

# RESOLVING CONFLICTS AT THE INTERFACE OF PUBLIC AND PRIVATE LAW

*Public and private law converge in cases where causes of action and remedies from both sides of the divide might be brought to bear, such as where the same conduct might amount to both a tort and crime, or where demonstrating invalidity of an administrative decision is an element of tortious liability. This essay canvasses a range of procedural tools that can be utilised to shape the relationship between public and private law; moving between independent, staged, prioritised and collaborative relationships. The question of whether these tools ought to be utilised in a given case is influenced by a range of policy concerns tied to the interests of the parties, the institution of the courts, and the wider public. Accordingly, the relationship between public and private law, and the question of what principles and remedies ought to apply at the interface, requires a delicate balancing act between these interests.*

The interface between public and private is one that has attracted many legal scholars, most often in the guise of the so-called ‘public-private divide’. This dichotomy is an analytically attractive concept, offering the promise of a means to distinguish areas that ought to be subject to public law control from those that ought to be subject to private law control. Adherents view the public and private sectors as distinct, with the result that public powers and interests should be subject to public—and not private—law control, whereas private powers and interests should be subject to private—and not public—law control. While pervasive in legal thinking, the concept of the public-private divide is not without its critics.<sup>1</sup> Many of the cited difficulties centre on the deceptive simplicity of the divide as an analytical tool; its promise of neat spheres of public and private operation does not easily accommodate the complex realities of the real world.

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<sup>1</sup> See, eg, Carol Harlow, ‘“Public” and “Private” Law: Definition without Distinction’ (1980) 43 *Modern Law Review* 241; Dawn Oliver, *Common Values and the Public-Private Divide* (Cambridge University Press, 1999).

Many criticisms of the public-private divide are concerned with the difficulty of allocating a case as appropriate for resolution by public or private law where features of both ‘publicness’ and ‘privateness’ arise.<sup>2</sup> For example, where a private body exercises public powers, the question may arise as to whether the matter is appropriate for resolution in judicial review proceedings.<sup>3</sup> Similarly, where a public body causes harm in the exercise of its statutory powers, the question may arise as to whether it is appropriate to allow the injured party to bring proceedings in negligence.<sup>4</sup> In cases such as these where the spheres of public and private are ill-defined, it may be unclear whether a matter is suitable for resolution by public or private law. An area that has received somewhat less attention,<sup>5</sup> and that which is addressed in this essay, is the operation of the public-private divide in cases where public and private law overlap. Unlike the above circumstances, difficulties of overlap arise where *both* public and private law mechanisms are relevant in a single matter, such as where the same conduct may be the subject of both a criminal prosecution and civil proceedings. Analysis of judicial resolution of such cases offers useful insights into how public and private law interact, as well as guidance on what factors we ought to consider in thinking about appropriate outcomes at the interface between public and private law.

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<sup>2</sup> As to the inherent imprecision of these concepts, see Mark Elliott, ‘Judicial Review’s Scope, Foundations and Purposes: Joining the Dots’ [2012] *New Zealand Law Review* 75, 76–77.

<sup>3</sup> See, eg, *R v Panel on Takeovers and Mergers; Ex parte Datafin Plc* [1987] QB 815.

<sup>4</sup> See, eg, *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540.

<sup>5</sup> This area has been the subject of significant inquiry by Matthew Dyson in the United Kingdom (see, eg, Matthew Dyson, ‘Disentangling and Organising Tort and Crime’ in Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press, 2014) 1; Matthew Dyson, ‘The State’s Obligation to Provide a Coherent System of Remedies Across Crime and Tort’ in Antje du Bois-Pedain, Magnus Ulväng and Peter Asp (eds), *Criminal Law and the Authority of the State* (Hart Publishing, 2017) 171). In Australia see, eg, Kylie Burns et al, ‘Australia: a Land of Plenty (of Legislative Regimes)’ in Matthew Dyson (ed), *Comparing Tort and Crime: Learning from across and within Legal Systems* (Cambridge University Press, 2015) 367.

## I WHERE ‘PUBLIC’ AND ‘PRIVATE’ COLLIDE

Before looking at some of the ways in which public and private law collide, it is necessary to say something first about the areas that broadly make up these bodies of law. As Harlow has noted, common law tradition does not build on defined categories of ‘public’ and ‘private’ law with the same rigour as our continental counterparts.<sup>6</sup> Certainly, it is not possible to point to any universally accepted definition of ‘public law’, with its content varying depending on the purpose to which it is being put.<sup>7</sup> Without delving too deeply, the public-private dichotomy is built on premises of liberal political philosophy, which views public law (for example, constitutional, administrative and criminal law) as the governing regime in the context of relationships between the individual and the state, and resists state interference in relationships between individuals (governed by, for example, the law of contract, tort and property).<sup>8</sup> While there are many reasons to doubt the legitimacy and utility of the public-private divide,<sup>9</sup> this essay adopts this loose distinction between the branches of public and private law for a different purpose; namely, to explore the ways in which they interact with one another.

Public and private law may converge in a variety of ways where the same factual matrix invites the application of both public and private law principles and remedies. One of the clearest examples of public-private collision of this type is where a person’s conduct can be understood both to constitute a criminal offence as well as a civil wrong. So, for example, committing an act of violence against a person may not only amount to a criminal offence (eg

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<sup>6</sup> Harlow (n 1) 241.

<sup>7</sup> Mark Aronson, ‘Public Law Values in the Common Law’ in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 134, 134; David Feldman, ‘The Distinctiveness of Public Law’ in Mark Elliott and David Feldman (eds), *The Cambridge Companion to Public Law* (Cambridge University Press, 2015) 17.

<sup>8</sup> Geoff Airo-Farulla, ‘“Public” and “Private” in Australian Administrative Law’ (1992) 3 *Public Law Review* 186, 187.

<sup>9</sup> See, eg, Oliver (n 1).

grievous bodily harm or rape), but also constitute a battery. If the wrongdoer were to be prosecuted for that criminal offence, and the victim were to separately bring proceedings to recover damages for the tort of battery, public and private law would thereby be engaged in respect of a single factual scenario. A host of other types of conduct might dually constitute crimes and torts, such as detaining someone against their will (ie the common law criminal offence and tort of false imprisonment) and taking another's property (ie the criminal offence of theft and tort of trespass). Criminal and civil law may also interact in respect of their applicable sanctions and remedies, for example the potential overlap between criminal penalties and the award of exemplary damages.

