Private Law and Institutional Competition

Jane Stapleton*

One way to study law as law *in the world* and to invite lawyers to see what they do from this perspective is to show the view from outside looking into the legal system: and that is what much of the socio-legal work done today aims to achieve. Social scientists, economists and so on apply their skills and insights to law as an institution. In this way we can use, for example, insights into witness psychology to evaluate our rules of evidence and procedure, economists can help structure our ideas about the legal regulation of markets and so on. But a second way to study law as law in the world is to look within the conventional materials of legal discourse, in other words into caselaw and law reform debates, and to unmask the full degree to which these phenomena are not closed self-contained *legal* phenomena but ones which are the direct product of social, political and economic concerns. As lawyers well know, modern legal scholarship has developed an increasing sensitivity to this perspective. Here I hope to use a loose notion of 'institutional competition' to rephrase old questions and phrase new ones in an attempt to broaden this perspective.

We all know that a quarter of a century ago New Zealand did a very strange thing: it replaced a large section of the private law of obligations with a new separate institution, the Accident Compensation regime.[1] It was a move that attracted and still attracts world attention, ranging from communitarian admiration to bewildered horror in some of the more entrepreneurial sectors of the US plaintiffs' Bar. In part the creation of the Accident Compensation regime was facilitated by a perspective which saw tort law as a particular type of institution with a particular role, and one which public policy analysis could then viably consider as having institutional alternatives and substitutes. Tort was seen to have 'institutional competitors'.

Here I want to invite you to consider how fruitful it might be to develop this institutional perspective of private law more widely. I will invite you to ask whether in different contexts the private law of obligations, by which I will mean the private *common* law of obligations, can be fruitfully seen as an institution which may 'compete' with other social institutions as a way of: resolving disputes between individual private citizens; handling misfortunes which might befall an individual; regulating behaviour; signalling rights/entitlements; and so on. In some areas this perspective will already, albeit covertly, be in place. In others, we find private lawyers have neglected important questions which an institutional approach helps bring to the fore.

Let me make a few things clear at the start. First, I want to use the word 'competition' here to refer to not only institutions which are perceived as having such parallel functions that they are substitutes or alternatives but also quite broadly to include situations where the role and content of private law is merely *moulded* by a concern with the role of other institutions rather than crudely ousted

* Professor, Research School of Social Sciences, Australia National University.

1 See the Accident Rehabilitation and Compensation Insurance Act 1992.

by such concerns. Sometimes that is used to justify intervention of private law, as where the private law is used to bolster the criminal law as in *Blake's*[2] case, sometimes to confine private law as in refusing to allow government policy decisions to be impugned via negligence claims. Secondly, I am going to adopt a quite broad interpretation of 'institution': one that extends to include non-formal 'arrangements that coordinate the behaviour of individuals in society', such as the market.[3]

Looking at private law in this way reveals that a perceived competition can result from quite separate arguments, for example: the argument that another institution is better at creating an entitlement for the complainant; or the argument that the defendant's behaviour is better regulated by another institution and so on. Importantly, though, one theme which emerges throughout is that when judges at the micro level of caselaw and others at the macro level of public choice come to resolve this perceived competition and perhaps make institutional choices, the process demands that weight be allocated to and be seen to be allocated to values which are directly or indirectly at the heart of political controversies. It is for this reason that I would want to extend what Sam Stoljar said about tort law, namely that: "The law of torts...is...the law's most constant and adventurous exercise in applied morality"[4] to add: the law of torts is also one of the law's most constant and adventurous exercises in applied politics.

Perceived Competition of Private Law Entitlements with Other Institutions at the Micro or Doctrinal Level

When courts are called upon to determine what should be the legal obligations a citizen owes another, there is a vast array of concerns which the particular facts might trigger. For example, in our law of defamation we need a concept of 'defamatory' which can adequately handle the phenomenon within a multicultural society that one statement may be regarded as totally innocuous in one community but may seriously damage the reputation of an individual in another community, for example the allegation in a Muslim community that a person drank alcohol. Some concerns raised by claims to private law entitlements raise more general questions of an ideological flavour, on which even people from identical cultural backgrounds may hold vastly different views. A topical and extensively litigated example here might be the degree to which one individual should have to control the behaviour of another.

(a) where the defendant is (a member of) the other institution

In determining private law entitlements courts are also often called upon to consider the appropriate role of certain institutions in society because they are the target of civil litigation. One example might be the health care profession: we see different jurisdictions reacting differently to the argument that such professions should in effect set their own legal standards of care.

