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AN AUSTRALIAN COMMON LAW

THE DECOLONISATION OF AUSTRALIA'S JUDGE MADE LAW

Australia, like Ireland, has a legal system which is a product of its past as a British colony. Following Cook's voyage of discovery, and the decision to establish a penal colony in the South Pacific, Captain Arthur Phillip landed in 1788 with a complement of convicts and their keepers at Sydney Cove. These origins determined Australia's membership of the common law family

In the case of both Ireland and Australia, earlier legal systems and laws were supplanted. In Australia's case this followed from the acceptance at an early time (confirmed by the Privy Council in Cooper -v- Stuart (1889) 14 App. Cas. 286) that Australia was a settled colony and that in consequence the whole of the law of England, both statute and common law came into force upon settlement to the extent that those laws were suitable to the conditions of the colony. Classification of the new colony as a settled colony had the consequence that the laws of indigenous communities were not recognised. Indigenous communities lived by a rich and complex system of laws which in a major part related to rights and duties in relation to land. The new colony did not recognise any relationship between the communities and their traditional lands and it was not until 1992 that the High Court

of Australia in Mabo's case overturned this principle and held that indigenous land rights survived colonisation and that they continue to survive provided certain conditions are fulfilled. This judgment is one of the most important in the history of our nation. The Australian Parliament has enacted legislation to give statutory effect to these principles.

Prior to the establishment of the Commonwealth of Australia in 1901, the laws of the various colonies, whether enacted or Judge made, were in almost all respects identical with those of England. This is not surprising in the case of the colonial Parliaments as they were subservient to London and any legislation passed by them was capable of being set aside. The colonial Courts followed the judgments of English courts without qualification. But although the circumstances of the colonies were very different to those in England this factor was reflected only to a very limited extent in the laws passed by the colonial Parliaments and to an even lesser extent in the decisions of the courts.

Although a new nation came into existence with the federation of the colonies in 1901, Australia was not fully independent. There is debate as to when Australia did achieve the status of being fully independent in the legislative, executive and judicial fields. The Statue of Westminster in 1931 removed the limits on the legislative powers of the dominions imposed by the *Colonial Laws Validity Act* of 1865. However Australia unlike many other former colonies did not welcome this legislation and was responsible for the inclusion in it of a provision, the effect of which was that ratification by the Australian Parliament was necessary before the statute took effect within Australia. Incomprehensible to an Australia looking back,

Australia's opposition to or reluctance towards the increased powers which the statute provided for, can be seen as a product of its sense of isolation and desire to maintain the cohesion of the British Commonwealth.

In 1942 the war-time government of John Curtin ratified the Statute of Westminster.

In 1986, the Australia Act was passed by the Federal Parliament and the Parliament of all of the States. It provided for the removal of the executive and legislative authority of the United Kingdom within any part of Australia and as we will see, abolished all remaining rights of appeal from States Courts to the Privy Council. At the same time the British Parliament passed an Act in the same terms.

Whilst some argue that the passage of the Statute of Westminster is the date from which Australia's national independence dates, others argue that it did not occur until 1942 or even later. Whilst it is generally accepted that the 1986 legislation passed by the Westminster Parliament was something which occurred simply out of an excess of caution, others argue that the fact that there was attendant upon Australia's status as an independent country such uncertainty as to require the taking of this step, means it was not until 1986, a mere 14 years ago, that Australia can be regarded as a fully sovereign and independent country. A commission appointed by the Federal Parliament concluded that Australia's independence occurred at some time between 1931 and 1950.

There is then considerable debate about the timing of Australia's independence and the process by which it was achieved. Unlike many countries having a colonial past

including Ireland, Australia cannot point to any single event or any dramatic episode, from which its sovereignty derives.

