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The Rule of Law in Private Law: A New Animating Ideal for Employment Law?

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Introduction

Law exists so that principles, and not purely power, govern relations between people in a society. The *rule* of law, by extension, is just concerned with maintaining and upholding, steadfastly, those principles of law against the reach of naked power. That simple formulation of the rule of law consists of many strands, however. Most rule of law literature focuses on how principles of law can be maintained and upheld against the reach of naked *public* power in the realm of public law.[1] What this paper focuses on is a forgotten strand of the rule of law: the need for principles of law to be maintained and upheld by the courts away from public law, where *powerful private parties* seek to place themselves above, or outside of, the law to secure an advantage for themselves. This strand is called in what follows "the rule of law in private law". What is meant by private law is that area of law, generally involving two private parties (though sometimes involving the State acting in some private capacity), where no special duties or obligations attach to either party because of their affiliation to branches of government: obvious examples include the law of contract and the law of torts. The rule of law in private law is simply the application of rule of law precepts to that context.

This paper seeks to unravel the meaning of the rule of law, as well as to show that the strand of the rule of law identified above may already be woven into the fabric of private law. Only a single case study of an area of employment law is selected to test this claim, but it is tentatively suggested that "the rule of law in private law" might, with further investigation, be shown to be at work underneath the logic of decisions in employment law, and private law as a whole.[2] It should be noted that this paper focuses on cases in employment law involving two private parties, without State involvement, and does not intend to take any firm position on the debate over whether employment law should be classified as part of public law or private law. Examples of employment cases with two private parties do not prompt that debate.

This paper argues, too, that there may be merit in identifying this underlying pattern in the tapestry of employment law specifically. Viewing the pattern that gives effect to the rule of law in private law may help to spark thinking about the underlying ideals of employment law, and about the way in which employment law should interact with other bodies of law, such as public law, in developing concepts like the rule of law in private law.

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[1] See, for instance, the analysis of Jeremy Waldron in: Jeremy Waldron "The Concept and the Rule of Law" (2008) 43 Ga L Rev 1.

[2] It should be pointed out that the term "employment law" is preferred to "labour law" in this paper, though it is not intended to carry a different meaning to the meaning attached commonly to "labour law" (for instance, the meaning given to the term "labour law" at the 2011 New Zealand Labour Law conference at which this paper was first presented).

The paper's structure reflects the development of these three points. Part I sketches the contours of "the rule of law in private law", explains how it can be situated within broader rule of law thinking, and examines whether the idea survives logical scrutiny. Part II explores a case study to show that, in employment law across several jurisdictions, the courts' approach to whether a party is an employee or independent contractor reflects the operation of the rule of law in private law. Close attention is paid in this regard to the recent United Kingdom Supreme Court judgment in *Autoclenz Ltd v Belcher* – its background, procedural history, relevant analysis, and relationship to the rule of law in private law – and the New Zealand parallel to this judgment is mentioned in passing.[3] Finally, Part III considers how the rule of law in private law might become a non-ideological animating ideal for employment law, and notes that the process of applying the rule of law in private law to employment law is a reminder of the need for dialogue between different bodies of law. This is not just some interesting but fruitless journey down a theoretical rabbit warren. Rather, it is an inquiry that can help explain and understand some of the forces driving many judgments in the employment law sphere. It is an inquiry, even more than that, that enjoins us all to work harder to improve the dialogue between employment law and other fields of law in a manner that proves to be profitable for all participants in that conversation.

The rule of law in private law

This section develops and defends the concept of "the rule of law in private law" that is at the core of this paper, and is later applied to the employment law context. It is necessary to explore in more detail what the idea is, and what it is not. To illustrate that it involves a legitimate offshoot of rule of law thinking, an effort is then made to connect it with more conventional, existing rule of law ideas. Some obvious objections to the concept are also briefly considered, and rejected.

An outline of the concept

In the late Lord Bingham's magisterial book, *The Rule of Law*, Thomas Fuller's 1733 injunction is quoted: "Be you never so high, the law is above you."[4] This quotation captures at least one part of the rule of law: the notion that nobody should be able to place themselves above the law. However, there is nothing in the injunction, "[b]e you never so high, the law is above you", or in the phrase "the rule of law", that suggests that it is only the executive or public officials that should not be able to place themselves above the law. It is understandable that most discussions of the rule of law have focused on branches of government: they wield power openly, which has the capacity to be abused, and needs regulating by principles of law. However, it is the thesis of this paper that any account of the rule of law is incomplete if it does not also explain how the rule of law might apply to private actors, especially in a private law context. The rule of law, I contend, must also extend to curbing the excesses of powerful private actors. They, too, are subject to the law and have the capacity to attempt to rise above it. When Thomas Fuller says "the law is above you", then, the "you" is a reference to not just the branches of government, but also private actors exercising power. It is a reference to all of those to whom the law applies.

This is all, however, a little fuzzy and in need of refinement, so that "the rule of law in private law" can have some more precise content.[5] What does "the rule of law" mean in a private law context, and how

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[3] *Autoclenz Ltd v Belcher* [2011] UKSC 41 [*Autoclenz* (SC)].

[4] Tom Bingham *The Rule of Law* (Penguin, London, 2011) at 4.

[5] This is not to say that perfect precision should be sought in any conception of the rule of law. (As Jeremy Waldron notes, such precision is not possible in the rule of law context – and not desirable: Jeremy Waldron "Thoughtfulness and the Rule

can it be used to prevent abuses of power by private parties? I argue that the rule of law, in general, is directed at retaining the integrity and strength of law.[6] It prevents parties from evading the reach of law. In the private law context, therefore, the rule of law can have the most purchase if it serves *to curb private actors' attempts to create for themselves their own law in a manner that usurps the power of the court to be a final arbiter of the law and secures an advantage for themselves*. Private actors' efforts to "contract out" of the general law to achieve some benefit, without any legal authorisation for that contracting out, are the private law analogue of the executive and legislature placing themselves above the law (through, for example, the use of ouster clauses[7] or the passage of legislation overturning a court decision stating the law).[8] Just as these actions of the branches of government offend our rule of law sensibilities by giving the law a plasticity and malleability that allows manipulation by those in power, so too, the private law analogue – parties seeking to arrogate to themselves the power to determine the law, and to deprive the courts of this power – troubles our rule of law instincts. And, the rule of law in private law should be applied especially vigilantly where attempts to evade the reach of the law provide a particular benefit for the more powerful party in a transaction, since the rule of law – and law as a whole – are designed to protect against arbitrary advantages secured only through the assertion of power.