The case of *Niven v SS*<sup>10</sup> offers a useful depiction of the potential degree of interaction between criminal and tort law in this respect. In this case, the respondent, SS, commenced civil proceedings relating to historical sexual assaults allegedly committed against him by the appellant. The following year, the appellant was charged with a number of criminal offences relating to that same conduct. The trial judge in the civil proceedings declined to exercise the available discretion to award a stay, and the civil proceedings went ahead accordingly.<sup>11</sup> The trial judge found in favour of the plaintiff in those civil proceedings, awarding both compensatory and exemplary damages. The criminal proceedings were heard almost a year later, resulting in the defendant's acquittal on all charges. Thus, the plaintiff successfully obtained compensatory and exemplary damages in the civil claim almost one year prior to the defendant's acquittal on 'relevantly identical' criminal charges.<sup>12</sup>

Another key area in which public and private law interact is where unlawful government action also amounts also to a civil wrong. For example, where a government official exercises

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<sup>10</sup> [2006] NSWCA 338.

<sup>11</sup> *Ibid* [11].

<sup>12</sup> *Ibid* [6].

their powers in bad faith, this may be the subject of a challenge via judicial review proceedings, and may also provide the foundation for a claim of misfeasance in public office.<sup>13</sup> Other private law causes of action predicated on the defendant's lack of lawful authority include assault, battery, false imprisonment and trespass. The case of *Ruddock v Taylor*<sup>14</sup> offers an example of the potential interaction between public and private law in such cases. Mr Taylor (a British citizen who had lived in Australia since childhood) was detained as an unlawful non-citizen following the cancellation of his visas on two occasions. Mr Taylor sought judicial review of each of the cancellation decisions, and was successful in having these quashed by the High Court.<sup>15</sup> The Court found that the visa cancellation power did not apply to a long-term resident in Mr Taylor's situation,<sup>16</sup> and also found that the decision-maker had misapprehended their statutory power in connection with Mr Taylor's opportunity to make submissions.<sup>17</sup> Mr Taylor was consequently released from immigration detention and brought a civil claim for false imprisonment predicated on the illegality of his detention (as established via the judicial review claim). He was successful at first instance<sup>18</sup> and on appeal to the New South Wales Court of Appeal,<sup>19</sup> but failed before the High Court.<sup>20</sup>

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<sup>13</sup> Assuming that the plaintiff is able to establish the other requisite elements of the tort: see *Northern Territory v Mengel* (1995) 185 CLR 307, 370 (Deane J).

<sup>14</sup> (2005) 222 CLR 612.

<sup>15</sup> The first decision was quashed pursuant to consent orders: *Re Ruddock; Ex parte Taylor* [2000] HCATrans 101 (16 March 2000). The second was quashed following a contested High Court hearing: *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391.

<sup>16</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 410 [44] (Gaudron J), 437 [136] (McHugh J), 497 [318] (Kirby J), 518 [377] (Callinan J). The High Court reversed its position on this point two years later in *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28.

<sup>17</sup> *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 398 [1] (Gleeson CJ), 420 [83] (Gaudron J), 420 [87] (McHugh J), 437 [139] (Gummow and Hayne JJ). In respect of the first cancellation decision, the Minister appeared to concede that Mr Taylor had been denied procedural fairness: *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 446 [165].

<sup>18</sup> *Taylor v Ruddock* (District Court of NSW, Murrell J, 18 December 2002).

<sup>19</sup> *Ruddock v Taylor* (2003) 58 NSWLR 269.

<sup>20</sup> *Ruddock v Taylor* (2005) 222 CLR 612.

Cases such as these, which raise the possibility of a collision between public and private law principles and remedies, have invited the courts to identify ways to resolve the tensions that arise. The following section canvasses a number of legal tools employed for this purpose.

## II TOOLS WHICH FACILITATE PUBLIC-PRIVATE INTERACTION

The courts have access to a sophisticated armoury of legal tools that can accommodate the interaction between public and private law in cases where principles and remedies collide, including the doctrine of collateral attack, estoppel by record, the court's inherent power to stay proceedings, and approaches to remedies and evidence. This discussion reveals that far from adhering to a strict application of the public-private divide, the law instead facilitates a number of differing patterns of interaction between public and private law. In some instances, these rules allow public and private law to independently coexist, with neither over-running the other. At other times, they facilitate a mutually exclusive approach (expressing preference for one cause of action or remedy at the expense of another), a staged approach (requiring one cause of action to be resolved ahead of another), or a collaborative approach (taking into account the outcome of one case in another). What is clear is that there is no one-size-fits-all approach which accurately portrays the dynamic interaction between public and private law.

### A *Collateral attack*

The first example of a legal rule which can either facilitate, or prevent, the interaction of public and private law is the doctrine of collateral attack. The rule against collateral attack operates to prevent proceedings that invite the court to make an order that is inconsistent with, or might 'tarnish' an earlier judgment.<sup>21</sup> At the interface of public and private law, there are a number of ways in which collateral attack may operate across the divide. As between criminal

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<sup>21</sup> *Giannarelli v Wraith* (1988) 165 CLR 543, 573–74.

and civil proceedings, the rule may prevent a party convicted of a criminal offence from bringing civil proceedings premised on their innocence (eg suing police for negligence in the conduct of an investigation, or legal representatives for negligence in the conduct of a trial).<sup>22</sup> It is less clear whether the rule has such a critical role to play where later civil proceedings seek to contradict an earlier *acquittal* in criminal proceedings, such as where a plaintiff brings a claim in tort (eg battery) following the defendant's acquittal of corresponding criminal charges (eg rape).<sup>23</sup> One reason that acquittals might fall into a different category is that the degree of inconsistency between the earlier and later judgments is not as pronounced as for convictions; there is no logical inconsistency in saying that the prosecution failed to prove a criminal offence beyond reasonable doubt, but that the plaintiff in civil proceedings succeeded in proving their case on the balance of probabilities.<sup>24</sup> Where it operates, the effect of the rule against collateral attack is to treat the earlier criminal proceedings (depending on their outcome) as precluding later civil proceedings; the relationship between public and private law becomes mutually exclusive.

Collateral attack also has a role to play across the divide in the relationship between judicial review and civil proceedings.<sup>25</sup> Key examples include cases in which a successful tort claim depends on establishing the invalidity of the decision or instrument that might otherwise have authorised the tortious conduct (eg where an administrative order authorises a plaintiff's detention in a false imprisonment claim). The validity point might have been raised directly by way of public law (judicial review) proceedings, but might also be attacked collaterally in

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<sup>22</sup> See examples referred to in Jane Stapleton, 'Civil Prosecutions Part 1: Double Jeopardy and Abuse of Process' (1999) 7 *Torts Law Journal* 244, 12–13. See also exceptions discussed at 14–15.

<sup>23</sup> *Ibid* 16–17.

