COMMERCE, THE COMMON LAW AND MORALITY*

BY PAUL FINN**

[A significant wind-change has occurred in Australia's common law as it applies to voluntary and consensual dealings. The older inspiration of self-reliance and individual responsibility is being qualified by a newer concern: that parties deal with each other fairly and in good faith. Neighbourhood-like duties are an emerging phenomena in dealings. This article describes this change and its reflection in evolving common law and equitable doctrine.]

Lon Fuller once observed that 'when law is compared with morality, it seems to be assumed that every one knows what the second term of the comparison embraces.'[1] For the most part, I will make precisely that assumption, though confident in the knowledge that there will be considerable diversity in the moral visions and values that we severally entertain and, therefore, in the province and meaning to give 'morality'. Without entering into the reasons why this should be so, I will at this point venture at least this much about morality. It has two characteristic and interrelated concerns: the first, respect for self; the second, regard for others. The proper content of these concerns and their relationship to each other will always remain contentious. Because of this, but also for other reasons (and in particular reasons of moral autonomy) there is a large question as to the extent to which particular moral precepts and values should be given coercive force in legal doctrine — a matter to which I will of necessity have to return.

Howsoever we may wish to define morality, it seems incontestable that the evolution of our law, including our commercial law, has been influenced profoundly 'both by the conventional morality . . . of particular social groups' and by the moral criticism of those 'whose moral horizon has transcended the morality currently accepted.'[2] There is, for example, a transparent moral dimension in our emerging unconscionability doctrine, discomfiting though this doctrine may be to an established order of conventional legal and moral thinking. This said, it equally seems to be incontestable that the law, including commercial law, does not track systematically even at a distance the imperatives of morality, conventional or otherwise. Moral values (and contentious ones at that) can and manifestly do inform the law. They are not its master.[3] Illustrative of this is the very obvious truism that legal censure does not as of course parallel moral censure. Recent comments of the English Court of Appeal bear testimony to this:

> this . . . is one of those many cases where the legal obligation falls short of the moral imperatives

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1 Fuller, L. L., *The Morality of Law* (revised ed. 1969) 3-4.

2 Hart, H. L. A., *The Concept of Law* (1961) 181.

3 I leave from consideration any question of the moral character of judicial decision itself.

> . . . The law cannot police the fairness of every commercial contract by reference to moral principles.[4]

Again legal prescription or legal censure is not necessarily moral prescription or moral censure.

The law, after all, is essentially a social and a practical enterprise. Society relies upon it as a powerful instrument both in facilitating and in constraining human action and endeavour. And in the end the law depends upon society for its continuing acceptance. Rightly we value individual freedom as central to self-realization. Yet in society we are necessarily involved in a cooperative endeavour and this entails social responsibilities. And our society itself is pluralistic. We have divergent inspirations and aspirations. In consequence, whatever the dominant interests and attitudes, tolerance, cooperation and checks and balances are necessary ingredients in our social existence and ordering. So the impositions that the law can make are necessarily qualified and tempered ones.[5] Equally, the forces which shape its parts are many, and consequentialist arguments are central to the shaping process. And so the law's formulation and application can be motivated by what is considered necessary and inescapable, by what is desirable, by what is practicable, or, simply, by what is expedient. As a result its myriad of tenets are not, and cannot claim to be, suffused as of course with principles of morality. Why then single out morality, as we have here, for special consideration? I would suggest that in Australia today there are good reasons for this especially in relation to our common law. And it will be on the common law as it relates to commerce that I will focus for the most part in what follows.

We have come, I would venture to suggest, to a watershed period in the history of our common law. With the demise of Privy Council appeals, we, not the English, are the ultimate arbiters of the law's shape and direction. This would be an important, but not portentous, fact were not other changes abroad. Confining attention for the moment to no more than legal doctrine and especially to that of relevance to commerce, in the last six years we have had to accommodate ourselves to an incomparable period of change. The dimensions of this warrant recall.

Contract law is in evolution, if not (to some) in revolution. The unconscionable dealings doctrine is resurgent;[6] consideration is under siege;[7] privity has taken a mortal blow;[8] the mistake rules are being revitalised with their limits as yet unsettled.[9] The implication and interpretation of contractual terms seem set fair for some reappraisal;[10] relief against forfeiture is in a state of expansive

[4] *Banque Financiere de la Cité S.A. v. Westgate Insurance Co. Ltd* (unreported, Court of Appeal of England, 28 July 1988).

[5] This is quite apart from the institutional limitations which are inherent in the machinery of the legal system itself.

[6] *Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447; *Westpac Banking Corporation v. Clemesha* (unreported, Supreme Court of N.S.W., 29 July 1988, Cole J.).

[7] *Waltons Stores (Interstate) Ltd v. Maher* (1988) 62 A.L.J.R. 110.

[8] *Trident General Insurance Co. Ltd v. McNeice Bros Pty Ltd* (1988) 80 A.L.R. 574.

[9] *Taylor v. Johnson* (1983) 151 C.L.R. 422; *Easyfind (N.S.W.) Pty Ltd v. Paterson* (1987) 11 N.S.W.L.R. 98.

[10] See Mason, A. and Gageler, S. J., 'The Contract', in Finn, P. D. (ed.) *Essays on Contract* (1986) 18-21; also *Castlemaine Tooheys Ltd v. Carlton and United Breweries Ltd* (1987) 10

uncertainty;[11] and the last word has not yet been said on penalties.[12] The doctrine of 'good faith' in contract performance is now squarely upon contract's agenda;[13] and we have the impact, direct and indirect, of the Trade Practices Act 1974 (Cth) and its State equivalents with which to contend.

