The Chase case : in search of a future for tort?

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This article discusses the role tort law might play in society even after the recovery of compensatory damages is forbidden. Using the Court of Appeal's decision in Chase *as a point of reference, the author produces a comprehensive analysis of the place of declarations and nominal damages in the law of tort, and concludes in favour of an "ombudsman" role for tort.*

"To every subject in the land, no matter how powerful, I would use Thomas Fuller's words over 300 years ago : ' Be you ever so high, the law is above you' ".
Gouriet v *Union of Post Office Workers* [1977] QB 729, 761-2 per Lord Denning MR

I INTRODUCTION

Tort actions are among the most vigorous and adaptable of all actions. The influence of tort law pervades everywhere. It measures the behaviour of everyone from Ministers of the Crown[1] to errant school children.[2] Those who fall short must account to those who suffer the result. Most often they will have to compensate. Sometimes behaviour merits special punishment and extra damages are imposed. If the business of law is to impose order on life, tort has been one of its best servants.

But even as tort has been reaching its maturity many have predicted its demise. Tort has always been the "battleground of social theory", and now a considerable body of theory is critical. Academic works abound with criticism and with alternate schemes for more equitable, more efficient compensation.[3] Some attack tort for having expanded too far, for having imposed too many liabilities on too many relationships threatening those it was designed to help.[4] The problems and

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1 *Rowling* v *Takaro Properties* [1988] AC 473, reversing *Takaro Properties* v *Rowling* [1986] 1 NZLR 22.

2 *Wilson* v *Pringle* [1986] 3 WLR 1.

3 J G Fleming "Is There a Future for Tort?" (1984) 58 ALJ 131.

4 G L Priest "The Current Insurance Crisis and Modern Tort Law" (1987) 96 Yale L J 1521.

criticisms are most acute when involving personal injury. In New Zealand these problems have been resolved by removing tort liability for personal injury and replacing it with a comprehensive insurance or social welfare scheme which covers all injuries regardless of fault.[5]

Should tort still have a role in our society even if damages are forbidden? In *Chase*[6] the New Zealand Court of Appeal seemed to give a divided answer. This article examines the various approaches taken in *Chase* and assesses what the decision might mean for the future of tort. It will largely agree with Cooke P that tort can continue to play an "ombudsman" role in society and the courts should not unnecessarily give up what is an important function merely because tort actions for personal injury can no longer bring a pecuniary benefit.

The article also looks at the approaches taken by the judges to the two remedies which courts could use to recognize this role: declarations and nominal damages. It will conclude that while a declaration that a tort has been committed may not be available to a dead victim, it should be available to a living one. It will disagree with the Court's conclusion that nominal damages are necessarily barred by accident compensation. Ultimately *Chase* may be less important for its actual result than the possibilities that Cooke P's judgment raise for the future.

II THE CASE

The circumstances surrounding Paul Chase's death are well known. He was shot by a police officer who entered Chase's flat at 6.40 am on 16 April 1983. The officer mistook an exercise bar Chase was carrying for a gun. Although the police were executing a search warrant, they had not announced themselves. Public questioning began the next day.

The questions focussed on the police's methods. The Minister of Police instructed an eminent barrister to report on the police's investigation of the shooting. His inquiry vindicated the police.[7] Doubts, however, remained.

III THE CASE IN COURT

Chase's administrator, the Public Trustee, claimed exemplary and nominal damages for battery, assault, and trespass to Chase's apartment. Compensatory damages were also sought for assault. Negligence in setting up the "dawn raid" was also alleged. The administrator also sought declarations that the police's behaviour "was unlawful and a high-handed and oppressive use of Police powers".[8]

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5 Accident Compensation Act 1982; see Report of the Royal Commission of Inquiry *Compensation for Personal Injury* [The Woodhouse Report] (Government Printer, Wellington, 1967).

6 *Re Chase* [1989] 1 NZLR 325.

7 C M Nicholson QC *Report for the Minister of Police* (September,1983).

8 Above n6, 341.

The object of the actions was perhaps not so much to win but to bring the whole matter into the open. In the High Court, Heron J struck out all the actions before there was any trial;[9] none was a valid cause of action. The Public Trustee appealed.

The Court of Appeal agreed that damages were statute barred; they could not survive section 27 of the Accident Compensation Act 1982; nominal damages would also have been an abuse of process.

The judges agreed that a declaration should not be granted but they were greatly divided over whether a declaration could be granted. Henry and Somers JJ saw little value in a declaration. The High Court either lacked jurisdiction, or should exercise its discretion to refuse to make such a declaration. Cooke P thought that in appropriate circumstances the High Court could use declarations to reflect an essential "ombudsman" function of tort. He agreed that a declaration should not be granted because Chase's death had already been sufficiently investigated.

Leave to appeal to the Privy Council was refused.[10]

IV DAMAGES FOR PERSONAL INJURY IN NEW ZEALAND

Section 27 of the Accident Compensation Act 1982 provides that:

> ...where any person suffers personal injury by accident...no proceedings arising directly or indirectly out of the injury or death shall be bought in any Court....

This section's life has not been easy. Plaintiffs in many cases, the cervical cancer litigation[11] being a prominent example, have sought to exclude their particular action from the bar. They deny that their injuries were actually accidents under the Act[12] or argue that the remedies they claim are not damages in terms of the Act.

In *Donselaar* [13] the Court of Appeal decided that section 27 did not bar claims for exemplary damages. New Zealand courts now have to examine whether accident compensation bars the remedies sought. This is not an easy task; there is little authority. In *Donselaar*, Cooke J (as he then was) described the process as a *terra incognita*.[14] It has opened a pandora's box of judicial possibilities, both for

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9 *Chase* v *The Attorney General* (Unreported, Wellington High Court, A106/84, 18 Sept 1986).

10 *Re Chase (No2)* [1989] 1 NZLR 345.

11 *Matheson* v *Green* [1989] 3 NZLR 564.

12 See s 2 of the Accident Compensation Act 1982.

13 *Donselaar* v *Donselaar* [1982] 1 NZLR 97.

14 Above n13, 106: "To set about assessing exemplary damages without the possibility of saying that aggravated damages are enough punishment would be to travel into a terra incognita on a course never contemplated by their Lordships [in *Broome* v *Cassell* [1972] AC 1027 and *Rookes* v *Barnard* [1964] AC 1129]".

the law of damages and, as *Chase* shows, for the law of tort itself. There is always controversy as to how far old rules should be moulded for new purposes.

In England the leading case is *Broome* v *Cassell*, which involves the serious defamation of a retired naval captain. It restricted exemplary damages to official conduct or conduct designed to make a profit. Lord Hailsham LC opined that ordinary bullies should not be punished through exemplary damages because they were already punished by compensatory damages.[15] It is yet to be decided whether the *Donselaar* brand of exemplary damages should include part of what was previously considered to be compensatory damages so as to act as an effective deterrent. The Court of Appeal believes that exemplary damages must be awarded with caution[16] but to be a fully fledged deterrent, exemplary damages may have to include such considerations.

"Personal injury by accident" includes "the physical and mental consequences of any such injury or of the accident".[17] After *Blundell*[18] "mental consequences" have been interpreted as including such things as the loss of dignity, distress, embarrassment, wounded feelings, or righteous anger[19] and actions based on such consequences have been referred to the Accident Compensation Corporation.[20] Cooke P in the recent intertwined decisions of *Matheson*[21] and *Willis*[22] was however concerned to limit the expanding definition of personal injury to a

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15 *Broome* v *Cassell*, above n14, 1078.

16 In *Donselaar*, above n13, 107, and in *Blundell*, below n18, 739-740.

17 Above n12.

18 *Auckland City Council* v *Blundell* [1986] 1 NZLR 732. Blundell alleged that while attempting to recover his car from the defendant's traffic department he was assaulted without provocation and then detained against his will. He sued for assault, false imprisonment and malicious prosecution. Ultimately he sought only exemplary damages for the assault and the false imprisonment.

19 *Dandoroff* v *Rogozinoff* [1988] 2 NZLR 588, approved in *Matheson v Green*, above n11, 572. This, and observations in *Blundell*, led Hillyer J to consider that false imprisonment was covered by the bar, see *Willis* v *The Attorney-General* (Unreported, High Court Auckland, CP 1626/88, 7 April 1989). This was in contrast to *Howley* v *The Attorney General* (Unreported, High Court Auckland, A586/85, 16 Jan 1989) in which Wylie J awarded $4000 compensatory damages for false imprisonment and false arrest after deciding that exemplary damages were unavailable. The difference is explicable by reference to *Howley's* particular history. At a hearing before *Blundell* was decided, *Howley* v *The Attorney General* (Unreported, High Court Auckland, A586/85, 30 June 1986), Chilwell J , reflecting an earlier judicial consensus, decided that claims for these types of damages should not be referred to the Accident Compensation Corporation. The approach in *Howley* has however recently been adopted by the Court of Appeal in reversing Hillyer J, which perhaps shows the overriding difficulty in s 27: see below n22.

