The evaluation effect plays an important role in reaching a settlement.⁹⁶

A common strategic consideration occurs when the plaintiff cannot provide sufficient evidence to prove all issues and remedies. For most cases in the contemporary US legal system, “[a] mere shift in the evidence offered to support a ground held unproved in a prior action will not suffice to make a new claim avoiding the preclusive effect of the judgment.”⁹⁷ I believe that this approach should be reconsidered. If plaintiffs were permitted to split a cause of action, in the first action they could claim only the remedies that could be easily proven; later, if they found sufficient evidence for a second remedy, they could sue for it separately. But under the rule against splitting a cause of action, plaintiffs are forced to delay their legitimate claim for the first remedy until they can provide sufficient evidence for all remedies. For example, in many tort cases it is known that a negligent defendant has caused damage, but it is often difficult to obtain a quick evaluation of the amount of damage caused because of difficulties in providing evidence, and so forth. The rule against splitting a

⁹⁴ Assuming it is an hypothesis, we should also consider the argument to the contrary, that although a more focused or confined action may be less “stimulating” than an “kitchen sink” action, adoption of the *Stefania Hotel* model would also increase the possibility of multiple actions—which could, presumably, create their own level of “stimulation” because in each case success would depend on the adjudication of the single cause of action being asserted.

⁹⁵ *Stefania Hotel*, *supra* note 90.

⁹⁶ This will be explained in Part IV.

⁹⁷ *Restatement*, *supra* note 3, §25 cmt b.

cause of action can have undesirable consequences for the injured in these situations.⁹⁸ In cases of this type, it would be appropriate to permit plaintiffs to split their cause of actions, allowing them to sue in the first action for an immediate restraining order or injunction, and later in a second action to demand compensation for damages.

In my last article I wrote that the plaintiff's strategic considerations are also relevant when there has been a long relationship between the litigants, as for example between a supplier and a large customer, or in other relationship contracts. In this type of situation, the damaged party is not likely to want to sue its business partner for all of the remedies that may flow from one cause of action because it wants to continue the relationship. Instead, the party may want to first claim one remedy, and reserve the option to sue later for the other remedies. Applying cause of action estoppel in such cases would force the litigants into a broad legal battlefield that would probably damage their future relations, which is against the interests of the litigants and of the public. The public interest, and that of the litigants, is best served by allowing the plaintiff to split the cause of action in such cases—not only *ex ante* (when requested by the plaintiff in the first action),⁹⁹ but even *ex post* (when it was not requested during the first action).

Currently though, it must be admitted that not every strategic consideration is legitimate, and the court should not always allow the plaintiff to split a single cause of action. For instance, the court should not allow a plaintiff to split the cause of action if this harms the defendant, or if the judge believes that the plaintiff is attempting to harass the defendant by repeatedly submitting one claim against the defendant at a time in order to cause damage to the defendant. In such a case, the plaintiff has no legitimate reason for splitting a single cause of action because it does not contribute to the behaviour modification of litigation, which I believe should be a major consideration in allowing a cause of action to be split. Furthermore, although some courts cite mistake or ignorance on the part of the plaintiff in the first action as sufficient grounds for splitting a cause of action,¹⁰⁰ we should accept Vestal's conceptual view that "when the purposes served and the general framework of preclusion/res judicata are considered, it would seem to be logical to conclude that a plaintiff is under

⁹⁸ James, Hazard & Leubsdorf, *supra* note 1 at 688-92. See also *ibid* ("[p]ractical and policy problems [caused by claim preclusion] can arise in almost any type of tort litigation" at 688).

⁹⁹ In the first action the court permitted claim splitting, as applied in the contemporary US legal system.

¹⁰⁰ Vestal, *RJ/Preclusion*, *supra* note 3 at 98.

an obligation to present his entire claim in the first suit, and that mistake or ignorance will not excuse him from the requirements of this rule.”¹⁰¹

The considerations cited above help explain the need for replacing the current common law model of a broad-scope cause of action estoppel with a more balanced and flexible one.

III. The Economic Efficiency Perspective

A major feature of civil procedure is ensuring that the legal system produces results with the least possible expenditure of time, money, and energy.¹⁰² Economic considerations legitimize outcomes on the grounds that decisions are rendered with the interests of both the individual and of society in mind.¹⁰³ Many scholars are increasingly using economic models to analyze litigation outcomes.¹⁰⁴ The possibility that a given trial outcome will have preclusive effects on future litigation significantly influences the outcome of negotiations¹⁰⁵ and is relevant to the question of settlement extortion.¹⁰⁶ This section deals with the economic efficiency perspective of the rules of cause of action estoppel in general,¹⁰⁷ by using utility-based analyses of the law—the article does no formal economic modeling, but uses the incentive-based economic methodology. The argument here is that the rule against splitting a single cause of action does not always contribute to producing an economically efficient legal system.

¹⁰¹ *Ibid* at 100 [footnote omitted].

¹⁰² Judith Resnik, “Tiers” (1984) 57:6 S Cal L Rev 837 at 857 [Resnik “Tiers”]. See also James, Hazard & Leubsdorf, *supra* note 1, ch 6 at 359-83; Zuckerman, *supra* note 2 at paras 1.91-1.93.

¹⁰³ Resnik, “Tiers”, *supra* note 102 at 857.

¹⁰⁴ It has been noted that none of the models incorporate the effects of preclusion. See “Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel”, Note (1992) 105:8 Harv L Rev 1940 at 1942-43, n 17 [“Exposing the Extortion Gap”]. See also Steven Shavell, “Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs” (1982) 11:1 J Legal Stud 55; Lucian Arye Bebchuk, “Litigation and Settlement Under Imperfect Information” (1984) 15:3 RAND J Econ 404.

¹⁰⁵ See e.g. “Exposing the Extortion Gap”, *supra* note 104 at 1953-55.

¹⁰⁶ See e.g. Lucian Arye Bebchuk, “Suing Solely to Extract a Settlement Offer” (1988) 17:2 J Legal Stud 437.

¹⁰⁷ Whereas the effects of the rules on the chances of reaching a settlement are discussed separately in Part IV.

A. Does Res Judicata Contribute to Producing an Economically Efficient Legal System?

I pointed out in my last article that, although many scholars consider RJ to contribute significantly to the economic efficiency of the courts, others, such as Edward Cleary, argue that this justification is insufficient. He believes that “[m]aintenance of the judicial system is a very minor portion of the cost of government. If the judges are too few to be able to decide cases fairly and on the merits, the public probably can afford to have more judges.”¹⁰⁸

Decisions about whether and how to economize are required at points of tension between individual and public needs. Cutting costs can mean sacrificing other valued needs, as in the case of RJ.¹⁰⁹ The doctrine of RJ remains problematic even if we reject Cleary’s view.

My present argument is that it appears that an economically efficient legal system must apply a so-called “minimal concept of res judicata”,¹¹⁰ so that the rules of RJ are “limited to the narrow question whether the prior action actually decided the issues necessarily involved in awarding the judgment.”¹¹¹ I agree with those who maintain that “[i]t seems clear that the adjudicative process would fail to serve its social and economic functions if it did not have this minimal effect.”¹¹² Furthermore, there are significant efficiency factors that justify the need for a rule of preclusion,¹¹³ such as avoiding wasteful repetitive litigation and providing court access to litigants waiting in queue.¹¹⁴ But we have seen that the modern rules of procedure have expanded the scope of the rules of cause of action estoppel and the prohibition against splitting the cause of action. The question remains whether the modern broad-scope cause of action estoppel actually contributes to an economically efficient legal system. Some scholars argue in favour of broad-scope preclusion, stating that, “[i]f two trials would

¹⁰⁸ Cleary, *supra* note 10 at 348 [footnote omitted].