The rule of law in private law operates in the same way as other strands of rule of law thinking: as both a precept underpinning legislation and judicial decision-making (a descriptive concept), and an aspirational ideal to which we should reach in law reform and advocacy (a normative concept). In some instances, the rule of law in private law might be partially, but not fully, incorporated into legislation or the common law – its influence on a rule or on reasoning might be apparent, but the concept might not have been adopted wholesale. Several examples may help to render vivid this somewhat abstract discussion. In the New Zealand context, in favour of which this paper admits a certain inevitable bias, the rule of law in private law is manifested in the judicially-settled conclusion that it is generally not possible for parties to contract out of the Fair Trading Act 1986. The courts have made clear, in line with the rule of law in private law, that the general consumer protection principles of the Fair Trading Act are to apply to all and that parties should rarely be able to place themselves above these principles.[9] The rule of law in private law also animates the hostility towards "entire agreement" clauses expressed in s 4(1) of the Contractual Remedies Act 1979. This provision states that if a clause purports to "preclude a [c]ourt" inquiring into pre-contractual representations, the court will not, in practice, be precluded from reviewing matters unless it is "fair and reasonable" for the clause to be conclusive. It is suggested that this judicial straining to avoid giving effect to entire agreement clauses is driven by a desire to uphold the rule of law in private law, since entire agreement clauses are prima facie contrary to the rule of law in private law – they allow private parties to create their own law, and to block the courts' ability to oversee the legality of an aspect of a transaction. These examples illustrate that traces of the rule of law in private law can already be found across the legal landscape, and that it may prove fruitful to excavate the concept further in existing law and to acknowledge its influence on judicial decisions.

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of Law" (British Academy Law Lecture, London, 1 February 2011.)) What is sought here is sufficient clarity for the concept to be a workable one for the purposes of the analysis in the remainder of this paper.

[6] While one should take care not to place too much stock in linguistic analysis, it is noteworthy that the language that we use in talking about the law seems to assume that the law needs some inner strength: this is arguably why we speak of "breaking" the law. Infringements "break" the law, arguably, because they chip away at the law's normative integrity.

[7] As in, for instance, s 109 of the Tax Administration Act 1994, recently discussed by the New Zealand Supreme Court in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2011] NZSC 158

[8] See, for instance, the Foreshore and Seabed Act 2004 (repealed by the Marine and Coastal Area [Takutai Moana] Act 2011), enacted in response to the Court of Appeal decision in *Ngati Apa v Attorney-General* [2003] 3 NZLR 643 (CA).

[9] See, for example, *David v TFAC Ltd* [2009] NZCA 44, [2009] 3 NZLR 239.

The ties between this concept and other strands of rule of law thinking

The rule of law is understood, in this paper, in Richard Fallon's terms as a web of interconnected strands that together serve to uphold principles of law against the reach of public and private power.[10] That is not how the rule of law is always conceptualised by scholars and judges. It is often associated with single ideas (such as liberty) or simple propositions, but these attempts over-simplify what the rule of law is, and how it is maintained in practice. They also polarise or shut down the debate on what the rule of law might mean instead of opening up new lines of inquiry. Accepting that the rule of law encompasses a web of related concerns properly accounts for the complexity of the concept, encourages ongoing debate about the meaning of the rule of law, and provides a useful set of familiar concepts that can be used to test whether a new strand of rule of law thinking belongs in the web of rule of law ideas. It is useful now to reflect how the rule of law in private law fits alongside conceptions of the rule of law already developed by other scholars.

There is, first, an echo of the rule of law in private law in the work of scholars who state that the rule of law requires the supremacy of law. Andrei Marmor points out that the "ideal of the rule of law is basically the moral-political ideal that it is good to be ruled by law"[11], which resembles Tamanaha's view that "the law does rule and should rule"[12], as well as Hayek's claim that the rule of law requires "reliance on the action of abstract rules governing the relations between individuals"[13]. Marmor's article goes no further than explaining why it is good to be ruled by law; but his observation (alongside Hayek, 1969) is broad enough to encompass the rule of law in private law. Marmor's approach presumes that all should be ruled by the law, including those private citizens who seek to evade the court's scrutiny by contracting out of the law or making their own law. Fallon's description of one aspect of the rule of law also has similarities to the concept that I have sketched above. Fallon's conception of the rule of law has five elements; the fourth of these elements is "the supremacy of legal authority". Elaborating on this, he argues that the "law should rule officials, including judges, *as well as ordinary citizens.*"[14] Fallon gets closer to the rule of law in private law because of his express reference to the rule of law reaching out to protect private citizens. What his theory of the rule of law confirms is that the rule of law in private law has pertinent parallels to the definition of the rule of law as being concerned with the paramountcy of law itself.

Second, the rule of law in private law has resonance because it builds on rule of law theory relating to abuse of power. Dicey, of course, gestures towards the need for the rule of law to regulate arbitrary power.[15] Philip Selznick, whose theory of the rule of law in industrial relations most closely mirrors

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[10] Richard H Fallon, Jr "'The Rule of Law' as a Concept in Constitutional Discourse" (1997) 7 Columbia Law Review 1 at 6: "The Rule of Law is best conceived as comprising multiple strands, including values and considerations to which each of the four competing ideal types calls attention. It is a mistake to think of particular criteria as necessary in all contexts for the Rule of Law. Rather, we should recognize that the strands of the Rule of Law are complexly interwoven, and we should begin to consider which values or criteria are presumptively primary under which conditions."

[11] Andrei Marmor "The Ideal of the Rule of Law" in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (2 ed, Blackwell, Oxford, 2010) 666 at 667.

[12] Brian Z Tamanaha "A Concise Guide to the Rule of Law" in Gianluigi Palombella and Neil Walker (eds) *Relocating the Rule of Law* (Hart, Oxford, 2009) 3 at 10.