Equity, the sometimes moral policeman of the law, has been one significant force in this re-shaping of contract. But in its renaissance in Australia it has gone well beyond contract. Equitable estoppel has been transformed;[14] the unconscionability principle (as distinct merely from the specific unconscionable dealings doctrine) is becoming as imperialistic in equity as the neighbourhood principle is in tort law;[15] breach of confidence has won unequivocal acceptance;[16] the fiduciary principle is resurgent, albeit measuredly in some instances;[17] the constructive trust is being liberated from its historical shackles;[18] and the inherent jurisdiction to award damages prospers again.[19] One could go on.

In yet another sphere we are witnessing the likely emergence of a law of unjust enrichment (or restitution).[20] Whether it will prove to be the Siamese twin of the unconscionability principle remains to be seen. It heralds, for example, a change of position defence in the law.[21] And quantum meruit for its part has been openly acknowledged to be a restitutionary remedy.[22]

The change is impressive, to some distinctly alarming. Old certainties are clearly in flight. But if we turn to North America it is otherwise. The parallels in Canadian law are close. And in the United States much that we find novel and discomfiting has there been orthodox for many years. But why this change in direction and what, if anything, has morality to do with it? The causes are various.

First and foremost amongst these I would note the growing awareness particularly in appellate courts of the need to match the common law to 'Australian circumstances, needs and values.'[23] At one level this simply rep-

N.S.W.L.R. 468; *Australian Coarse Grains Pool Pty Ltd v. Barley Marketing Board* (unreported, Supreme Court of Qld., 22 Feb. 1988, Kelly S.P.J.). The last decision was reversed by the Full Court, and special leave to appeal to the High Court of Australia was granted.

11 *Stern v. McArthur* (1988) 62 A.L.J.R. 588.

12 *Amev-U.D.C. Finance Ltd v. Austin* (1986) 60 A.L.J.R. 741; *Esanda Finance Corporation Ltd v. Plessnig* (1989) 84 A.L.R. 99.

13 Lucke, H. K., 'Good Faith and Contractual Performance' in Finn, P. D., *op. cit.*, and contrast the attitudes taken in *Amman Aviation Pty Ltd v. Commonwealth of Australia* (1988) 80 A.L.R. 35 and in *Qantas Airways Ltd v. Dillingham Corporation* [1988] A.C.L.D. 692.

14 *Waltons Stores (Interstate) Ltd v. Maher* (1988) 62 A.L.J.R. 100; *Silovi Pty Ltd v. Barbaro* (1988) 13 N.S.W.L.R. 466; *Collin v. Holden* [1988] A.C.L.D. 642; *Waverley Transit Pty Ltd v. Metropolitan Transit Authority* [1988] A.C.L.D. 524; *Verwayen v. The Commonwealth* [1988] A.T.R. 80-222; see also *Orr v. Ford* (1989) 84 A.L.R. 146.

15 *Baumgartner v. Baumgartner* (1988) 62 A.L.J.R. 29.

16 *Moorgate Tobacco Co. Ltd v. Phillip Morris Ltd (No.2)* (1984) 156 C.L.R. 414.

17 *Hospital Products Ltd v. United States Surgical Corp.* (1984) 156 C.L.R. 41; *United Dominions Corporation Ltd v. Brian Pty Ltd* (1985) 157 C.L.R. 1; *Kinsela v. Russell Kinsela Pty Ltd* (1986) 4 N.S.W.L.R. 722; *Transport Industries Insurance Co. Ltd v. Brown* [1988] A.C.L.D. 23.

18 *Muschinski v. Dodds* (1986) 160 C.L.R. 583; *cf. Daly v. Sydney Stock Exchange* (1986) 160 C.L.R. 371; see also *Stephenson Nominees Pty Ltd v. Official Receiver* (1987) 76 A.L.R. 485.

19 *Catt v. Marac Australia Ltd* (1987) 9 N.S.W.L.R. 630.

20 *Muschinski v. Dodds*, *supra*; *Baumgartner v. Baumgartner*, *supra*; *Trident General Insurance Co. Ltd v. McNeice Bros Pty Ltd*, *supra*.

21 *ANZ Banking Group Ltd v. Westpac Banking Corp.* (1988) 62 A.L.J.R. 292.

22 *Pavey & Matthews Pty Ltd v. Paul* (1987) 162 C.L.R. 221.

23 Mason, A., 'Australian Contract Law' (1988) 1 *Journal of Contract Law* 1.

resents the open recognition of the freedom and the responsibility our courts now have in the moulding of our law — a freedom emphasised in the demise of Privy Council appeals. No longer can we expect the embrace of 'ready-made solutions from abroad rather than developing our own answers.'[24] At another level it bespeaks a new, or at least a more openly espoused, view of judicial law making in and for Australia. This large and important matter raises issues going far beyond our present concerns. I will pass it by for the moment with only these comments. It has marked implications for legal reasoning itself. And it is reflected, as I noted earlier, both in a growing divergence of our common law from that of England and in a much closer kinship with the laws of New Zealand, Canada and, though more distantly, the United States — countries, it may be added,whose histories, concerns and circumstances have distinct resonances with our own.