This level of ambiguity and the somewhat reluctant progress towards independence is also reflected in deep resistance to constitutional change as evidenced by the rejection at referendums of all but a few proposed changes to the constitution. The most recent of these was of course, the rejection of the proposal to replace the Queen as the formal Head of State with a President appointed by the Houses of the Australian Parliament. Australia enters the 21st century with an unsatisfactory constitutional arrangement which seems to be regarded as unsatisfactory by a majority of its citizens but without any consensus on what should replace it.

This history forms a background to any consideration of the question why, notwithstanding the very great differences in the circumstances of the two countries, the common law of England in the words of Mr Justice Toohey "Towards an Australian Common Law" 1990 Australian Bar Review, page 18 "exerted a pervasive, almost an exclusive influence over Australian law" and why the first signs of a common law of Australia did not emerge until so late in the century.

Whilst in 1901, Australia emerged as a new nation but with significant limitations upon its sovereignty there were some factors which might have provided the impetus to the development of a separate Australian common law at an early stage. Firstly, Australia as a constitutional entity owed its existence to a basic law. It shares this with Ireland but not with England. Secondly, federation gave rise to a set of relationships and legal considerations in respect of which the unitary nature of

the English system provided little or no assistance. As a result of both of these other sources of guidance were looked to particularly the United States of America with whose constitution the Australian constitution has much in common in both a structural and a textual sense. Thus a corpus of constitutional law developed which had nothing in common with Britain.

From a relatively early time Australian legislation was influenced by many sources other than Britain. This readiness to draw on jurisdictions including sources outside of the common law heritage reflects the desire for legislation to be both contemporary and relevant to Australia.

However, the position of judge made law, the topic of my discussion, was very different. Two factors can be regarded as being primarily responsible for this.

The first is the retention of appeals to the Privy Council. While the Privy Council remained the final Court of Appeal, it is not surprising that little in the way of divergence from the English common law emerged in decisions. The constitution reserved however, to the High Court of Australia, the right to determine inter se questions, that is questions arising under the constitution of the powers of the Commonwealth and the States unless it granted a certificate permitting an appeal to the Privy Council. From a very early time, the High Court refused to grant such certificates.

However, appeals to the Privy Council remained possible in one form or another until 1986. Abolition occurred over a period of almost 20 years. In 1968 the Gorton

government abolished all appeals to the Privy Council on matters arising under the Federal jurisdiction. In 1975 the Whitlam government abolished all remaining appeals from the High Court of Australia to the Privy Council. This still left a right of appeal from the Supreme Court of each of the States to the Privy Council. Australia was at this time faced with the position where there were two final Courts of Appeal available to litigants in the Supreme Court. The Courts of the States were bound by decisions of both the Privy Council and of the High Court of Australia and the risk of conflicting decisions of those two courts raised the possibility of serious dislocation.

In 1986 appeals from the Supreme Courts of the Australian States were abolished.

The second factor which inhibited the development of an Australian common law flowed from a policy adopted by the High Court of Australia to follow the judgements of English courts, particularly the House of Lords in preference to its own decisions.

In 1926 the High Court in *Sexton -v- Horton (*1926) CLR 240 said at page 221 - per Knox CJ and Stark: "Unless some manifest error is apparent in the decision of the Court of Appeal, this Court will render the most abiding service to the community if it accepts that Court's decision, particularly in relation to such subjects as the law of property, the law of contracts, and the mercantile law, as a correct statement of the law of England until some superior authority has spoken".

Perhaps more importantly, the High Court as a matter of policy decided that it would be bound by judgments of the House of Lords in preference to its own judgments where there was a conflict between the two.

The process of removal of the right of appeal to the Privy Council and the departure from the policy of following the judgments to the House of Lords cleared the way for the development of an Australian common law. This development has occurred quite recently and rapidly.

The first break came in *Parker -v- The Queen* (1963) 101 CLR 610. The House of Lords had held in *DPP -v- Smith* (1961) AC 290 that a person must be taken to intend the natural and probable consequences of his action. The High Court was not prepared to accept that this was the law on the subject of intention. Faced with an unacceptable judgment of the House of Lords it abandoned its self-imposed obligation to follow the judgments of that body.