¹⁰⁹ For another example of the tension between individual and public needs see Resnik, “Tiers”, *supra* note 102 at 857.

¹¹⁰ James, Hazard & Leubsdorf, *supra* note 1 at 674.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ For a list of procedural efficiency and fairness factors favouring preclusion, see Casad & Clermont, *supra* note 3 at 31-33.

¹¹⁴ *Ibid* at 31.

produce a large overlap of issues or evidence, it is wasteful to society and harassing to the adversary to have more than one trial.”¹¹⁵

This statement puts forth an important argument for preclusion, but it does not take into account major efficiency factors favouring non-preclusion. A more balanced view is expressed by Casad and Clermont: “A fuller explanation of the policies that detail *res judicata* would recognize that efficiency factors can counsel not only for but also against preclusion.”¹¹⁶ This statement seems more accurate. Casad and Clermont continue on to argue that “[s]ome major fairness factors push against a rule of preclusion, but so do some minor efficiency factors.”¹¹⁷ I will show that there are many fundamental efficiency factors, in addition to the “minor” ones mentioned by Casad and Clermont,¹¹⁸ which argue against a rule of preclusion, and that the modern common law broad-scope model of cause of action estoppel is in many ways inefficient. In some cases, RJ, and especially the rule against splitting a single cause of action, does not contribute to an economically efficient legal system.

B. Litigation Costs

As the economists say, litigation is costly. It involves both private and public costs (the latter, in the form of expenditures for judges, court personnel, and courthouses).¹¹⁹ Private litigation costs involve, at a minimum, the collection and exchange of information between the parties about the nature of the claimant’s legal demand and the basis of the respondent’s refusal to comply with the demand.¹²⁰ When the controversy reaches the stage of litigation, the parties incur additional costs in their efforts to convey information to the court by pleading, motions, testimony,

¹¹⁵ James, Hazard & Leubsdorf, *supra* note 1 at 686-87. See also Vestal, *RJ/Preclusion*, *supra* note 3 at 103.

¹¹⁶ *Supra* note 3 at 30. Also note the following observation by Casad & Clermont:

Moreover, although some arguments that draw instead on fairness do favor preclusion, powerful fairness concerns cut the other way, counseling either to stop the rule of *res judicata* short of the particular case or to create an exception to the rule of *res judicata* for the particular case. Finally, *res judicata* does not exist in a procedural vacuum, but responds to specific substantive policies as well. (*ibid* at 30-31).

¹¹⁷ *Ibid* at 33.

¹¹⁸ *Ibid* at 33-34.

¹¹⁹ See e.g. US, Rand—The Institute for Civil Justice, *Costs of the Civil Justice System: Court Expenditures for Processing Tort Cases*, R-2888-ICJ, by James S Kakalik & Abby Eisenshtat Robyn (Santa Monica, Cal: Rand—The Institute for Civil Justice, 1982) at vii <<http://www.rand.org/pubs/reports/R2888/>>.

¹²⁰ The survey brought in the text above is based on James, Hazard & Leubsdorf, *supra* note 1 at 364-66.

and so forth. There are usually additional costs such as lawyers' fees, court fees, stenographic costs, expert witness fees, and other expenses.¹²¹

Below, I analyze the litigation costs caused by cause of action estoppel. In advancing the economic case against the cause of action estoppel rule, I compare the presumed cost of litigation under the rules of cause of action estoppel with that of a more focused litigation (the latter being possible only if we have pared down the cause of action estoppel rule), and show that the latter may be cheaper than the former.¹²²

1. *Ex Ante* Analysis

The aforementioned traditional view that “it is wasteful to society and harassing to the adversary to have more than one trial,”¹²³ and similar justifications of cause of action estoppel, address the rule from an *ex post* perspective, without considering the effects of the rule on the parties' incentives before a dispute has been initiated. Some scholars argue that procedural rules are often examined from a narrow perspective, focusing on the effect of the rules *ex post*.¹²⁴ In an effort to strike a proper balance between “justice” and “efficiency”, courts tend to ignore the *ex ante* effects of procedural rules, that is, the effects before their actual application. *Ex ante* examination of legal rules is a fundamental element of the economic approach to the analysis of law, designed to give jurists an insight into the effects of legal rules on the behaviour of the parties.¹²⁵ *Ex ante* analysis of the rules of cause of action estoppel can reveal the effect of these rules on private litigation costs.¹²⁶

It appears that the broader the scope of cause of action estoppel, the higher the private litigation costs of conducting a single lawsuit. First,

¹²¹ *Ibid* at 364.

¹²² We do not compare, however, the cost of litigation under the rules of cause of action estoppel with the possibility of multiple actions corresponding to multiple causes of action (the latter also possible only if we pare down the cause of action estoppel rule). In this scenario, presumably the economics may turn out to favour litigation under the rules of cause of action estoppel.

¹²³ James, Hazard & Leubsdorf, *supra* note 1 at 686-87.

¹²⁴ See e.g. Alon Klement & Roy Shapira, “Justice and Efficiency in Civil Procedure—A New Perspective” (in Hebrew) (2007) 7 *Law & Business Review* 75.

¹²⁵ As Steven Shavell explains, “Under the economic approach to the analysis of law, two basic types of questions about legal rules are addressed. The first type is *descriptive*, concerning the effects of legal rules. ... Given the characterization of individuals' behavior as rational, the influence of legal rules on behavior can be ascertained” (*Foundations of Economic Analysis of Law* (Cambridge, Mass: Belknap Press, 2004) at 1).

¹²⁶ Klement & Shapira, *supra* note 124 at 102. For an analysis of the influences of issue preclusion see “Exposing the Extortion Gap”, *supra* note 104.

under broad-scope cause of action estoppel, it is necessary to fully claim all items and remedies that are part of one cause of action in a single action because the plaintiff cannot sue later on the original cause of action or on any of its items—even if the item has been omitted from the original action. Second, it is necessary to expend significant effort on each cause of action because the consequences of the decision have far-reaching effects on possible future actions. So, the broad-scope cause of action estoppel substantially increases the litigation costs of both the plaintiff and the defendant. Naturally, broad-scope cause of action estoppel also increases public litigation costs because the court must spend more time dealing with the initial action.

Furthermore, it appears that the broad-scope of the cause of action estoppel produces uncertainty over the rights of the parties because the many issues, claims, and remedies that are involved significantly increase ambiguity. This also increases the *ex ante* costs of litigation owing to higher “uncertainty costs”.¹²⁷

These observations lead to the conclusion that under broad-scope cause of action estoppel, fewer claims are submitted to the court, but the cost of every claim is much higher than that of an average claim under a narrow cause of action estoppel policy. This can have an adverse effect on access to judicial decision-making.¹²⁸ *Ex ante* considerations of broad-scope cause of action estoppel can prevent plaintiffs from submitting their claims to the court because of the need to claim all remedies in one cause of action, which could increase trial costs to a level that may prevent them from submitting their claims at all.

2. The Direct Costs of Stimulating Overlitigation in the Initial Action

We have seen in Part III that insistence on including all factually distinct claims in one action may have disadvantages, some of which affect cost-efficiency for both the litigants and the courts. As noted, preclusion is liable to force parties to litigate their potential claims to the utmost, thereby increasing the cost of litigation. But if the plaintiff were permitted to sue in the first action for only a portion of the remedies without the risk of preclusion, there is a reasonable chance that in many cases, as shown above, there would be no need to sue for the other remedies in the end. In

¹²⁷ On uncertainty costs in general see James, Hazard & Leubsdorf, *supra* note 1 at 365.