<sup>24</sup> *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630, 635; Jane Stapleton, 'Civil Prosecutions Part 2: Civil Claims for Killing or Rape' (2000) 8 *Torts Law Journal* 1, 2.

<sup>25</sup> See, eg, Roger Douglas, 'Collateral Attacks on Administrative Decisions: Anomalous but Efficient' (2006) 51 *AIAL Forum* 71, 71–72.

private law (tort) proceedings. As explained in *Ousley v The Queen*,<sup>26</sup> this form of collateral challenge is one in which an administrative decision ‘is challenged in proceedings whose primary object is not the setting aside or modification of the decision’; ‘where the validity of the administrative act is merely an incident in determining other issues’.<sup>27</sup> Collateral challenge to administrative decisions via tort claims has a long lineage. Indeed, actions in tort were the primary vehicle for challenging the legality of government actions prior to the development of specialised judicial review remedies.<sup>28</sup> Following the rise of modern administrative law, however, there has been a concomitant rise in discomfort with the incidental resolution of public law issues in private law claims.

There are a number of policy concerns that might weigh against permitting collateral challenge, as reflected in the list of criteria identified by Besanko J in *Jacobs v OneSteel Manufacturing Pty Ltd*:<sup>29</sup>

1. Are the grounds of challenge likely to involve the adducing of substantial evidence?
2. If a collateral challenge is permitted, will all proper parties be heard before the court or tribunal in which the collateral challenge is to be heard?
3. In the particular case, does the allowing of a collateral challenge by-pass the protective mechanisms associated with judicial review proceedings such as the rules as to standing, delay and other discretionary considerations?
4. Is there a statutory provision that bears in one way or another on the question of whether a collateral challenge should be permitted?
5. Is the issue raised by the collateral challenge clearly answered by authority?

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<sup>26</sup> (1997) 192 CLR 69.

<sup>27</sup> Ibid 98–99. This case involved collateral challenge in the context of public law (criminal) proceedings. Besanko J saw no reason to distinguish civil proceedings in *Jacobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568, 593 [89].

<sup>28</sup> See, eg, *A v New South Wales* (2007) 230 CLR 500, 532 [94]. See also Amnon Rubinstein, ‘On the Origins of Judicial Review’ (1964) 2 *British Columbia Law Review* 1, 2; Ellen Rock and Greg Weeks, ‘Monetary Awards for Public Law Wrongs: Australia’s Resistant Legal Landscape’ (2018) 41(4) *University of New South Wales Law Journal* 1159, 1168–70; Mark Aronson, ‘Retreating to the History of Judicial Review?’ (2019) 47(2) *Federal Law Review* 179, 184.

<sup>29</sup> (2006) 93 SASR 568.



6. Are there other cases pending which raise the same issue?

7. (Possibly) Is there a more appropriate forum in terms of expertise and perhaps court procedures such that a collateral challenge should not be permitted?<sup>30</sup>

These criteria reflect concerns that civil proceedings might not be the most appropriate vehicle to challenge the validity of a decision or instrument given the capacity of the tribunal to determine the challenge, potential discrepancies between the identity of the parties to the challenge, and knock-on effects for other cases. Against these concerns can be weighed the attraction of dealing with all relevant matters in one set of proceedings rather than creating a fragmented collection of claims with potentially contradictory outcomes.<sup>31</sup>

An example of the successful operation of collateral challenge in this context is that of *Commonwealth v Okwume*.<sup>32</sup> In somewhat similar circumstances to the case of *Ruddock v Taylor*,<sup>33</sup> discussed above, Mr Okwume was held in immigration detention following cancellation of his short stay business visa. Unlike in *Ruddock*, however, Mr Okwume commenced proceedings for the tort of false imprisonment without first establishing the invalidity of the cancellation decision in judicial review proceedings; the validity point was dealt with by way of collateral challenge. Ultimately, Mr Okwume succeeded in establishing that the relevant official had failed to comply with procedural fairness requirements in making the cancellation decision,<sup>34</sup> which opened the doorway to a finding that Mr Okwume's detention was unlawful for the purpose of the tort claim.<sup>35</sup> We can contrast this case with *Soh*

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<sup>30</sup> Ibid 594 [93].

<sup>31</sup> *Director of Housing v Sudi* (2011) 33 VR 559, 601–02.

<sup>32</sup> (2018) 160 ALD 515.

<sup>33</sup> (2005) 222 CLR 612.

<sup>34</sup> *Commonwealth v Okwume* (2018) 160 ALD 515, 536 [101], 539 [117] (Besanko J), 576 [284] (White J).

<sup>35</sup> Mr Okwume's victory was somewhat pyrrhic: only the immediate 17 hour period of detention effected by the author of the cancellation decision was found to be unlawful (ibid 542 [137]), as officials who later relied on the cancellation decision to hold Mr Okwume in detention enjoyed the benefit of holding a 'reasonable suspicion' as to Mr Okwume's status as an unlawful non-citizen for the purpose of s 189 of the *Migration Act 1958* (Cth) (ibid 549 [162]).

*v Commonwealth*,<sup>36</sup> a further false imprisonment case premised on the alleged unlawfulness of the decision to imprison the plaintiff, including (relevantly) on the ground that he had been denied procedural fairness. While Madgwick J accepted that there had been a denial of procedural fairness,<sup>37</sup> this finding did not automatically translate into a finding of illegality for the purposes of the tort of false imprisonment:

It seems to me that, in the present case, where illegality of the decision is sought to be made a sword in an action for damages, a denial of natural justice will not of itself invalidate the applicant's detention ... unless I make a formal declaration to that effect.<sup>38</sup>

Liability for false imprisonment was therefore conditioned on Madgwick J's discretion to make a declaration of invalidity, which his Honour declined to exercise given Mr Soh's lengthy delay in seeking relief.<sup>39</sup> On this basis, Mr Soh was unable to make good his claim that his imprisonment was 'unlawful' for the purposes of his false imprisonment claim.<sup>40</sup> These cases demonstrate the flexibility of the doctrine of collateral attack in accommodating a co-operative relationship between public and private law.

## B *Estoppel by record*

Another set of legal rules which facilitate complex interactions between public and private law are those falling within the umbrella of estoppel by record. Cause of action estoppel prevents re-litigation of a cause of action,<sup>41</sup> which may extend to 'the facts which support a right to judgment ... a right which has been infringed ... [and] the substance of an action as distinct from its form'.<sup>42</sup> Issue estoppel is also concerned with re-litigation, preventing a party

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<sup>36</sup> (2008) 220 FCR 127.

<sup>37</sup> *Ibid* 147 [97]–[98].

<sup>38</sup> *Ibid* 148 [101].