20 Under s27(4) which requires courts to refer any action which raises a question about whether it involves personal injury by accident to the Corporation for determination.

21 Above n11.

22 *Willis* v *The Attorney-General* [1989] 3 NZLR 574.

common-sense, holistic interpretation[23] guided by the broad spirit of the accident compensation scheme. Unless a particular duty guards personal safety, damages for its breach are not barred. Malicious prosecution, defamation and actions protecting economic and proprietary interests cannot be barred.[24] Similarly, false imprisonment by itself cannot fall under the bar and Hillyer J was wrong to refer the claim for false imprisonment in *Willis* to the Corporation because s27(4) only requires real questions to be put to the Corporation.[25]

While *Matheson* and *Willis* are a welcome clarification and put an end to the somewhat amazing interpretations floating around in legal circles, Cooke P again emphasized the *Blundell* interpretation of "mental consequences" when duties do protect personal safety. In *Matheson* these included assault and negligence but also a breach of the fiduciary relationship between doctor and patient. His Honour confirmed Henry J's opinion in *Dandoroff*[26] that separating out elements of humiliation or righteous anger from "mental consequences" properly covered by compensatory damages would involve too fine a distinction which the courts do not retain jurisdiction to make.[27] Cooke P perhaps went further, agreeing not only that the separation was difficult but denying that the section was limited "to mental consequences identifiable by some particular medical or psychiatric description, nor to what is often called shock or trauma".[28] In *Chase*, counsel had attempted to focus on Chase's sense of outrage or fear at the point when he heard the police intruders or when he saw the gun. Reflecting this approach, the judges rejected counsel's attempt.

Perhaps this is reading too much into "mental consequences". "Mental consequences" parallel "physical consequences". Any scheme which failed to recognize psychological injury would be deficient in scope. But there is however a middle state, outrage at violation of one's legal or civil rights or the desire to have that violation judicially recognized. Even given Cooke P's qualification, "mental consequences" cannot cover this middle state.

The award of nominal damages recognizes breaches of legal rights. It does not involve a mixing of damages. In awarding nominal damages as well as awarding exemplary damages the court should focus not on the effect on the "injured" but on the tortfeasor's action in interfering with the person's rights. The provision of "mental consequences" in the scheme must not stop the courts from vindicating legal rights.

Exemplary damages by themselves raise interesting issues. There may be something about intentional torts which makes damages less able to be split into

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23 Above n22, 577.
24 Above n22, 577.
25 Above n22, 579.
26 Above n19, 598.
27 Above n11, 572.
28 Above n11, 572.

nominal, compensatory and exemplary categories. A plaintiff seeking compensation for a breach of civil rights may equally be punishing someone for breaking those rights or seeking judicial notice that those rights have been abused. Deciding which damages are exemplary, which declaratory and which compensatory in function is not as simple as some suggest. Cooke P's judgment in *Chase* is an attempt to find a place for recognizing legal rights.

V HOW DOES DEATH AFFECT DAMAGES?

Before 1936 a tort action was said to die with the person.[29] A personal representative could neither sue nor be sued in tort.[30] The Law Reform Act 1936 (identical in this respect to the Law Reform (Miscellaneous Provisions) Act 1934 (UK)) reversed this rule.[31]

Section 3(1) reads (with emphasis added):

> ... on the death of any person after the passing of this Act all causes of action subsisting against or vested in him shall survive against or, as the case may be, *for the benefit of his estate* .

This provision would have made compensatory damages available, but they were barred by accident compensation. "Exemplary" damages, available under accident compensation, are explicitly barred by the 1936 Act itself.[32] It was argued that where the Act said "exemplary damages" it really meant what are now called "aggravated" damages.[33] There is some authority for this view,[34] but the Court dismissed the submission. Exemplary damages had the same meaning in 1936 as today. The idea that *Donselaar* created a new kind of exemplary damages[35] was demolished. *Donselaar* only allowed the survival of exemplary damages in personal injury cases; it did not re-create them.[36]

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29 P H Winfield "Death as Affecting Liability in Tort" (1929) 29 Col L Rev 239. The Latin maxim invoked was *actio personalis moritur cum persona.* That its origins were obscure and its purpose uncertain did not prevent the maxim's application.

30 *Kirk* v *Todd* (1882) 21 Ch D 484; *Pulling* v *The Great Eastern Rly Co* (1882) 9 QBD 110; *Rose* v *Ford* [1937] AC 826, 842 per Lord Wright.

31 Law Revision Committee - Interim Report (1934) Cmd 4540, p4; N Hutton "The Mechanics of Law Reform" (1961) 24 MLR 1, 23-6.

32 Section 3(2)(a).

33 In *Re Chase,* above n6, Cooke P (at 330) defined aggravated damages as of a "...compensatory nature for wounded feelings and the like, rather than purely punitive damages".

34 *Broome* v *Cassell* , above n14, 1133 per Lord Kilbrandon.

35 See S J F Whiteman *Chase v the Attorney General : an examination of the decision and its impact on the doctrine of exemplary damages in New Zealand* (1987) Legal Writing Requirement, Victoria University of Wellington (Law Library, VUW).

36 See *Taylor* v *Beere* [1982] 1 NZLR 81. The Court of Appeal declined to follow Lord Devlin's restriction on the award of exemplary damages in *Rookes* v *Barnard* , above n14, in a defamation case.

Arguably section 3(1) allows actions for nominal damages. The judges in *Chase* did not consider whether nominal damages are "for the benefit of the estate". Whether they are is not clear cut. This article will later argue that although nominal damages are "damages" they are quasi-declaratory and perhaps should not be treated like other kinds of damages. The same kinds of difficulties associated with a declaration might well arise in relation to such "damages".

VI A FUTURE FOR TORT LAW ?

Chase is a logical development of *Donselaar*. In *Donselaar* Richardson J acknowledged that accident compensation did not remove the courts' ability to recognize injury. It only removed damages for injury.[37] *Donselaar* made it possible for a remedy to be not necessarily barred under accident compensation because it was called "damages". Because all substantive damages are barred, *Chase* concerned whether the courts should still recognize the existence of a cause of action. Before accident compensation damages did not have to be defined. Damages could always be thrown to the jury, who could lump them together, to decide what the circumstances justified. Lord Wilberforce, dissenting from the House of Lords' narrow view of exemplary damages in *Broome* v *Cassell*,[38] opined:

> As a matter of practice English law has not committed itself to any of these theories [about the nature of tort] : it may have been wiser than it knew.

Cooke P appreciated the difficulties. He quoted this passage in *Chase* and has elsewhere spoken of the problem.[39] In *Donselaar* and later in *Blundell* [40] the Court of Appeal insisted that exemplary damages are only available when a defendant behaves high-handedly, contemptuously or deliberately in abuse of power.

Exemplary damages while a "... a useful weapon in the legal armoury ..."[41] are not likely to be a tool of every day use. They do not cover intentional torts which fall short of the *Blundell* standard because there is some justification, even if it is mistaken, provocation, necessity or perhaps good intentions. A doctor who, for example, administers treatment without a patient's consent but believing that consent is unnecessary or hoping that it will help does not deserve special punishment. Almost certainly exemplary damages do not cover the commonest and potentially most harmful human failing, utter carelessness.

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37 Above n13, 111.

38 Above n14, 1114.

39 Sir Robin Cooke "The New Zealand National Legal Identity" (1987) 3 Canta LR 171, 179: "Judgment is at present reserved in *Chase* v *Attorney-General* on whether the representative of a deceased victim of tort can make such a claim [for exemplary damages]. It is not a simple as it sounds".

40 Above n18, 739.

41 Above n13, 107 per Cooke J.

But deliberate cruelty is not the only kind of behaviour that should be brought to account. Abuses of power which do not cry out for special punishment should still be recognized as unacceptable. Those who have power over others should be told they cannot misuse it. Some might disagree that courts should review careless acts as they review deliberate acts. But if we have learnt anything during the last few years it is that in a complex, modern society, failure to take care can be just as grievous and cause as much outrage as a deliberate act, especially when the very nature of a person's job, as it is with a doctor's, is to take care.