¹²⁸ The above discussion, in Part III.A, focused on the *ex post* effects of broad-scope cause of action estoppel on the constitutional right to access to judicial decision-making—the prohibition of initiating further claims on behalf of the first cause of action. The analysis in this section draws attention to a more harmful effect on access to judicial decision-making.

the cases illustrated in Part II.C—dealing with the plaintiff's strategic considerations—it is in the public's interest to allow the plaintiff to split a single cause of action in order to maximize the efficient operation of the courts, and reduce both private and public litigation costs.

As mentioned, cause of action estoppel is also liable to cause parties to include possible claims that they may be unwilling to forgo but are simultaneously hesitant to press, which can also result in increased costs of litigation, both private and public. As I quoted before in my last article, Casad and Clermont explain this issue as follows:

The simplistic approach is to assume that *res judicata*, at least if effortlessly applied, always saves costs by foreclosing additional litigation. But a moment's thought reveals countervailing effects. A broad rule of claim preclusion will encourage a claimant to put everything before the first court, while a narrower rule might result in unassembled matters never having to be litigated at all. A broad rule of issue preclusion, which establishes an outcome for all purposes in all contexts for all times, may produce litigation to the death over that issue in the initial action. Obviously, every *res judicata* problem requires the weighing of net savings: adding up the savings of avoided later litigation, but subtracting the costs of fighting over *res judicata*'s application and also the costs of intensified initial litigation.¹²⁹

In some cases, the plaintiff is not permitted to split a single cause of action into two or more actions that deal with the different remedies that function in different directions, such as when the plaintiff claims for cancellation and restitution, and alternatively claims for the enforcement of the contract. In such cases, the cause of action estoppel forces the plaintiff to provide sufficient evidence to prove both remedies. This makes the litigation more complex and less efficient for both the court and the litigants than if the plaintiff were permitted to split the cause of action into these two remedies, with a reasonable chance that the first remedy would be sufficient and the second remedy unneeded. But even if the plaintiff wished to sue later, the permission to split remedies would not be considered inefficient; since the court's decision in the first action should function as an issue estoppel, the issue determined in a prior action could not be relitigated in the later action based on a different claim or demand.

3. Aggravation Costs

An additional aspect of the cost of litigation, described in the following, is the psychological toll that it carries:

Litigants usually find litigation to be not merely a distracting "waste of time" but also intensely aggravating. They suffer worry, loss of

¹²⁹ *Supra* note 3 at 34.

sleep, tension, and spasms of rage. There is no legitimate market value for this kind of human suffering, and calculation of its cost is therefore artificial. ... The cost for most people is nevertheless real, perhaps especially “real” precisely because the burden of this cost is not readily transferable through the market or through a measure of damages. ... Be that as it may, it is possible to assign artificially a value to psychological cost, just as the law assigns a value to “pain and suffering” incurred by one who has suffered personal injury. That value can then be made commensurate with other costs involved.¹³⁰

It seems that the aggravating effects of cause of action estoppel described in Part II increase the psychological aspects of the private costs of litigation. Furthermore, as we have seen, the aggravating effects harm cooperation and the reasonable relations between the parties, which in turn further increases both private and public litigation costs. At the same time, we must also take into account the possible psychological costs of repeated interaction during litigation—but these costs are not certain as they are present only when the plaintiff chooses to litigate multiple cases, whereas under the current rule against splitting a single cause of action, the presence of psychological costs is beyond any doubt.

C. Long-Run Efficiency Considerations

Casad and Clermont highlight the efficiency considerations of the long-run deterrent effects of RJ:

Society, including all litigants, has an interest in avoiding the expenditure of time, energy, and money on repetitive litigation and in providing court access to the others waiting in line. That seems obvious enough, but it entails some nonobvious corollaries. Most importantly, the lawmaker must not restrict attention to short-run considerations. A significant efficiency consideration is the long-run deterrent effects of res judicata.¹³¹

Casad and Clermont argue that the long-run aspect favours a broad-scope rule of cause of action estoppel: “Claim preclusion’s harsh result in the case at hand might encourage many future litigants to dispose of their whole dispute, optimally defined, in a single lawsuit.”¹³²

This is true, but it is only one part of the picture. We must also pay attention to another long-run consideration favouring non-preclusion. The discussion of the aggravating effects of the rule against splitting a cause of action in Part II.B, revealed that the pro-defendant effects of the rule

¹³⁰ James, Hazard & Leubsdorf, *supra* note 1 at 365.

¹³¹ *Supra* note 3 at 31.

¹³² *Ibid* at 31.

may cause plaintiffs to counteract the skew by asserting meritless claims and remedies in court. Thus, in the long-run, cause of action estoppel increases the cost of public litigation by providing plaintiffs with added incentives to sue for meritless claims.

IV. The Effects of the Rule Against Splitting a Single Cause of Action on the Chances of Reaching a Settlement

A. *The Importance of Promoting Settlements*

In recent decades, the promotion of settlements has become an increasingly important part of the judicial role and the procedural system.¹³³ But however much we value compromise, there is always a need for a legal process in which rights, entitlements, and claims can be tested and determined by the court.¹³⁴ Methods such as pretrial conferences and court-ordered mediation, as well as a growing movement for alternative dispute resolution (ADR), serve to find new ways of encouraging parties to resolve their disputes without going to trial.¹³⁵ The principal rationale for this effort is the belief that ADR will reduce the large backlog of cases facing trial and appellate courts.¹³⁶ Out-of-court settlements have many benefits and offer considerable savings to litigants and the court. Parties that settle are spared the cost of litigation and obtain swift resolution.¹³⁷ At the same time, scarce court resources are spared. By settling their dispute, parties also avoid the tension, uncertainty, and emotional burden that litigation often entails.

¹³³ See e.g. Samuel R Gross & Kent D Syverud, "Don't Try: Civil Jury Verdicts in a System Geared to Settlement" (1996) 44:1 UCLA L Rev 1; Marc Galanter & Mia Cahill, "Most Cases Settle: Judicial Promotion and Regulation of Settlements" (1994) 46:6 Stan L Rev 1339. Whether active judicial promotion of settlements is likely to be successful or desirable is another question, the answer to which depends on the type of intervention.

¹³⁴ See Owen M Fiss, "Against Settlement", Comment, (1984) 93:6 Yale LJ 1073.

¹³⁵ See Stephen C Yeazell, "The Misunderstood Consequences of Modern Civil Process", Essay, [1994] 3 Wis L Rev 631; Judith Resnik, "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III" (2000) 113:4 Harv L Rev 924. For a summary of the various approaches to resolution without adjudication, see Owen M Fiss & Judith Resnik, *Adjudication and its Alternatives: An Introduction to Procedure* (New York: Foundation Press, 2003) at 431-532.

¹³⁶ See Jethro K Leiberman & James F Henry, "Lessons from the Alternative Dispute Resolution Movement" (1986) 53:2 U Chicago L Rev 424 at 432; Judith Resnik, "Failing Faith: Adjudicatory Procedure in Decline" (1986) 53:2 U Chicago L Rev 494 at 536-37.

¹³⁷ See Zuckerman, *supra* note 2 at para 1.116.

Promoting settlement is also a major objective of the new English CPR.¹³⁸ In his report on access to justice, Lord Woolf said that court resolution should be seen as the last resort, to be employed only if the parties are unable to resolve their dispute otherwise.¹³⁹ CPR 1.4(2)(e) and (f) express this idea by requiring the court to encourage the parties to settle their disputes using alternative resolution procedures.¹⁴⁰ To achieve this, the CPR adopted a two-pronged strategy:¹⁴¹ facilitating inter-party communication¹⁴² and providing economic incentives for settlement.¹⁴³

The present subsection analyzes the effects of the rule against splitting a single cause of action on the chances of reaching a settlement. I argue that in many ways—although not always—the rule reduces the chances of achieving a settlement and therefore has a harmful effect on both the economic and behavioural aspects of litigation, in addition to the effects discussed in the previous sections. By contrast, allowing the splitting of a single cause of action is liable—in many cases—to significantly increase the litigants’ incentives to settle and could play an important role in promoting settlements.