Subsequently in *Uren -v- John Fairfax Pty Ltd* (1966*)* 11CLR 118 the High Court refused to follow *Rookes -v- Barnard* (1964) AC 1129 on the question of the right to award exemplary damages. On appeal to the Privy Council the Privy Council accepted that it was possible for the common law in Australia to differ from that of England and dismissed the appeal. This was a judgment of great significance in terms of an acceptance that the common law could develop differently in distant parts of the common law world. Subsequently in *Invercargill County Council -v- Hamlyn* (1996) 1 All ER 756 (a judgment given long after appeals to the Privy Council from Australian courts had been abolished) the Privy Council which had been asked to overturn a judgment of the New Zealand Court of Appeal and substitute therefore a judgment in accord with what the House of Lords had held in *Anns -v- Merton London Borough Council* (1917) AC 728 held that except in those

cases where the Court appealed from purports to apply settled principles of English common law the Privy Council recognises the right of the superior courts of the country from which appeals still lie to determine what the common law is in the differing circumstances of those countries. The fact that so few countries now maintain a right of appeal to the Privy Council greatly lessens the significance of the judgment but it represents the final stage in a process begun in Uren's case.

Finally, the High Court after the abolition in 1975 of rights of appeal from the High Court to the Privy Council held in 1978 that it was no longer bound to follow the decisions of the Privy Council. See *Viro -v- the Queen* (1978-79) 141 CLR 88 in which the High Court refused to follow a judgment of the Privy Council on the question of self-defence.

Since that time the judgments of English courts including the Privy Council and the House of Lords have been of persuasive value only. Perhaps they now have or will come to have a standing not significantly different to that which McCarthy J in *Irish Shell Ltd -v- Elm Motors Ltd* (1984) IR 200 at 225-227 thought should be afforded English decisions in Irish courts.

SOME EXAMPLES OF DIVERGENCE

1. Perhaps one of the most significant areas of divergence is in the field of tortious liability in negligence. The common law historically avoided expressing liability in terms of general principle but rather allowed recovery in certain circumstances moving incrementally from one accepted category to

another by analogy. This was the method of the common law and the means by which it developed.

The judgment of the House of Lords in *Donohue -v- Stevenson* (1932) AC 562 establishing liability in cases of injury to person or damage to property upon the basis of the foreseeability of injury (the neighbour principle) was, in terms of the common law approach, somewhat exceptional. It became part of the common law of Australia and all common law jurisdictions.

During the second part of the century the circumstances in which liability in the case of pure economic loss might arise engaged the courts of both Australia, England and Ireland. Recovery was allowed in some circumstances (e.g. for negligent advice and where reliance was established and in cases where beneficiaries suffered losses because of a solicitor's negligence in preparing a will) and denied in others. The fear of an indeterminate liability to an indeterminate number of persons was a major consideration in the approach of the courts.

In *Anns -v- Merton London Borough Council* (1978) AC 728 the House of Lords sought to formulate a comprehensive unified theory of tortious liability in terms of what has come to be known as the two-stage test. However in later cases (*Murphy -v- Brentwood* (1991) AC 398 and *Caparo Industries -v- Dittman* (1990) 2 AC 605) the House of Lords returned to the traditional approach of allowing recovery only in established or accepted categories with any widening of liability being the result of incremental extension by analogy

to such accepted categories. In the latter case the House of Lords proposed three criteria by reference to which the existence of a cause of action might be considered making it clear, however, that this was a means by which the traditional approach might be maintained and which would enhance the development of the common law with guidance always being taken from situations in which causes of actions had previously been held to exist. The three considerations are:

A. Foreseeability of damage.

B. Proximity of relationship between the parties.

C. Whether it is reasonable to impose a duty in the circumstances.

Thus at the end of the century and in the absence of any change of heart on the part of the House of Lords, little in the way of extension of liability in this area can be expected at least other than incremental or incidental extension. The law of England in this field is characterised by insistence on precedence which is of course the fundamental feature historically of the common law.