Secondly, and directly germane to our theme of morality, there is an evident change in the standards of conduct which the law is exacting from persons in their voluntary or consensual dealings with others. Putting the matter in a very general way for the moment, I suggest it can rightly be said that we are witnessing a partial shift (though of marked consequence) in the ideology which is informing much legal doctrine. Associated with this is an emerging tendency to formulate some range of doctrines, not in terms of distinct, limited and discrete rules of behaviour, but as generalised standards of conduct which in a controlled way are instance-specific in their application. I do not wish to overstate either of these phenomenon. Our judges, particularly in the High Court, cannot be said to demonstrate a common view of how our society should be ordered under the common law, or, for that matter, as to how the burden of the common law should find its practical expression. I simply note in passing how very few of the doctrinal changes I mentioned earlier were won in unanimous decisions of the High Court. Differences in methodology, in perception of the judicial function and in approaches to the evolution of our law for our society, characterise the judgments of the justices of the Court. Nonetheless, the change that I have mentioned does emerge clearly if one takes an historical perspective. My comments here will be general and therefore oversimplified and will be limited, for the most part, to contractual and business dealings.

For the late nineteenth century, as for much of this century, individualism and self-reliance were the endorsed virtues of the common law. That this was so was not altogether surprising. As the one-time Victorian politician, C. H. Pearson was to write in the 1890's:

> The settlers of Victoria, and to a great extent of the other colonies, have been men who carried with them the English theory of government: to circumscribe the action of the State as much as possible; to free commerce and production from all restrictions; and to leave every man to shift for himself, with the faintest possible regard for those who fell by the way.[25]

Consonant with the virtues I mentioned, the individual and moral autonomy of a person was reinforced by a marked reluctance to contemplate legal backing for such alleged positive obligations as one member of the community owed to

[24] *Ibid.* 2.
[25] Pearson, C. H., *National Life and Character* (2nd ed. 1894) 18-9.

another, save in two situations: first, where those obligations had actually been assumed towards that other and in a form the law felt capable of countenancing (as in a contract law based on the consideration doctrine); or secondly, where it was necessary if effective social intercourse was to be maintained (as in the universal obligation of honesty). If, as Ralph Waldo Emerson observed in the mid-nineteenth century, 'you will always find those who think they know what is your duty better than you know it',[26] the courts systematically immunised themselves from that judgment.

All of this gave to the common law a simple, almost dichotomous, order. Fraud[27], duress[28] and a limited number of quite tightly drawn equitable doctrines[29] apart, a person could as a rule pursue vigorously his own self interest in his dealings with others. If, however, he had made himself another's fiduciary (and such tended to be seen in traditional legal categories[30]) then he was obliged to act loyally in that other's interests to the exclusion of his own. Significantly even in relation to the fiduciary's duty of loyalty, the judges were to disavow any reliance upon 'principles of morality'. It was all a matter of acknowledging the propensities of ordinary mortals when confronted with a conflict of duty and self interest.[31] In short, the law in essence condoned selfish behaviour save where it demanded selfless behaviour. Moral action was, in the main, a matter of individual propensity; moral delinquency, a matter of social censure. One is left with the speculation as to whether this system was predicated on an assumption as to the general likelihood of morally acceptable behaviour.

Importantly in all of this, the law would not mend hard bargains save in the most gross of cases. Superior knowledge and superior power were advantages which could be exploited. In this environment *caveat emptor* could flourish. As Blackburn J. was to observe in *Smith v. Hughes*:

> whatever may be the case in a court of morals, there is no legal obligation on [a] vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor.[32]

In this environment, the now brutal sounding view of Wills J. is that

> any right given by contract may be exercised against the giver by the person to whom it is granted, no matter how wicked, cruel or mean the motive may be which determines the enforcement of the right.[33]

Tort law, for its part, was hardly more benign. Positive misrepresentations in dealings were actionable only if made fraudulently.[34] Non-disclosure was rarely actionable at all.[35] Economic interests and relations received quite narrow

26 Emerson, R. W., 'Self Reliance' in *Selections from Ralph Waldo Emerson* (1957) 151.

27 In its narrow common law sense: see *Derry v. Peek* (1889) 14 A.C. 337.

28 Again narrowly circumscribed: *cf.* Goff and Jones, *The Law of Restitution* (3rd ed.) 198.

29 *I.e.* misrepresentation — *Redgrave v. Hurd* (1881) 20 Ch.D. 1; undue influence — *e.g. Allcard v. Skinner* (1887) 36 Ch.D. 145; unconscionable dealings — *Fry v. Lane* (1880) 40 Ch.D. 312; and the law of forfeitures and penalties.

30 *E.g.* agent, trustee, company director and the like.

31 *Bray v. Ford* [1896] A.C. 44, 51-2.

32 (1871) L.R. 6 Q.B. 597, 607.

33 *Allen v. Flood* [1898] A.C. 1, 46.

34 *Derry v. Peek* (1889) 14 A.C. 337.

35 The suggestion made by Lord Campbell in *Brownlie v. Campbell* (1880) 5 A.C. 925, 950 fell on arid ground outside of the United States: *e.g. United States National Bank of Oregon v. Fought* 630 P.2d. 337, 345-7 (1981). Several limited common law doctrines did, however, make non-disclosure a basis for contract avoidance in limited contexts: *e.g.* the *uberrimae fidei* rule in

protection from the predatory action or interference of others.[36]

To some, these, in retrospect, were halcyon days. And to those of this view one can almost say in words of Yeats: 'All changed, changed utterly: A terrible beauty is born.'[37] Today, though not all willingly, we are marching to a different drum. As Sir Robin Cooke (President of the New Zealand Court of Appeal) has observed, legal obligation is being asked to match 'the now pervasive concepts of duty to a neighbour and the linking of power with obligation.'[38] Individualism has to accommodate itself to a new concern: the idea of 'neighbourhood' — a moral idea of positive and not merely negative requisition — is abroad. This warrants emphasis.