B. Splitting of a Single Cause of Action as an Opportunity for Employing Settlement Strategies

The present subsection shows how allowing splitting of a single cause of action can play an important role in promoting settlements by providing opportunities for the parties to employ useful settlement strategies.

1. How Does the Aggravation of Dispute Affect the Chances of Reaching a Settlement?

The aggravating effects of cause of action estoppel, as we have seen, contradict the desirable objective of co-operation between the parties in the conduct of proceedings. According to the modern English CPR, the duty of the parties to co-operate also means that “[t]hey must respond positively to reasonable requests for information and to offers to invitations to settlement negotiations, and they are encouraged to agree [on] as

¹³⁸ See generally *ibid* at paras 1.113-1.122; CPR, *supra* note 64.

¹³⁹ Woolf, *Final Report*, *supra* note 65 at 4.

¹⁴⁰ See Zuckerman, *supra* note 2 at para 1.113; CPR, *supra* note 64.

¹⁴¹ See Zuckerman, *supra* note 2 at para 1.113.

¹⁴² Represented by the pre-action protocols. See *ibid* at paras 1.104-1.112.

¹⁴³ Consisting of economic sanctions, normally in the form of adverse costs. See *ibid* at para 1.114.

many aspects of the litigation process as possible.”¹⁴⁴ Under the broad-scope rule of cause of action estoppel, it is difficult to create the environment of co-operation needed to achieve a settlement.

The rule of cause of action estoppel forces plaintiffs to include all the claims and remedies that may be developed from one cause of action, thereby aggravating the dispute between the parties, and forcing them to litigate their potential claims to the utmost. It is clear that aggravation of the dispute resulting from the rule against splitting a cause of action reduces the chances of reaching a settlement.

2. Mediator Settlement Strategies

The theory of mediation illustrates how the process of determining which issues are included in a legal action, and in what order, greatly affects the outcome.¹⁴⁵ The approach recommended by many mediators is to discuss the less problematic issues in the beginning and leave the more emotional and intensely disputed issues for later, or perhaps not address them at all.¹⁴⁶ This settlement strategy helps establish a more congenial atmosphere in which the parties are more co-operative and have a greater chance of reaching a settlement. Therefore, the mediator steers the discussion toward the issues that are most likely to be relevant to finding a solution or a settlement.¹⁴⁷

It is clear that the rule against splitting a cause of action is a major obstacle to the use of mediator settlement strategies. By contrast, allowing the splitting of a single cause of action can establish a more congenial atmosphere that provides the parties with better opportunities for achieving a settlement. At the same time, it can be argued that without prohibiting the splitting of a single cause of action, the litigants could go on liti-

¹⁴⁴ *Ibid* at para 1.100.

¹⁴⁵ See Robert A Baruch Bush & Joseph P Folger, *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* in Jeffrey Z Rubin, ed, *The Jossey-Bass Conflict Resolution Series* (San Francisco: Jossey-Bass, 1994) at 67. See also Susan S Silbey & Sally E Merry, “Mediator Settlement Strategies” (1986) 8:1 Law & Pol’y 7 at 16.

¹⁴⁶ For example, studies on divorce disputes show that mediators have a tendency not to discuss issues concerning intimate relations between spouses, such as trust and self-evaluation, although these issues have been raised by the parties. The mediators prefer to concentrate on factual issues, such as money, property, and child custody rather than dealing with the spouses’ private relations. See Bush & Folger, *supra* note 145 at 67, citing William A Donohue, *Communication, Marital Dispute, and Divorce Mediation* (Hillsdale, NJ: Lawrence Erlbaum Associates, 1991) at 160, 164. For another approach, see Silbey & Merry, *supra* note 145 at 16-17.

¹⁴⁷ See James A Wall, Jr & Dale E Rude, “Judicial Mediation: Techniques, Strategies, and Situational Effects” (1985) 41:2 Journal of Social Issues 47 at 56.

gating endlessly rather than settle. But this argument is not convincing because, as mentioned in Part III.C, the judge has the authority to prevent the plaintiff from splitting a cause of action when it does not conform to the behaviour modification model of litigation.

3. The Initial Action as an “Early Neutral Evaluation”

Another important consideration favouring cause of action splitting is illustrated above in the *Stefania Hotel* case in Part II.C. With the permission to split a single cause of action, the first action becomes an early neutral evaluating stage that provides the litigants an accurate judicial evaluation of their chances at the later stages, which affects the chances of reaching a settlement.

Many scholars have emphasized the significance of early evaluation as an important factor in encouraging a settlement. In his report on access to justice, Lord Woolf explained that we need a system “which enables the parties to a dispute to embark on meaningful negotiations as soon as the possibility of litigation is identified, and ensures that as early as possible they have the relevant information to define their claims and to make realistic offers to settle.”¹⁴⁸ A number of settlement processes, such as mediation and some forms of neutral case evaluation and scheduling, may be able to provide the litigants with more and better information for problem-solving.¹⁴⁹ For example, parties to legal disputes have resorted to “mini-trials” to resolve complex litigations between wealthy parties such as corporations. At the mini-trials, the parties present summaries of their cases. They do so within narrow time limits, before a neutral expert, and in private proceedings in the presence of senior officers from each party. Having been educated about the strengths and weaknesses of each side, the officers try to work out a settlement. They may ask the expert to advise them on the case.¹⁵⁰ In the United States there is great awareness of the advantages of early neutral evaluations, mini-trials, summary jury trials, and so forth.¹⁵¹ In England as well, we find that “[i]n the Commer-

¹⁴⁸ Woolf, *Final Report*, *supra* note 65 at 107.

¹⁴⁹ See Carrie Menkel-Meadow, “Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)”, *Essay*, (1995) 83:7 *Geo LJ* 2663.

¹⁵⁰ See Eric D Green, Jonathan B Marks & Ronald L Olson, “Settling Large Case Litigation: An Alternative Approach” (1978) 11:3 *Loy LA L Rev* 493.

¹⁵¹ See Edward Brunet & Charles B Craver, *Alternative Dispute Resolution: The Advocate’s Perspective*, 2d ed (Newark, NJ: LexisNexis, 2001) at 1-3.

cial Court, the parties' attention is drawn to the possibility of an 'early neutral evaluation' of the dispute."¹⁵²

In sum, it seems that allowing the splitting of a single cause of action can play an important role in promoting settlements by providing opportunities for the parties to use the first action as an "early neutral evaluation" device for obtaining an accurate judicial evaluation of their chances in the later stages, and therefore significantly increasing the chances of achieving a settlement. At the same time, note that the "evaluation stage", such as in the form of judicial dispute resolution, summary trials on a single issue, and the mini-trial process, is now commonplace in contemporary litigation. In other words, we need not jettison the cause of action estoppel in order to enjoy the benefits of early evaluation, but the benefits of early evaluation could be enhanced by allowing the splitting of a single cause of action.

C. The Effects of Certainty and Uncertainty on the Chances of Reaching a Settlement

Another argument against broad-scope cause of action estoppel is based on its potentially negative effect on the *ex ante* chances of the parties to settle without going to trial,¹⁵³ which depends on their expectations about what may be achieved in a compromise versus a court action.¹⁵⁴ It has been noted that "the parties, having found out in the course of discovery the strengths and weaknesses of their cases, will be more inclined to settle without going to trial at all."¹⁵⁵ As Michael E. Solimine reveals:

¹⁵² See UK, *The Admiralty & Commercial Courts Guide*, 9th ed, by The Hon Mr Justice David Steel & The Hon Mrs Justice Gloster DBE (London: Her Majesty's Courts & Tribunals Service, 2011) ("[i]n appropriate cases and with the agreement of all parties the court will provide a without-prejudice, non-binding, early neutral evaluation ('ENE') of a dispute or of particular issues" at s G2). See also Zuckerman, *supra* note 2 at para 1.120.