McCarthy J's judgment in *Ward v McMaster* (1988) IR 337 where he identified the same factors seems almost prescient in its anticipation of Caparo. However as I read the judgment His Honour did not see the considerations he enunciated as having the same limiting effect as the House of Lords was later to give to them. Indeed His Honour said the proposition that recovery should only be allowed in established categories or situations analagous thereto "suffers from a temporal defect - that right should be determined by

the accident of birth". (p347). This remark was cited with approval by Gummow J in *Perre -v- Apand* [1999] 164 ALR 606.

TURNING NOW TO AUSTRALIA

The law in this area has developed quite differently in Australia although there are some recent indications of a faltering in the direction it has taken. The High Court of Australia rejected the two stage test of *Anns* in *Hayman -v- the Council of the Shire of Sutherland* (1985) 157 CLR 424. However, this and subsequent cases *(Jaensch v Coffey* (1984) 155 CLR 549 and G*ala v Presto*n (1991) 172 CLR 243) saw the enunciation in Australia of a principle of proximity as the basis for liability. The High Court has held that proximity is the basic concept of a single theory of tortious responsibility with the principle of foreseeability in cases of injury to person or damage to property being an established or accepted application of this. The test of proximity acts as a limiting factor upon indeterminate liability in cases of economic loss. However this approach with its emphasis upon principle rather than precedent admits the development of liability in the field which would seem now not to be possible in England, or possibly to only a limited degree. However in two recent cases *Hill -v- Van Erp* (1997) 188 CLR 159 and *Pyrenees Shire Council -v- Day and another* (1998) 151 ALR 147, there has been a questioning of the concept of proximity as a sole determinant of liability. One of the members of the Court, (Kirby J) has in the *Pyrenees* case, and in the later case of *Pere -v- Apand* (supra), postulated the adoption of a test similar to that in Capara declaring proximity dead as a universal test.

The law in this field is plainly susceptible to further change but it would I think be fair to say that in seeking an acceptable expression of the principle of liability for tortious negligence the courts in Australia are seeking an Australian solution to the question, one which involves affording English authority no more than persuasive value and are unlikely to return to the English approach of precedent rather than principle.

The High Court has held consistent with the approach it has taken on the question of liability in tort that certain long standing authorities governing liability in particular categories are no longer the law in Australia and have been absorbed into the general law of negligence with liability in such cases to be assessed according to the general duty of care. These are:

(a) Occupier's liability. The liability of an occupier is now to be assessed in accordance with general principles of negligence and not in accordance with the particular rules applicable according to the category of the entrant concerned. See *Papatonakis -v- the Australian Telecommunications Commission* (1985) 156 CLR 7 and *Australian Safeway Stores Pty Ltd -v- Zaluzna* (1987) 162 CLR 479.

(b) The rule of the *Rylands -v- Fletcher* (1861) - (73) All ER1 has been abolished. According to this principle a person who brings onto his land and collects and keeps there anything likely to do mischief if it escapes is liable for any damage which is suffered in consequence of its escape. In *Burnie Port Authority -v- General Jones Pty Ltd* (1994)

179 CLR 520 the High Court held that this principle no longer forms part of the law of Australia and that any special rule in that regard has been absorbed into and qualified by the general principle of negligence.

(c) The High Court of Australia has permitted recovery to a subsequent owner of a building against a builder for inadequate foundations. *(Bryan -v- Maloney* (1995) 182 CLR 609). There are two judgments of the House of Lords *D and F Estates Ltd -v- Church Commissioners* (1989) AC 177 and *Murphy -v- Brentwood District Council* (1991) 1AC 398 which would prevent recovery in England. This judgment, based as it was upon the principle of proximity (the High Court regarded the subsequent purchaser as in a similar relationship of proximity to the builder as the original owner), is the consequence partly of a more expansive and flexible approach to the law of negligence in Australia. Associated with this is the greater readiness of the Australian courts to allow a right to recover in both negligence and contract in circumstances where English courts have tended to compartmentalise the cause of action into either contract or tort.