Many of the most topical examples of this process by which courts evaluate institutional role are found in the area of the civil liability of public authorities,

2 *Attorney-General* v *Blake* [1998] 1 All ER 833.

3 Philip Pettit, 'Institutional Design and Rational Choice' in *The Theory of Institutional Design*, ed. R. Goodin (Cambridge University Press, 1996)54, at page 55.

4 S. Stoljar. 'Concerning Strict Liability' in *Essays On Torts*, ed. P. Finn (1989), 267.

that is when public authorities are sued by individuals. For example, when Parliament sets up a public body specifically to regulate other institutions, say banks or companies or polluting factories, when if ever should the victims of the latter institutions be able to sue the regulator in damages? When should the regulator be immune from such complaints and free to sacrifice the interests of the individual to the perceived interests of the community as a whole? For example, a bank regulator who suspects maladministration in a bank might put confidence in the banking system above the interests in the individual depositors and so not warn them of his suspicions in the hope the bank could put its house in order. Clearly then, cases of public authority liability raise important questions about the nature of an individual citizen's rights against those of the collective. My point here is that it is a shame so few private lawyers analyse such cases in these public law terms rather than in traditional doctrinal terms.

Even where the facts of a public authority case do not trigger these grand political questions of trade-off between the individual and the collective good, there can nevertheless be important questions raised about the relationship of the public authority to the citizenry. Take the notorious example of council building inspectors who carelessly pass as adequate, foundations which prove so inadequate that the person who acquires the new structure suffers economic loss as a result. Here the public authority has no excuse that its behaviour was somehow designed to promote the general good at the expense of the individual.

But nevertheless, courts in some jurisdictions have decided that, given the special role of the institutional defendant, it should owe no duty of care to the individual. Put briefly the justification given goes something like this: public authorities are entrusted with a lot of things to do and many of them involve the supervision of the conduct of others. If the public authority was to be available as a target for a civil claim when those others misbehave, then the victim is likely to sue only the deep-pocketed authority and not bother suing the actual injurer. The building owner for example would sue the building inspector and not the actual builder who dug the bad foundations.

In cases where there is no point in the public authority then seeking contribution from the injurer because he is not good for judgment...and as we all know builders are notorious in this regard...that loss remains on the authority. This is so even though its level of responsibility for the damage to the victim might be thought quite peripheral *compared to that of the direct injurer,* the builder. It is bad enough when a private defendant gets saddled with a liability bill way out of proportion to his responsibility but there are, it is said, real public policy objections to burdening a public authority with such a *disproportionate* burden: it will distort their budgets and thereby distort the discharge by them of their public functions, in the discharge of which functions there is a clear public interest.

Regardless of whether you accept these arguments, and how could I expect any New Zealander to do so, what is striking is how different jurisdictions respond to them. As we know, the House of Lords accepts the no liability arguments[5] but the New Zealand Court of Appeal rejects them[6] and does so by

5 *Murphy* v *Brentwood District Council* [1990] 2 All ER 908.

6 *Invercargill City Council* v *Hamlin* [1994] 3 NZLR 513; [1996] 1 All ER 756.

an appeal to the relevant market custom here where, it seems, it is the almost universal custom in the house market for buyers to rely exclusively on the local authority inspection. New Zealand buyers do not get private surveys. From this practice the Court of Appeal constructed a duty of care on the Council, even though the effective result is that the local ratepayers will bear the burden of bad builders in their area: a result I have elsewhere called private law, 'socialising a risk'.[7]

(b) other situations

But quite apart from these cases where courts must consider directly the appropriate role of institutions because they are the target of the civil complaint, there is another important way in which issues of institutional role arise within private law. These are cases where the court is invited to *deny* protection to the plaintiff on the basis that there is some other institution which is somehow more appropriate: for the resolution of the relevant dispute; or for the handling of the relevant misfortune which has befallen the plaintiff; for the regulation of the relevant conduct of the defendant; and so on.

When this sort of argument is raised we are invited to see the *private law of obligations as an institution which 'competes' with these other social institutions.* Let me briefly illustrate this dynamic with three examples of institutions which might be perceived as competing with private law: the intervention of Parliament; the institution of the market; and the criminal law.