[13] FA Hayek *The Political Ideal of the Rule of Law* (National Bank of Egypt, Cairo, 1955) at 32, cited in Philip Selznick (with the collaboration of Philippe Nonet and Howard M Vollmer) *Law, Society, and Industrial Justice* (Russell Sage Foundation, New York, 1969) at 15.

[14] Fallon, above n 10, at 8 (my emphasis).

[15] Dicey's account focuses on the supremacy of law, as well as the need to prevent abuse of power: see AV Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan, London, 1961) at 202, where Dicey says that the

the theory sketched in this paper, notes that the rule of law "seeks progressively to reduce the degree of arbitrariness in positive law and its administration."[16] E.P. Thompson expands on the idea. Famously calling the rule of law "an unqualified good" (a pronouncement that surprised his Marxist colleagues, many of whom viewed law as an inherently ideological instrument),[17] Thompson writes that it requires "the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims."[18] The rule of law in private law is consistent with Thompson's view. Thompson does not distinguish between public and private power, merely viewing power as "all-intrusive"; this would seem to justify a conception of the rule of law (such as the rule of law in private law) that aims to account for the abuse of private power. Thompson's enjoinder for effective inhibitions upon power also matches the notion of the rule of law in private law, which places a check on power by preventing attempts by parties to create their own law in a manner that will benefit the powerful party.

Third, the rule of law in private law may trade on the strand of writing that emphasises the links between equality and the rule of law. Bingham emphasises that equal application of the law is a necessary part of the rule of law.[19] That legitimises what might appear to be an extension of the rule of law from the public law to the private arena, to ensure that the law is applied with equal vigilance to powerful private parties. Further, a recent paper by Paul Gowder underscores that the rule of law has equality, not liberty, at its foundation.[20] For Gowder, the rule of law is about "vertical equality between officials and ordinary citizens and horizontal equality among ordinary citizens."[21] The rule of law in private law aims to foster such horizontal equality, by applying the law fearlessly where parties attempt to contract out of the law or secure advantages over each other.

This brief survey of some overlapping rule of law literature illustrates that the rule of law in private law has a certain pedigree in rule of law thinking: it is connected to strands of thought exploring the supremacy of law, the abuse of power, and equality. That pedigree suggests that the rule of law in private law is a concept that belongs in the web of interconnected strands that make up "the rule of law", and helps to explain its initial persuasiveness.

Objections to this view of the rule of law

With a prima facie case now established for the plausibility of the rule of law in private law, it is important to consider criticisms of the concept. If the rule of law in private law can be defended against these criticisms, it might be considered a workable idea that could be usefully applied to the employment law context.

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rule of law "means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government."

[16] Selznick, above n 13, at 12. I am grateful to Mark Bennett for drawing Selznick's work to my attention after a first draft of this paper had been completed. Selznick articulates the question that drives his inquiry in the following way: "Can we justify, within the framework of legal theory, the application to private organizations of principles hitherto restricted to public government?" See: ibid, at 244. Selznick's approach differs from my own in that Selznick argues that the rule of law should apply to private individuals and associations where private "governance" exists: ibid, at 274. I would not restrict the compass of the rule of law to the same extent.

[17] See discussion in Daniel H Cole "'An Unqualified Human Good': E.P. Thompson and the Rule of Law" (2001) 2 Journal of Law and Society 177.

[18] As noted in: ibid, at 182.

[19] Bingham, above n 4, at 55.

[20] Paul Gowder "Equality under the (Rule of) Law" (unpublished, 2011) <http://papers.ssrn.com>.

[21] Ibid, at 2.

It might be said immediately that speaking about "the rule of law in private law" is to colonise private law with public law concepts. The rule of law is a purely constitutional concept, some might say; a useful idea to bandy around when talking about governance and public administration, but an idea that would be out of place if applied to private transactions. To apply it to such transactions might be to allow for concepts that are even more foreign to the private lawyer, like human rights and procedural justice, to seep into private law. This objection has a superficial appeal; but, even if one were to accept the desire to rigidly compartmentalise the concepts and categories of private law and public law, this objection seems overstated. The notion of the rule of law in private law has content distinct from what the rule of law means in other contexts, as has been explained above (though it may share with other conceptions of the rule of law higher-level justifications such as equality and abuse of power). It requires already-existing law in the private law space to be enforced vigilantly against parties seeking to escape the reach of the law. Once seen in this light, it can be recognised that the rule of law in private law need not radically alter the arc of private law's development; it only provides a new way of explaining decisions already made, and a new precept to bear in mind as the law is applied and developed.

That first objection comes from a private law perspective. What about the damage that might be done to "the rule of law" itself by devising or developing this new concept of the rule of law in private law? It is already accepted that there is some indeterminacy around what "the rule of law" means: indeed, Waldron, amongst others, has asked whether it is an "essentially contested" concept.[22] Does this development of a new strand of rule of law add further woolly thinking to an already imprecise area? And, could affirmation of this new strand dilute what little content has been accepted as part of the rule of law? While these are valid concerns, it is suggested that there are more advantages than disadvantages for the idea of the rule of law that come from bringing into its web the concept of "the rule of law in private law". The rule of law is presently confined, arbitrarily (according to the argument in this paper), to the public law sphere. To explore how it should operate in private law is to contribute to the development of a *fuller* conception of the rule of law, which can operate across the legal system. Additionally, any concern about imprecision or the dilution of core rule of law content is easily minimised once it is acknowledged that, in defining the rule of law, we are not seeking one-line soundbites or simple propositions, but are rather identifying a web of interrelated concepts.

A separate challenge to "the rule of law in private law" relates to how new the concept really is. On one view, it might seem that the concept is reducible to a rallying-cry that provisions such as s 4(1) of the Contractual Remedies Act 1979 are to be applied without fear or favour – but that is merely to call for the enforcement of existing law! On another view, if "the rule of law in private law" requires only that the courts insist that parties do not block access to the courts, it is difficult to distinguish the concept from the notion that courts should be independent and impartial in applying the law – an uncontroversial tenet of the rule of law. It may be true that there is some overlap between "the rule of law in private law" and these positions. In fact, as was noted in the previous section, the linkages between "the rule of law in private law" and other conceptions of the rule of law could be part of the reason for the concept's appeal. However, it is wrong to say "the rule of law in private law" offers nothing new. It plainly aims to reorient the rule of law to include the private law context, and focuses on the ability of private parties to evade the obligations of law – two areas that remain neglected, if not untouched, by existing rule of law scholarship.