<sup>39</sup> *Ibid* 148 [102].

<sup>40</sup> *Ibid* 149 [103].

<sup>41</sup> *Blair v Curran* (1939) 62 CLR 464, 532 (Dixon J). See further JD Heydon, LexisNexis, *Cross on Evidence* (online at 13 August 2019) [5070].

<sup>42</sup> *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 610 (Brennan J).

from raising an issue in subsequent proceedings that was ‘legally indispensable’ to earlier proceedings.<sup>43</sup> To similar effect is the doctrine of *Anshun* estoppel,<sup>44</sup> which is a species of the court’s inherent power to stay proceedings that constitute an abuse of process.<sup>45</sup> The principle is based on the obligation of a party to bring forward their entire case to be dealt with in a single set of proceedings,<sup>46</sup> and may arise where ‘the matter relied upon ... in [the] second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it’.<sup>47</sup> The various species of estoppel by record are most relevant as a regulatory tool *within* the spheres of public and private law. They operate, for example, to prevent parties from re-litigating the same substantive civil dispute through alternate causes of action,<sup>48</sup> allow an accused to raise pleas of *autrefois acquit* or *autrefois convict* as a bar to a second prosecution for a criminal offence in respect of which they have already been acquitted or convicted, and preclude a party from mounting a subsequent judicial review challenge based on alternative grounds in circumstances where no jurisdictional error was identified in earlier proceedings.<sup>49</sup>

It is less clear whether the rules falling under the umbrella of estoppel by record have a valid role to play *across* the public-private law divide. The first difficulty relates to privity of parties. Unless a judgment is regarded as one *in rem*,<sup>50</sup> the doctrines of cause of action and

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<sup>43</sup> *Blair v Curran* (1939) 62 CLR 464, 531–32 (Dixon J).

<sup>44</sup> Named for the High Court’s decision of *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

<sup>45</sup> Justice KR Handley, ‘*Anshun* Today’ (1997) 71 *Australian Law Journal* 934, 940.

<sup>46</sup> Heydon (n 41) [5170].

<sup>47</sup> *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589, 602.

<sup>48</sup> See, eg, *King v Lintrose Nominees Pty Ltd* (2001) 4 VR 619, 625–26 [17].

<sup>49</sup> *Kong v Minister for Immigration and Citizenship* (2011) 199 FCR 375, 390 [39]. Flick J considered that the principles applied in the judicial review context despite concerns that have been raised to the contrary (at 389–90 [38]): see generally Enid Campbell, ‘Relitigation in Government Cases: A Study of the Use of Estoppel Principles in Public Law Litigation’ (1994) 20 *Monash University Law Review* 21; William Wade and Christopher Forsyth, *Administrative Law* (11th ed, Oxford University Press, 2014) 206.

<sup>50</sup> *P E Bakers Pty Ltd v Yehuda* (1988) 15 NSWLR 437, 442. Relevant examples include an award of a writ of habeas corpus, or a declaration as to the validity of an election: see, eg, Campbell (n 49) 33.

issue estoppel only operate to bind the parties to the original proceedings and their privies.<sup>51</sup> Because the parties in criminal and civil proceedings will almost always differ,<sup>52</sup> this presents a significant restriction on the operation of these principles across that area of the divide. A second difficulty is that, even in circumstances where public and private law proceedings arise out of the same facts, it does not follow that the degree of overlap will be sufficient to enliven the principles of estoppel by record; there is unlikely to be identity between causes of action<sup>53</sup> or issues<sup>54</sup> in such cases, and it will be difficult to argue that it was unreasonable for a party not to raise a public law argument in a private law claim, and vice versa. So, for example, the government defendants in *Ruddock v Taylor* were unsuccessful in arguing that Mr Taylor ought to be estopped from bringing a tort claim due to his failure to have raised his application for damages in the earlier judicial review claim;<sup>55</sup> ‘there was not the slightest chance that the High Court would have done anything about it if he had’.<sup>56</sup> A final difficulty with the extension of principles of estoppel by record across the divide (at least where the public case is criminal) is differences in the applicable burden of proof, with criminal law being determined by reference to a higher burden than civil proceedings.<sup>57</sup> Taken together, these various factors limit the

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<sup>51</sup> *Taylor v Ansett Transport Industries* (1987) 18 FCR 342, 358; *Trawl Industries of Australia Pty Ltd (In Liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406, 526. For an overview, see James O’Hara, ‘Litigation Preclusion: To what extent could (or should) a litigant be barred by prior litigation to which it was not a party?’ 46 *Australian Bar Review* 286.

<sup>52</sup> The exception would be in cases where the criminal offence is prosecuted privately: *R v Thompson* [1991] 58 A Crim R 81, 84. The courts do not readily accept that an informant in criminal proceedings can be regarded as the prosecutor: eg *Soare v Ashley* [1955] VLR 438.

<sup>53</sup> See, eg, *Kosanovic v Sarapuu* [1962] VR 321, 327–28 (O’Byrne J); *El Alam v Northcote City Council* (1996) 2 VR 672, 681 (Mandie J).

<sup>54</sup> *Kosanovic v Sarapuu* [1962] VR 321, 333 (O’Byrne J). The issues must be ‘identical’ and not merely similar (at 328).

<sup>55</sup> *Ruddock v Taylor* (2003) 58 NSWLR 269, 278–79 [42]–[44] (Spigelman J), 285 [82] (Meagher JA); *Ruddock v Taylor* (2005) 222 CLR 612, 647 [131] (Kirby J).

<sup>56</sup> *Ruddock v Taylor* (2003) 58 NSWLR 269, 285 [82] (Meagher JA).

<sup>57</sup> *Kosanovic v Sarapuu* [1962] VR 321, 342.

circumstances in which it may be appropriate for the principles of estoppel by record to influence the relationship between public and private law.

### C *Stay of proceedings*

A further procedural rule which may influence the relationship between public and private law is the court's power to stay proceedings. The most relevant use of this power, for present purposes, is to facilitate a staged relationship between civil and criminal proceedings, requiring one to be finalised before the other can proceed.<sup>58</sup> Historically, this result was mandated by the operation of the so-called 'felonious tort rule', which prevented civil proceedings from going ahead until a criminal prosecution had been finalised or its failure otherwise explained.<sup>59</sup> The rationale for the rule is said to originally lie in the historical English practice of forfeiture, which saw all property of convicted felons forfeited to the Crown.<sup>60</sup> To allow civil claims to precede criminal prosecution, therefore, would have resulted in a plaintiff taking financial priority over the Crown in respect of that property. If that was the only explanation for the rule, however, it ought to have been abolished along with forfeiture in 1870. The continuation of the felonious tort rule after that date is said to be justified by the public policy rationale that plaintiffs ought to be encouraged to prosecute crimes in the public interest in priority over their own interests,<sup>61</sup> or to 'do their duty to the public by prosecuting for the felony before they seek redress for the private injury done to themselves'.<sup>62</sup> Whatever its origins or rationale, the

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<sup>58</sup> *Citation Resources Ltd v Landau* (2016) 116 ACSR 410, 423 [49]. In some circumstances, statutory provisions have the effect of creating an automatic stay: see, eg, *Corporations Act 2001* (Cth) s 1317N.

