the first part of this note is correct, these complexities will only have to be faced by those who are defending prosecutions and not civil actions for defamation.[71]

I. W. P. McCALL

## SKELTON v. COLLINS

*The position of State Courts with regard to precedents of the House of Lords.*

In *Parker v. R.* in 1963 Dixon C.J. made it clear that in future the High Court would follow a decision of its own in the face of House of Lords' decisions which it believed to be misconceived and wrong.[1] This left the position of House of Lords' decisions as precedents in Australia uncertain in two major respects. Firstly, it was unclear whether the High Court would disregard a House of Lords' decision where there was no earlier High Court decision on the point in question. Secondly, the weight to be given to House of Lords' decisions by State Courts became uncertain. In *Skelton v. Collins*[2] the High Court has, in resolving these uncertainties, accorded to decisions of its own a position of authority which seems well deserved in view of the great reputation built up by the Court over the past twenty years.

The case came to the High Court from the Supreme Court of Western Australia, where Hale J. had had to decide what was the proper principle for the assessment of damages for personal injuries when the plaintiff was, and would remain, unaware that he had suffered any injury.[3] His Honour had before him a decision of a

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71 Perhaps, contrary to the writer's prediction in the first line of this note, the last has been heard of this case. Since this note was written the defendant lodged with the High Court notice of motion for special leave to appeal against the judgment. The motion was not proceeded with because of lack of jurisdiction in the High Court. An application was then made for an extension of time within which to lodge notice of motion to the Full Court of the Supreme Court of Western Australia for a new trial which was refused by Nevile J., following City of Sandringham v. Evans (no. 2), (1942) 48 A.L.R. 137, and Re Hinchcliffe, Johnson v. Dixon, (1907) 24 W.N. (N.S.W.) 200.

1 (1963) 111 C.L.R. 610, 632.

2 (1965-66) 39 A.L.J.R. 480.

3 [1965] W.A.R. 90, 92.

majority of the House of Lords, in *West and Son Ltd. v. Shephard,*[4] that the unconsciousness of the plaintiff should have little effect on the assessment. On the other hand, there were two recent Western Australian decisions, *Scutt v. Bailey (No. 2)*[5] and *Fowler v. Fowler,*[6] which were based on the dissenting judgments in *West's* case, and which held that damages should be quite low where the plaintiff is not aware of his injuries. In the absence of a High Court decision directly in point, Hale J. decided that it was better that the Supreme Court should 'speak with one voice',[7] and consequently he did not follow *West's* case.

At this point it is necessary to examine the place occupied by the House of Lords in the Australian system of precedent at the time *Skelton's* case went to the High Court.

In *Piro v. Foster and Co. Ltd.*[8] the High Court stated that, whilst Australian courts were not technically bound by decisions of the House of Lords, the latter should nevertheless be regarded as final declarations of the law unless there were differentiating local conditions. It was said that this decision formally wrote the House of Lords into the hierarchy of tribunals whose decisions bind Australian courts.[9] Over the years the writing faded, and in *Parker's* case the High Court started formally to erase it.

But despite the clarity of the statement made in *Parker's* case, the State Courts were left in doubt as to the effect it had on the application to them of *Piro v. Foster and Co. Ltd.* Thus in *Uren v. John Fairfax and Sons Pty. Ltd.*[10] three different views are to be found. Herron C.J. looked to the particular wording used by Dixon C.J. and concluded that, where the High Court has already laid down a contrary statement of the law in a carefully reasoned decision, a State Court had a discretion to disregard a contrary House of Lords' decision if it considered that that decision was based on a fundamental misconception of the law.[11] Walsh J., on the other hand, thought that

4 [1964] A.C. 326.
5 [1964] W.A.R. 81.
6 [1964] W.A.R. 193.
7 [1965] W.A.R. 90, 92.
8 (1943) 68 C.L.R. 313.
9 Cowen, *The Binding Effect of English Decisions upon Australian Courts,* (1944) 60 L.Q.R. 378, 381.
10 [1965] N.S.W.R. 202. The case went to the High Court on appeal to the High Court: see (1966) 40 A.L.J.R. 124.
11 [1965] N.S.W.R. 202, 220-221.