What kind of role does tort have over and above its traditional compensatory or punitive ones? Linden has argued[42] that tort law has always been multi-dimensional and has a broader role than just the allocation of economic loss. It satisfies the very human desire for vindication and resolves who is responsible and who is not. Compensation for personal injury is better done through no-fault social welfare schemes but tort should still fulfil this "ombudsman" role in our society.[42a]

Tort still has a strong deterrent effect even without damages. The frequent use of our defamation law shows the value society places on people's and businesses' good names. Often bad publicity ruins a career or a business. An adverse law suit can be even more damning than the actual award of damages.

A judgment that a doctor had acted unethically or negligently would lower professional status and perhaps destroy credibility. A judgment against employers for failing to take proper safety precautions would focus public attention on their business and they would have to show what they were doing about it. The police in cases like *Chase* might be forced to change their methods or discipline members, although the Police Complaints Authority perhaps is now a more than adequate forum. Public opinion, especially in the age of television should not be underestimated. But first someone must get to the truth of the matter. This is where tort has a role.[43]

The need to determine what portion of the plaintiff's loss the defendant should bear may have turned tort's focus away from the real issue of bringing to account those responsible. The removal of liability for the compensation of unintended injuries might well free up tort rather than close it down.[44]

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42 A M Linden *Canadian Tort Law* (4ed, Butterworths, Toronto, 1988); "Tort Law as Ombudsman" (1973) 51 Can Bar Rev 155.

42a See, for instance, the recent case *In Re F* [1989] 2 WLR 1025, in which doctors applied for a declaration that performing a sterlisation operation on a woman mentally incapable of giving consent did not amount to a battery.

43 Above n42.

44 See W H Pedrick "Does Tort Law Have a Future?" (1978) 39 Ohio State L J 781.

Cooke P agreed with these sentiments. He quoted extremely favourably from Linden in *Chase* and the sentiments are echoed in *Donselaar*.[45] His belief that the courts do not simply have a pecuniary role was behind his readiness to accept that the Declaratory Judgments Act could be used to give affect to this underlying role of tort. He wrote:[46]

> Attempts to foreclose the categories of cases in which such jurisdiction [to grant a declaration] may appropriately be exercised can be equally short-sighted. It is given to no Judge to foresee all the possible kinds of cases, or all the shifts in what the public interest will require from time to time.

The Court of Appeal should not close down any potentially useful tool. Declarations might recognize a cause of action which the courts have always recognized but for which the traditional award of damages is no longer available.

But more traditional judges seek order in a different way. They place a greater emphasis on the old rules. Even though an extension of the old rules might fulfil some new demand it may not be the courts' duty to do so. In *Chase* Henry J adopted a narrower view of the courts' role, echoing Heron J in the High Court. The courts should not recognize abstract rights without a hard and fast benefit. The courts are practical arbiters only and resolve disputes when on-going interests, particularly property interests, are at sake. At one point he wrote:[47]

> No good purpose can be served by the drawing of attention judicially to particular facts which are no more than an example, however striking, of instances where damages are not recoverable .

There is some force in this argument. Some believe that the basis of tort is compensation.[48] Many would argue that courts are not the right forum for plaintiffs to bring grievances when all they can gain is emotional satisfaction. In 1979 Professor Palmer, arguing that the scope of exemplary damages should be limited to reviewing official conduct, concluded "[p]rivate vengeance is not an admirable trait to encourage".[49] The availability of actions without damages might be said merely to promote vengeance. The ability of the judicial process to provide the right answers can be overestimated. Tort law, developed in a world dominated by compensation, may not be the best tool for such a task. More specialist tribunals or ombudsmen or conciliators might be more appropriate.

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45 Above n13, 106-107.

46 Above n6, 333.

47 Above n6, 343.

48 Above n3. See for instance W P Keeton (ed) *Prosser and Keeton on the Law of Torts* (5ed, St Paul, West Publishing Co,1984) 5-6.

49 GWR Palmer *Compensation For Incapacity* (Oxford University Press,Wellington, 1979) 276.

But these criticisms ignore the New Zealand experience. The compensation aims of accident compensation are widely accepted, but there is both academic[50] and popular criticism that wrongdoers are not being brought to account. The defects of civil liability were large but it was a significant check on the behaviour of society's "powerful", its doctors, its employers, its police. Not only did society benefit through the establishment of minimum standards of behaviour but just as importantly for a society based on individual dignity, individuals could vindicate their own rights. While compensation was a major factor in tort, it was never its only dimension. The intentional torts revolved around concepts of personal dignity. They were actionable per se and judgment could be received without proof of actual damage. Tort was not solely compensatory.

The continued development of the Ombudsman's office, of a health ombudsman, of a Police Complaints Authority, of a Commissioner for Children and promises of reform in the medical practitioners' disciplinary tribunals are an acknowledgment of the importance of having independent forums where complainants can have "their day in court". Public attention has focussed on the difficulties and delays of bringing complaints against doctors. The courts can still be a safety net when a forum is not working well or where there is no forum at all.

The cervical cancer affair perhaps best highlights this concern. Whatever the rights and wrongs of the matter, Ms Matheson wants to bring those she believes have done her harm to account. High Court action was stalled on the merely procedural matter of whether the alleged mistreatment falls within the "medical misadventure" arm of "personal injury by accident". The Court of Appeal has recently decided that because all the claims Matheson made against her doctors involved the protection of her personal safety she may recover only exemplary damages for "injuries received after 1974".[51] Exemplary damages, given her doctor's good intentions, may however be unlikely.

In the future the public sector may be well catered for as review and complaint authorities continue to expand. Ironically it is in the private sector that tort as an ombudsman might be most active. Private vengeance may not be desirable but accountability is. It is a principle that applies to the private sector as well as to the public sector. People are just as affected by their fellow citizens' actions as they are by the State's. Cooke P thought that in appropriate circumstances this ombudsman role might be filled through declaratory judgments.

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50 C Yates "Law Commission Proposals for Accident Compensation : What place for personal remedies?" (1989) 19 VUWLR 24. Ms Yates' article neatly summarises the advantages of tort liability in promoting safety and as providing a forum for dispute resolution. She fails, however to take sufficient account of the "bad side" of personal liability for personal injury. While no doubt the prospect of liability does make people more cautious, it deters not only the grossly negligent but also increases the insurance costs for the responsible doctor or employer to a point where, given the expansion of cause of actions, they may become prohibitive.

51 Above n11.

VII WHAT ARE DECLARATIONS?

A declaration is a ruling by a court as to the legal obligations or relationship between two parties or a ruling that those obligations have been breached.[52] Declarations are part of both public and private law. Despite *Chase* involving alleged police misconduct, and being described by counsel as being of a vital constitutional nature, *Chase* is about rights in private law.

In private law there appear to be two kinds of declaration[53], one relying on inherent jurisdiction and the other based on section 2 of the Declaratory Judgments Act 1908.[54] The Chancery courts had an inherent jurisdiction to make a declaration. This jurisdiction which appears to be sui generis followed equitable principles.[55] Chancery courts however would not make a declaration unless it was accompanied by some more substantive relief like damages or an injunction.[56]

As no consequential relief could be sought in *Chase* the plaintiff was clearly correct in seeking a declaratory judgment under section 2 of the Declaratory Judgments 1908, which reads:

> No action or proceeding in the High Court shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and the said Court may make binding declarations of right, whether any consequential relief is or could be claimed or not

Section 10 of the Act however lays down that such a declaration is in the absolute discretion of the Court. It reads:[57]

> The jurisdiction hereby conferred upon the [High] Court to give or make a declaratory judgment or order shall be discretionary, and the said Court may, on any grounds which it deems sufficient, refuse to give or make any such judgment or order.

The modern interpretation (post-1920s) is that the section confers an almost unrestricted jurisdiction on the courts, but courts are careful when considering

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52 For general statements of the law relating to declaratory judgments see I Zamir *The Declaratory Judgment* (Stevens & Sons, London, 1962), PW Young *Declaratory Orders* (2ed, Butterworths, Sydney,1984), B C Gould *Declaratory Judgments in New Zealand* (LLM Thesis, Auckland, 1962).

53 *Malayan Breweries Ltd & Ors* v *Lion Corporation Ltd & Ors* (1988) 4 NZCLC 64, 344 : 64,381-382 per Barker J and *Commerce Commission* v *Fletcher Challenge Ltd* [1989] 2 NZLR 554, 609-612. In the light of these cases it may be possible to argue that the inherent jurisdiction has been subsumed by the statutory provisions.

54 In public law declarations are usually sought under originating summons. In New Zealand jurisdiction is under section 3 of the Declaratory Judgments Act.

55 *Malayan Breweries,* above n 53.