¹⁵³ The present article does not argue that a settlement is desirable from a social perspective. On this issue, see e.g. Fiss, *supra* note 134; Carrie Menkel-Meadow, "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference", Essay, (1985) 33:2 UCLA L Rev 485. For a summary of the variant approaches towards settlement, see Fiss & Resnik, *supra* note 135 at 440-95.

¹⁵⁴ This view is based on concepts of economic analysis of compromise. See e.g. Shavell, *supra* note 104.

¹⁵⁵ Sir Leonard Hoffmann, "Changing Perspectives on Civil Litigation" (1993) 56:3 Mod L Rev 297 at 305. See also Julius Byron Levine, *Discovery: A Comparison Between English and American Civil Discovery Law with Reform Proposals* (Oxford: Clarendon Press, 1982) at 1; William H Speck, "The Use of Discovery in United States District Courts" (1951) 60:7 Yale LJ 1132.

A well-developed literature suggests that the litigants' certainty as to the facts and law of the case leads to settlements. As the parties' assessments of the facts and of the law become more accurate and converge, the more likely it is that the parties can confidently predict the outcome of a trial, and settle accordingly.¹⁵⁶

Applying this consideration to the rule against splitting a cause of action suggests that a broad-scope of this rule obstructs the clarification of the strengths and weaknesses of the parties because the many issues, claims, and remedies involved increase the uncertainty about the parties' chances at trial and diminish the chances of out-of-court settlement.¹⁵⁷ This argument, however, is not as strong as the others mentioned in the previous subsections because there may be other factors that support a broad-scope cause of action estoppel policy. Solimine suggests that “[p]aradoxically, equally impressive sources argue that risk-averse parties are more likely to settle if the results of a trial are *uncertain*.”¹⁵⁸ If this last assumption is true, then the rule against splitting a cause of action can actually contribute to achieving a settlement because the rule increases uncertainty about the parties' chances at the trial. And to his question of who is right, Solimine provides a reasonable answer: “Perhaps both, in that ‘certainty’ is not a singular concept.”¹⁵⁹ He concludes that “[i]t seems likely, however, that certainty as to the procedural or substantive law will lead to more settlements than not.”¹⁶⁰

Another relevant factor regarding the effects of uncertainty on the chances of achieving a settlement is the manner in which the defendant evaluates the future possibility of being sued again by the plaintiff based on the original cause of action. A series of *Psychological Science* studies

¹⁵⁶ Michael E Solimine, “Revitalizing Interlocutory Appeals in the Federal Courts” (1990) 58 Geo Wash L Rev 1165 at 1180. For examples of this literature, Solimine refers to: Richard A Posner, *Economic Analysis of Law*, 3d ed. (Boston: Little, Brown and Company, 1986) at 522-26; Hon Eugene F Lynch & Lawrence C Levine, “The Settlement of Federal District Court Cases: A Judicial Perspective” (1988) 67:2 Or L Rev 239 at 246-48.

¹⁵⁷ For the factors of uncertainty and their effect on the chances of reaching a settlement, see e.g. James, Hazard & Leubsdorf, *supra* note 1 at 368-75.

¹⁵⁸ Solimine, *supra* note 156 at 1180. For examples of these sources, Solimine refers to: D Marie Provine, *Settlement Strategies for Federal District Judges* (Washington, DC: Federal Judicial Center, 1986) at 27-28; Honourable Hubert L Will, Honourable Robert R Merhige, Jr & Honourable Alvin B Rubin, “The Role of the Judge in the Settlement Process” (1978) 75 FRD 203 at 206-11.

¹⁵⁹ Solimine, *supra* note 156 at 1180. Solimine further illustrates his answer: “For example, the parties may agree on liability but be uncertain as to damages. Others may not agree on either, but one or both parties may be particularly risk-averse, and simply not willing to take the risk that their estimates are incorrect” (*ibid* at 1180-81).

¹⁶⁰ *Ibid* at 1181.

shows that people value future events¹⁶¹ more than past events. One could argue, therefore, that under a legal system that allows the splitting of a single cause of action, the defendant would hesitate to settle on the first action because he is aware of the possibility of being sued again in the future by the same plaintiff on one of the remaining items of the original cause of action that were omitted from the original action. Nevertheless, the possibility of a future suit does not necessarily cause the defendant to reject settlement offers presented in the first action because of the “optimism bias” applied by Oren Bar-Gill.¹⁶² Based on insights from behavioural law and economics, among them the underestimation of future borrowing caused by the optimism bias, Bar-Gill explains how consumers use credit cards.¹⁶³ He argues that “[c]onsumers tend to underestimate the likelihood of adverse events that might necessitate borrowing. Optimistic individuals tend to underestimate the probability of being involved in an accident that might generate high bills or other liquidity needs.”¹⁶⁴ He concludes that “[t]hese and other manifestations of the optimism bias lead consumers to underestimate the likelihood that they will incur a liquidity shock that necessitates a resort to credit card borrowing.”¹⁶⁵ Applying Bar-Gill’s observation in the context of our discussion about the effects of un-

¹⁶¹ For a summary of the literature see Eugene M Caruso, Daniel T Gilbert & Timothy D Wilson, “A Wrinkle in Time: Asymmetric Valuation of Past and Future Events” (2008) 19:8 *Psychological Science* 796. The authors present two reasons why people might rationally value future events more than past events: “First, knowledge of the future is often less certain than knowledge of the past, and the ... [temporal value asymmetry] may reflect attempts to compensate for this fact. ... Second, valuations can change the future, but not the past” (*ibid* at 796). The authors argue that temporal value asymmetry “occurs even when these rational considerations are moot” (*ibid*). Another psychological study demonstrates other implications of decision making under uncertainty regarding future events (Amos Tversky & Eldar Shafir, “The Disjunction Effect in Choice Under Uncertainty” (1992) 3:5 *Psychological Science* 305). Tversky & Shafir argue that in the presence of uncertainty, people are often reluctant to think through the implications of each outcome and, as a result, may violate Savage’s sure-thing principle (Savage’s sure-thing principle is one of the basic axioms of the rational theory of decision making under uncertainty. The principle states that “if prospect x is preferred to y knowing that Event A occurred, and if x is preferred to y knowing that A did not occur, then x should be preferred to y even when it is not known whether A occurred” (*ibid* at 305)). The authors present examples in which “the decision maker has good reasons for accepting x if A occurs, and different reasons for accepting x if A does not occur. Not knowing whether or not A occurs, however, the decision maker may lack a clear reason for accepting x and may opt for another option” (*ibid*). They suggest that, “in the presence of uncertainty, people are often reluctant to think through the implications of each outcome and as a result may violate [the sure-thing principle]” (*ibid*).

¹⁶² Oren Bar-Gill, “Seduction by Plastic” (2004) 98:4 *Nw UL Rev* 1373 at 1375.

¹⁶³ *Ibid*.

¹⁶⁴ *Ibid*.

¹⁶⁵ *Ibid* at 1376.

certainty on the chances of achieving a settlement might produce a reasonable explanation why the possibility of a future suit does not necessarily incline a defendant to reject settlement offers presented in the first action. Because optimistic defendants tend to underestimate the likelihood of a future suit by the plaintiff, they would not reject a reasonable settlement offer presented during or before the first action. At the same time, one can argue that optimism about the chances of future filing can act against accepting a settlement offer in the present. Optimism about *one's own chances* in future litigation would surely act against accepting a settlement offer at that moment.