Parliament

The first example of perceived institutional competition I want to touch on is where, in their approach to private law, courts perceive across a particular field a competition between them and the intervention of Parliament via either pro-active regulatory systems or via the enactment of specific entitlements. It is clear that at each end of the spectrum the answer to this question is not problematic. For example, the fact that in the area of the sale of goods the legislature has enacted both regulatory offences and sales legislation which gives buyers certain rights against sellers does not pre-empt the private common law from creating entitlements against sellers in the same circumstances. That is how we were able to have *Donoghue* v *Stevenson.*[8] Conversely, where the legislature has clearly attempted to 'cover the field' it would be constitutionally improper for the common law to enter it.[9] But between these two extremes there clearly exists the potential for a competition to be perceived between the two institutional responses: and so that leads courts[10] to ask themselves when *should* private law refuse its assistance to an individual on the basis that this is an area 'properly to

---

7 J. Stapleton, 'Tort, Insurance and Ideology' (1995) 58 MLR 820.

8 [1932] AC 562.

9 Examples from the United Kingdom include the Occupiers' Liability Acts (1957 & 1984) enacting rules 'in place of the rules of the common law', s. 1(1) in both Acts.

10 A study of the way the judicial response to this perceived competition varies between individual judges, and may vary over time with respect to any one judge, should give fruitful insights into their wider 'political' (with a small 'p') approach to law.

be seen as the province of Parliament' or one which is 'more appropriate to Parliamentary action'.[11]

Now the irony here is that, while courts are often concerned not to open themselves up to this separation of powers objection that what they have done in recognising a certain private law entitlement is tantamount to 'judicial legislation', it is quite obvious that, *if* in response to this concern, courts adopt a tactic of timid incrementalism this can undermine the central claim for the very existence of the common law in general and private law in particular, namely that it is able to respond flexibly to the needs of a changing society. This is because it is often recognised, at least in retrospect, that what was needed from the common law of private obligations was a decision which had the very sort of widespread socioeconomic impact which might, from another perspective, look 'legislative'. So if, for example, we take landmark private law decisions such as *Donoghuev Stevenson* or *Grantv The Australian Knitting Mills* [12], we find that their recognition of private law entitlements had a profound influence on the liabilities and therefore on the overheads of the entire manufacturing sector of the economy. Yet, far from being regarded as examples of illegitimate 'judicial legislation', these cases are hailed as paradigm cases illustrating the glorious strength and value of a flexible and responsive common law.

This suggests that it is too simplistic to see the difficulty here as one of institutional 'competition', between private law and parliamentary action. We need to conceptualise and apply in practice a constitutional model which both embraces elements of the separation of powers doctrine (such as the independence of the judiciary) while vindicating the judicial activism/legislation upon which depends another vital plank of our constitutional arrangements, a vibrant common law. Again in general private lawyers have not concerned themselves with developing such a public law approach to these judicial concerns, preferring to focus on narrower doctrinal distinctions within caselaw categories. Perhaps reformulating the difficulty in institutional terms, here of 'institutional coexistence', might help provoke such interest.

The Market

A second major institution with which the private law of tort is seen to 'compete' at the micro level is the institution of the market. There are a number of variants of this perceived competition. For example, in the famous 'privity fallacy' the defendant argues that it is a vital aspect of the institution of a market transaction, that is of a contract, that it can exhaustively define the civil obligations of the contracting parties not only to each other but to third parties affected by the performance of the contract. Since *Donoghue's* case, we all know that, when put in this form the institutional competition is won by tort not by the market: market transactions are not allowed simply to oust obligations the parties would otherwise owe *third parties*. This is now such a legal dogma we tend not to reflect

---

11 Contrast *X* v *Bedfordshire County Council* [1995] 3 All E.R. 353, 'I can see no legal or commonsense principle which requires one to deny a common law duty of care which would otherwise exist just because there is a statutory scheme which addresses the same problem', 395 (per Lord Browne-Wilkinson).

12 [1936] AC 85.

on the profound communitarian idea on which it is based. Again, by couching the phenomenon in institutional terms perhaps we could prompt ourselves to look afresh at this major 'bright line' of the law of obligations.

But the variant of this competition I want to address in a little detail is a different one: this is the question of when, if ever, courts regard the plaintiff's ability to secure protection in the market as a good reason why he should be denied the protection of the private law institution.

It is axiomatic that when a person is given a private law entitlement against another party it is something the recipient gets for free, he or she has not had to bargain for it. I do not *have* to bargain for my entitlements not to be defamed or confronted with a nuisance and so on. On the other hand, it might conceivably be a general objection to the recognition of any private law entitlement that the recipient *could* have bargained for the relevant protection of his or her position in the marketplace. This is not such an easy objection to overcome as it might first appear. Of course, we all instinctively recoil from the proposition in many contexts: we do not refuse to allow a pedestrian to sue a reckless driver on the basis that he could have somehow contracted or bribed the driver to take care of him; we do not refuse a person a defamation claim against a newspaper on the basis that the victim could have persuaded or contracted with the paper not to defame her.