56 See the observations in *Guaranty Trust Company of New York* v *Henry & Company* [1915] 2 KB 536, 557-558.

57 These provisions are the same as the English Rule of Court O 15, R 16.

whether to grant a declaration.[58] Denning LJ for instance once wrote " I know of no limit to the power of the court to grant a declaration except such limit as the court may in its own discretion impose upon itself".[59] The flexibility the section confers is a boon to those who see a role, as Cooke P does in *Chase*, that the court should be filling. He referred to Sir Jack Jacob's comment that:[60]

> The action for a declaration is potentially one of the most fertile, generative and creative procedural devices for ascertaining and determining the rights of parties on points of law, and is likely to continue to develop as providing a remedy of increasing importance.

But declarations have always been marked by controversy as to how far the court can and should go. There are limits. Lord Dunedin's classic test for granting a declaration, in a case involving a dispute over the currency a particular bank loan was made in, was quoted by Henry J, and is perhaps the most succinct summary of these restrictions:[61]

> The question must be real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought.

VIII A DECLARATION FOR AN ADMINISTRATOR?

The issue of whether the court should grant declarations to acknowledge the commission of a tort was complicated in *Chase* because Chase died and his administrator was seeking a declaration. Somers and Henry JJ's arguments against an administrator being able to seek a declaration, that the cause of action does not survive death, that a declaration merely recognizing the commission of a tort cannot be said to be a "benefit to the estate" and that an administrator does not have sufficient standing, cannot be used against a live plaintiff who has suffered personal injury.

Each judge considered that the declaration should fall within the meaning of section 3 of the 1936 Act. Can a remedy which is non-pecuniary in nature, and which has little prospect of increasing the estate be said to be "for the benefit of the estate"? Cooke P believed it might;[62] Somers[63] and Henry[64] JJ believed it could

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58 *Hanson* v *Radcliffe U D C* [1922] 2 Ch 490, 507; see *Commerce Commission*, above n 53.

59 *Barnard* v *The National Dock Labour Board* [1953] 2 QB 18, 41.

60 *Halsbury's Laws of England* (4ed,1982) Vol 37 para 252, n2.

61 *Russian Commercial and Industrial Bank* v *British Bank for Foreign Trade* [1921] 2 AC 438. Lord Dunedin's judgment was a liberal one, extending, not restricting, the English rule in the teeth of virulent opposition from Lord Wrenbury.

62 Above n6 332.

63 Above n6 337.

64 Above n6 341.

not. It is already established that a discretionary remedy like an injunction can be for the benefit of the estate, but in that case there was a clear pecuniary benefit.[65] If the administrator had been seeking a declaration about the contents of one of Chase's bank accounts then there could be no doubt that this kind of declaration would be "for the benefit of the estate".

A "Benefit"

There is an initially attractive argument from statutory context that "for the benefit of the estate" is not necessarily pecuniary. The phrase may have been used only in opposition to the preceding "against ... the estate" which gave effect to the statute's other main intention of ensuring that tort liability was not extinguished by the tortfeasor's death. It is submitted that it is doubtful whether a declaration against a deceased's estate would necessarily fail merely because there was no pecuniary claim against an estate. The purpose of the legislation seems to have been to place a victim in the same position as if the tortfeasor had not died. This argument might be countered on the basis that, if this was indeed correct, there would be no need for " ... for the benefit of the estate". The draftsman could merely have written "for the estate". Ultimately the use of "benefit" may not add greatly to the section's sense. If an action is for the estate, it will be for its benefit and what counts is that actions for the estate are being contrasted with actions against the estate.

How can a non-pecuniary remedy which will not give a pecuniary benefit to the estate be said to be "for the estate" or "for the benefit of the estate"? Cooke P presented two arguments. He referred to his own judgment in *Brightwell* [66] where a declaration was granted because an adverse decision against the Accident Compensation Corporation might lead to a change in the law. *Brightwell* showed that courts will sometimes grant an order that can bring only intangible satisfaction or relief contingent on executive discretion. Both Cooke P and Henry J concluded that in *Chase* a declaration that the police acted unlawfully might lead the Government to make an ex gratia payment. This would however be unlikely. Chase's family had already been compensated under the accident compensation scheme. Further compensation would essentially acknowledge that the original compensation was insufficient.

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65 *Sugden* v *Sugden* [1957] P 120, 135 per Denning LJ.

66 *Brightwell* v *The Accident Compensation Corporation* [1985] 1 NZLR 132, 134-5. Brightwell received a lump sum payment from the Corporation for an injury. Aware that the amount of the lump sum had not been recently increased, he sought a declaration that the Corporation had failed properly to exercise its statutory duty to advise the Minister on whether the lump sum should be increased. The Minister was not bound to accept the department's recommendation. The case concerned pre-trial discovery issues, and the Corporation did not dispute that Brightwell would benefit from the declaration.

Secondly, Cooke P doubted whether there has to be a pecuniary benefit at all; money is not the be all and end all of "benefits for the estate". Cooke P argued that a declaration of the illegality of the police's conduct might bring "some solace or satisfaction to the family".[67] Seemingly addressing his brother judges he wrote:[68]

> In my opinion it would be narrow and excessively legalistic to treat this as not a benefit to the estate. The law need not be so materialistic as to treat pecuniary benefit as the only kind of benefit which it will recognize.

Somers J however preferred not to make a definite decision on the matter, thinking that the issue could probably not be decided in the abstract but commented:[69]

> I find it difficult to accept that the solace a declaration may provide to the family of a deceased person can be described as a benefit to his estate.

B Parliamentary Intent

Both Parliament and the 1934 Law Reform Committee envisioned pecuniary remedies.[70] The Committee wanted an administrator to be able to sue but wanted damages "... to be proportioned either to the loss of the estate or the loss to the dependants or both heads of loss together in certain cases".[71] The Committee was cautious in giving rights to an estate. Declarations like the one sought in *Chase* could not have survived if the Committee's wording had been adopted. The declaration would have remedied neither a loss to an estate or a loss to dependants. The Bill was changed merely because the draftsperson thought the committee's concern about certain types of damages could be dealt with by the set of specific exceptions contained in section 3(2) of the Act[72] which reads:

> Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person -
> (a) Shall not include any exemplary damages...

This wording of section 3(2) might suggest that actions "for the benefit of the estate" are restricted to damages. But the Committee was concerned about an estate gaining fortuitous damages and it perhaps did not consider declarations. Indeed there was no reason why it should have.

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67 Above n6, 332.
68 Above n6, 332.
69 Above n6, 337.
70 Above n31. Indeed Sir Noël Hutton pointed out it was the dominating concern over the mounting road toll that pushed the Bill through in record time.
71 Cmd, above n31, para 13.
72 Hutton, above n31, 25.

C *The Effect of Excluding Exemplary Damages*

Henry J drew on the exclusion of exemplary damages. While a declaration is conceptually distinct from exemplary damages, a declaration in this case would, he thought, involve the same kind of inquiry that the Act was trying to prevent by prohibiting exemplary damages.[73] It would be wrong to allow a plaintiff to get around this bar by pleading for a declaration, "quando aliquid prohibetur ex directo, prohibetur et per obliquum".[74]

If exemplary damages had been allowed in *Chase*, the plaintiff would have sought them but the statute bar should not necessarily preclude a declaration. Under the 1936 Act there could still have been a claim for compensatory damages. When as in *Chase* the defendant relies on statutory protection or on justification or on necessity, an action for compensatory damages would also involve an inquiry whether the defendant had satisfied those defences. Compensatory damages are also declaratory of illegality; without illegality there can be no compensation. Henry J's criticism also ignores the claim that the raid was negligently planned. A declaration can be made about a negligent act but negligence does not give rise to exemplary damages.

Surer grounds can explain the bar on exemplary damages. Exemplary damages punish the defendant. It is difficult to conceptualize why a plaintiff should get such damages when compensatory damages include outrage or anger, exactly the kind of thing an award of exemplary damages would go towards. Pragmatism perhaps best justifies the plaintiff getting them. Exemplary damages are a useful device; the plaintiff is the only person to whom the damages might be given. The plaintiff should be rewarded for bringing the action. Exemplary damages perhaps also satisfy the demands of justice that a victim personally extract punishment. When a person dies the personal nexus between the victim and the assailant is broken. The beneficiaries would get a windfall.[75]

But exemplary damages are a "useful weapon in the legal armoury",[76] this particular restriction should not survive. It is a nonsense that people should avoid punishment merely because the result of their actions exceeded their expectations. In 1936 compensatory damages both enabled an inquiry and acted as punishment. Now in New Zealand these damages do not exist.