The legal genesis of one's duty to a neighbour was, of course, in tort law in Lord Atkin's judgment in *Donoghue v. Stevenson*.[39] It was there acknowledged that though the requirements of 'a practical world' restricted its scope, it was 'based upon a general public sentiment of moral wrongdoing'.[40] Powerful in its effect upon the legal imagination, the idea it encapsulates permeates our law. In its imperative that in society we be responsible to or for others, it seems to be leading us inexorably to some commitment to the view that we must demonstrate 'good faith and fair dealing' in our relationships with others. The English may be unprepared to accede to this, fearful of its implications for legal certainty.[41] And again one can invoke their Court of Appeal speaking in 1988:

> in the case of commercial contracts, broad concepts of honesty and fair dealing, however laudable, are a somewhat uncertain guide when determining the existence or otherwise of an obligation which may arise even in the absence of any dishonest or unfair intent.[42]

But for Australian law this idea, I would suggest, is a dominant influence in those many changes in doctrine to which I referred earlier — masked though this may often be by judicial observations suggesting that all that is in issue in individual cases is doctrinal readjustment to produce more just, coherent and satisfactory outcomes. That second dimension of morality I noted at the outset — 'regard for others' — is securing heightened recognition in the law.

As a legal idea 'good faith and fair dealing' (or neighbourhood if you like) is rich in moral connotation. Its emphatic concern is regard for others. And its contemporary effects are many. First, and a superficial point: it is having a very direct impact upon the language of the law itself. One need only note the growing currency of terms such as 'unconscionable conduct', 'basic fairness', 'the fair and reasonable man', 'reasonable expectations', 'reasonable reliance', 'the protection of legitimate interests', 'unfair detriment', 'unjust enrichment', and the like. The evocative, and morally judgemental, adjective is with us.

Secondly, more substantially, we are witnessing new and heightened standards of conduct being imposed as commonplace. I can here do no more than exemplify this in a limited way.

insurance law, and the latent defect in title rule in vendor-purchaser transactions.

36 *E.g. Allen v. Flood* [1988] A.C. 1.

37 Yeats, W. B., 'Easter 1916'.

38 *Nicholson v. Permakraft (N.Z.) Ltd* (1985) 3 A.C.L.C. 453, 459.

39 [1932] A.C. 562.

40 *Ibid.* 580.

41 *E.g. White and Carter (Councils) Ltd v. McGregor* [1962] A.C. 413, 430.

42 *Banque Financiere de la Cité S.A. v. Westgate Insurance Co. Ltd, supra.*

(i) *Duties of disclosure* in some variety are becoming a prime corrective to advantage taking in dealings and this in recognition of the view that there is a widening 'array of contexts where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair.'[43] We have not as yet travelled quite the distance down the disclosure path that has occurred in the United States. *The Restatement (Second) of Torts* (1977) for example, would have it that it is an actionable wrong for a party to a 'business transaction' to fail to disclose —

> facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure.[44]

A justification given for this, it should be noted, is that 'the continuing development of modern business ethics has . . . limited to some extent [the] privilege to take advantage of ignorance.'[45]

At the moment we have a variety of doctrines which can source duties of disclosure in business dealings: unilateral mistake in contract formation,[46] equitable and common law estoppel in some of their manifestations,[47] deceit,[48] the special circumstances doctrine in suretyship,[49] and negligence[50] are ready examples. But by far the most potent is s. 52 of the Trade Practices Act, 1974 (Cth). It promises to be the central force in the expansion of duties 'to speak' in business dealings.[51] The Act, but by no means the Act alone,[52] marks a distinct qualification upon 'the common law's general reluctance to require an individual to take positive action for the benefit of others'.[53]

(ii) *Duties to recommend independent advice or else to provide explanation* have won new prominence with the revitalisation of the unconscionable dealing's jurisdiction.[54] Though it languishes in England,[55] it has won an expansive endorsement in the United States[56] and is resurgent in Australia (in common law

[43] *Chiarella v. United States* 445 U.S. 222, 248 (1980) *per* Blackmun J.; this topic is considered in detail in Finn, P. D. (ed.), *Essays on Tort* (1989) (Ch 7 — 'Good Faith and Nondisclosure').

[44] Restatement (Second) of Torts s. 551(2)(e)(1977).

[45] *Ibid.* comment l, p. 124.

[46] *Taylor v. Johnson* (1983) 151 C.L.R. 422.

[47] *Waltons Stores (Interstate) Ltd v. Maher* (1988) 62 A.L.J.R. 110; *Laws Holding Pty Ltd v. Short* (1972) 46 A.L.J.R. 563.

[48] *Brownlie v. Campbell* (1880) 5 A.C. 925. The potential in deceit has been little explored in Australia: *cf.* in the U.S. 37 Am.Juris. 2d., §145 ('Fraud and Deceit').