Not all the possible deficiencies of this new concept can be canvassed or even envisaged here. What has been attempted is an assessment of whether "the rule of law in private law" can withstand some

[22] Jeremy Waldron "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 Law and Philosophy 137.

obvious objections. It is suggested that it passes this test. Attention turns in the next part of the paper to applying "the rule of law in private law" to the employment law context.

A case study: employment law through the lens of the rule of law in private law

This paper does not pretend to prove, once and for all, that the rule of law in private law underpins private law as it is expressed in statute and the common law. That wide proposition can only be explored through extensive research. What is attempted here is to throw light on a single recent judgment of the United Kingdom Supreme Court, *Autoclenz Ltd v Belcher*, to illustrate *how* the rule of law in private law might be seen as driving legal reasoning in the employment law context. After the background, procedural history, and judgment are discussed, especial focus is placed on the rule of law in private law in the judgment. It is then noted in passing that the New Zealand parallel of *Autoclenz Ltd v Belcher – Bryson v Three Foot Six Ltd*,[23] which also dealt with the question of who is an employee deserving of employment law protections, may reflect reasoning grounded in the rule of law in private law. These examples – as well as providing a useful primer on recent developments in this area of employment law – suggest that the rule of law in private law may be an important principle latent in the law of employment.

Autoclenz Ltd v Belcher: *some background*

The issue in *Autoclenz Ltd v Belcher* ("*Autoclenz*") was whether 20 valeters providing car-cleaning services in Derbyshire were "workers" under the National Minimum Wage Regulations 1999, or independent contractors not deserving of payment of minimum wages and entitlement to statutory paid leave. The Regulations defined a "worker" as a person who has entered into or works under:[24]

> (a) a contract of employment; or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

National Minimum Wage Regulations 1999 (SI 1999/584) (UK), reg 2(1).

The respondents (the valeters) had a contract with Autoclenz, the appellant, and Autoclenz had contracts with British Car Auctions (BCA) to clean vehicles. The original written contracts between those employed and Autoclenz, one of which was examined by the United Kingdom Supreme Court and was dated June 1991, described a person who had been employed by BCA as "the Sub-contractor."[25] The contracts noted an undertaking by those employed to "perform the services ... within a reasonable time and in a good and workmanlike manner."[26] Clauses 2 and 3 of the contract also attempted to make clear the legal status of those employed. In Clause 2, the signing party was said to "[confirm] that he is a self-employed independent contractor", with tax arrangements specified, and in Clause 3, the parties were said to "agree and acknowledge that the Sub-contractor is not, and that it is

[23] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.
[24] National Minimum Wage Regulations 1999 (SI 1999/584) (UK), reg 2(1).
[25] *Autoclenz* (SC), above n 3, at [4].
[26] Ibid, cl 1.

the intention of the parties that the Sub-contractor should not become, an employee of Autoclenz." On the basis of these contracts, Inland Revenue had concluded in May 2004 of the status of those working for Autoclenz that "the balance of probability leans more towards self-employment than PAYE."[27]

In 2007, two new documents were drafted by Autoclenz. The first, not signed by the respondent Belcher, claimed that Autoclenz would engage valeters "FROM TIME TO TIME on a sub-contract basis". It asked valeters, which it acknowledged to be "experienced", to complete and return a form of agreement, which was said to "confirm that any contractual relationship between Autoclenz and yourself is one of client and independent contractor and not one of employer/employee", and to protect Autoclenz from tax and insurance obligations. The first document said that "as an independent contractor", the person employed could engage individuals to carry out work on the person's behalf; would have to purchase overalls from Autoclenz identifying the person as an Autoclenz contractor; would be required to provide cleaning materials; would have to have a valid driving licence; and would "not be obliged to provide ... services on any particular occasion". The second document, which seemed to bear some resemblance to the original contract, was signed by the respondent and described him as a "sub-contractor". It also expressly noted that it was the intention of the parties that the sub-contractor was not an employee.[28]

Procedural history

The Employment Tribunal (ET), which issued a judgment, in March 2008, on the preliminary question of whether the respondents were "workers", made findings of fact after reviewing the contract constituted in the two documents described above. It held that the valeters would not have been offered further work had they not signed the revised contracts, and that the valeters did not negotiate any of the terms (though it was made clear to them by Autoclenz that Autoclenz regarded the valeters as self-employed). The valeters worked in teams of four, taking a batch of six vehicles at a time, and on most days, there was enough to work keep 14 valeters busy. They were paid according to their work, with invoices being prepared by Autoclenz (though notionally prepared by the valeters), and tax and national insurance arranged by valeters on a self-employed basis. Autoclenz provided equipment and materials, introducing a 5% charge for materials in 2007, as well as Autoclenz overalls.[29]

The ET found that the valeters were "workers" since they were working under a contract of employment, according to limb (a) of the definition of "workers" quoted above, and were at any rate workers under limb (b) of the definition. Judge Foxwell, giving judgment for the ET, emphasised that the valeters had no control over their hours of work, no economic interest in the way that work is organised, and did not work as individuals, but rather as teams. The individuals could not source their own materials and were, crucially, "subject to the direction and control of the respondent's employees on site". Autoclenz prepared invoices, determined the deductions and rates of pay, devised the contracts, and gave detailed specification of the services. Judge Foxwell thought that the supply of training and company overalls was not determinative, though it was relevant to the view that the valeters were "fully integrated into the respondent's business" and had "no real other source of work". The substitution clause, which allowed a valeter to engage individuals to send another valeter on their behalf did not reflect "what was actually agreed between the parties", according to Judge Foxwell, which was that valeters were relied upon to turn up and had to notify employers in advance if they were unavailable for work: one of the respondents had worked elsewhere only once in 17 years of work. In

[27] Ibid, at [5].
[28] Ibid, at [6]–[10].
[29] Ibid, at [11]–[15].

sum, these were contracts for "personal service" where work was done in return for money, with "the degree of control" exercised by Autoclenz consistent with these agreements being contracts of employment.[30]