But equally there are situations in which we might well object to private law protecting a person because we think the person could and should have protected himself by contract in the market: for example, say I badger my elderly neighbour to mind my prize Pekinese dogs while I go on holiday but she forgets to lock her garden gate and they escape. Though I doubt if there is a case in point, my strong suspicion is that no court would find the neighbour liable and there would be a good likelihood that the court would advert to the market opportunities I had to secure a *legal* entitlement to my dogs being looked after carefully, namely I could have used a commercial kennel and should have done so if I had wanted the right to compensation which I now seek to get for free from the institution of private law. I have on purpose used a case of physical loss to make this point about institutional competition with the market because although it is *much* more common to see it restraining the private law institution in relation to cases of economic loss[13], it is a concern which might potentially operate across all claims for private law entitlement.

The economists have provided us with the tools and language we need to structure the problem these cases raise. We start with the Coase Theorem[14] which tells us that, if there were no transaction costs associated with bargaining, resources would end up in the hands of those who valued them the most, this being judged by ability to pay. In a sense then, the recognition of legal entitlements might have two functions.

---

13 J. Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 301, 331-335.

14 R. Coase, 'The Problem of Social Cost' (1960) 3 J. Law & Econ. 1. On which see W. Samuels, 'The Coase Theorem and the Study of Law and Economics' (1974) 14 Nat. Res. J. 1.

First, since the entitlements we are talking about can often themselves be bought and sold via contractual disclaimers and so on, when a case decides that a person should have such an entitlement it enriches that party: it is a redistributive move which moves the goalposts so to speak of the market. Looked at in this way, we should always ask when we see such cases of new entitlement: what is the social, economic or other policy goal which justifies this enrichment of one party at the expense of others? Is the wealth shift being used to further an instrumental goal such as deterrence?

The second way in which we might view the intervention of the private law institution is as a way of trying to mimic the existing market, that is to arrive at the distribution of resources which *this* market would have achieved had the transaction costs not been present. In other words, Mrs Donoghue gets the protection she gets because, had she had the chance to bargain with Mr Stevenson, she would have wanted to secure the protection she was later given by private law.

Now many of the cases in which courts allow the market institution to 'trump' and oust the private law institution seem to be based on this second rationale of the role of private law: that is, they seem consistent with the idea that the intervention of private law is only justified when the plaintiff could not have bargained for the relevant protection so that when he could have done so protection is refused.

But again, the institutional competition here is not as simple as this model allows. If it *were* the case, then no court would ever recognise an entitlement in tort where the plaintiff was already in a bargaining situation with the defendant and yet we know very well that courts *do* recognise such added obligations which do not appear explicitly or implicitly in the contractual arrangement bargained for by the parties in the market.

If we analyse these cases, that is cases when courts *are willing* to help plaintiffs regardless of opportunities to protect themselves in the market, we are really asking when is it that the first model, the wealth-shifting model, provides the rationale behind private law obligations. Looking at obligations from this perspective allows us real insight into whatever moral, social, or economic goals are perceived to justify this enrichment of one party at the expense of others.

When we do this study of cases we find, for example, that courts are particularly concerned to intervene in the case of personal injuries, creating private law entitlements even where the plaintiff already had market protection from the relevant misfortune as in *Grant's* case where the plaintiff had warranty protection. Conversely when I did this study in relation to economic loss claims in the UK I found that courts seem openly hostile to claims for economic loss from disappointed commercial players who had access to market protection and I would argue that this reflects the hitherto strong judicial view that the institutional role of the market is best protected by commercial dealings being 'at arm's length' and that tort obligations should not intrude to reduce this distance.[15]

---

[15] J. Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111 LQR 301, 331-335.

I have also found some evidence that even where that market protection was *not* available to commercial players some courts refuse protection and I would argue that there is in these cases evidence of quite a strong 'market principle' (as I call it)[16]. Such a principle might be produced by a judicial perception that viewed overall the market institution is more efficient and therefore more socially desirable if commercial dealings are conducted at arm's length, and that the law should not reduce this distance by creating unbargained for private law obligations to link parties. In other words, there are certain business risks which participants in the commercial market, that is those engaged in profit-seeking, should shoulder as the price of being allowed by society to take profits.