<sup>59</sup> *Smith v Selwyn* [1914] 3 KB 98, 106. See further Clifford Pannam, 'Felonious Tort Rule' (1965) 39 *Australian Law Journal* 164.

<sup>60</sup> Pannam (n 59) 166; Matthew Dyson, 'The Timing of Tortious and Criminal Actions for the Same Wrong' (2012) 71 *Cambridge Law Journal* 86, 106.

<sup>61</sup> Pannam (n 59) 168; Dyson, 'The Timing of Tortious and Criminal Actions for the Same Wrong' (n 60) 106.

<sup>62</sup> *Wickham v Gatrill* (1854) 65 ER 433, 435.

felonious tort rule no longer holds sway in Australia.<sup>63</sup> While this rule no longer mandates a staged relationship between criminal and civil proceedings traversing the same offence, the same result can be achieved via the more flexible mechanism of the court's power to stay proceedings.

Unlike the felonious tort rule, the court's power to stay proceedings is inherently discretionary, rather than operating as a blanket rule. Further, while the felonious tort rule operated to prioritise the criminal law, the exercise of the discretion to award a stay is tipped the other way. In *McMahon v Gould*,<sup>64</sup> Wootten J identified a range of matters relevant to the exercise of the discretion.<sup>65</sup> Relevantly, these include that the defendant has no prima facie entitlement to a stay of civil proceedings simply by reason of pending or possible criminal proceedings. Instead, the plaintiff is entitled to have their case heard in the ordinary course, requiring justification for the 'grave' interference with that entitlement. Matters that might justify such an interference could include that the concurrent hearing of civil and criminal proceedings would undermine the defendant's 'right of silence',<sup>66</sup> or impose too great a burden to allow the defendant to adequately defend both proceedings.<sup>67</sup> This tool allows the courts to put in place a staged dynamic between two causes of action in appropriate cases, allowing one to be resolved before the other can be entertained. However, as a general rule there is no reason civil proceedings cannot be determined before criminal proceedings traversing the same subject matter.<sup>68</sup>

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<sup>63</sup> *Caesar v Sommer* [1980] 2 NSWLR 929, 931; *McMahon v Gould* (1982) 7 ACLR 202, 205 (Wootten J).

<sup>64</sup> (1982) 7 ACLR 202.

<sup>65</sup> *Ibid* 206–07.

<sup>66</sup> Note that later authorities raise concerns about the weight Wootten J affords the privilege against self-incrimination (see eg *Websyte Corporation Pty Ltd v Alexander [No 2]* [2012] FCA 562, [109]–[116]).

<sup>67</sup> *McMahon v Gould* (1982) 7 ACLR 202, 206 (Wootten J).

<sup>68</sup> See, eg, *Niven v SS* [2006] NSWCA 338.

## D *Duplication of remedies*

In addition to rules that can govern the relationship between causes of action, there are also rules that target the interaction between public and private law remedies. One such rule is that governing the overlap between exemplary damages and criminal sanctions. Exemplary damages serve similar functions to the goals of punishment and deterrence in the criminal context, being awarded where ‘the defendant’s conduct is sufficiently outrageous to merit punishment’.<sup>69</sup> In circumstances where a defendant might be considered liable for both categories of sanctions in respect of the same conduct, the question of duplication arises, inviting the courts to consider the relationship between public and private law. The approach adopted by the Australian courts in resolving this tension is largely influenced by the order in which proceedings are commenced, as well as the outcome in the former case. First, a plaintiff may seek punitive damages *after* the defendant has been *convicted* of an offence arising out of the same facts. This situation is governed by the rule set out in *Gray v Motor Accident Commission*,<sup>70</sup> where a plurality of the High Court held that exemplary damages could not be awarded in circumstances where ‘the criminal law has been brought to bear upon the wrongdoer and substantial punishment inflicted’.<sup>71</sup> In reaching this view, it was acknowledged that there might be difficulties involved in marking out the bounds of what amounted to ‘substantial punishment’ (though a term of imprisonment would always be so),<sup>72</sup> and whether there was sufficient overlap between the two causes of action so as to engage the principle.<sup>73</sup> However, the plurality indicated that ‘it would be a most unusual case in which it was open to a civil court to conclude that the outcome of those criminal proceedings did not take sufficient

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<sup>69</sup> Justice James Edelman, Jason NE Varuhas and Simon Colton, *McGregor on Damages* (20th ed, Thomson Reuters, 2017) 415.

<sup>70</sup> (1998) 196 CLR 1.

<sup>71</sup> *Ibid* 14 [40].

<sup>72</sup> *Ibid* 16 [54].

<sup>73</sup> *Ibid* 14 [45].

account of the need to punish the offender and deter others from like conduct'.<sup>74</sup> In other words, because the objective of criminal punishment overlaps with that of punitive damages awards, to award punitive damages following a criminal conviction amounts either to a second-guess of the criminal court's assessment or to a duplication of the punishment imposed.<sup>75</sup>

The second scenario in which the two sets of remedies overlap is where a plaintiff seeks punitive damages *before* the defendant has been *convicted* of an offence, either because criminal proceedings have not been commenced or have not yet been finalised. The High Court in *Gray* acknowledged that this scenario might raise difficult questions, though these did not need to be determined in that case.<sup>76</sup> In obiter, the plurality noted that it was doubtful whether the mere possibility of criminal proceedings would rule out exemplary damages, though the position may be more fraught where criminal proceedings were on foot but not finalised.<sup>77</sup> In the Privy Council decision of *W v W*,<sup>78</sup> Lord Hoffman also addressed this concern, noting:

There is an additional problem when a criminal prosecution follows a civil action. Logically, the criminal punishment should take into account the exemplary damages which have been awarded but there is an argument for regarding criminal proceedings in the name of the state as having primacy over a private action.<sup>79</sup>

The New South Wales Court of Appeal addressed the related question of whether exemplary damages could be awarded prior to potential disciplinary proceedings in *James v Hill*.<sup>80</sup> There, Tobias JA rejected the appellant's argument that the award would raise the spectre of 'double

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<sup>74</sup> *Ibid* 15 [46].