[49] *Cf. Behan v. Obelon Pty Ltd* [1984] 2 N.S.W.L.R. 637. For a development out of the suretyship cases see 'The Good Luck' [1988] 1 Ll.L.R. 514 — a holding now doubtful in the light of *Banque Financiere de la Cite S.A. v. Westgate Insurance Co. Ltd, supra.*

[50] *Rest Ezi Furniture Pty Ltd v. Ace Shohin (Aust.) Pty Ltd* (1987) A.T.R. 80-081; *Foti v. Banque Nationale de Paris* (unreported, Supreme Court of S.A., 17 March 1989, Legoe J.).

[51] *E.g. Henjo Investments Pty Ltd v. Collins Marrickville Pty Ltd* (1988) A.T.P.R. 40-850; *Finucane v. New South Wales Egg Corporation* (1988) 80 A.L.R. 486; *Aliotta v. Broadmeadows Bus Service Pty.Ltd.* (1988) 40 A.T.P.R. 40-873.

[52] *Cf.* the expansion of equitable estoppel: *e.g. Waltons Stores (Interstate) Pty Ltd v. Maher* (1988) 62 A.L.J.R. 110; see also in tort *Hawkins v. Clayton* (1988) 62 A.L.J.R. 240 esp. *per* Gaudron J.

[53] *Sutherland Shire Council v. Heyman* (1985) 157 C.L.R. 424, 468.

[54] *E.g. Commercial Bank of Australia Ltd v. Amadio* (1983) 151 C.L.R. 447.

[55] *National Westminster Bank Plc. v. Morgan* [1985] A.C. 686.

[56] S. 2-302 of the Uniform Commercial Code; *Restatement (Second) of Contracts*, s. 208. For its relevance to the themes of this paper see Mallor, J.P., 'Unconscionability in Contracts between Merchants', (1986) 40 *Southwestern Law Journal* 1065.

and statutory forms),[57] in New Zealand[58] and in Canada.[59] In its primary setting its concern is with relationships (ordinarily culminating in contractual outcomes)[60] in which both parties would, as a matter of course, be expected to look after their own interests in their dealing *inter se*, but in which one party, because of his own circumstances or because of the relative positions of both, is in fact unable to conserve his own interests. That person is vulnerable to exploitation and, on occasion, to manipulation at the hands of the other. At least when that other knows or has reason to know of that vulnerability, the courts will countenance claims that he be held responsible in some measure for the protection of the vulnerable party's interests in a dealing between them. That responsibility is manifested in practice in the duties to which I have referred.

There is by no means uniformity between the common law countries as to when the disadvantaged position of one party should author this protective responsibility in the other. But a Canadian judge has properly reminded us that the standards which a court of one country may see as appropriate to its community may well vary from those of another, and will vary in the same country over time.[61] These comments are particularly apposite for Australia today. The general comment should, however, be made that a rather basic reorientation in unconscionable dealings is underway throughout the common law world. Historically it has tended to focus upon protecting a person because of his own weakness. Today the pressure would seem to be to protect a person because of another's strength, to curb self-interested power rather than to aid an inept and incompetent interest. This reorientation is a feature of contract review legislation.[62] It reflects, in some degree, communitarian or welfarist aspirations. And it provides some explanation both for the growing invocation of this doctrine against institutions such as banks,[63] and for the espousal of its suitability to dealings in which a person otherwise capable of conserving his own interests is nonetheless 'transactionally disadvantaged' given the nature of the particular dealing in question.[64]

For all of its ameliorative power, it is important to stress that this doctrine, if expanding somewhat, remains a limited one. As Rogers J. observed when it was raised by an international construction company against an international airline:

> The emphasis on the wealth and standing of the defendants and their ready access to the best of advice is to displace the operation of concepts of unconscionable conduct which underlie decisions such as *Commercial Bank of Australia Ltd v. Amadio* . . . For a successful and wealthy international conglomerate to appeal to the safeguards the law provides for the elderly, the illiterate and the financially oppressed is to move into a totally inappropriate field of discourse.[65]

[57] S. 52A Trade Practices Act 1974 (Cth), and its State counterparts.

[58] *E.g. Nichols v. Jessup* [1986] 1 N.Z.L.R. 226.

[59] *E.g. Bertolo v. Bank of Montreal* (1986) 33 D.L.R. (4th) 610; *Bank of Montreal v. Featherstone* (1987) 35 D.L.R. (4th) 626. It should be noted that in Canada the jurisdiction has attracted a damages remedy — see *Dusik v. Newton* (1985) 62 B.C.L.R. — and is influencing developments in the tort of negligence — *e.g. Tracy v. Atkins* (1980) 105 D.L.R. (3rd) 632; *Jacques v. Seabrook* [1982] 4 W.W.R. 167.

[60] The jurisdiction applies to gifts: *Ulitan v. Farnsworth* (1948) 76 C.L.R. 646.

[61] *Harry v. Kreutziger* (1978) 95 D.L.R. (3d) 231, 241.

[62] *E.g.* s. 52A Trade Practices Act 1974 (Cth); Uniform Commercial Code, S. 2-302 (U.S.).

[63] *E.g. National Australia Bank Ltd v. Nobile* (1988) A.T.P.R. 40-856; *Westpac Banking Corporation Ltd v. Clemesha* (unreported, Supreme Court of N.S.W., 29 July 1988, Cole J.).

[64] Eisenberg, M., 'The Bargain Principle and Its Limits' (1984) 95 *Harvard Law Review* 741, 763-73; Finn, P. D., *op. cit.* n. 10, 130-4.