D *The Survival of the Cause of Action*

The leading case of *Rose* v *Ford* [77] shows the practical, if not the intended, effect of the Act. Miss Rose died after a motorcycle accident. Her administrator

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73 Above n6, 342.
74 Above n6, 342.
75 See *Rookes* v *Barnard* , above n14, 1261 per Lord Devlin.
76 Above n13, 107.
77 [1937] AC 826.

sued for damages for her pain and suffering (including the amputation of her leg) and for her loss of expectation of life. The administrator succeeded. Not startling today, the decision was revolutionary in 1937[78] and was immediately repealed in New Zealand by section 17 of the Statutes Amendment Act 1937 which reads:

> Where...a cause of action survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person shall not include any damages for his pain or suffering, or for any bodily or mental harm suffered by him or for the curtailment of his expectation of life.

Their Lordships emphasized less the Act's actual wording, looking instead to its intention that the administrator should possess the same rights as the deceased had when she died. Lord Wright opined: "The administrator simply stands in the shoes of the deceased, and in a sense may be said to continue her life".[79] Lord Russell, concentrating on a defendant, said:[80]

> The object of the Act is to place a person who has by his negligence caused damage to someone who has subsequently died, in the same position as regards liability....as he would have been in if the injured person had sued and recovered judgment while still alive.

In deciding whether a declaration is available the case could be taken either way. While the widest scope seemed preserved for the administrator, "for the benefit of the estate" was not in issue. Further, on several occasions their Lordships simply repeated the formula in the section. It is however respectfully submitted that their Lordships interpreted the section as enabling rather than restricting actions. One wonders whether, given the situation of *Chase* , they would have agreed with Cooke P and, as he almost seemed to do, sighed "of course".

Against this, however, must be placed judicial observations about what constitutes a "cause of action" under the Act. While in *Sugden* v *Sugden* it was indicated that an injunction was a cause of action and could survive, courts have tended to limit statute-derived jurisdictions which sought to confer rights personally for or against the deceased. In New Zealand it has been held a cause of action must not be too personal to survive the death.[81] A petition for a dissolution of a marriage for instance is too personal to survive. English courts have tended to place similar restrictions. An attempt to reverse a marriage settlement after the husband died failed because that kind of action was held to be simply too personal.[82] Ormrod J issued a caution about extending the Act into areas where it was not designed to go.

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78 R G McElroy and T A Gresson *The Law Reform Act 1936* (Butterworths, Wellington,1937)16-25.

79 Above n77, 845.

80 Above n77, 838.

81 See *Hawke* v *Public Trustee* [1957] NZLR 152. Followed in *Jenkinson* v *Thompson* [1969] NZLR 179.

82 *D'Este* v *D'Este* [1973] 2 WLR 183, 187.

Was a declaration establishing that Chase's civil rights were violated simply too personal to survive his death? None of the judges phrased the problem in this way though Henry J thought that Chase's right to establish a tort did not pass to the administrator. The 1936 Act was designed so that actions for damages should survive. In New Zealand causes of action for personal injury still survive but actions for damages do not. In *Chase* Cooke P was not trying to create a cause of action but was merely trying to recognize an existing one. There may well be a difference between a cause of action for damages surviving death, and the right to establish a tort surviving death. Damages can be transferred to third parties. The kind of satisfaction that comes from establishing a wrong is very personal and is perhaps not capable of being transferred. Actions in defamation, the tort that recognizes dignity and reputation, do not survive death at all. The framers of the 1936 Act did not mean courts to recognize causes of action in the abstract.

E "For the Estate" or "For the Relatives" or "For Chase"?

Cooke P did not deny that there has to be a benefit to the deceased's estate. Rather he said that the benefit need not be pecuniary. The benefit for the estate was the emotional satisfaction of Chase's family, the factual beneficiaries of his intestacy. If an estate's beneficiary was a charity or even the government, then it would be difficult as Henry J pointed out[83] to say that a declaration could be a "benefit to the estate".

But Somers J's objection to a declaration surviving is strong. The Act does not read "for the administrator to vindicate the deceased's rights", nor "for the deceased's relatives", nor "for the estate's beneficiaries", but "for the benefit of the estate". An "estate" is defined in section 2 of the Administration Act 1969 as "real and personal property of every kind, including things in action". A person's estate may well be conceptually distinct from the interests of the deceased or the deceased's relatives or even the interests of the estate's beneficiaries. Cooke P's approach can only be squared with extreme difficulty with an estate being a bundle of property rights, but there are very good reasons for wanting to get around this kind of technical bar.

F Does an Administrator Have Standing?

Lord Dunedin required that the person seeking a declaration of an issue " must have a real interest to raise it". Standing is needed in both private and public law, though in public law it has recently been relaxed.[84] The requirement that a party seeking a declaration must be a party to the dispute is an important control mechanism.

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83 Above n6, 342.

84 See, for example, *R* v *Inland Revenue Commissioners Ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617. See W Wade *Administrative Law* (6ed, Claredon Press, Oxford, 1988) 700-709.

Henry J having considered the plaintiff's submission on the "vital constitutional nature of the action" stated that the plaintiff had:[85]

> confuse[d] the rights of the deceased with the rights of the estate. The administrator holds the estate on behalf of the successors of the deceased, and as such he can have no greater legal or equitable right to establish, simpliciter, the commission of a tort against the deceased than would any other member of the public. For example, if in this case the only beneficiary was a charity, no possible right of the estate could be relevant.

An administrator is a creature of statute. Under the Administration Act 1969 an administrator's task is to distribute the deceased's estate.[86] In Henry J's view an administrator can seek a declaration only when a declaration would increase the deceased's estate. His Honour conceded that an administrator might have an interest in an ex gratia payment but courts in his Honour's view should only make declarations where there is a legal entitlement.[87]

Cooke P did not consider this standing problem because he had found that a declaration survived under the 1936 Act and hence an administrator had a right to bring the action. Cooke P might have achieved the same result by asserting that the wide-ranging nature of declaratory judgments enabled him to make the declaration without the survival of the cause of action. That approach would have directly confronted the problem of standing. Henry J 's position is strong. An administrator is strictly a stranger to the action; the constitutional nature of the action is not relevant. But should the rule be so inflexible? Chase's rights may have been violated, and his administrator was the only one to vindicate them. A member of the general public was not seeking to enforce rights possessed only as a member of the general public against a private citizen or body. That is the classic case where standing should be denied.[88]

G Conclusion

Somers and Henry JJ believed that the authors of the 1936 Act did not foresee declarations. There are plenty of examples of the courts telling Parliament that it has done more than it strictly intended to do. A 1934 law reformer would have been truly visionary to anticipate this kind of action, since only the abolition of common law damages gave these proceedings any raison d'être. A combination of the 1936 Act's prohibition on exemplary damages and accident compensation's prohibition on damages means that unless the courts can use declarations to inquire into a death they cannot inquire at all.

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85 Above n6, 342.
86 Above n6, 342. See s24 and s25 Administration Act 1969.
87 Above n6, 342.
88 *Gouriet* v *Union of Post Office Workers* [1978] AC 435.

Cooke P 's approach does not square well with the merely pecuniary or property nature of an estate under the Administration Act 1969. But on policy grounds his approach is preferable. It resolves a strange inconsistency in our law. If someone is beaten to within an inch of her life the civil courts can inquire most rigorously through exemplary damages. If the assailant hits a little harder and perhaps a little more successfully the civil courts can do nothing to bring the assailant to account. While the 1934 reformers are blameless perhaps the same might not be said of the modern law reformer, who in the very earnest desire to improve society's treatment of the injured removed the courts' flexibility to respond in appropriate circumstances.

IX DECLARATIONS FOR LIVING PLAINTIFFS?

Perhaps the issue whether the courts should recognize the survival of a cause of action would have been clearer if the case did not involve someone who had died but rather a live plaintiff who although injured was not injured in circumstances justifying exemplary damages. Freed from the difficulties involved with the position of the administrator, Cooke P's arguments on tort's role as an ombudsman have much greater force. But can a declaratory judgment be used?

Although Cooke P was considering a case where exemplary damages were claimed, it is consistent with his views about both the nature of tort and the almost unlimited nature of the declaratory jurisdiction that a declaration may be available when exemplary damages are not available. On the other hand, although not directly considering the point, both Somers and Henry JJ proceeded on the basis that both the courts' role and declaratory jurisdiction are much more restricted and it is possible to conclude that they would not be prepared to allow a live plaintiff to seek a declaration.

The judges acknowledged that the mere fact that damages are statute-barred does not mean that a declaratory judgment cannot be made. A declaration can be made not only where consequential relief is available but is not claimed but also where consequential relief could not be claimed.[89] There need not be a cause of action.[90] This contrasts with the narrower inherent jurisdiction which depended on the availability of substantive relief.

Support for awarding a declaration when damages are barred comes from *Amalgamated Society of Carpenters* v *Braithwaithe*,[91] a case where the plaintiff was wrongfully expelled from a trade union which had statutory immunity from damages. Lord Buckmaster opined:[92]

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89 See the observations in *Guaranty Trust Company of New York* v *Henry & Company* [1915] 2 KB 536, 557.