<sup>75</sup> *Ibid* 14 [42]–[43]. See also *W v W* [1999] 2 NZLR 1, 7.

<sup>76</sup> *Gray v Motor Accident Commission* (1998) 196 CLR 1, 15 [48].

<sup>77</sup> *Ibid*.

<sup>78</sup> [1999] 2 NZLR 1.

<sup>79</sup> *Ibid* 8.

<sup>80</sup> [2004] NSWCA 301.



punishment’, as it would be possible for the disciplinary tribunal to take into account the exemplary award in determining an appropriate sanction.<sup>81</sup>

A third potential scenario in which the question arises is where a plaintiff seeks punitive damages *after* the defendant has been *acquitted* of a criminal offence arising out of the same facts. The New Zealand Court of Appeal grappled with this issue in *Daniels v Thompson*,<sup>82</sup> ultimately reaching the view that where tortious conduct is the subject of a criminal prosecution, exemplary damages ought not be available irrespective of whether the accused was convicted or acquitted. The finding was underscored by concern for ‘the primacy of the criminal law in imposing discretionary Court-based sanctions for criminal offending’.<sup>83</sup> Because the matter did not arise for determination in *Gray*, the High Court left open the possibility of the Australian courts taking different approach.<sup>84</sup> This invitation was taken up by the New South Wales Court of Appeal in *Niven v SS*, with Tobias JA declining to follow *Daniels*.<sup>85</sup> A critical factor, for his Honour, was that the accused’s acquittal removed any prospect of double punishment. Accordingly, there was no fundamental disconnect between an acquittal in criminal proceedings, and the award of exemplary damages in civil proceedings.<sup>86</sup> The acquittal of a defendant in criminal proceedings is therefore no bar to exemplary damages in civil proceedings traversing the same subject matter.<sup>87</sup> All of this confirms that there is a complex relationship between public and private law remedies and sanctions, with some

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<sup>81</sup> *Ibid* [82].

<sup>82</sup> [1998] 3 NZLR 22.

<sup>83</sup> *Ibid* 51.

<sup>84</sup> *Gray v Motor Accident Commission* (1998) 196 CLR 1, 15 [47].

<sup>85</sup> *Niven v SS* [2006] NSWCA 338, [63].

<sup>86</sup> *Ibid*.

<sup>87</sup> See further *Whitbread v Rail Corporation New South Wales* [2011] NSWCA 130; *Cheng v Farjudi* [2016] 93 NSWLR 95.

circumstances permitting awards to be made independently, and others requiring a co-ordinated or mutually exclusive approach.

## E *Sharing of evidence*

The final set of rules considered in this essay which affect the relationship between public and private law are those which govern the admissibility of evidence of a finding in one case in another. For example, can a plaintiff rely on the defendant's prior criminal conviction as evidence in civil proceedings traversing the same subject matter? Putting to one side cases which raise the prospect of estoppel by record,<sup>88</sup> the common law position is that a plaintiff in a civil claim cannot rely on a previous criminal conviction to reduce their evidential burden. While an earlier judgment may be admissible to confirm the outcome of a case, the rule in *Hollington v Hewthorn* prohibits the admission of a judgment as proof of the underlying facts (in that case, a driver's careless driving conviction was inadmissible in later civil proceedings to establish negligence).<sup>89</sup> The rule has been the subject of significant criticism, including on the grounds that it excludes highly probative evidence, adds time and cost to litigation, and increases the chances of producing inconsistent judgments.<sup>90</sup> Accordingly, the Australian Law Reform Commission recommended altering the rule so as to allow the admission of evidence of a criminal conviction against that person in later civil proceedings,<sup>91</sup> a recommendation that has been put into effect via legislative reform.<sup>92</sup>

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<sup>88</sup> As discussed at section B above, this prospect may arise where the parties to both proceedings are the same.

<sup>89</sup> *Hollington v F Hewthorn & Co Ltd* [1943] KB 587.

<sup>90</sup> See Australian Law Reform Commission, *Evidence* (Interim Report No 26, 1985) 441. See also Heydon (n 41) [5200], [5220].

<sup>91</sup> Australian Law Reform Commission (n 90) 442.

<sup>92</sup> *Evidence Act 1995* (Cth) s 92(2) and equivalent provisions in NSW, Tasmania, Victoria, ACT and the Northern Territory. The legislation in Queensland raises a presumption as to the elements underlying the conviction: *Evidence Act 1977* (Qld) s 79. For discussion, see Heydon (n 41) [5225]–[5230].

But what of the converse position, where a party in criminal proceedings seeks to adduce evidence of an earlier civil judgment? The ALRC thought that these circumstances ought to be treated differently to those described above, as a civil judgment is of ‘considerably less’ probative weight than a criminal conviction.<sup>93</sup> One reason for this is the lower burden of proof employed in civil proceedings. Another is that the parties in civil proceedings play a far greater role in confining the evidence that is produced to the court than is the case in criminal proceedings. Bearing these matters in mind, the ALRC reached the view that ‘[t]he disadvantages of admitting evidence of a civil judgment (the potential for waste of time and costs in investigating the judgment, and the greater likelihood of challenge to the evidence) outweigh the minimal probative value of the evidence’.<sup>94</sup> Again, a number of jurisdictions have taken up this recommendation,<sup>95</sup> with the result that earlier civil judgments cannot be adduced as evidence in later criminal proceedings.

## F *Summary*

As outlined in this section, the interaction between public and private law is not simple or linear. In cases where public and private law causes of action converge, the various procedural tools employed by the courts reflect a range of differing relationship dynamics. Sometimes, these tools facilitate an independent relationship between causes of action and remedies, allowing both to operate in parallel. At other times, the relationship may be mutually exclusive in nature (ie the operation of one precludes the operation of another), staged (requiring one to be determined before another) or collaborative (allowing both to work in conjunction with one another). What this discussion has also made clear, however, is that the operation of many of

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<sup>93</sup> Australian Law Reform Commission (n 90) 445.

<sup>94</sup> *Ibid.*

<sup>95</sup> Reflected in *Evidence Act 1995* (Cth) s 91 and equivalent provisions in NSW, Tasmania, Victoria, ACT and the Northern Territory.

these rules is not clear-cut, requiring the courts to consider what style of relationship between public and private law ought to be established in a given case.

### III THE PUBLIC-PRIVATE BALANCING ACT

On closer examination, the application of the various tools deployed by the courts to manage the collision of public and private law is underpinned by a range of policy considerations.<sup>96</sup> The decision as to whether a tool ought to be used (and accordingly, what type of relationship should be established between public and private law) involves a delicate balancing act between these various policy considerations. This section outlines a number of those considerations, before providing an example of this balancing act in operation.

