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**A NOTE CONCERNING: “When Old Meets New”:
Civil Remedies in the Criminal Context”,
A Paper by J.P. Laporte, D. Sean McGarrity
& Jamie Nelson**

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Criminal law is mostly about punishing those who commit crimes; it is primarily about the accused and little about the victim.

Consequently, the authors of “When Old Meets New: Civil Remedies in the Criminal Context” observe accurately that monetary compensation for victims is not provided as a result of the criminal trial process. They note correctly that restitution orders generally fall far short of the compensatory damages that would be available in a civil action. Damages are not generally the subject matter of a criminal trial; a civil trial involving sister torts is the proper place to obtain them.

The authors have suggested a streamlined process for victims. Once you have a conviction, there should be a process for shunting the quantification of damages issue into a civil case and proceeding quickly to a damages-only hearing.

It is argued that *res judicata*, the prohibition against relitigating an issue or facts already decided in the particular case, does not apply because the parties are not the same in a civil and criminal case dealing with the same events. It is stated that the plaintiff in the civil case is the victim, the pursuer in the criminal case, the Crown. If accurate, this forces the victim/plaintiff to prove the whole case all over again. However, this is not quite the law. In Canada, one cannot relitigate, in a collateral proceeding, findings of fact necessary to support a criminal conviction. So it would appear to a certain degree that the tort case is restricted to proof of damages and a plaintiff will not have to establish liability, often a significant hurdle in a lawsuit.

The Canadian case setting out this principle is *Demeter v. Dominion Life Assurance Co.*¹ Peter Demeter was convicted of murder for hiring someone to kill his wife. He appealed his conviction to the Ontario Court of Appeal and lost. After his conviction he attempted to collect the proceeds of life insurance policies held in his wife’s name. The defendant insurer denied coverage on the grounds that Demeter had killed his wife and could not profit from that criminal act by collecting on the policies. Demeter took the position that he did not hire someone to kill his wife. One of the issues before the Court was whether relitigating the issue of whether Demeter had murdered his wife was an abuse of process. The Court concluded that this was an abuse of process;

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1. (1981), 33 O.R. (2d) 839, 125 D.L.R. (3d) 708 (H.C.J.), aff’d (1982), 35 O.R. (2d) 560, 132 D.L.R. (3d) 248 (C.A.).

if he wanted to challenge his conviction, an appeal was the proper and only avenue available to do so. He could not proceed in a collateral, *i.e.*, civil, proceeding and claim that he had not killed his wife.

So the law in Canada is this: once there is a judicial finding of guilt, then both the conviction and the findings of fact required to support the conviction are not subject to challenge and cannot be contradicted in a collateral private/tort action.

I saw this argument in small claims court in my articling year. The accused/defendant had intentionally killed the plaintiff's dog. The defendant argued the dog had attacked him. The court in the criminal trial found as a fact that the dog had not attacked him. To obtain a conviction for killing an animal without lawful excuse required a finding of fact that the dog had not attacked the defendant. It was successfully argued by the plaintiff that, according to *Demeter*, the liability issues could not be raised, the case could only proceed as a damages assessment. In this particular case, after lengthy legal argument, the defendant decided to settle the case on acceptable terms before any judicial determination.

So there is perhaps more assistance for the victim than would be suggested by some of the comments made in this paper. However, that assistance is limited for a number of reasons. First, this application of *Demeter* is not so commonly known and quite possibly could be missed by litigants. Second, findings of fact necessary to support the conviction may not include the particular plaintiff. Some potential plaintiffs may have been dropped from the prosecution as counsel negotiates a settlement with the Crown. The Crown is not concerned with civil liability issues, nor is the criminal court. If a potential plaintiff/victim is not named in the charges that are successfully prosecuted or plead to, then than plaintiff will have to prove he or she was a victim. It is not certain whether the prohibition against similar fact evidence will prevent such a plaintiff from leading evidence of a conviction. As it is not the practice of Crown counsel to advance civil claims, it is not a priority to name all victims in a case. In fact, it is more the norm that the Crown pares down a prosecution to proceed with its strongest case both for the purposes of trials and guilty pleas. This leaves our potential civil plaintiff out in the cold.

It is also possible that findings of fact necessary to support conviction may not include sufficient facts to prove liability. In the example of the killing of the neighbour's dog, if the charge did not require a finding of fact that the accused had not been attacked, this issue would have to be relitigated if an attack was raised as a defense. The plaintiff would have to prove most of his or her case all over again.

In conclusion, for the reasons I have given above, I agree with the bulk of the authors' positions, and make the small qualification that there is some relief for those victims fortunate enough to know about the legal opportunity; fortunate enough to be named as a victim in the criminal prosecution and conviction; and fortunate enough to have judicial findings of fact that were needed to support the conviction and prove their civil case. Clearly, there is a need for reform, and perhaps a need to turn some of the focus of the criminal process away from its exclusive obsession with the accused, and give some real attention to the victim.