It is not easy, therefore, to reach a final and clear conclusion about the effects of uncertainty (in the context of applying or not applying the rule against splitting a single cause of action) on the chances of achieving an out-of-court settlement.

V. Redesigning Cause of Action Estoppel

A. *Toward a Narrow-Scope Rule*

The analysis of conceptual contentions against the broad-scope Anglo-American rule of cause of action estoppel presented above revealed the problematic incentives for litigating parties under the current rules of cause of action estoppel: the undesirable effects on the conduct of litigation, the cost of litigation, and the chances of reaching a settlement. We have seen that the rule against splitting a cause of action is inconsistent with some of the major aspects of the behaviour modification model, and I argued that the rule does not necessarily contribute to an economically efficient legal system. I presented many procedural factors that argue against cause of action estoppel in its broad-scope common law version, although it should be emphasized that along with these factors we also find a few factors favouring the current rules of cause of action estoppel.

It appears that an economically efficient legal system must apply a so-called “minimal concept of *res judicata*”, meaning that the rules of RJ should be limited to the narrow question of whether the prior action actually decided the issues that were necessarily involved in awarding the judgment. This “minimal concept of *res judicata*” is also desirable from the perspective of the conflict resolution model. I agree with those who argue that “[i]t seems clear that the adjudicative process would fail to serve its social and economic functions if it did not have this minimal effect.”¹⁶⁶ Furthermore, there are significant efficiency factors that justify the need

¹⁶⁶ James, Hazard & Leubsdorf, *supra* note 1 at 674.

for a rule of preclusion, such as avoiding wasteful repetitive litigation and providing court access to litigants waiting in queue. But the article has presented many more procedural factors that argue *against* cause of action estoppel in its broad-scope common law version than those that argue *for* it. Also note that the actual effect of the few factors favouring the current rules of cause of action estoppel is rather small because the effects of issue estoppels or preclusion already ensure that an issue determined in a prior action cannot be relitigated if it arises in a later action based on a different claim or demand. In sum, the present article recommends reconsidering the rules of cause of action estoppel and redesigning them according to a more balanced paradigm.

In principle, according to arguments forwarded in this article, there is no reason why the rules of cause of action estoppel cannot be limited to the narrow question of whether the prior action decided the issues involved in awarding the judgment. According to this approach, cause of action estoppel is a drastic measure and should be applied only in clear cases in which a matter has been directly litigated, when one “has had his day in court”, and it should not to be extended to matters that could or should have been raised and litigated in the first action.

Conceptually, as I have shown elsewhere,¹⁶⁷ the effects of RJ are inconsistent with some of the main characteristics of the Anglo-American system itself and contradict many of the valued features of the procedure, such as the authority of the litigants and opportunities for persuasion, correctness, revisionism, economy, and consistency. Clearly the litigants’ autonomy is especially disregarded with the application of cause of action estoppel, which forces the plaintiff to submit the subject matter of the entire case relating to the cause of action at one time, including every remedy flowing from the cause of action based on the subject matter. James, Hazard, and Leubsdorf note the conflict between the two fundamental goals of civil procedure are “to permit full development of the contentions and evidentiary possibilities” of plaintiffs and respondents, and “to bring an adjudication to a final conclusion with reasonable promptness and cost,” with the second aim receiving lesser weight.¹⁶⁸

The rules permit the presentation of alternative positions and considerable freedom in developing both the claim and the defence during the trial. Similar liberality should be allowed after the judgment.¹⁶⁹

¹⁶⁷ Sinai, “Reconsidering RJ”, *supra* note 9.

¹⁶⁸ *Supra* note 1 at 673.

¹⁶⁹ As noted by James, Hazard & Leubsdorf:

B. A Comparative Perspective

Martin Shapiro has claimed that it should be a chief purpose of comparative law to provide data for testing general theories about law.¹⁷⁰ Indeed, examination of legal history reveals that the rules of claim preclusion did not always apply in some legal systems. Furthermore, our proposal in favour of narrow-scope claim preclusion is strengthened by the experience of two legal systems, German-Continental civil law¹⁷¹ and Jewish law,¹⁷² which have adopted a minimal concept of cause of action estop-

[T]here is, in principle, no reason why the rules of *res judicata* could not be limited to the narrow question whether the prior action actually decided the issues necessarily involved in awarding the judgment. This could be called a minimal concept of *res judicata*; without it, a judgment would not conclusively decide anything. It seems clear that the adjudicative process would fail to serve its social and economic functions if it did not have this minimal effect (*ibid* at 674).

Furthermore, the authors stress that an appeal could be—but is not—an opportunity for the comprehensive reconsideration of the case. Motions for extraordinary relief from judgments can serve a similar function, but they do not because their scope is much more limited (*ibid* at 742, 781-92).

¹⁷⁰ *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981) at vii.

¹⁷¹ I prefer to focus on Germany rather than on other civil law jurisdictions because many jurists consider it to be a fine representative of the European-Continental system of civil procedure, which is valued more highly by scholars than the United States common law of civil procedure. See e.g. John H Langbein, “The German Advantage in Civil Procedure” (1985) 52:4 *U Chicago L Rev* 823. See also Benjamin Kaplan, Arthur T von Mehren & Rudolf Schaefer, “Phases of German Civil Procedure” (1958) 71:7-8 *Harv L Rev* 1193 & 1443.

¹⁷² Modern analysis of procedural rules in widely divergent legal systems has prompted many to question—and sometimes change—the rules in their own legal systems, often importing these rules from other systems. A central axis of comparison runs between the adversarial system practiced in common law jurisdictions (England and the United States) and the inquisitorial system practiced on the European Continent. There is, however, an additional axis of comparison of particular interest that extends between the adversarial-inquisitorial systems on the one hand and the procedural system of Jewish law on the other. This comparison is based on a body of original legal literature that takes into account not only legal rules but also cultural differences between Judaism and dominant Western society. Some scholars are of the opinion that Jewish law provides a basis for the reform and development of Western law (see e.g. H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 3d ed (New York: Oxford University Press, 2007) at 120-22). In the United States, some scholars use, and often reinterpret, Jewish law to provide a counter-model to dominant conceptions in contemporary US legal theory. See Suzanne Last Stone, “In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory” (1993) 106:4 *Harv L Rev* 813. For an example of comparative research dealing with procedural law, see Yuval Sinai, “The Doctrine of Affirmative Defense in Civil Cases—Between Common Law and Jewish Law” (2008) 34:1 *NCJ Int'l Law & Com Reg* 111; Sinai, “Reconsidering RJ”, *supra* note 9.

pel. In the past, I presented a general recommendation for reconsidering the rules of RJ through a comparative analysis.¹⁷³ Some of the observations presented in that article apply here as well with regard to cause of action estoppel and the rule against splitting a cause of action.