90 See *Dyson* v *The Attorney-General* [1912] 1 Ch 158.

91 [1922] 2 AC 440.

92 Above n91, 448-9.

> ...it is a totally different proposition to say that a man claims to possess rights and that he seeks to enforce the obligations they create.

But *Braithwaithe*, as Henry J pointed out,[93] also raised a serious objection to allowing a declaration in personal injury cases without damages. Courts have always required that a declaration resolve an on-going difficulty for the plaintiff[94] rather than a merely theoretical question or one in which the plaintiff has no interest.[95] Henry J focused on this absence of utility in *Chase*. In *Braithwaithe* the plaintiff's expulsion deprived him of a share in a benefit scheme; a declaration may not have been made without this property interest.

In *Chase* the events were in the past. Their resolution was unlikely to bring any tangible reward for the plaintiff. Courts have been greatly reluctant to make declarations which would only bring emotional satisfaction. For instance, in *Turner* v *Pickering*[96] Casey J declined to make a declaration that certain members of a board of an incorporated society were not properly elected because a new board had since been elected. Again in *Maerkle* v *British & Continental Fur Co Ltd*,[97] a case involving the failure to account of an agent to a German principal for pre-war sales, there were strong observations against awarding a declaration which could at best bring a spes of a payment by a compensation board but could really only bring "nebulous satisfaction".

Henry J referred to other cases raised by counsel and by Heron J in the High Court, which he found confirmed his conclusion. *Malone's* case[98] concerned a request for a declaration that phone tapping was illegal, which failed because phone tapping was not illegal; in *Nixon* v *Attorney-General*[99] the court refused to grant a declaration that the plaintiffs were entitled to a pension because they had only a spes rather than a legal entitlement in the fund. Henry J wrote in his final passage:

> It can seldom if ever be a function of the court to make findings on issues which bear no relationship in a real sense to the rights of the parties inter se and the absence here of a right requiring protection, enforcement, or even judicial recognition is I think so strong a factor in the exercise of the discretion as to be fatal to the case of the administrator.

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93 Above n6, 343.
94 Zamir, above n52, 193.
95 See for instance *Thorn Rural District Council* v *Bunting* [1972] 1 Ch 470.
96 [1976] 1 NZLR 129.
97 [1954] 3 All ER 50, per Jenkins LJ.
98 *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344.
99 [1930] 1 Ch 566.

Although Henry J wrote about discretion, that discretion is always going to be exercised. That is the same as denying jurisdiction.[100] Henry J, it is submitted, classified the kind of action in *Chase* as having no utility at all.[101]

Henry J's approach would prevent Cooke P's ombudsman role for tort. He also wrote:[102]

> In practice declarations of the type sought would never be seen as an appropriate form of relief to an injured party in the context of the pleaded circumstances. The proper relief would be an award of damages recognizing the commission of the tort, and if condemnation was required exemplary damages would follow.

Personal injury cases are almost always concerned with past events. Determinations of who caused the injury do not help a plaintiff in a hard and fast way. If this utility requirement was taken too far, declarations would not be allowed where they might be most useful. Plaintiffs are unlikely to continue a relationship with a negligent doctor or continue to take dangerous pills but yet there may be a strong, understandable personal desire to bring the doctor or the drug company to account. There are certainly benefits to society in bringing them to account. There might, of course, be exceptions. There may be some on-going circumstances involving negligence or perhaps battery where a declaration may be of use, though with the exclusion of false imprisonment from personal injury this is perhaps less likely. On-going situations would perhaps be best resolved through injunctions, which are not barred by accident compensation.[103]

Somers J, although declining the declaration on the same grounds as Cooke P, indicated that he too shared doubts about whether this kind of declaration was a proper use of declaratory judgments. Somers J acknowledged that before Chase died he had a cause of action and his concerns seemed very much tied up with the position of the administrator. He referred to the now famous *Gouriet*[104] case in which Lord Diplock strongly rejected the use of declaratory judgments when the plaintiff was not seeking recognition of private legal rights. In *Gouriet* the plaintiff sought to establish without the Attorney-General's consent that a crime was going to be committed which did not specially affect him .

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100 See Zamir, above n52, 64.

101 Compare the approach of Young, above n52, 159. Young, while agreeing in theory that a declaration might be made about a past tort, pointed out that such a declaration risked being struck out as a matter of *discretion.*

102 Above n6, 342.

103 See *Tucker* v *News Media Ownership* [1986] 2 NZLR 716. An injunction was sought to prevent publication of details of Tucker's criminal record. The action was founded under the rule in *Wilkinson* v *Downton* concerning the intentional infliction of emotional distress and under a breach of privacy. While it is arguable after *Willis* that a common sense interpretation would exclude at least a breach of privacy from personal injury, the key point is that only damages and not injunctions are barred by section 27. Indeed accident compensation was not mentioned in the case.

104 Above n88, 500-501.

It is submitted, however, that Cooke P's response has great force. In *Nixon* and *Malone* there were simply no legal rights that could be recognized. In *Turner* the situation had already been resolved. Lord Diplock's restrictive observations in *Gouriet* are aimed at plaintiffs trying to get declarations when they have no legal right or interest to be recognized. Lord Diplock was, as Cooke P pointed out, asking for caution.

Admittedly in cases like *Chase* it is not the enforcement of a legal right that is being asked for. Rather it is the recognition that one has been breached. In *Donselaar* Richardson J noted that accident compensation did not stop the recognition of injury nor did it stop a cause of action in tort.[105] The law has always been in the business of giving satisfaction or vindication in tort when there is strictly speaking no legal duty still to be enforced. The existence of nominal damages can only be explained as an attempt to do this. If causes of action do survive, it would be odd if the court cannot recognize a cause of action in appropriate circumstances by awarding a declaration.

The jurisdiction conferred on the High Court by the Declaratory Judgments Act is very wide. Declarations can do a valuable job in allowing courts to give effect to tort's ombudsman role. In future cases this ability may be very useful indeed. Cooke P is right. Judges cannot see the future. Doors should not be bolted unnecessarily against unknown plaintiffs. There is a difference between being careful and being restrictive.

X WHEN WILL DECLARATIONS BE MADE?

Cooke P declined as a matter of discretion to make a declaration. He indicated factors which courts might consider before making declarations in future cases. Cooke P's principal concern was that there had already been both an inquiry and an inquest into the the events leading to Chase's death. A judicial declaration would be only another view about the police's actions.[106]

If there has already been an independent inquiry into events, then it is most unlikely that the court will make a declaration. The plaintiff would already have had a day in court. An independent body would have examined the matter and adjudicated its rights and wrongs. This applies to the living as well as to the dead. There has for instance already been an extensive public inquiry into the cervical cancer affair.[107] Some might argue that there is something special about a court judgment that a mere inquiry cannot give the plaintiff, especially in the sense of bringing a defendant to account. But a matter can be looked into too often, and a defendant can be judged too many times. If a court cannot grant direct sanctions,

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105 Above n13, 111.

106 Above n6, 334.

107 S Cartwright *The Report of the Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital* (Auckland, 1988).

then it can add nothing more. Perhaps at that point the parties should get on with their lives.

If declarations are to be unavailable because a plaintiff has already been heard then the court should inquire whether the plaintiff has been properly heard. Rules based on natural justice may have to be developed, not just to protect the defendant or the accused, but also to protect the interests of the plaintiff in an inquiry.[108] If the inquiry is ambiguous or somehow tainted the court would still have a role to play.

But what should happen if the plaintiff "gets in" first before an inquiry is set up?[109] The court might refuse to hear the declaration if there is already an established body which would adjudicate the dispute, like the Police Complaints Authority. A specially established body might more appropriately consider the matter and there would be every prospect that tort's ombudsman role would be fulfilled. If there were no such body and an inquiry depended on ministerial discretion, or would be run by governmental officials, then there would be no reason for the court to decline on this ground. There would be no guarantee that the ombudsman function would be carried out.

Cooke P drew attention to the government's ability to call a commission of inquiry to look into the whole matter under the Commissions of Inquiry Act 1908. Section 2(f) empowers a commission of inquiry into "any other matter of public importance" . The Government called such an inquiry into alleged police misconduct in the Arthur Allan Thomas case.[110] Cooke P regarded the government's refusal in *Chase* as important.[111] The government had decided that the matter was not of sufficient public importance. His Honour wrote:[112]

> ...to ask the Court to deal with the matter in the declaratory jurisdiction is tantamount in the light of the nature and history of this case to inviting the Court to act as if it were a Commission.