The Employment Appeal Tribunal (EAT) differed, holding that the respondents had not worked under a contract of employment, per limb (a) of the definition, but had been working under a limb (b) contract, in which work was done for another party who was not a client or customer, rendering the individual doing the work a "worker".[31] The Court of Appeal (Sedley, Smith and Aikens LJJ) restored the judgment of the ET, holding that the valeters fell within both (a) and (b) of the definition. Each Judge delivered a separate judgment. Lady Justice Smith said "that the parties to a contract describe the effect of their contractual arrangements in a particular way is not conclusive of the actual effect of the contractual arrangement."[32] The EAT had placed too much emphasis on the written agreement in reaching its conclusion that there was no contract of employment, said Smith LJ,[33] but was correct that the substitution clause and "right to refuse work" clause were a sham, obscuring the true status of the parties as workers or employees.[34] Lord Justice Aikens wished to state his reasons in his own words because the case raised "a serious issue in employment law and it is one that must arise frequently."[35] Lord Justice Aikens felt it was not helpful to talk of "true intention" or "true expectation", lest a court stray into parties' subjective, private intentions.[36] In the employment sphere, where written terms can be dictated by one party, a court must, however, be "realistic and worldly wise" and "investigate allegations that the written contract does not represent the actual terms agreed."[37] Applying that approach in the present context reveals that the valeters were workers, not independent contractors. Lord Justice Sedley was less hesitant in confirming that the valeters were "employees in all but name". The protestations to the contrary in the contract were "odd" and "bore no practical relation to the reality of the relationship."[38]

The judgment of the United Kingdom Supreme Court

The Supreme Court (Lords Hope, Walker, Collins, Clarke and Wilson) handed down a unanimous judgment on 27 July, 2011, with the reasons given by Lord Clarke. Lord Clarke noted that the key question was in what circumstances the terms of a written agreement might be ignored. After laying out certain uncontroversial propositions, Lord Clarke observed that "a different approach has been taken" to interpreting contracts in the context of employment contracts. (Lord Clarke was careful to note that the judgment should not be, of course, thought as the correct legal approach to other contracts).[39] There is a need to focus on "the reality of the situation" where written documentation may not reflect the reality of the relationship.[40] Lord Clarke went on to consider the variety of instances where a court may disregard written terms because they represent "a sham". After resolving some disagreements in the case law that need not detain us here, his Lordship observed that a court must assess "what was the true agreement between the parties."[41] He agreed with the Court of Appeal that

[30] These details are all taken from the quoting of the ET's findings at [37] of the Supreme Court's judgment.
[31] Ibid, at [3].
[32] *Autoclenz Ltd v Belcher* [2009] EWCA Civ 1046 ["*Autoclenz* (CA)"], at [13].
[33] Ibid, at [54].
[34] Ibid, at [57]–[62].
[35] Ibid, at [71].
[36] Ibid, at [91]
[37] Ibid, at [92].
[38] Ibid, at [104].
[39] *Autoclenz* (SC), above n 3, at [21].
[40] Ibid, at [22].
[41] Ibid, at [29].

the issues of bargaining power that arise in an employment context require a more sensitive approach to whether the terms of a written agreement represent the "true agreement" between the parties. Lord Clarke labelled this "a purposive approach."[42] Applying these principles, Lord Clarke then leaned heavily on the findings of fact reached in the ET. He found that these findings could not be sensibly challenged, and concluded that it was open to the ET to hold that the terms of the written document could be disregarded,[43] thereby confirming the view that the valeters were "workers" under (a) and (b) of the definition.

Analysis

On first glance, the outcome in this case might seem surprising, especially for those observers in favour of giving effect to written terms in contracts. The relevant written contract here had been as express as possible in identifying the valeters as independent contractors, not as employees; they were described as sub-contractors throughout; and both parties had signed this document. Autoclenz could have done little more to attempt to attain independent contractor status for the valeters. Despite this, the Court was uncompromising in finding that the written terms of the contract could be disregarded, and that it could, nonetheless, find that the valeters were workers, or, as they would be called in New Zealand, employees. What drove the Court to this conclusion?

In some ways, this was an orthodox application of the case law: several cases were cited by the Court for the proposition that the written agreement may not reflect the reality of the employment relationship – notably *Consistent Group Ltd v Kalwak* and *Firthglow Ltd (t/a Protectacoat) v Szilagyi* – and the Court simply applied the propositions from these cases.[44] The factual context also pulled strongly in the direction of the conclusion that the Court reached. It was evident that the substitution clause, allowing for alternative valeters, had not been used in practice, and "the right to refuse work" clause was a similarly hollow undertaking, given the fact that the evidence suggested one valeter had worked elsewhere only once in 17 years. It was arguably the settled legal position, and the facts, that led the Court to reject Autoclenz's submission that the valeters should be regarded as independent contractors, in reliance at least in part on the written contract.

I argue, however, that the Court was, at most, impelled to its conclusion, and at the very least, fortified in its view, by an underlying commitment to the rule of law in private law. The Court in *Autoclenz* sought to guard against the ability of a party (in this instance, Autoclenz) from usurping the court's function to determine the law and secure an advantage by inserting seemingly definitive statements into a contract. The Court affirmed that parties may not place themselves above the law, or the courts, in this way – and reminded parties that it will retain a supervisory role, reviewing written agreements in the employment sphere, and being willing to disregard these agreements where they do not accurately represent the factual matrix between the parties. Lady Justice Smith's words in the Court of Appeal express the precept pithily: any attempt by parties to "describe the effect of their contractual arrangements in a particular way is not conclusive of the actual effect of the contractual arrangement" as determined by a court.[45] Of course, it is true that, had the factual matrix indicated that, the valeters were independent contractors, the Court would not have disregarded the terms of the written contract. However, that would be because no party would have been seeking an advantage through the creation

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[42] Ibid, at [35].
[43] Ibid, at [38].
[44] *Consistent Group Ltd v Kalwak* [2008] EWCA Civ 430, [2008] IRLR 505; *Firthglow Ltd (t/a Protectacoat) v Szilagyi* [2009] EWCA Civ 98, [2009] ICR 835.
[45] *Autoclenz* (CA), above n 32, at [13].

of an autonomous law, away from the Court's oversight. More importantly, had the Court acknowledged that the valeters were independent contractors in those circumstances, it would not have relinquished its role as final arbiter of the law, and would still have resisted parties' attempts to decide the law for themselves. Overall, the Court was influenced in *Autoclenz* by upholding the rule of law in private law – although the extent of that influence might be difficult to state with any certainty.