#### A *Isolating the Policy Concerns*

The deployment of procedural tools to manage the relationship between public and private law causes of action and remedies invites consideration of a number of different policy concerns. Some of these concerns are pragmatic in nature. For instance, allowing both public and private law to operate in parallel might be thought to invite duplication of costs and resources. From this perspective, the use of procedural tools to limit the duplication of proceedings might serve to limit impacts on resourcing. We might therefore think that it is appropriate to utilise the principles of estoppel by record to prevent the unfairness inherent in requiring a defendant to invest the time, cost and effort of defending themselves against essentially the same charge on multiple occasions.<sup>97</sup> Similar concerns might underpin our choice to facilitate collateral challenge of an administrative decision in tort proceedings; insistence on separate public and private law proceedings increases the cost burden for the

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<sup>96</sup> For general discussion, see eg Robert C Casad and Kevin M Clermont, *Res Judicata: a Handbook on its Theory, Doctrine, and Practice* (Carolina Academic Press, 2001) ch 3.

<sup>97</sup> See, eg, Gavin Dingwall, 'Prosecutorial Policy, Double Jeopardy and the Public Interest' (2000) 63 *Modern Law Review* 268, 268–69.

prosecuting party and potentially decreases access to justice.<sup>98</sup> Resourcing concerns are also relevant from an institutional perspective, with the result that we might view one of the purposes of rules which limit duplication as being to ‘promote the efficient use of court resources and time’,<sup>99</sup> and to avoid ‘the perception that the administration of justice is inefficient, careless of costs and profligate in its application of public moneys’.<sup>100</sup>

Another pragmatic concern which might influence the approach to public-private law relationships is that of expertise. Thus, for example, Besanko J thought that one of the criteria that stood against permitting collateral challenge was whether there was ‘a more appropriate forum in terms of expertise’.<sup>101</sup> A further pragmatic policy concern at play relates to strategic advantages arising from the duplication or separation of public and private law cases. For example, it might be thought that a defendant will be unfairly disadvantaged if a prosecuting party has multiple opportunities to test their strategy and evidence, and is able to craft a stronger case with the benefit of experience.<sup>102</sup> There may also be concerns of strategic unfairness implicit in allowing a prosecuting party to ‘circumvent’ applicable procedural protections (eg tighter standing rules or shorter limitation periods) by allowing a choice as to which type of claim to bring.<sup>103</sup>

Beyond pragmatic interests, the use of procedural rules to facilitate relationships between public and private law also reflects a range of concerns of principle. One such concern centres on the spectre of ‘double punishment’, reflected in the maxim *nemo debet bis vexari pro eadem causa* or ‘no one should be harassed twice for the same cause’. This essentially defendant-

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<sup>98</sup> See, eg, Douglas (n 25) 83.

<sup>99</sup> *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* (2011) 248 FLR 193, 218 [125] (McLure P).

<sup>100</sup> *UBS AG v Tyne* (2018) 360 ALR 184, 200 [59] (Kiefel CJ, Bell and Keane JJ).

<sup>101</sup> *Jacobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568, 594 [93].

<sup>102</sup> Dingwall (n 97) 268.

<sup>103</sup> *Jacobs v OneSteel Manufacturing Pty Ltd* (2006) 93 SASR 568, 594 [93].

oriented concern is implicit in a number of the procedural tools discussed in this essay, including the availability of the plea of double jeopardy, the application of issue estoppel to prevent re-agitation of an allegation already resolved in the defendant's favour, and the rules which restrict the dual imposition of exemplary damages and criminal sanctions.<sup>104</sup> As noted in *Rogers v The Queen*,<sup>105</sup> the underlying concern 'looks to the position of the individual and reflects the injustice that would occur if he or she were required to litigate afresh matters which have already been determined by the courts'.<sup>106</sup>

Not all such concerns for fairness, however, are focussed on the position of the defendant; there are also the interests of the plaintiff or prosecuting party to consider. For example, the rules relating to the admissibility of findings from one proceeding in another may reflect concerns about the unfairness of requiring a party to prove something that has already been established in a party's favour in prior proceedings, supporting the abandonment of the rule in *Hollington v Hewthorn*.<sup>107</sup> Similarly, the unfairness of requiring a party to bring two separate proceedings to establish what might be dealt with in a single case might justify permitting collateral attack on an administrative decision in tort proceedings.<sup>108</sup>

Another breed of concerns relate to the idea of finality of judgments; *interest rei publicae ut sit finis litium* ('it is for the common good that there should be an end to litigation'). This is one of the key tenets underlying principles of estoppel by record,<sup>109</sup> the court's power to stay proceedings as an abuse of process,<sup>110</sup> and the rule against collateral attack.<sup>111</sup> The idea of

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<sup>104</sup> *Gray v Motor Accident Commission* (1998) 196 CLR 1, 14 [42]–[43].

<sup>105</sup> (1994) 181 CLR 251.

<sup>106</sup> *Ibid* 273.

<sup>107</sup> See, eg, Australian Law Reform Commission (n 90) 208.

<sup>108</sup> Douglas (n 25) 78.

<sup>109</sup> See, eg, *Jackson v Goldsmith* (1950) 81 CLR 446, 466 (Fullagar J).

<sup>110</sup> *Attorney-General v Kowalski* [2014] SASC 1, [198].

<sup>111</sup> *DJL v Central Authority* (2000) 201 CLR 226, 262 [90] (Kirby J).

finality has an ‘undoubted value’,<sup>112</sup> and ‘expresses the need, based on public policy, for judicial determinations to be final, binding and conclusive’.<sup>113</sup> A related maxim is that of *res judicata pro veritate accipitur*, which ‘expresses the need for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct’, and which ‘is essential for the maintenance of public respect and confidence in the administration of justice’.<sup>114</sup> Accordingly, the principle of finality is justified by reference to both the public interest as well as concerns to preserve the institutional integrity of the court system. However the requirement of finality is not absolute, and may at times need to give way to other concerns such as access to justice; ‘finality is a good thing, but justice is better’.<sup>115</sup> From the perspective of a prosecuting party, the operation of procedural rules to preclude subsequent or parallel litigation might be viewed as a limit on access to justice.<sup>116</sup>

A final concern implicit in the above rules that of inconsistent results, which may arise if public and private law proceedings are allowed to operate in parallel or without regard to one another. At heart, resistance to inconsistency reflects concerns about threats to the legitimacy of the court system,<sup>117</sup> and supports the invocation of procedural tools to prevent subsequent proceedings, including estoppel by record,<sup>118</sup> the *Anshun* doctrine,<sup>119</sup> and the power to stay proceedings.<sup>120</sup> Objections to inconsistency are also relevant to calls to abandon the rule in *Holligton v Hewthorn*,<sup>121</sup> and underpin reluctance to award exemplary damages following the

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<sup>112</sup> *Neil Pearson & Co Pty Ltd v Comptroller-General of Customs* (1995) 38 NSWLR 443, 453.