[65] *Qantas Airways Ltd v. Dillingham Corporation* [1987] A.C.L. 35-692.

(iii) *Duties to have regard to the legitimate interests or reasonable expectations of another*, though lacking secure doctrinal foundations in many instances, are an emerging phenomenon. Relationships, whatever their type, inevitably give to one or both parties the *de facto* capacity to affect adversely the interests of the other. Expectations can be thwarted, obligations ignored, vulnerability exploited, legitimate interests disregarded, powers exercised harshly, and so on. How far the law should go in protecting against these eventualities will remain forever contentious. No certain line marks the point at which social or moral censure should become legal censure. Yet increasingly, the courts are being asked to confront this issue — in mortgages in relation to the exercise of a power of sale;[66] with majority shareholders in their treatment of a minority;[67] with discretionary action taken in or in virtue of a distributorship or franchise;[68] with the directors of a marginally solvent company diminishing its assets in the face of outstanding debts;[69] with an insurer settling claims under a limited liability policy;[70] with one contracting party's decision or action in relation to the other;[71] *etc.*

I can only touch very lightly on the diverse and complex issues raised here. The common characteristic in the examples given is that while one party has a manifest interest, actual or prospective, at stake in the relationship, the other has the power or capacity to prejudicially affect that interest. They raise the following common question: is the use or manner of use of that power or capacity unfair and unjust in the circumstances of the relationship, and if so, is it to be subjected to legal regulation? Here again 'good faith and fair dealing' is providing the immanent justification for regulation in a growing number of instances. The core idea in this seems a simple one.

Though not disentitled from pursuing self-interest in or because of a relationship, one party's decision or action may bear so directly upon the interests of the other that basic fairness to that other may require that in some circumstances he should have regard to those interests in addition to his own, and if necessary, should desist from or modify the proposed course of action in consequence. This, for example, is the kernel of the marginally solvent company-corporate creditor issue.

I would not wish to create the impression that all of this is not in fact hotly contested. Far from it. This is one of the main battlegrounds of the good faith

66 *E.g. Australian and New Zealand Banking Group Ltd v. Bangadilly Pastoral Co. Pty Ltd* (1978) 139 C.L.R. 195; *cf. Cuckmere Brick Co. Ltd v. Mutual Finance Ltd* [1971] Ch. 949.

67 *E.g. Crumpton v. Morrine Hall Pty Ltd* [1965] N.S.W.R. 240, 244.

68 *Hospital Products Ltd v. United States Surgical Corp.* (1984) 156 C.L.R. 41; *Dunfee v. Baskin-Robbins Inc.* 720 P.2d 1148 (1986); *Rickel v. Schwinn Bicycle Co.* 192 Cal. Rptr. 732 (1983).

69 *Kinsela v. Russell Kinsela Pty Ltd* (1986) 4 N.S.W.L.R. 722; *Nicholson v. Permakraft (N.Z.) Ltd* (1985) 3 A.C.L.C. 453; *Winkworth v. Edward Baron Development Co.* [1987] 1 All E.R. 114, 118; Knepper, W. E., *Liability of Corporate Officers and Directors* (3rd ed. 1978) para 7.13; but, for the minority U.S. view, see *B. & S. Riggin & Erection Inc. v. Wydella* 353 N.W. 2d 163 (1984).

70 *E.g. Distillers Company Bio-Chemicals (Australia) Pty Ltd v. Ajax Insurance Co. Ltd* (1974) 130 C.L.R. 1, esp. *per* Stephen J.; 44 Am. Jur. 2d., §1399 *et seq.* ('Insurance').

71 *E.g. Meehan v. Jones* (1982) 149 C.L.R. 571; *Secured Income Real Estate (Aust) Ltd v. St Martins Investment Pty Ltd* (1979) 144 C.L.R. 596; *Noranda Australia Ltd v. Lachlan Resources N.L.* (1988) 14 N.S.W.L.R. 1; *Elders IXL Ltd v. National Employers' Mutual General Insurance Assoc.* [1988] A.C.L. 35-386; *Greenberg v. Meffert* (1985) 18 D.L.R. (4d) 548; *Dayan v. McDonald's Corp.* 466 N.E. 2d 958 (1984).

idea in the common law world. And it has been made more problematic by our lack of available doctrinal tools with which to express the good faith idea. In some jurisdictions fiduciary law has been distorted to this end.[72] And we, for example, required the statutory 'oppression' remedy to give it adequate recognition in our company law.

(iv) *One's entitlement to insist on one's strict legal rights is undergoing progressive curtailment in the unconscionability principle* (though not through it alone).[73] The traditional approach of the courts in delineating the legal incidents of a consensual relationship went little beyond the ascertainment of the formal rights and obligations (if any) which inhered in that relationship.[74] These, as a rule, were to be observed strictly. Beyond them parties were, as a rule, allowed freedom of action. Today this approach is being supplemented by a concern for 'relational' factors — the actual conduct of the parties in the relationship, the known assumptions upon which one or both act(s), and so on. These may make it unfair and unjust for one party to act in a particular way notwithstanding that he has a formal right so to act, or notwithstanding that he is not formally precluded from so acting. Our new doctrine of equitable estoppel is a testament to this — and the decisions in Victoria of O'Bryan and Tadgell JJ. in *Waverley Transit Pty Ltd v. Metropolitan Transit Authority*[75] and *Collin v. Holden*,[76] and of the Full Court in *Verwayen v. The Commonwealth*[77] are potent illustrations of this process in practice.