For example, information is a source of wealth so perhaps one business risk which should be borne in this way is the risk of bad information.[17] In other words commercial participants in a market should not be able to claim an entitlement to free accurate information from another participant, subject to rules about fraud or pre-contractual misrepresentation. This is, no doubt, why in most English-speaking jurisdictions tort is unlikely to protect a successful tenderer who suffers economic loss by relying on incorrect prices quoted by a potential supplier in his price list. Where the plaintiff could have checked the information, a decision not to protect him will give incentives for duplication of effort in this regard and will also free the careless information-giver of the incentive to care which the private law obligation would have generated. But under a market principle which I think can be perceived in some caselaw these two cost effects might be regarded by the private law institution as a price worth paying in the long run for a robust and efficient market institution.

It may be that this vision of the market is itself now in juridical competition with a quite different vision of the market emerging from recent judicial interest in some jurisdictions in deploying concepts of estoppel, good faith and even fiduciary relationships in market contexts. This is not the place to pursue this point further. It is enough here to point out that the perceived institutional competition between private law and the market is undergoing a period of considerable uncertainty as judges shift their attitude about what it is that is valuable in the market institution and as they become more open about their role in this regard.

Criminal Law

Let me now turn to the relationship of the criminal law and private law entitlements, and here we will see the potential for clashes between fundamental human and institutional interests. Clearly the fact that the defendant's behaviour was so bad that it triggers criminal sanctions does not provide a sound reason

16 *Ibid.*, 341.

17 For example in *San Sebastian Pty. Ltd.*v *The Minister* (1986) 162 C.L.R. 341, 372 it was said that 'to impose a legal duty of care on the unsolicited and voluntary giving of any information and advice on serious or business matters would chill communications which are a valuable source of wisdom and expertise for a person contemplating a course of conduct', a view which throws added doubt on the finding of a duty in *Hedley Byrne & Co. Ltd.* v *Heller & Partners* [1964] A.C. 465. See also the denial of a duty in *Caparo Industries Plc* v *Dickman* [1990] 2 AC 605.

for private law to *deny* a private law entitlement to his victim.[18] It would seem very odd and would no doubt bring the law into disrepute if, say, a driver was so reckless that he was found guilty of dangerous driving but was then allowed to shelter behind that very criminal conviction when the victim attempts to obtain private law compensatory damages for his or her injuries.

One might from this one scenario draw a wider conclusion that the criminal law institution does not compete in any sense with the private law institution. But this would be wrong. Of course, in many areas the criminal law takes no interest in the *behaviour* at the centre of the civil dispute: this is typically the case with defamation proceedings, for example. But in many other ways there is the potential for both systems of justice to be involved and sometimes the criminal law is interested in the behaviour at the centre of a civil dispute. As we will see, this creates the potential for the two institutions to interact with one another in ways that profoundly affect the shape of private law.

For example, sometimes we see the *intervention* of private law being justified on the basis that it supports the criminal law.[19] Conversely there are well-known cases where respect for the institution of the criminal law inhibits or ousts the operation of private law.[20] For example, it has been held to be an abuse of process for a person convicted of an offence to sue his solicitors alleging negligence in their advice to him and the conduct of his defence to the criminal charge.[21]

Another form of institutional competition here is where the presence of the criminal justice institution might be regarded as rendering baseless the particular type of civil claim. The core example here is the claim for exemplary damages. To what extent in claims for exemplary damages should the civil law take notice of the fact that the criminal justice system has or might be interested in the events at the centre of the civil dispute?

This very question was recently placed squarely before the New Zealand Court of Appeal in the case of *Daniels* v *Thompson*.[22] As an aside may I say that both the majority judgment and the minority judgment of Justice Thomas are classic examples of the common law method at its best. Here we see judges using plain English to address with care, detail and even-handedness the complex concerns raised on either side of the dispute. We see no jargon, no formulaic labels or 'tests' and whatever illumination has been provided by academic material is, refreshingly, demonstrated by the extensiveness of the analysis, its open nature and its clarity, rather than by thesis-like incantation of innumerable academic publications.

After carefully weighing the perceived functions of the criminal justice institution against the perceived functions of exemplary damages, the majority held that the latter was no more than duplicative of (at least some of) the functions

---

18 See for example, *W* v *Meah* [1986] 1 All ER 935, victims successfully suing convicted rapist.

19 See eg *Attorney-General* v *Blake* [1998] 1 All ER 833.

20 On the general point see Brennan C.J. that the law should 'limit the admission of a civil duty of care in order not to trespass upon the operation of the criminal law': *Gala* v *Preston* (1990-1) 172 CLR 243, at 272.

21 *Somasundaramv M. Julius Melchior & Co. (a Firm)* [1988] 1 WLR 1394 (CA).