The German model of RJ is in many regards similar to the doctrine of RJ in Anglo-American jurisprudence, but the scope and effect of the doctrine are somewhat different.¹⁷⁴ According to one interpretation of the German doctrine, the goal of RJ is to guarantee certainty in litigation and to preclude repeated relitigation of matters already litigated and decided.¹⁷⁵ German civil procedure does not recognize the concept of RJ in its broad, common law sense.¹⁷⁶ The basic rule is that a judgment binds the parties with respect to the subject matter of claims actually asserted and decided, but parties are not bound in actual or potential claims not submitted for adjudication.¹⁷⁷ In other words, the concept of cause of action estoppel in the broader Anglo-American version, including the rule against splitting a cause of action, does not apply in the German civil procedure.¹⁷⁸ In the previous subsection, I argued for the desirability of a narrow-scope rule of cause of action estoppel. In this sense, the German model of RJ is superior to the common law model.¹⁷⁹

In my earlier article, I presented the details of the concept of non-finality of judgments, unique to Jewish law.¹⁸⁰ Although RJ applies to

¹⁷³ *Ibid.*

¹⁷⁴ See generally Peter L Murray & Rolf Stürner, *German Civil Justice* (Durham, NC: Carolina Academic Press, 2004) at 355-66. See especially *ibid* at 355, n 245. In the German civil system, only a judgment that is not subject to further appeal stands as conclusive adjudication and is subject to RJ (*ibid* at 355-56). The rationale is that wherever there is a multi-level apparatus of justice, as in the continental system in general (see Mirjan R Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1986) at 28-29), and in the German civil justice system in particular (see Murray & Stürner, *supra* at 367-418), original decisions can be treated as tentative, and the need for decision stability is felt only after the highest authority has spoken (see Damaska, *supra* at 145).

¹⁷⁵ See Murray & Stürner, *supra* note 174 at 355.

¹⁷⁶ *Ibid* at 357.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Although it poses some difficulties from the perspective of cost-efficiency, as discussed at length in Part IV of Sinai, "Reconsidering RJ", *supra* note 9.

¹⁸⁰ See *ibid* at Part V. For a general overview of some of the relevant sources in Jewish Law see Prof Nahum Rakover, *A Guide to the Sources of Jewish Law* (Jerusalem: Library of Jewish Law, 1994); Menachem Elon, *Jewish Law: History, Sources, Principles*, translated by Bernard Auerbach & Melvin J Sykes (Philadelphia: Jewish Publication Society, 1994) vol 3. In general, the principles and rules of Jewish law are based on the Scripture (Rakover, *supra* at 15). Some rules are mentioned explicitly, but others are

some extent in Jewish law as well, it is minimal compared with common law and continental jurisprudence.¹⁸¹ Jewish law also adopts a balanced approach toward cause of action estoppel from the perspective of the behaviour modification model and from the point of view of cost efficiency. In principle, the plaintiff has the right to divide a cause of action into different stages and submit different claims because the plaintiff may have legitimate reasons for doing so. Nevertheless, the court does not permit the plaintiff to split a single cause of action if it will harm the defendant, or if the judge believes that the plaintiff is attempting to harass the defendant by submitting one claim at a time in order to make the defendant take a new oath each time.

The above observations are based on the writings of an important rabbinical authority, Rabbi Shimeon ben Tzemach Duran, the Rashbatz, a North African rabbi of the fourteenth century who was asked about a defendant's demand that the plaintiff aggregate all of his remedies in one cause of action so that he may not reopen the case later.¹⁸² In other words, the defendant was seeking to achieve the effect of an ancient version of the rule against splitting a single cause of action and the rule of cause of action estoppel to prevent the plaintiff from later reopening the case. Rashbatz wrote that there is no legal ground for compelling the plaintiff

only implied. All are elucidated in the teachings of the *Tanna'im* and *Amora'im*—the rabbis of the *Mishnah* and *Talmud*—and presented systematically in the codes. The *Mishnah* is the first topical compilation of the Oral Law (*Torah shebe'al peh*), completed around 200 CE (*ibid* at 33). For some 300 years after the redaction of the *Mishnah*, approximately 200-500 CE, Jewish scholarship was devoted primarily to the study, clarification, and application of the *Mishnah* (*ibid* at 43). The scholars of this period, known as the *Amora'im*, wrote the *Talmud*. Halakhic literature after the period of the *Talmud* includes codes, halakhic glosses, responsa literature, and court decisions (*ibid* at 61). The main codes are the Maimonides code *Mishneh Torah* (1135-1204), *Tur* (1270-1340), and *Shulhan Arukh* (1488-1575), which is universally accepted as the authoritative code of Jewish law. Thus, over many generations, a comprehensive legal system has developed based on the Scripture as elaborated by exegesis and amplification.

¹⁸¹ As I showed in Part V of Sinai, "Reconsidering RJ", *supra* note 9, in Jewish law a judgment is always subject to revision—normally by the court that rendered it in the first place—if new evidence has come to light disproving the facts that the judgment was based on, provided that the party seeking to adduce such new evidence is not barred from doing so. Every judgment is also subject to revision for errors of law. The traditional, ancient concept of non-finality of judgments in Jewish law also applies in the contemporary rabbinical courts authorized in the modern State of Israel. Nevertheless, it bears mentioning that the lack of finality in Jewish law, as acknowledged, arose at a time when there was no appellate level court in the Jewish legal system. After an appellate court process was established in Israel, the nature of finality changed—although a broader residual discretion is left to trial adjudicators in religious courts to reopen cases that have not yet been appealed.

¹⁸² Rabbi Shimon ben Tzemach Duran, *Shut Ha'Tashbetz* [Responsa Tashbetz], revised ed. (Lvov: np, 1891) vol 2 at § 2, online: Hebrew Books <<http://HebrewBooks.org>>.

to assemble all of his remedies against the defendant in one cause of action. According to Rashbatz, the plaintiff has the right to sue in a first action based on one remedy only, and later again in other actions based on other remedies. The plaintiff has the right to divide one cause of action into different stages and sue separately based on different remedies because the plaintiff may have legitimate reasons for doing so. Rashbatz presented some of these reasons. First, the plaintiff may have witnesses who can appear readily in court to testify about one remedy, whereas witnesses related to another remedy may be far and cannot appear in court immediately. In this situation it would be unjust to prevent the plaintiff from submitting an action until it is possible to include all the claims. Second, the plaintiff may not want to submit all of the remedies in the beginning because there is a chance that the defendant would later acknowledge the second remedy. Third, the plaintiff may believe that there is a chance of reaching a settlement or compromise with the defendant regarding the second remedy.¹⁸³ Fourth, in the beginning the plaintiff may not know all the potential remedies that are possible against the defendant. All of these reasons are considered sufficient for splitting a cause of action into different stages, so that cause of action estoppel does not apply to it. The defendant can prevent the plaintiff from splitting the cause of action only if it can be shown by the defendant that this would cause damage to the defendant's property. The main halakhic codifiers accepted Rashbatz's opinion.¹⁸⁴

As I wrote in my prior article, the defendant's objection to the plaintiff splitting the cause of action is accepted by the court if such splitting is liable to cause damages to the defendant. For instance, if a claim of non-ownership of land is filed against a defendant who has possession of the land under dispute, and the plaintiff asks the court to address the issue of the land's ownership at a later stage, the defendant's objection is accepted because delaying the judicial decision about ownership could affect the value of the land, which would decrease owing to rumours about the ownership dispute.¹⁸⁵ The court can also prohibit the plaintiff from delaying part of the claim even if smaller damages may be incurred by the defen-

¹⁸³ The chances of seeking a settlement under the common law doctrine of cause of action estoppel are not high, see text accompanying *supra* note 144.

¹⁸⁴ Rabbi Yosef Karo, *Shulhan 'Aruk* [Code of Hebrew Law], translated by Rabbi Dr Chaim N Denburg (Montreal: Jurisprudence Press, 1955) vol 4: *Hoshen Ha-mishpat* [Breastplate of Judgment] at § 24 (containing original Hebrew text (Lemberg ed, 1911) and glosses of Rabbi Moses Isserles) [translated by author]; Rabbi Yisroel Yisser Isserlin, *Sefer Pischei Teshuvah* (in Hebrew) (Vilnius: np, 1874) ad loc, § 4 [*Pischei Teshuvah*].