The seed of this tendency to subject formal rights and obligations to 'equitable considerations' is to be found in Sir Owen Dixon's observations in *Thompson v. Palmer*;[78] its flowering, in *Waltons Stores (Interstate) Ltd v. Maher*.[79] It provides, perhaps, the most systematic recognition of imposed obligations of fair dealing arising from the actual circumstances of one's relationship with another. And it reflects closely both the injury averting concern and the moral ethos of the neighbourhood principle in the law of negligence.

I have limited myself to four general illustrations of the change in the standards of conduct which our law is now exacting. I will not enlarge upon the impetus fiduciary law has given to this process.[80] Nor will I address its expanding thrust into business relationships. I should, however, note that it is being invoked increasingly throughout the common law world to maintain the integrity of

72 This is particularly so in Canada and the United States.

73 *Cf.* estoppel by convention: *Con-Stan Industries of Australia Pty Ltd v. Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 C.L.R. 226; *Elsea Holdings Ltd v. Butts* (1986) 6 N.S.W.L.R. 175, esp. *per* Samuels J.A.

74 This is an obvious over-simplification.

75 Unreported, Supreme Court of Vic., 19 Aug. 1988, O'Bryan J.

76 Unreported, Supreme Court of Vic., 15 July 1988, Tadgell J.

77 (1988) A.T.R. 80-222.

78 (1933) 49 C.L.R. 507, 547.

79 (1988) 62 A.L.J.R. 110.

80 Often, quite inappropriately, fiduciary law has been invoked to secure no more than fair dealing. This was the essence of the claim in *Hospital Products Ltd v. United States Surgical Corp.* (1984) 156 C.L.R. 41; and see *e.g. Standard Investments Ltd v. Canadian Imperial Bank of Commerce* (1985) 22 D.L.R. (4th) 410; *Dunfee v. Baskin-Robbins Inc.* 720 P.2d. 1148 (1986); *Offshore Mining Co. Ltd v. Attorney-General* (unreported, Court of Appeal of N.Z., 28 Apr. 1988, *per* Cooke P.).

business negotiations, especially where one party's revelations for the purposes of negotiations exposes it to the risk of harm at the hands of the other should an agreement not eventuate.[81] Equally, I will do no more than allude without elaboration to yet another distinct strand in 'good faith and fair dealing' — its growing concern with the outcomes of relationships and dealings. Is one party being unfairly advantaged, the other imposed upon? Increasingly we are addressing ourselves in particular to the nature of gains made. 'Unjust enrichment' is becoming a new fascination.[82]

A rather simple impulse seems to inform a major theme (though not the sole one) in the expanding neighbourhood idea: it is to afford some measure of protection from unfair treatment when, in a relationship, a person is in a position of vulnerability. Such a position may arise, for example, from disparities in information possessed ((i) *supra*); from personal circumstances and/or relative positions ((ii) *supra*); from the powers, formal and informal, the other possesses to affect prejudicially ((iii) *supra*); or from a course taken with the other's encouragement or without demur ((iv) *supra*). Each and all of these possibilities occur, and occur commonly, in commercial and business dealings. To that extent the story so far told may not be altogether welcome to commerce. But it is by no means the entire story.

In common with negligence in tort, it is not the object of good faith to enforce general altruism in relationships. One's duty to a neighbour is offset, some would say but lightly, by that neighbour's own responsibility of care for self: hence, contributory negligence and the *volenti* defence. Equally the rules of proximity and remoteness gird potential liability with practical limitations. Similar limitations, though as yet far more muted, curtail good faith and fair dealing. These are compelling us to encounter what are for us relatively unfamiliar concepts in the law governing consensual relationships: they are 'risk assumption' and 'risk allocation'.

Before a person can complain of prejudice suffered as a result of another's action or inaction, it would appear to be incumbent upon that person to show that in the circumstances of their relationship he should not bear the risk of that prejudice being occasioned. It is here that individual responsibility re-emerges as a relevant consideration. This is well illustrated in observations of a United States court in exonerating a bank from a duty of disclosure to a commercial customer. The customer could

> not avoid the responsibility of exercising reasonable diligence for his own protection by relying upon his bank to provide him with information which was not specifically requested and which was otherwise readily available.[83]

As this suggests — but there are other indications as well[84] — the analytical tools

[81] *E.g. Fraser Edmiston Pty Ltd v. A.G.T. (Qld.) Pty Ltd* [1988] 2 Qd.R. 1; *International Corona Resources Ltd v. Lac Minerals Ltd* (1987) 44 D.L.R. (4th) 592 (on appeal to the Supreme Court of Canada); *Marr v. Arabco Traders Ltd* (unreported, High Court of N.Z., 22 May 1987, Tompkins J.).

[82] *Cf.* the observations of Deane and Dawson JJ. in *Stern v. McArthur* (1988) 62 A.L.J.R. 588, 604; of Gaudron J. in *Trident General Insurance Co. Ltd v. McNiece Bros Pty Ltd* (1988) 62 A.L.J.R. 508, 537-9.

[83] *Denison State Bank v. Madiera* 640 P.2d 1235, 1243 (1982); see also 37 Am. Juris. 2d §148 ('Fraud and Deceit') where diligence and accessibility are likewise stressed.

[84] *Hawkins v. Clayton* (1988) 62 A.L.J.R. 240, *per* Gaudron J.; *Waltons Stores (Interstate) Ltd v.*

of 'reasonable reliance' and 'reasonable expectations' are likely to be given a prominent place[85] in articulating when one person's individual responsibility is to be displaced in favour of the other's neighbourhood responsibility.