22 [1998] 3 NZLR 22.

of the criminal justice system, namely *to punish, deter and express society's condemnation of outrageous conduct.*[23] Thus, where the criminal justice system has tried or is likely to try the defendant on a charge arising out of the facts disputed in the civil claim for exemplary damages, the civil claim is to be barred (or stayed in the case of possible or pending criminal charges). Justice Thomas argued against an automatic bar on the basis that the function of exemplary damages is sufficiently distinguishable from and supplementary to criminal law and process.

Whatever one's view of the decision in *Daniels*, the case should prompt us to consider much more widely the interaction of the criminal law and private law. When I do so I am deeply concerned about the possibility that our earlier neglect of the problems here will produce serious miscarriages of justice in the future, this time in the civil courts rather than the criminal courts.

Civil Claims Against an Acquitted Person

Let me focus your attention first on a particular fact situation where the major danger lies. This is where a civil claim occurs after:

1. the defendant had been acquitted of a criminal charge and
2. where the criminal charge hinged on one key issue of fact alone which it would be necessary to re-hear in order for the civil claim to succeed.[24]

The two examples I want you to have in mind are cases of killing where the key issue is one of identification and cases of rape where the key issue is one of consent.

In the United Kingdom a number of civil claims for assault have recently been allowed to proceed against people who have been acquitted of murder charges which turned on the identification issue.[25]

Let me make one minor and one major point which these British cases suggest. The minor point is this. According to the majority in *Daniels*, in equivalent New Zealand cases where the criminal law is or is likely to be interested, exemplary damages are barred. In such cases the functions such damages are said to perform, namely *to punish, deter and express society's condemnation of outrageous conduct,* can only be achieved by the criminal law and the operation of the criminal law is only triggered by proof beyond reasonable doubt. In contrast, in cases where the criminal law has not been or is unlikely to be invoked against the defendant, these functions, now achievable by the use of exemplary damages, can be furthered merely by proof on the balance of probabilities . Why should the level of proof required in civil law be different from that in criminal law to the extent that the functions being served by the two bodies of law are the same? This seems anomalous. The anomaly could be removed by a rule that whenever

---

23 It clearly does not parallel certain aspects of the latter, such as determining whether punishment should include imprisonment.

24 Different less problematic issues arise in the far more numerous cases where the criminal charge does not hinge on such a common key fact but on the issue of breach of a standard of behaviour such as reckless driving. Acquittal of reckless driving does not nor should it bar a civil claim for damages in negligence: such an acquittal and a finding of civil negligence do not reflect incompatible 'facts'.

25 And in the US there is, of course, the notorious OJ Simpson cases.

exemplary damages are sought the key fact on which their availability depends should be proved beyond reasonable doubt. Alternatively, the anomaly could be removed by a rule that proof of the key fact on the mere balance of probabilities should be sufficient to justify using the civil law to further these functions, in which case the view of the majority in *Daniels* that exemplary damages are merely duplicative of what can be delivered by the criminal process would be flawed.

The much more important issue raised by the phenomenon of civil suits for assault against persons acquitted of murder charges hingeing on identification concerns the question of whether allowing the rehearing of such a key fact by way of a civil suit should be seen as an abuse of process or otherwise against public policy. In *Daniels*, since the matter was not in point, it is understandable that all members of the New Zealand Court of Appeal sanguinely accepted that, though a person acquitted of a murder charge in relation to such a killing in New Zealand cannot now face a later civil claim for exemplary damages, the 'acquittal does not operate as a general bar to civil proceedings based on the same' key fact.[26] But it seems to me that this is an issue to which private lawyers have not given sufficient attention and it is one which we need to address before we find ourselves facing a new wave of miscarriages of justice, this time generated by flaws and inadequacies in our civil justice system rather than our criminal justice institution.

We need to debate whether, where a civil claim is brought against a person acquitted of a serious criminal charge *and* the civil claim necessarily requires rehearing of a key allegation of fact on which the criminal charge turned, the civil claim ought to be struck out as an abuse of process or otherwise against public policy. In my view, we are in danger of allowing ourselves to shelter behind technical differences between the private and criminal law institutions, notably the lower standard of proof in private law, in order to avoid considering the wider issues here with the sort of focus and care the New Zealand Court of Appeal brought to bear on the exemplary damages question in *Daniels*.

What are the arguments for allowing a finding on a key fact to be challenged in a civil claim after an acquittal? In sum they are two: first, that the criminal acquittal in such cases is not a finding that the defendant was not the killer, simply that that key fact had not been proven beyond reasonable doubt; and secondly, that whatever estoppels might be raised against the Crown in relation to fresh charges which necessarily require a re-hearing of the issue of fact, none should be applied to the civil plaintiff who is seeking merely compensation not penal sanctions.