*Parker's* case did not affect State Courts at all,[12] whilst Wallace J. thought it applied as much to them as to the High Court and that the High Court should be followed wherever there was a conflict of decision.[13]

Then there was the question of what a State Court should do where there was no High Court decision on a point. In *Skelton's* case Hale J. thought that *Parker's* case did not provide a 'charter to every individual Australian judge . . . to follow a decision of the House of Lords only if he happens to agree with it.'[14] He disagreed with the course taken in *Scutt v. Bailey (No. 2)* and *Fowler v. Fowler.* Rejection or acceptance of decisions of the House of Lords was, in his view, a matter for the High Court and only for the High Court.

In the High Court, Owen J., with whom Taylor and Windeyer JJ. concurred, expressly disapproved the statement in *Piro v. Foster and Co. Ltd.* that Australian courts should normally follow decisions of the High Court.[15] Evaluation of the merits of conflicting lines of authority is thus to take place in the High Court, not in the Supreme Courts of the States.

Turning to the other question, Owen J. thought that where a House of Lords' decision was directly in point and there was no High Court decision on a point arising in a State Court then the House of Lords' decision would 'no doubt' be followed.[16] This apparently descriptive statement will presumably have some prescriptive effect also, though cases will probably arise in which State Courts will disregard House of Lords' precedents in the hope that the High Court will see fit to take the same course.

The above propositions provided much needed guidance for State Courts, but it should be noted that they were not strictly necessary to the decision in *Skelton's* case. What was necessary was that the Court should find itself free to disregard *West's* case even though it could not invoke any longstanding precedents of its own on the matter. The decision of the majority ends any conjecture that *Parker's* case was only to apply to situations in which there was a direct and sustained conflict with the House of Lords on an important and contentious issue. Windeyer J. made it plain in his judgment that he

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12 Id. at 226.
13 Id. at 236-7.
14 [1965] W.A.R. 90, 93.
15 (1965-66) 39 A.L.J.R. 480, Kitto J. was also in agreement on this point: id. at 484.
16 Id. at 498.

considered that it was time that Australian courts took the initiative in making their own creative developments of the inherited common law. He pointed out that, as well as a body of particular rules, Australia inherited the spirit and method of the common law, which were to be used to mould those rules to fit Australian social and economic conditions.[17]

The High Court, with only Menzies J. dissenting, then went on to hold that only moderate damages should be awarded in the circumstances being considered. An earlier House of Lords' case, *Benham v. Gambling*,[18] was followed in preference to *West's* case.[19]

*Skelton's* case thus completes what *Parker's* case started in reversing the *Piro v. Foster and Co. Ltd.* approach to decisions of the House of Lords as authority in Australia. The High Court is now more independent than ever before, and it has attained this position by its own initiative. The right to appeal to the Privy Council from decisions of the Court is the last remaining bar to its full maturity.

G. A. CALCUTT*

## NAGLE v. FEILDEN

*Common law protection of the right to work at one's chosen occupation.*

Progress made in developing protection for a man's right of work is to be seen in *Nagle v. Feilden*,[1] a recent decision of the Court of Appeal. The direct application of the case is to the right to membership of a body which has absolute control of employment in a trade or profession.

In the United Kingdom horse-racing on the flat is under the complete control of the Jockey Club. All trainers must hold a Jockey Club licence, and any horse trained by someone other than a licensed trainer would not be permitted to run at a race-meeting under the Club's control. The invariable practice of the Jockey Club had been not to license women as trainers, and accordingly Mrs. Nagle's appli-

17 Id. at 496-7.

18 [1941] A.C. 157.

19 For a note on the effect of the decision on the law relating to damages, see (1966) 29 M.L.R. 570.

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1 [1966] 1 All E.R. 689; [1966] 2 W.L.R. 1027.