Some might say that it is odd to attribute to the United Kingdom Supreme Court, in this case, a basis for its decision that it did not itself identify. Lord Clarke might be surprised to be told that the reason he reached the conclusion he did was not one he recognised at the time. The same critique might claim that the reconstruction of the decision offered above involves too great a degree of inferential interpretation and reading between the lines of the judgment in *Autoclenz*. To be sure, suggesting that the rule of law in private law underlay the Court's decision requires inferences to be drawn. However, it will be recalled that no attempt has been made to say just how influential this concept was in guiding the Court to its conclusion. All that has been done is suggested, tentatively, that the Court had in mind a precept – relating to the role of the courts, and the relationship between the parties and the general law – that I have attempted to articulate and develop. It is difficult for courts to be wholly transparent in canvassing all considerations that have a bearing on their judgments. What is proposed here is the modest claim that there was one consideration latent in the judicial reasoning in *Autoclenz* that the Supreme Court may have been influenced by, but did not fully explain or explore.

Similar reasoning in Bryson v Three Foot Six in the New Zealand context

It is useful to note, in passing, that in the New Zealand parallel to *Autoclenz*, *Bryson v Three Foot Six*,[46] in which the Supreme Court of New Zealand examined the question of whether a film industry worker was an employee or independent contractor; it might also be argued that the Court aimed to uphold the rule of law in private law. A contract, the "crew deal memo", stipulated that the film industry worker in that case, Mr Bryson, was an independent contractor. The Supreme Court raised some doubts initially about whether the characterisation of the legal relationship between Mr Bryson and Three Foot Six, the company doing work for the Lord of the Rings Project, was a question of law at all, amenable to appeal.[47] However, proceeding to consider whether the Employment Court Judge had made an error of law, the Court (in a decision given by Blanchard J) held that she had, rightly, not treated "as a determining matter any statement by the persons that describes the nature of their relationship", consistent with s 3(b) of New Zealand's Employment Relations Act (ERA) 2000. Only when "*the Court or Authority* has examined the terms and conditions of the contract and the way in which it actually operated in practice … will [it] usually be possible to examine the relationship …"[48] In this case, it was open to the Judge to find that "the crew deal memo did not give any reliable indication of the real nature of the relationship,"[49] and to find that – on the basis that he was fully integrated into Three Foot Six, not able to delegate his work, and working effectively full-time – Mr Bryson was an employee.

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[46] *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721. This case has had something of a legislative sequel: the Employment Relations (Film Production Work) Amendment Act 2010, colloquially known as "*The Hobbit* legislation" because of the circumstances surrounding its passage, purports to preclude the possibility that workers in Mr Bryson's position could be "employees", by amending the definition of "employee" in s 6(1) of the Employment Relations Act 2000. No court has yet definitively settled the legal effect of this amendment.

[47] Ibid, at [17]–[23].

[48] Ibid, at [32] (emphasis added).

[49] Ibid.

Again, it might be said that, while the Court applied orthodox principles (from statute and common law) in the face of strong facts, it was influenced, in some way, by an aversion to Three Foot Six's attempt to stipulate definitively the legal status of its relationship with Mr Bryson. It also seems apparent that the Supreme Court sought to underscore the need for a court or judicial body to reserve the right to make an assessment of the factual circumstances and reach its own conclusion about whether an individual is an employee or independent contractor. These are principles at the heart of the rule of law in private law.

It had been noted in *Bryson* that the intention of the parties was "no longer decisive,"[50] and that under the previous legislation (the Employment Contracts Act (ECA) 1991), significant weight had been placed on the written contract. This raises an interesting question for proponents of the rule of law in private law: had the law been that the intention of the parties *was* decisive, how should a court have ruled in a scenario where the parties had made express that they believed that a worker was an independent contractor? In this situation, would the rule of law in private law not pull in the opposite direction to the law? How should a court have balanced these concerns? The answer to these questions is surprisingly simple: the obligation of the court, under the rule of law in private law, is only for the court to uphold the law against the parties' attempts to secure an advantage by placing themselves above, or outside of, the law. In a situation where the law dictated that the parties' intentions were decisive, the court would still take care to assess the parties' intentions. However, the parties' attempt to stipulate the nature of their relationship would no longer be an instance of the parties placing themselves above the law. Applying the rule of law in private law in that situation would *require* a court to give effect to the parties' contract.

Needless to say, it cannot be concluded from these two examples in the employment law arena that the rule of law in private law runs like a thread through private law. That would be inferring too much. What can be said is that a glimpse has been offered here of how the rule of law in private law might underpin judicial decision-making. It is hoped that the consideration of this case study might provide a platform for further thinking about the rule of law in private law in other legal contexts.

The value of this concept for employment law

The rule of law in private law is a concept that may have relevance outside of employment law, in contract law and the law of torts, amongst other areas. However, this part of the paper highlights the particular value that the concept could have for employment law. Firstly, the rule of law in private law might prove to be an animating ideal for employment law as a whole. Secondly, the concept is important in serving as a reminder of the types of new frameworks that can emerge when ideas (such as the rule of law) originating in other fields of law (like public law) are harvested in new contexts.

A new animating ideal?

Historically, there has been little effort to theorise deeply what values lie beneath employment law: as Horacio Spector has noted, the "literature on the philosophical foundations of labor law is scant."[51] This may be because employment law is an area of law that divides many people (including judges), and for which it is difficult to come up with bridging principles that find a middle ground between polarised positions. Where attempts have been made to arrive at descriptions of the ideals

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[50] Ibid, at [5].
[51] Horacio Spector "Philosophical Foundations of Labor Law" (2006) 33 Fla St UL Rev 1119 at 1121.

underpinning employment law, the ideals have often been coloured by ideological views on freedom of contract or the protection of labour rights. While ideology may be difficult to escape (making talk of "non-ideological ideals" futile), there have been few accounts of employment law, as a whole, that are not wholly reliant on a commitment to certain ideological preferences.[52]

The rule of law in private law has considerable promise as a concept that might be shown to undergird employment law but that does not require such ideological preferences. The rule of law is a familiar legal concept (even if its content is the subject of much dispute) that would not be considered foreign to those judges, practitioners, and academics seeking a new animating ideal for employment law – even if the rule of law in private law is a slightly novel variation on the rule of law. The rule of law in private law is also especially suited to the needs of employment law in most jurisdictions. In most jurisdictions, there is now a statutory framework that governs employment law,[53] and the rule of law in private law provides a rationale for ensuring close adherence to that framework (on the part of judges as well as parties to a dispute), and applying that framework with vigilance.