The arguments against allowing compensation claims after an acquittal in such cases include the following:

---

[26] [1998] 3 NZLR 22, at 50 (judgment of the majority). See also the sanguine attitude of the Law Commission: Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Law Com No. 247, page 136 footnote 146: 'if...the defendant is acquitted...the plaintiff should normally be permitted to proceed with his or her civil claims (including a claim to punitive damages in respect of the conduct concerned).' Though it must be noted the Law Commission was not focussing on the particular type of case involving a key fact in relation to heinous conduct on which I have been focussing.

1. to preserve the dignity of the institution of the criminal law;
2. the law has an interest in finality of process;
3. allowing civil claims here converts all criminal verdicts of not guilty into verdicts of 'not proven';
4. in the case of allegations of heinous conduct such as unlawful killing or rape the procedural and other safeguards in place in the criminal justice system are present not just because there is a potential sanction of imprisonment, but also because of the social stigma any form of legal finding of such heinous conduct precipitates;
5. recent miscarriages of (criminal justice) should teach us that those safeguards of defendants' rights are vital in these areas;
6. where a system such as the Criminal Injuries Compensation system exists such plaintiffs are typically pursuing the sort of punitive and vindicatory functions which the majority of the New Zealand Court of Appeal suggest are for the criminal law.

Civil Claims Against a Person Neither Convicted nor Acquitted

There have also been cases where civil claims have been brought against unprosecuted persons in relation to rape where the key fact was consent and in relation to killings where the defendant argues an identification defence. Sometimes in the latter cases the motive for the civil claim has been the hope that the civil proceedings will kick-start the criminal law process itself, either by revealing or testing new evidence or otherwise. But to the extent such cases reveal flaws in the system of prosecution and review, the solution lies in reform of that aspect of the criminal law institution rather than the artificial[27] deployment of the private law with its attendant relative neglect of the interests of the defendant.

What is disturbing in my view, is that our neglect of the institutional 'competition' here has permitted the uncontrolled use of the private law of obligations as a vehicle for what are, in effect, private prosecutions for the most serious conduct, which prosecutions we have allowed to be determined merely on the balance of probabilities. In so doing we are laying the ground for serious miscarriages of justice.

Competition of Private Law Entitlements with Other Institutions: Insurance; Social Insurance/Social Welfare

At this micro level of caselaw I have been discussing, there are many other institutions which might be perceived as in competition with private law. The institution of the company and its corporate veil is a topical one, at least in Australia. Another interesting perspective is to ask in what ways private law competes with the redistributive function/effect of the taxation system at the

---

27 Compare 'Any perceived shortcomings in that regard should not, as a matter of principle, be met by the artificial use of a remedy which is not appropriate to meet those objectives': *Daniels* v *Thompson* [1998] 3 NZLR 22, at 49 (Judgment of the majority).

micro level. But let us now leave this level and move to the macro level of law reform debates, and to do this I will use the institution of private insurance which straddles both the micro and macro levels. As we will see, insurance leads to the macro debate about whether the public institutions of social insurance or social welfare should affect the shape or indeed the very existence of areas of private law as ways of resolving disputes, handling misfortunes, regulating behaviour and so on.

At the level of private law doctrine, a question arises as to whether the insurability of either party should be relevant to the incidence of obligations. Here my basic claims are that courts do not, cannot and should not allow the availability of the private insurance mechanism to contain or 'trump' the institution of private law.[28] The point I make here is that those who are tempted to *argue for* the relevance of private insurance often have highly ideological motivations which have kick-on effects in the macro debates about the very shape and existence of private law. Let me give examples from opposite ends of the spectrum.

To arrive at the conclusion that private insurance was relevant to the law of obligations, you must reject the possibility that private law did anything much effectively except deliver money to plaintiffs. This is what Patrick Atiyah, for example, somewhat swiftly concluded about the operation of tort law. In particular, he saw little evidence that tort law, for example, resulted in significant deterrence of the relevant wrongful behaviour of the defendant. Now if you start from the position that tort does nothing significantly of use but deliver compensation the phenomenon of private insurance might well be regarded as relevant in two ways, both ideologically loaded.