Torts provides the most significant illustration of a difference in the philosophical approach between English and Australian common law.

2. The House of Lords held in *DPP -v- Smith* (1961) AC 29A that a person must be taken to intend the natural and probable consequences of his actions. The High Court rejected this as being the law as to what constitutes intention in

Parker -v- the Queen (1963) 111 CLR 610 as we have already seen. The Privy Council subsequently in *Frankland -v- The Queen* (1987) AC 576 appears to have vindicated the judgment of the High Court.

3. The Court of Appeal in England had decided that in cases where a person had, as a result of the negligence of another, suffered a reduction of expectation of life or loss of income, this was to be assessed only during the period of the reduced life expectancy. In *Skelton -v- Collins* (1966) 115 CLR 94 the High Court of Australia held that the loss of earning capacity should be assessed having regard to the probable length of the working life of the injured person had he not been injured, and not merely to the probable period left to him as a result of his injuries. Subsequently the House of Lords in *Pickett -v- British Rail Engineering Ltd* (1980) AC 136 (H L) overturned an earlier judgment of the Court of Appeal and the law in England and Australia is now the same.

4. The judgment of *Uren -v- John Fairfax Pty Ltd* (1966) 117 CLR 118 is important in two respects. Firstly the High Court of Australia rejected the limitations upon an award of exemplary damages which the House of Lords had imposed in *Rookes -v- Barnard* (1964) AC 1129. On appeal to the Privy Council the judgment of the High Court was upheld. In this judgment of the Privy Council, it was recognised that the common law in Australia might and would develop in a different way to that of England.

5. The common law in Australia on the question of forum non conveniens has been expressed in a different way to that of England where *Spiliada Maritime Corp -v- Consulex Ltd* (1987) AC 460 was expressly not followed by the High Court in *Oceanic Sunline Special Shipping Co Inc -v- Fay* (1998) 165 CLR 197. As will be appreciated, questions of appropriate forums within a Federal system such as that of Australia will give rise to quite different considerations to those which arise between sovereign nations.

6. The law of promissory estoppel has been taken a good deal further in Australia in cases such as *Walton Stores (Interstate) Ltd -v- Maher* (1998) 164 CLR 387 and *Commonwealth of Australia -v- Verwayen* (1990) 170 CLR 394 than has been the case in England.

7. In *Trident General Insurance Co Ltd -v- McNiece Bros Pty Ltd* (1988) 165 CLR 107, the High Court modified the doctrine of privity of contract to allow for recovery by a person who was not a party to the contract (in that case an insurance policy) and who had given no consideration. This involves a substantial departure from the common law principle law of privity of contract.

8. A more expansive approach to the concept of unconscionable conduct and the remedy of the constructive trust in cases of unconscionable conduct has

developed in Australia. One can compare cases such as *Baumgartner -v- Baumgartner* (1987) 164 CLR 137 and *Commercial Bank of Australia -v- Amadio* (1983) 151 CLR 447 with cases such as *National Westminster Bank PLC -v- Morgan* (1985) AC 686.

9. The law of self defence has developed differently in Australian common law criminal systems to that in England. In *Zecevic -v- DPP* (1987) 162 CLR 645 the High Court held that it was necessary that there be an honest and reasonable belief that use of force was necessary to defend oneself against an unlawful attack which threatened death or serious bodily harm. In England at the time the law required only an honest belief that the circumstances justified force to defend oneself.