¹⁸⁵ See Rabbi Shlomo ben Avraham ben Aderet, *She' elot u-teshuvot ha-Rashba* [Responsa Rashba], ed by Aharon Zelznik (Jerusalem: Jerusalem Institute, 733 [2005-06]) vol 1 at §1077 [translated by author].

dant—for example, if multiple actions against the defendant would affect the defendant's reputation.¹⁸⁶

Another sixteenth century North African rabbi I wrote of, Radbaz, commented in a *responsum* that the court should not permit the plaintiff to split a single cause of action if the judge believes that the plaintiff is a fraud who wants to harass the defendant repeatedly with one claim at a time in order to make the defendant take a new oath each time.¹⁸⁷ In such a case the plaintiff has no legitimate reason for splitting a cause of action, contrary to the cases mentioned by Rashbatz.¹⁸⁸

Conclusion: A Proposal for a New Model

The present article argues that some of the major elements of RJ, especially cause of action estoppel and the rule against splitting a single cause of action, raise difficulties and have many drawbacks—moral, conceptual, social, behavioural, in addition to cost efficiency drawbacks. It was demonstrated that the rules of cause of action estoppel, and particularly the rule against splitting a single cause of action, do not necessarily contribute to an economically efficient legal system, and that these rules act as obstacles to achieving a desirable behaviour modification model of litigation and to reaching a settlement. They also provide problematic incentives to the parties involved. The rules of cause of action estoppel, especially the rule against splitting a single cause of action, do not comply with the behaviour modification model because they have an undesirable effect on the conduct of litigation. It was further shown that the said behavioural effects might also increase the cost of litigation and reduce the chances of reaching a settlement.

Note that the difficulties raised by the present article with regard to the rules of cause of action estoppel do not necessarily amount to a complete indictment of the concept of RJ, and some good arguments support at least a minimal concept of RJ. But the arguments presented here should lead us to reconsider the current broad-scope common law model of RJ and help us understand the need for a more balanced model. The traditional assumption that an efficient judicial system should seek to in-

¹⁸⁶ See Rabbi Shlomo ben Avraham haCohen, *Shut Maharashach Shlishi* [Responsa Maharashach], (Thessaloniki, np: 1730) vol 3 at § 26, online: Hebrew Books <<http://HebrewBooks.org>> [translated by author].

¹⁸⁷ Rabbi David ben Solomon Ibn Zimra, *Shut haRadvaz* [Responsa Radbaz], revised ed (Jerusalem: np, 1882) vol 4 at §1281, online: Hebrew Books <<http://HebrewBook.org>> [translated by author].

¹⁸⁸ Therefore there is no contradiction between Rashbatz and Radbaz, as explained in *Pischei Teshuvah*, *supra* note 184, § 4 (near end of section).

clude everything in one single “cause of action” is not accurate, at least in the cases addressed in this article. I therefore propose to establish a more balanced rule that would replace the current broad-scope rules of cause of action estoppel and the rule against splitting a cause of action.

According to the proposed model, the optimal concept of cause of action estoppel should be narrower than the Anglo-American version. The basic rule should be that a judgment binds the parties with respect to the subject matter of claims actually asserted and decided, but parties are not bound in actual or potential claims not submitted for adjudication.

A legal system aiming to serve litigants must combine the practical-strategic considerations of both litigating parties and those related to the efficiency of the judicial system.¹⁸⁹ The proposed model should seek to include in a single lawsuit only that which is *efficient* to include in that lawsuit from the perspective of both the courts and the litigants. It is not necessary to fully litigate all grievances arising from a transaction. Three major procedural goals should be considered by the courts: (a) contribution to the efficiency of the legal system, (b) contribution to the behaviour modification model and to the co-operation of litigants, and (c) increasing the chances of reaching a settlement. I propose cancelling the contemporary common law strict and broad-scope rule against splitting a cause of action because this rule does not achieve the three desired procedural goals.¹⁹⁰ Instead, I propose that a more lenient and flexible rule apply, which gives the court greater discretion to act in a way that is consistent with the three major procedural goals. In my proposal, the default rule permits cause of action splitting, but there are exceptions to the general rule. The court should have the authority to prevent the plaintiff from splitting a cause of action when it finds that cause of action splitting would clearly cause inefficiency, have a harmful effect on the behaviour modification model, or reduce the chances of reaching a settlement.

It is possible to say that I chose the easy way of arguing against a strict rule and in favour of a flexible one, which is always more straightforward because it allows for discretion. But what about the costs of discretion, such as increased uncertainty, subjectivity of judges, lack of clear *ex ante* prescriptions, and so forth. The answer is that the current common law rule is not as strict as it seems and also suffers from similar costs of discretion and uncertainty. As I have stated elsewhere,¹⁹¹ although the

¹⁸⁹ See Rotenberg, *supra* note 90 at 399.

¹⁹⁰ RJ law itself contains some flexibility to permit relitigation, but the limitations on relitigation are strict and strictly enforced, and the discretion of the courts is narrow. See James, Hazard & Leubsdorf, *supra* note 1 at 675.

¹⁹¹ See Part II of Sinai, “Reconsidering RJ”, *supra* note 9.

public interest in RJ is justified by the general trend to promote stability, certainty, and consistency, modern Anglo-American rules often do not promote these values in practice. The major trend in the development of the modern doctrine of RJ expands the theoretical applicability of the preclusion rules,¹⁹² at the same time recognizing and generating more and more exceptions of considerable scope and discretionary nature to this doctrine.¹⁹³ It is clear that this trend does not contribute to certainty and consistency.¹⁹⁴ Another factor causing uncertainty and inconsistency is the variety of definitions offered by judges, scholars, and statute-writers to the phrase “cause of action”—the broader the definition, the broader the scope of preclusion. Despite attempts to find an acceptable definition of “cause of action”,¹⁹⁵ no consensus has been reached.¹⁹⁶ It appears, therefore, that our proposal in favour of a flexible rule would not significantly increase the costs of discretion that are also present in the current rule.

Under the proposed flexible rule that allows splitting a cause of action or claim, plaintiffs can pursue a cause of action in stages, using legitimate strategic considerations, and are not forced to press their claims to the utmost. The court should allow the plaintiff to split a single cause of action *ex ante* (when requested by the plaintiff at the beginning of the proceedings) or even *ex post* (when it had not been requested initially). This does not mean, however, that every strategic consideration is legitimate. The court should not allow cause of action splitting in every case. For instance, as mentioned previously, it should not allow the plaintiff to split a single cause of action if it would harm the defendant or if the judge believes that the plaintiff is attempting to harass the defendant repeatedly with one claim at a time in order to cause damage to the defendant. In such a case the plaintiff has no legitimate reason for splitting a single cause of action, as it does not contribute to the behaviour modification model of litigation, which I believe should be a major consideration in allowing a cause of action to be split. Nevertheless, we cannot ignore the

¹⁹² For the wider modern scope of finality see James, Hazard & Leubsdorf, *supra* note 1 at 674-75.

¹⁹³ See Casad & Clermont, *supra* note 3 at 36. Exceptions to RJ are indicated in the references mentioned at *supra* note 40. For example, English law provides that new evidence unavailable at the time of trial can constitute under certain circumstances an exception to the application of RJ. See e.g. Andrews, *Principles*, *supra* note 2 at 505.

¹⁹⁴ Although, in many cases, all the factors appear to support a general rule of preclusion, in any individual case, these same factors may call for non-preclusion, justifying a special exception to the rule.

¹⁹⁵ For a summary of the different definitions see e.g. James, Hazard & Leubsdorf, *supra* note 1 at 684-88. See also Cleary, *supra* note 10 at 341-42 (the author criticizes the extensive efforts to define cause of action).

¹⁹⁶ See Harnon, *supra* note 8 at 550-59.

considerations of the conflict resolution model and, at the beginning of this section, I also argued that a “minimal concept of *res judicata*” should apply since it is also desirable from the perspective of the conflict resolution model.