First, the realisation that when first party insurance is used, the victim chooses the level of cover he or she wants, might suggest that as an institution handling the plaintiff's misfortune and need for financial support it is preferable because it vindicates the victim's autonomy. This is the line now being put by the Yale branch of the Law and Economics movement.[29] Secondly and conversely, the realisation that third party insurance is available to ensure that the compensation monies would be available in the event of a finding of liability might be seized upon to justify the expansion of common law entitlements. Historically, this seems to have been what happened in the US after the war under the strong influence of the writings of scholars such as Fleming James.

But note that, common to both these ideologically opposed strategies is not only the idea that tort law was only about delivering money for those suffering certain misfortunes but that *pooling* of the risk of such misfortunes was a sensible, socially desirable goal. As New Zealanders know well, this suggested a third strategy: the public pooling of risk and the *public* organisation of compensation either by a social welfare or social insurance model, techniques I have collectively called socialisation of risk. In other words, the idea that the only useful thing the institution of tort did in the area of personal injuries was deliver compensation raised the question whether it was simply a bad surrogate for public institutions of compensation.

---

[28] J. Stapleton, 'Tort, Insurance and Ideology' (1995) 58 MLR 820.

[29] *Ibid.*

In the Commonwealth there then seemed an obvious and 'rational' need to reform our institutional response to misfortunes: if tort was only about compensation then it was grotesque: first, its doctrines limited access by the injured to compensation; secondly, it was so expensive per dollar of compensation delivered; and thirdly, that in practice non-legal socioeconomic barriers usually prevented even those within the doctrinal limits from securing private law compensation. The 'rational' solution seemed clear: sweep away tort and replace it with a public institution of compensation. In other words, Atiyah and other Commonwealth academics, in parallel with Mr. Justice Woodhouse in New Zealand saw tort as in competition with such public institutions which could deliver the compensation which tort was so bad at delivering in practice. This loop of ideas culminating in an embrace of a strategy by which tort was replaced by a needs-based Beveridge-type system of public support became and remains an orthodox critique of tort as an institution throughout the common law world.[30]

But what if the orthodoxy on which the macro debate about the fate of private law proceeds is fundamentally flawed. Unless we are certain what are the valued social functions of an institution we cannot speak meaningfully about which are its institutional competitors. One view is that there is no necessary linkage between the fate of private law and other institutions which also provide support for misfortune and so on. This view that these institutions should not be automatically coupled in this way nor seen to compete with one another, is based on the argument that private law really does do something other than provide compensation and it is something which the institutions which are said to compete with it do not do. If this is so, we would have to decouple the fate of private law from the fate of, say, social security, because social security would no longer be an arguable surrogate for tort and vice versa. In New Zealand this perspective is tantamount to asking: what have we lost in abolishing tort claims for personal injury by accident?

So what is it that private law does that institutions such as private insurance and social security do not? I believe we have focused too much on the money effects of private law entitlements and not enough on *other effects.* Two of these other effects are the publicity and shaming effects which litigation can generate. Well-known pieces of evidence of the importance of these effects in private law are the door-of-the-court pronouncements of winning plaintiffs that it was not so much the money that gave them satisfaction but that the defendant had had to explain/admit/be shamed by the evidence adduced in court. I have already touched on these effects of private law in the earlier section about criminal law where I noted that they might be outweighed in certain cases by public policies to do with the interests of accused people and the integrity of the institution of criminal justice.

But my point here is that these other effects are usually discussed in terms of the individuals actually involved in the particular legal process. I believe there is another effect of the private law institution which we have neglected and it is its symbolic value to all citizens. Historians have garnered rich insights taking this perspective of institutions. For example, E. P. Thompson has written eloquently about the genuine symbolic importance to the poor of the legal concept of the rule of law.[31] Political scientists since Bagehot[32] have also appreciated that even where an institution has little or no effective or 'efficient' power in

relation to the ends it seems to be pursuing, it may have a real, albeit symbolic or 'dignified', importance in that it is achieving quite different but nevertheless important ends. Needless to say, if private law is valued for this effect of signalling core social values, it would have a major impact on how we approach macro questions relating to the fate of the private law institution. Again, to the extent that the orthodox perspective has seen an institutional competition here between tort and state provision it is simply too crude.

30 More recently, and in response to the apparent eclipse of electoral support for growth in such publicly funded schemes Atiyah has called for the replacement of tort by a different institution delivering financial support, namely first party insurance even though the redistributional impact of the change in his choice of institutional substitute for tort are likely to be profound: P. Atiyah, *The Damages Lottery*, (Hart Publishing, 1997).

31 E. P. Thompson, *Whigs and Hunters*, (Penguin, 1990) 258-269.

32 W. Bagehot, *The English Constitution*, (Fontana, London, 1963).