10. The High Court of Australia has held that juries should be warned about the need to take care in using confessional statements alleged to have been made orally whilst an accused is in police custody involuntarily. See *McKinney -v- the Queen* (1991) 171 CLR 468. This innovation is not, if I understand matters correctly, currently reflected in the law of England.

11. In *Dietrich -v- the Queen* (1992) 109 ALR 385, the High Court has held that the trial of an indigent person facing a serious criminal charge should be stayed until legal representation is provided. In reaching this conclusion the

High Court derives support from cases in the United States rather than English authority.

12. In the field of legal professional privilege the Australian Courts have qualified this in a way which involves a departure from English law. In cases such as *Grant -v- Downs* (1976) 135 CLR 674 the High Court imposed a sole purpose test when considering whether documents are privileged from disclosure. NB. However in a judgment handed down just prior to Christmas 1999, (the *Esso* case) the High Court appears to have reverted to a dominant purpose test so that this represents an area where the High Court having moved away from the common law of England now has returned to it.

13. In Australia it has been held (*Cook -v- Cook* (1986) 162 CLR 376) that the duty of a learner driver to his/her passenger may in some circumstances be lower than that of a careful experienced driver, contrary to what was said in England in *Nettleship -v- Weston* (1971) 2 QB 691. That is, the test will not always be a universal objective one.

14. In *Hungerfords -v- Walker* (1989) 171 CLR 125 the High Court has held that an award of interest as damages was allowable where as a result of negligence or breach of contract a person was deprived of moneys and in doing so refused to follow the judgment of the Privy Council in *London Chattham and Dover Railway Co -v- South Eastern Railway Co*(1893) AC 439.

15. In *Jago -v- District Court* (*NSW)* (1989) 168 CLR 23 the High Court recognised the jurisdiction to stay criminal proceedings for abuse of process in circumstances where delay has jeopardised the accused's prospects of obtaining a fair trial. It was not until 1992 that the House of Lords held that such a power existed in England.

16. The High Court refused in *Kars -v- Kars* (1996) 187 CLR 354 to follow the House of Lords in *Hunt -v- Severs* (1994) 2AC 350 in which it was held that an injured person requiring the provision of services provided gratuitously held moneys received from a tortfeasor for such services on trust for the provider.

17. In the recent judgment of the High Court of Australia of *Astley & Others -v- Aust Trust Ltd* (1999) 161 ALR 155 the Court held that where an action was brought in contract for negligent breach thereof it was not possible to reduce the damages awarded to the Plaintiff under the apportionment legislation (in that case the Wrongs Act (1936)) for contributory negligence on the part of the Plaintiff. The High Court refused to follow two judgments of the Court of Appeal on this point.

As Oliver Wendell Holmes said: "The law embodies the story of a nation's development". Or as Mr Justice Toohey, a former member of the High Court of Australia said in the article already quoted: "Each nation as part of the common law

tradition is entitled to pursue its own laws according to the particular conditions and attitudes of the time".

It is illustrative to look at the comments of those who have spoken on this subject and the light that comment throws upon the existence of an Australian common law and how it then stood. In March 1988 Professor Crawford writing in "Australian Law After Two Centuries" volume II Sydney Law Review 444 said at page 450, after viewing the steps by which the Privy Council appeals had been abolished and the cases in which the High Court had overturned its previous policy of being bound by the House of Lords:

"These rules establish only the pre-conditions for an 'Australian' jurisprudence. The substance will take longer, especially since there is little indication of anything approaching judicial nationalism. The dominant feature is an adherence to independent reasoning within the received technical mode, but it is combined with a considerable degree of openness to decisions and developments in other jurisdictions. An Australian jurisprudence may well be the outcome of such an approach but it is not its object".

The then Chief Justice Sir Anthony Mason in an article "Changing the Law in a Changing Society" delivered on the 9th September 1991 and published in 67 ALJ 568 said at 578:

"In recent years the High Court has brought about significant developments in legal principle, so much so that it can now be said that there is an emerging Australian common law".