This is not the place to discuss in detail the practical operation of risk analysis. It is, however, a matter of some importance to note that it is central to such doctrines as equitable estoppel and unconscionable dealings. The burden of equitable estoppel is to identify those factors which will result in the responsibility which one party would ordinarily bear for the consequences of his own actions justifiably being transferred to the other[86] — hence the emphasis on the other party's encouragement or acquiescence with knowledge.[87] The burden of unconscionable dealing is to discern the point at which one person's inability to conserve his own interests is so significant and manifest to the other as to make it inappropriate for the other to insist that the former be held responsible for the disadvantage which might befall him from dealing with that other.

If there is a moral endeavour in this change in emphasis that I have outlined — and some would prefer to describe it simply in terms of the legal acknowledgement of one's responsibilities in social cooperation — it is not without its critics and its costs.

One clear casualty is some diminution in the level of general certainty and finality associated with commercial dealings and action. It is not that the law itself is now afflicted with endemic uncertainty — though in a period of change such as we have, controversies are by no means stilled. Rather, it is because the application of standards of conduct, though contrived and controlled in scope, are in the end instance-specific. It is easy to overstate the consequences of this. They do not render every transaction, every action potentially vulnerable — far from it. Standards do, however, require one to be sensitive to the possible presence of those phenomena in a dealing which can activate a particular standard. This, it may be said, involves a cost at least in vigilance. And if a standard is too uncertain, too pervasive, or is perceived to be too stringent, vigilance may be unavailing or else its cost may be felt to be a deterrent to activity in the arena where that standard applies. I would seriously question whether these allegations could fairly be made of the standards I have discussed. They may to some be unpalatable. They may necessitate the abandonment of old practices (and for a variety of reasons we may be sternly resistant to this). They may, if not properly comprehended, induce an excessive caution with corresponding costs both to an enterprise and to society. But they are not necessarily objectionable on any of these grounds.

Commerce has its economic concerns and these are vital ones to our well-being. But commerce is founded on relationships with others, and that is the heart of the matter. Not only one interest is involved here. And if this be

Maher (1988) 62 A.L.J.R. 110, esp. *per* Mason C.J. and Wilson J.; *Restatement (Second) of Torts*, s. 551(2)(e).

[85] But not an exclusive one. They are not particularly useful in solving problems in unconscionable dealings cases.

[86] It is a different question whether the factors so far identified are arbitrary and artificial in some instances: see Finn, P. D. (ed.), *Essays in Equity* (1982) 82.

[87] *E.g. Waltons Stores (Interstate) Ltd v. Maher* (1988) 62 A.L.J.R. 110.

acknowledged, and if it be accepted as a worthwhile value to afford limited protection to the vulnerable, then an accommodation — a balance — must be struck. To hearken back to a golden age, to the law of the late nineteenth century, is to give almost complete primacy to one interest and is to accept that casualties to that interest should be tolerated because of its importance. We may be able to afford this in economic terms. But there is a moral cost. And would its acceptance be socially deleterious?

Our law has turned. It may be asked why and what justifications there are for this. My comments here will be few, tentative and more in the nature of questions. On a number of occasions I have drawn attention to the need for a country to relate its law to its own community. There is, I venture, much to commend in Montesquieu's observation in the *Spirit of Laws* that

> the political and civil laws of each nation . . . should be adapted in such a manner to the people for whom they are made, as to render it very unlikely for those of one nation to be proper for another.[88]

Earlier I referred to C. H. Pearson's description of the Australian colonists and of their apparent endorsement of individualism and unconstrained enterprise. But Pearson went on immediately to note the Australian paradox:

> Planted in Australia, the Englishman . . . is rapidly creating a State Socialism, which succeeds because it is all embracing, and able to compel obedience, and which surpasses its continental State models because it has been developed by the community for their own needs,and not by State departments for administrative purposes.[89]

We tend to lose sight of this.[90] The history of our social policy has been marked by cooperative endeavour, by the acceptance of social responsibility and by concern for the vulnerable in society, and this in an environment which espoused and accepted a large measure of individual freedom. History at least is with the courts if only now they are reflecting it.

Some would, however, argue that society is changing in its direction; that a new way is needed; that external forces are compelling this. If it be accepted for present purposes that there is a significant social mood that we be less concerned for the apparently vulnerable — including the vulnerable in dealings — does this provide a basis of criticism for the stance of the courts I have outlined? Or does it provide a greater justification for it? Is it a vital role of courts to stand for important values, if necessary against the dominant interests? If a dominant social sentiment emphasises regard for self may it not be necessary for the law to accept a modest moral role: to accentuate that other dimension of morality — 'regard for others' — at least in our intercourse with others? Let me conclude with another paradox. The 'good faith' idea I have considered has its most systematic acceptance in the laws of the United States; its most systematic rejection in the law of England. Australia, New Zealand and Canada stand in between. I would not ask you to accept the common stereotype images of these societies. But do they suggest that those who pursue good faith are espousing for their societies a moral view, but one which is an aspiration?

[88] Montesquieu, *Spirit of Laws*, Book 1, Ch. 3, ss. 11-12.
[89] Pearson, C. H., *op. cit.* n. 25.
[90] For a legal treatment of state socialism in colonial Australia see Finn, P. D., *Law and Government in Colonial Australia* (1987).