This may be true in *Chase* but public interest should not be the be all and end all of declarations. The court should not be involved in the rehashing of trivial

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108 For an example of a court reviewing the operation of a commission of inquiry see *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] NZLR 662.

109 That a court action is pending, even if it is a criminal action, does not mean a commission of inquiry should be stalled, but a court may order special restrictions on any commission: see *Thompson* v *Commission of Inquiry into the Administration of the District Court at Wellington* [1983] NZLR 98 per Barker J.

110 See *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252. This case established, amongst other things, that a royal commission might be set up in part to review actions which might be criminal.

111 The "Nicholson inquiry" was not a commission of inquiry. Rather it came from a request by the Attorney-General that Mr Nicholson supervise the police investigation and make a report to the Minister of Police.

112 Above n6, 335.

events. But tort is a private action satisfying private ends. Society may not be interested but an issue might be vital to an individual. To erect a calculus which took notice only of public utility would ignore important and deeply rooted demands of justice. Such a calculus would run contrary to Cooke P's view of the declaratory jurisdiction. Each case should be assessed on its own merits.

A government's refusal to set up an inquiry cannot be decisive. Indeed it may be most appropriate for a court to start making inquiries when a government refuses to. A government should not be able to get out of jail by saying that there is insufficient public interest to justify an inquiry.

Cooke P was concerned to draw a line between the role of a commission and that of a court. But courts do act in a sense as commissions of inquiry. Their value is the open exchange of conflicting opinions and facts leading to a final adjudication. Courts everyday consider which behaviour is proper and which is not. But there is a line between commissions and courts. Commissions recommend changes in policy or laws and in the way governments should go about their business, Courts adjudicate what is legally acceptable. Courts can only be ombudsmen of legal rights. They are guardians of the law and not of policy.

Cooke P thought that such declarations should only be granted in "exceptional circumstances".[113] But perhaps this is setting too high a standard. The plaintiffs in cases like *Chase* would not be asking that courts make a declaration unrelated to an ordinary cause of action. Rather they would be asking only that the courts recognize a valid cause of action. The cause of action is itself a safety-barrier. Hopefully, what Cooke P means by "exceptional" is that there is a private right which cries out for recognition, but there is no body, apart from a court, to recognize it.

Cooke P obviously had the particular history of the Chase saga in mind. Paul Chase probably had his day in court and got an independent inquiry into his death. The court has closed the saga. But Cooke P's judgment leaves the possibility that a declaration might be used in the future to give someone else their day in court.

XI NOMINAL DAMAGES AND THE BAR ON DAMAGES

Chase's administrator also claimed nominal damages in respect of battery, assault, trespass to land and negligence. Nominal damages would have been an alternative way of determining whether what happened was unlawful. In *Donselaar* the court examined at length the nature of exemplary damages to determine whether they arose "directly or indirectly out of the accident". There was no such examination of nominal damages in *Chase*. Each judge found them barred by section 27 of the Accident Compensation Act. Cooke P said that there was no good reason for nominal damages not to be barred. But it is submitted the

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113 Above n6, 334.

situation is not so obvious and that there was at least a good case for holding that nominal damages are not included in the bar.

Nominal damages perhaps reflect the common law courts' desire to declare that a right had been interfered with, even if the plaintiff had suffered no quantifiable loss.[114] In early cases like *Ashby* v *White*[115] it was said:[116]

> I think it impossible that there should be an injury without damage : injury in its nature imports damage though it cost not the party injured one farthing.

The Earl of Halsbury LC offered in *The Mediana*[117] the following obiter statement:[118]

> "Nominal damages" is a technical phrase which means that you have negatived any thing like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.

Nominal damages are not really damages in the same sense as either compensatory or exemplary damages. They neither punish nor compensate but just declare.[119] They are not merely low awards of compensatory damages granted when the plaintiff has suffered very little loss.[120] Awards of nominal damages are really non-pecuniary. Indeed in an interesting case, *Beaumont* v *Greathead*,[121] Maule J concluded that nominal damages in fact do not have any pecuniary value, so that a

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114 See H McGregor *McGregor on Damages* (15ed, London, McMillan, 1988) 249, paras 396-399.

115 (1703) 6 Mod 46 per Holt C J.

116 Above n115. While this quote shows the kind of approach adopted so that nominal damages might be awarded McGregor criticizes the statement as misleading in seeming to equate nominal damages with ordinary damages. The statement is a complete fiction. It confuses cases where nominal damages are to be awarded with cases where damages are simply to hard to quantify. According to McGregor, above n114, 246-250,"the proper approach is to regard injuria or wrong as entitling the plaintiff to a judgment for damages in his favour even without loss or damage, but where there is no loss or damage such damages will be nominal damages only".

117 [1900] AC 113.

118 Above n117, 116.

119 See S Todd "Trespass to the Person and the Accident Compensation Act" [1987] NZLJ 234, 235. This appears to be Todd's approach. He writes: "Assault, battery and false imprisonment are actionable per se. Damage is not an ingredient of the cause of action.... Certainly nominal damages are recoverable in all these cases. Their purpose is to vindicate the sanctity of the person, not to compensate for harm".

120 Above n117, 118: "There is no doubt in many cases a jury would say there really has been no damage at all- 'We will give the plaintiff a trifling amount'- not nominal damages be it observed, but a trifling amount; in other cases it would be more serious".

121 (1846) 2 CB 494.

debt of £50 plus nominal damages for breach of contract could be satisfied by the acceptance of £50 " full satisfaction".

Nominal damages act as a peg for the award of costs.[122] While this is not something to be promoted, nominal damages could also act as host for the parasitic exemplary damages when there is no actual loss.[123] In *Donselaar* Richardson J wrote:[124]

> In this case the cause of action is complete without proof of actual damage. And s5(1)[the equivalent of the 1982 Act's section 27] does not preclude recognition in proceedings for damages not barred under its provisions of nominal damages arising out of a personal injury. What is barred is proceedings for recovery...if I am wrong in the conclusion I have reached and exemplary damages must be founded on the existence of actual damage...

Richardson J drew a distinction between recovery and recognition and, with Cooke J,[125] implied that nominal damages might not be recovered, being barred under section 27 of the Accident Compensation Act. But if the above interpretation about nominal damages is correct, it might be said that strictly one does not recover nominal damages but by their award one receives recognition of the infringement of one's legal right. If nominal damages are really declaratory of legal rights then why should a scheme designed to stop compensatory damages bar them? Like exemplary damages, the focus is on the behaviour of the tortfeasor and not the effect on the injured.

The Court in *Donselaar* was particularly concerned to protect the socially useful device of exemplary damages. Similar benefits surround nominal damages. They enable courts to decide publicly whether someone has wrongfully interfered with someone else. There might often be an overlap with the award of exemplary damages, but nominal damages deal with behaviour which although tortious does not meet the high standard for exemplary damages set in *Blundell*. Just because people do not deserve special punishment should not mean that their behaviour is beyond judicial review. It is a sad fact that those in authority often do not stop a particular method or acknowledge that it was wrong until they are told so. Perhaps nominal damages would also cover claims in negligence, which at present cannot be heard in the courts.

XII NOMINAL DAMAGES AND NEGLIGENCE

In *Chase* it was claimed that the dawn raid was negligently set-up. At common law, nominal damages would have been available for the actions involving

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122 See H Street *Principles of the Law of Damages* (London, Sweet & Maxwell, 1962) 17.
123 Above n13, 111.
124 Above n13, 111.
125 Above n13, 106.

battery, assault and trespass. Henry J however observed that the position is not so clear regarding nominal damages for negligence.

Battery, assault and trespass are actionable "per se". A plaintiff need only to prove that the defendant has "intentionally" violated the plaintiff's legal right.[126] But negligence becomes actionable only when a negligent act causes harm.[127] This reflects the principle behind modern negligence law, which focusses not on breaches of abstract duties but only on breaches of duty that harm one's neighbours.[128] Courts cannot recognize negligence until actual damage has occurred. Until then there is no cause of action.

Henry J, although ultimately concluding that nominal damages had to be barred, echoed the plaintiff's submissions and resolved that:[129]

> On balance I think it probably permissible (again in theory) for a plaintiff to establish the tort by proof of actual damage, which either is not quantified whether by choice or otherwise, or for reasons such as exist in the present case is not recoverable at law.

This, with respect, is the correct approach. Once a negligent act has caused actual damage there is a complete cause of action. A person's legal right has been infringed. It should not matter whether a person is injured by an intentional or by a negligent act; the courts should recognize that infringement.

XIII NOMINAL DAMAGES AND "ABUSE OF PROCESS"

The judges in *Chase* believed that an action for nominal damages would be an "abuse of process". While High Court Rule 186(c) enables the High Court to strike out proceedings as an abuse of process, the High Court usually relies on an inherent jurisdiction to strike out actions which in Lord Diplock's words:[130]

> although not inconsistent with the literal application of its [the High Court's] procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute amongst right thinking people.