<sup>113</sup> *Rogers v The Queen* (1994) 181 CLR 251, 273.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ras Behari Lal v King-Emperor* (1933) 50 TLR 1, 2 (Lord Atkin).

<sup>116</sup> O’Hara (n 51) 297.

<sup>117</sup> *R v Carroll* (2002) 213 CLR 635, 672 [128] (McHugh J).

<sup>118</sup> *Ibid.*

<sup>119</sup> *Owston Nominees No 2 Pty Ltd v Clambake Pty Ltd* (2011) 248 FLR 193, 218 [125] (McLure P).

<sup>120</sup> *R v Carroll* (2002) 213 CLR 635, 649 (Gleeson CJ and Hayne J).

<sup>121</sup> See, eg, Australian Law Reform Commission (n 90) 441; Heydon (n 41) [5200].

imposition of criminal sanction; if the criminal court has assessed all the circumstances and determined the appropriate outcome (eg substantial punishment, some lesser punishment or no punishment at all), the award of civil penalties may be viewed as second-guessing that judgment.<sup>122</sup> At least where the relevant public law proceedings are criminal in nature, the reach of the inconsistency point across the public-private divide is tempered by differences in the applicable burden of proof. This is because there is no theoretical inconsistency between a positive finding in the criminal context determined beyond reasonable doubt, and a negative finding in the civil context determined on the balance of probabilities.

## B *Rules in Practice: Niven v SS*

The legal rules and doctrines canvassed in this essay operate to facilitate complex relationships between public and private law in cases where the two converge, moving between independent, staged, prioritised and collaborative dynamics. The complexity of these dynamics is only exacerbated by the fact that, in many cases, the operation of these rules is a matter of judicial discretion or may turn on tactical or co-incidental matters, such as which cause of action is brought first in time, or strategic decisions made by the parties in conducting litigation. This complexity is illustrated by the case of *Niven v SS*.<sup>123</sup> As noted above,<sup>124</sup> this case involved a civil claim for damages relating to historical sexual assaults, in which the plaintiff successfully obtained damages (including exemplary damages) prior to the defendant being acquitted of relevant charges in criminal proceedings that followed a year later. The case considered the application of two of the procedural tools discussed above—namely, the court’s power to stay proceedings (which would have created a staged dynamic between public and private law), and the overlay between exemplary damages (a private law remedy) and criminal penalties (a

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<sup>122</sup> *Gray v Motor Accident Commission* (1998) 196 CLR 1, 15 [46].

<sup>123</sup> [2006] NSWCA 338.

<sup>124</sup> See above page 4.



public law remedy). In declining to utilise these tools in the case, the court instead expressed preference for facilitating an independent relationship between public and private law.

The approach adopted by the court in this case explicitly drew on a number of the policy considerations outlined above. In determining whether or not to stay the civil proceedings, the trial judge applied the guidelines previously set out by Wootten J in *McMahon v Gould*.<sup>125</sup> As that case made clear, there is no automatic stay of civil proceedings pending criminal proceedings. The task involves ‘the balancing of justice between the parties’, weighing the ‘grave’ interference with the plaintiff’s entitlement to proceed in the ordinary course against specific unfairness to the defendant.<sup>126</sup> The defendant in *Niven* urged that allowing the civil proceedings to go ahead would afford the plaintiff the opportunity to ‘rehearse’ his evidence before the criminal trial, and that requiring the accused to give evidence in the civil proceedings would prejudice his ‘right to silence’ in the criminal proceedings.<sup>127</sup> Ultimately, however, the trial judge determined that the balance should be struck in favour of allowing the proceedings to continue, with that finding upheld on appeal.<sup>128</sup>

In discussing the availability of exemplary damages, other policy considerations were raised, including the prospect of ‘double punishment’ of the accused.<sup>129</sup> Again, however, the award of exemplary damages was upheld notwithstanding the potential for overlap with criminal sanctions.<sup>130</sup> In proceeding on this basis, Tobias JA referred to yet another policy

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<sup>125</sup> (1982) 7 ACLR 202, 206–07.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Niven v SS* [2006] NSWCA 338, [10].

<sup>128</sup> *Ibid* [45].

<sup>129</sup> *Ibid* [63].

<sup>130</sup> *Ibid* [66].

consideration, being the likelihood of the creation of inconsistent judgments in both proceedings. Dismissing this concern, his Honour noted:

[T]he High Court in *Grey* [sic] left open the position that might arise if relevant criminal proceedings ended in the accused's acquittal prior to the hearing and determination of the civil proceedings for the same conduct. In such an event it would be difficult to suggest the whole of the plaintiff's action including a claim for exemplary damages should be struck out given the differences, particularly with respect to the standard of proof, between a criminal and a civil trial. In my opinion, the position is a fortiori where the acquittal occurs after the conclusion of the civil trial.<sup>131</sup>

The outcome in this case provides a useful illustration of the complexity of the relationships that may arise between public and private law, and of the difficult policy choices that influence the exercise of judicial discretion to favour one style of relationship dynamic over another.

## CONCLUSION

This essay demonstrates that in cases where public and private law converge, the relationships between the two areas cannot be delineated by way of the simple binary promise of the public-private divide. Some circumstances will permit an independent relationship, in which public and private law principles and remedies operate in parallel. However, public and private law may also stand in relationships that prioritise one over another, which preclude the operation of one another, or invite a collaborative approach. These complex relationship dynamics are supported and facilitated through the application of procedural rules, including those of collateral attack, estoppel by record, the power to stay proceedings, duplication of remedies, and admissibility of evidence.

What this essay has further demonstrated, however, is that the operation of procedural rules does not necessarily provide hard and fast answers about how public and private law interact, and what the appropriate outcome in a case might look like. Determining whether, and

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<sup>131</sup> *Ibid* [62].

how, the procedural rules will apply in a given case is influenced by a range of pragmatic and principled policy considerations which draw on the interests of the parties and the institution of the courts, as well as the wider public interest. To further complicate matters, the application of these policy considerations to a particular case will be influenced by coincidental and strategic factors, such as which action is brought first in time and the way in which the case is run. The task of defining appropriate outcomes at the interface of public and private law is a delicate balancing exercise, requiring careful attention to policy and practice.

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*Migration Act 1958* (Cth)