The next challenge for scholars is to map out the theoretical underpinnings of employment law, in order to explore whether the rule of law in private law is relevant to issues in employment law other than the single issue canvassed as a case study above (namely, whether an individual is an employee or independent contractor). In the New Zealand context, several examples of future possible directions in the scholarship can be noted. The rule of law in private law may be a fruitful concept to use when theorising the pervasiveness of the good faith concept enshrined in s 4 of the ERA, because it highlights the inability of parties to contract out of legal requirements in an effort to secure an advantage. For a similar reason, it may be a useful way to justify and strengthen procedural fairness obligations in the context of dismissal, since it would provide an explanation for why such obligations should not be easily jettisoned.[54] It may even offer a justification for the view taken by Chief Judge Colgan in *Smith v Stokes Valley Pharmacy (2009) Ltd* that the introduction of employment trial periods of 90 days or less in ss 67A and 67B of the ERA does not extinguish the right of an employee to seek and receive an explanation for dismissal,[55] since, in that decision, Chief Judge Colgan attempted to preserve the enforcement of existing law, despite the introduction of ss 67A and 67B – a decision that might be thought to be consistent with the rule of law in private law. Further research is undoubtedly needed, and tensions within the concept will have to be worked through. One challenge will be whether the rule of law in private law can be redeployed to argue for reform in employment law (since it would be expected that an animating ideal for an area of law could be used to justify changes in the law), when perhaps the rule of law in private law exhibits a bias in favour the enforcement of existing law. Regardless of how this challenge is worked through, it is clear that the rule of law in private law has potential to be used as an idea both to rationalise existing employment law decisions and to forecast future decisions, if it can be properly theorised, and if it is the case, that it is a concept that often underlies judicial decision-making.

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[52] Gordon Anderson's most recent suggestion that social justice underpins employment law may present one solution to this debate, though it remains to be seen how much consensus the idea of social justice attracts. See the discussion in Gordon Anderson *Reconstructing New Zealand's Labour Law: Consensus or Divergence?* (Victoria University Press, Wellington, 2011).

[53] See, for example, the Employment Rights Act 1996 (UK) and the Workplace Relations Act 1996 (Cth).

[54] The standard obligations are set out in *NZ Food Processing Union v Unilever NZ Ltd* [1990] 1 NZILR 35 at 45–46.

[55] *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] ERNZ 253. This case is closely scrutinised in: Scott Worthy "Revisiting *Stokes Valley* and Statutory Interpretation" (New Zealand Labour Law Conference, Wellington, 2 December 2011).

A reminder of the value of dialogue for employment law

The preceding passage outlined a very direct benefit for employment law that might be achieved by developing a theory of the rule of law in private law: namely, a unifying principle for that body of law. However, ongoing thinking about the rule of law in private law may also supply a more cerebral benefit for employment law: a reminder of how valuable it can be to borrow ideas from different bodies of law and apply them to new contexts. The notion of the rule of law in private law is a product of adopting a public law notion, the rule of law, and adapting it to the private law context. Even on the basis of the limited analysis offered in this paper, it seems true that such cross-fertilisation has use for employment law by sparking some fresh insight or at least probing conventional orthodoxies. It might be hoped that the development of the rule of law in private law might act as a spring for further cross-fertilisation between other areas of law and employment law. What is meant by cross-fertilisation is not necessarily wholesale, unthinking incorporation of ideas: of course, in some instances, doctrines will be inapplicable. What is required is debate, particularly amongst the academic community, about whether ideas might be fruitfully borrowed and applied, and a willingness for scholars in employment law and other fields to be in a state of dialogue. This dialogue should go both ways: so that ideas from areas such as public law can be tested within an employment law context, and ideas from employment law can be held up as possible solutions for problems in other areas of law.

Before exploring examples to make these somewhat abstract observations more concrete, it is worth making the point that employment law – at least in New Zealand, the jurisdiction with which the author is most familiar – seems especially bereft of the benefits of this dialogue. It is unclear why employment law has become insulated and isolated from this dialogue across different fields of law. It may be the product of the specialisation of employment law, and the establishment of separate institutions to deal with employment law matters (though one would think that the ability of the Court of Appeal and Supreme Court to consider employment law issues on appeal might at least lead to judges and lawyers being forced to contemplate employment law from time to time). It may be because employment law is seen as an area of law that is so much the product of political preference and policy that it can offer little by way of more general insights into the law (though employment law is by no means unique in being an area of law that is entangled in politics).[56] Or, it may be due to the fact that employment law remains in the midst of something of an identity crisis – since it lies on the margins of public law, contract law, tort law, and equity – that makes scholars in the field of employment law hesitant about engaging with any other particular field of law. Whatever the reason for this insulation, and notwithstanding the fact that right across the law there is arguably insufficient dialogue between the sub-disciplines, it appears fair to say that employment law could do well to be in a more lively state of dialogue with other bodies of law.

Because the concept at the core of this paper – the rule of law in private law – is an example of employment law importing an idea from elsewhere, it may be helpful to gesture towards some examples of dialogue being “exported” the other way (wherein employment law can supply concepts and approaches that might be picked up and explored by other bodies of law) to highlight the value of dialogue. It may not be sufficiently appreciated how much of a promising incubator employment law might be for novel doctrines and perspectives.

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[56] The view that employment law, at least in New Zealand, is closely entangled with issues of ideology was well-explained in: Margaret Wilson “Recent Developments in Employment Law” (Auckland University Law Review Contributors’ Symposium, Auckland, 7 October 2011).