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126 The degree of intention of course varies between the nominate torts. In battery touching has to be deliberate(see *Letang* v *Cooper* [1965] QB 232), whereas in trespass to land intention refers merely to voluntary action which leads the defendant to enter someone else's property (see WVH Rogers *Winfield and Jolowicz on Tort* (12ed, London, Sweet & Maxwell, 1984) 359-360).

127 *Nicholls* v *Ely Beet Sugar Factory Ltd* [1936] Ch 343, 351 per Lord Wright.

128 *Donoghue* v *Stevenson* [1932] AC 562, 580-581 per Lord Atkin : "The rule that you are to love your neighbour becomes in law you must not injure your neighbour...You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour".

129 Above n6, 340.

130 *Hunter* v *Chief Constable of the West Midlands Police* [1982] AC 529, 536.

While this is not a conclusive test, it appears that there must be something improper surrounding the action itself or its results for it to be struck out as an"abuse of process".[131] An action might be an attempt to relitigate something already decided or an attempt to attack a judgment through collateral action rather than through appeal. The judges were undeniably right in deciding that the action for trespass to land should be struck out. Such an action had little chance of success, the police officers had a valid search warrant and such an action would merely have been an opportunity, in Cooke P's words, "to ventilate the allegations of police misconduct in connection with the shooting".[132] It is not the courts' role to listen to allegations which cannot succeed.

But what factors are present in *Chase* to make nominal damages for the other causes of action an abuse of process? Cooke P relied on the nature of the accident compensation bar.[133]

He wrote:[134]

> It would open the door to abuse of court procedure if anyone who was debarred by the Accident Compensation Act from suing for compensatory damages could bring as of right an action for nominal damages.

If his Honour meant that it would be an abuse of process to allow a plaintiff to proceed with an action that cannot succeed because nominal damages are barred then he was undoubtedly correct. He may however have meant that actions for nominal damages would in themselves be an abuse of process. But with respect an action for nominal damages without collateral relief cannot be an abuse of process just because there is no collateral relief. That is the very nature of the action. Why, in principle, should the situation be different just because collateral relief is barred by statute? Nominal damages could always be claimed where there was no actual damage and hence no collateral relief was available.[135]

Why was Cooke P so cold on nominal damages, yet prepared to accept that the court could make a declaration? As will have become apparent nominal damages and a declaratory judgment achieve the same end. Indeed in 1961 Professor Street thought that nominal damages might be subsumed into declaratory judgments.[136] Cooke P's concern was that "anyone... could *bring as of right* an action for nominal damages". The code nature of the Accident Compensation Act might be thought to be undermined by the unfettered availability of nominal damages. The court could not stop "abuse" by those following their own pointless agendas on trivial matters.

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131 *Reid* v *New Zealand Trotting Conference* [1984] 1 NZLR 8 per Richardson J; *New Zealand Social Credit Political League* v *O'Brien* [1984] 1 NZLR 84 per Cooke J.

132 Above n6, 335.

133 Above n6, 329.

134 Above n6, 329.

135 Above n114, 249, paras 396-398.

136 Above n122, 17.

A declaration would not cause the same problems since the courts retain an absolute discretion to decline one if the action is unmeritorious. But this same "problem" has always existed with nominal damages. Those with their own agendas have always been able to turn up and demand "justice" and the courts have been compelled to listen to them.[137] The courts could and did impose costs where the action was so worthless that the recovery of nominal damages could not be regarded as "successful".[138]

Perhaps plaintiffs should not simply be able to rephrase their actions merely to get around the discretion that Parliament has deliberately given the courts when granting declarations. The difficulty is, however, that this approach leaves nominal damages up in the air. All claims for nominal damages might well be better phrased as declarations, but this should not mean that actions for nominal damages should be struck out because a court decides against a declaration. The standard for a declaration is higher than for nominal damages. When it passed the Declaratory Judgments Act 1908, Parliament intended to give courts a jurisdiction to resolve problems outside the old causes of action. It surely did not intend to restrict the operation of the causes of action themselves.

In one sense Henry J was consistent with his earlier observations about the 1936 Act. If the Law Reform Act (1936) only allows pecuniary actions to survive then it might well be quite wrong for an administrator to get around this by merely pleading a cause of action which is only vaguely pecuniary in nature and which is really declaratory.

The unfettered operation of nominal damages in theory might open undesirable flood gates. The valuable role that tort might have, could well be submerged in trivial litigation. On policy grounds it is perhaps more desirable for the courts to exercise some control over actions. But rather than declaring all nominal damages to be barred on this basis, would it not be better to look at the particular merits of each claim to see whether it is a genuine attempt to vindicate legal rights or is merely vindictive, petty or mean? Some claims for nominal damages might be an "abuse of process". But some might not.

XIV CONCLUSION

Accident compensation bars substantive damages for personal injury. Should this bar mean that courts should no longer recognize the commission of a tort? *Donselaar* indicated that the courts will recognize torts which merit special punishment. The challenge raised in *Chase* was whether courts should recognize torts which do not merit such punishment. Does tort indeed have an ombudsman

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137 Above n127, 354-5. Lord Wright made strong observations against the courts' picking and choosing between how worthwhile particular actions are.

138 See *Anglo-Cyprian Trade Agencies Ltd* v *Paphos Wine Industries Ltd* [1951] 1 All ER 873 per Devlin J. The case was one of contract, not tort, but the principle is surely the same.

role? Should it survive the removal of damages, or is tort merely a device to allocate economic loss ?

It is a challenge that was not and could not be directly resolved in *Chase*. The wrong plaintiff was in court. Cooke P's arguments wait for a more appropriate plaintiff. If Chase had been alive, many of the majority's arguments against a broader role for tort would not have been applicable, and Cooke P's procedural reasons would have been less strained.

This article has sought to show however that in *Chase* there were two contrasting approaches to this challenge. The approaches of Somers and Henry JJ reflected a narrower, perhaps more traditional approach. Courts are practical arbiters. They should resolve issues and protect rights only when resolution will have a hard and fast result. Cooke P perhaps had a more innovative and some might say expansive vision of the aims of tort. Courts are declarers of right and wrong and they must be prepared to adapt to meet changed needs.

There is something to be said for Henry J's approach. Many would agree that tort's wider role might better be served by non-judicial bodies if indeed they are to be served at all. But Cooke P's approach is better. It provides a fall back. It is too optimistic to think that there will always be appropriate forums, or that the government will provide a special one if necessary. Private grievances of importance only to the plaintiff and the defendant may be overlooked. History cannot boost our confidence that governments will always call independent inquiries. Cooke P is right. No judge can see what future circumstances may necessitate. Sometimes there will be nowhere else to go but to a court. Courts in the present should not remove a role that might be vital in the future.

But all the judges thought that the future of tort should be carefully guarded. None thought that nominal damages should be available. Cooke P, the advocate of preserving tort through declarations, wanted to restrict declarations to "exceptional cases". It remains to be seen how the courts will respond to this role and the new challenges it brings. It is to be hoped that the courts reflect Cooke P's view that courts should not unnecessarily give away inherent jurisdiction, especially one which declares our civil rights.

Henry J wrote of the unreality of allowing an action for nominal damages.[139] The whole case has an air of unreality. Practically, the costs of establishing a tort without being able to recover damages will be prohibitive. Most citizens could not afford to bring tort actions without the prospect of damages. For a declaratory remedy to be effective and available there may need to be a facility to recover the real legal costs of an action. But the fact that this kind of procedure is going to be rarely used does not mean it should not be available when it is sought.

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139 Above n6, 340.

There is another, perhaps deeper unreality in the case. Society is used to the courts being allocators of loss. Although courts have always fulfilled other roles, their economic function has undoubtedly dominated. On American television programmes the question asked of lawyers and of courts is not "Am I right or is the other guy?" but "How much can I get?". Courts deciding the first question without the second may seem odd, but the first question is what the law is really all about.

In 1979 Professor Palmer almost proudly proclaimed "The Destruction of the Common Law".[140] Articles detailing or predicting the death of tort abound. They are matched in dedication, if not in volume, by opinions arguing that tort is adaptable. To those, Cooke P's judgment must now be added. The great strength of the common law is that it can adapt to meet changing needs. It is a strength that protects our liberty. Accident compensation threw out much of the bath-water associated with tort liability. Hopefully it did not throw out the baby. Only time and adventurous litigants will tell whether tort will one day join Mark Twain in asserting that "the reports of my death have been greatly exaggerated".

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140 Above n49, 274.