One possible employment law "export" that might be of utility for the law of contract is the approach taken to contractual interpretation in determining whether a person is an employee or independent contractor, touched on in the analysis above. Employment law has long acknowledged that evidence of the factual matrix can be used to shed light on a relationship also embodied in a contract. At a time when the law of contract is grappling in certain jurisdictions with deciding on how much of the factual matrix is relevant to contractual interpretation, particularly in relation to post-contractual conduct,[57] evidence of how workable and robust the employment law posture has been (albeit in achieving different objectives) might be profitable for contract law scholars and contract law as a whole. Of course, in *Autoclenz*, Lord Clarke was very careful to limit his observations about disregarding written terms of a contract to the employment law sphere, and not to allow the comments to be used in an ordinary contract context.[58] On the approach suggested here, perhaps there would be some utility in not being so cautious.

A second instance where employment lawyers might advance the development of other bodies of law by outlining issues that have been dealt with in employment law that may be of relevance elsewhere, especially in New Zealand, is on the subject of good faith. There has been an extensive, and now possibly well-worn, debate in contract law over the existence and enforceability of a duty of good faith.[59] It seems that this is an area where employment lawyers can fruitfully contribute reflections on how the concept of good faith, outlined in s 4 of the ERA, has been developed and applied, even if it is a concept that has been tailored to the employment context. Dialogue might include discussion of how workable and practical good faith has been, and how it has been defined. Interestingly, in *Wellington City Council v Body Corporate 51702 (Wellington)*,[60] Tipping J alluded to the possible relevance of the employment law concept of good faith when assessing whether an agreement to negotiate in good faith was enforceable.[61] While Tipping J noted that the statutory nature of the duty of good faith in the employment law context allowed for greater certainty than in contract, the fact that he outlined the employment law duty of good faith in spite of this superficial difference – when counsel also had not addressed the point – reveals that perhaps Tipping J was of the view that there could be some further dialogue between contract law and employment law on this point.

The prospect of such dialogue will not appeal to those who support absolute specialisation, or to those who favour fine distinctions between areas of law and rooting ideas firmly within very narrow contexts; but to those who prefer not to classify the law into hermetically sealed compartments, and who accept that ideas, such as good faith can have a similar shape across various parts of the law, the notion of cross-fertilisation of concepts (exemplified by the development of the rule of law in private law) might be thought to be appealing. Some might even consider such cross-fertilisation essential to the law's enduring unity and vitality.

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[57] The High Court of Australia most recently expressed the view that post-contractual negotiations should be inadmissible in *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 251 ALR 322 (HCA); the New Zealand Supreme Court has taken a more liberal view towards admissibility in *Wholesale Distributors Ltd v Gibbons Holdings Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.
[58] *Autoclenz* (SC), above n 3, at [20].
[59] For a small selection of the contributions to the debate, see James Allsop "Good Faith and Australian Contract Law: A Practical Issue and a Question of Theory and Principle" (2011) 85 ALJ 341; Johan Steyn "The Role of Good Faith and Fair Dealing in Contract Law: A Hair-Shirt Philosophy" (1991) 6 Denning LJ 1131; Paul Finn "Good Faith and Fair Dealing Australia" (2005) 11 NZBLQ 378; EW Thomas "Good Faith in Contract: A Non-Sceptical Commentary" (2005) 11 NZBLQ 391; and Rick Bigwood "Symposium Introduction: Confessions of a Good Faith 'Agnostic'" (2005) 11 NZBLR 371.
[60] *Wellington City Council v Body Corporate 51702 (Wellington)* [2002] 3 NZLR 486 (CA).
[61] Ibid, at [36].

Conclusion

This paper began by sketching a notion of the rule of law in private law. After the core components of the concept were laid out, its relationship to other rule of law concepts was explained, and it was defended against objections grounded in its alleged incompatibility with private law norms, its effect on the meaning of the rule of law, and its relative novelty. Emphasis was then placed on how the rule of law in private law was manifested in the reasoning of the United Kingdom Supreme Court in *Autoclenz*. To illustrate this, it was necessary to discuss the background and procedural history of the case, as well as the judgment's main parts. It was noted that a desire to uphold the rule of law in private law could be inferred from the reasoning in *Autoclenz*, and that a similar precept arguably underpinned the decision of the New Zealand Supreme Court in *Bryson v Three Foot Six*. While the rule of law in private law was said not to be confined to employment law, the final part of the paper examined the especial use of the concept to employment law – as a possible animating ideal for employment law, and as a reminder of the need for dialogue between employment law and other areas of law.

Some of the greatest leaps in insight in the common law have occurred through the use of inductive reasoning that has highlighted underlying patterns in parts of the law hitherto thought to be without order.[62] *Donoghue v Stevenson* is one case where that leap was made: a case where Lord Atkin discerned, when reviewing the historical course of negligence judgments, a sense of direction (in the form of the neighbourhood principle) latent in what, up to that point, had seemed like an erratic trail of individual judgments.[63] This paper would not immodestly claim to make that leap in insight for employment law, or private law as a whole, in arguing that the rule of law in private law can be induced as the underlying precept of much judicial reasoning. It does claim, however, to be written in the spirit of Lord Atkin's endeavour in *Donoghue v Stevenson* – as part of an enterprise seeking to crystallise or clarify the principles at the bottom of law itself. For Cardozo, this stock of principles drawn upon in court is not a set of ideas "lying beneath" the law; this reservoir of values, precepts, and propositions *is the essence of law itself*.[64] Whether we see such principles as law, or just as its sources, most would accept that the search for these principles is a worthwhile journey, upon which this paper has humbly embarked.

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[62] The term "leap in insight" is borrowed from Chief Justice Elias, who uses it in: Sian Elias "JUSTICE for One Half of the Human Race? Responding to Mary Wollstonecraft's Challenge" (Address to the Canadian Chapter of the International Association of Women Judges' Conference, Vancouver, 10 May 2011).

[63] *Donoghue v Stevenson* [1932] UKHL 100, [1932] AC 562.

[64] Benjamin N Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924) at 43. Selznick shares this view: "Legal ideas, variously and unclearly labelled 'concepts,' 'principles,' and 'doctrines,' have a vital place in authoritative decision. ... It would be wrong to speak of these as merely a 'source' of law; they are too closely woven into the fabric of legal thought and have too direct a role in decision-making." See Selznick, above n 13, at 27.