# PRECEDENT

## *Attitudes of the English and Australian Courts*

Several recent decisions of both Australian and English courts are sufficient to justify some comment on the relationship between such courts, and an examination of these decisions suggests that the notion of strict precedents within one hierarchy has been relaxed. The attitude of the courts is now ostensibly to follow the reasoning displayed by a decision in another hierarchy in preference to following a binding precedent.

This attitude is displayed by the very recent decision of the Privy Council in *Australian Consolidated Press Ltd.* v. *Uren*[1]. This was an action for defamation. The trial judge directed the jury to award exemplary damages. On appeal to the Full Court of the Supreme Court of New South Wales it was held that this was a misdirection and a new trial was ordered. There were cross appeals to the High Court of Australia and eventually there was an appeal to the Privy Council against so much of the decision as determined that as a matter of law it was competent to award punitive damages in the case. The Privy Council affirmed this determination of the High Court. This in itself is not extraordinary, but the attitude displayed by the Privy Council judgment is interesting. While at the same time strongly affirming and defending the Privy Council's power to grant leave under the powers of the prerogative, the judgment of the Privy Council warmly approved the High Court's reasoning, and this despite a well-reasoned decision of the House of Lords in 1964 in *Rookes* v. *Barnard*[2], which vehemently opposed the award of punitive damages in libel actions. Although this decision, being a House of Lords' decision, was not strictly binding upon the High Court of Australia, the High Court has always given consideration to the reasoning of the House of Lords in similar cases[3].

In some instances indeed the High Court has overruled or refused to follow its own earlier decisions where in conflict with later English decisions[4]. But it was held by the Privy Council in *Uren* that the High Court in this case were completely justified in not following the House of Lords in *Rookes* v. *Barnard*. An examination of the law in Australia before 1964 concerning the award of exemplary damages in a libel action revealed that the law was well settled, and it was not necessary to change it as the law had not been developed by *processes of faulty reasoning* nor founded on misconception. Had this been the case, it is implicit in the judgment, the High Court would not have been justified in following its own decisions. The emphasis in the judgment is on the process of

1. (1967) 41 A.L.J.R. 66.
2. [1964] A.C. 1129.
3. See the statement of Latham C.J. in *Piro* v. *Foster and Co. Ltd.* (1943) 68 C.L.R. 313, at 320, where he refers to the desirability of uniformity of decision on matters of legal principle and to achieve that end the High Court, he suggested, and other courts in Australia should as a general rule follow decisions of the House of Lords in cases of clear conflict upon matters of general legal principle.
4. E.g. in *Waghan* v. *Waghan* (1942) 65 C.L.R. 289 the Court refused to follow its own decision in *Crown Solicitor* v. *Gilbert* (1937) 59 C.L.R. 322.

reasoning which resulted in the Australian decisions. The Privy Council judgment suggested that in this area of the law (that is, the award of punitive damages in a libel action) the High Court was completely justified in following its own *reasoning* in preference to the House of Lords decision as this sphere of the law was a "matter of domestic or internal significance (and thus) the need for conformity was not compelling"[5]. This sounds very altruistic in principle, but why should the awarding of punitive damages in libel actions be a matter of "domestic or internal significance"?

The High Court in *Skelton* v. *Collins*[6] adopted a similar attitude. All members of the Court in that case emphasized that the High Court is not bound by decisions of the House of Lords, but only recognizes their high persuasive value. But in the final analysis said Windeyer J. "This Court must consider the question for itself; and all the more so, it seems to me if the decision was reached after reference only to English decisions, not to the state of the law elsewhere, and seemingly to meet only economic and social conditions prevailing in England . . ."[7].

In *Skelton* v. *Collins*[6], an action for damages for personal injuries, the High Court applied an early House of Lords decision, *Benham* v. *Gambling*[8], and declined to follow the reasoning of the majority in a later decision of the House of Lords in *H. West and Son Ltd.* v. *Shephard*[9]. This was a different situation to that which arose in *Uren* where the Privy Council was faced with a conflict between a House of Lords decision and Australian law. But the judgments of both the Privy Council and the House of Lords indicate a tendency to seek a basic reasoning for development of the law within any sphere and to examine its applicability to the locality.

In *Uren,* the Privy Council warmly approved the High Court's reasoning. This is a change of attitude to that adopted by the Privy Council when it reversed two decisions of the High Court in 1964: *Commissioner for Railways* v. *Quinlan*[10] and *Parker* v. *R*[11]. In *Freightlines and Consolidated Holdings* v. *State of New South Wales*[12] the Privy Council affirmed the judgment of the High Court of Australia and other judgments of Sir Owen Dixon and the High Court to the like effect. The section 92 Road Transport Cases were held to be a correct development and exposition of the law.

It is arguable that the Privy Council is more kindly disposed towards the High Court. This may be a superficial conclusion, but it is quite apparent that the Court of Appeal holds the judgments of the High Court in very high esteem. *Lane* v. *Holloway*[13] was a case concerning trespass to the person and

5. (1967) 41 A.L.J.R. 66, at 73.
6. (1966) 39 A.L.J.R. 480.
7. *Id.,* at 497.
8. [1941] A.C. 157.
9. [1964] A.C. 326.
10. [1964] A.C. 1054.
11. [1964] 2 All E.R. 641.
12. [1967] 3 W.L.R. 749 (The question in that case was whether the Road Maintenance (Contribution) Act 1958-1965, was valid and did not offend section 92 of the Constitution.)
13. [1967] 3 All E.R. 129.

the point in question was whether damages ought to be reduced by reason of provocation afforded by the plaintiff's conduct. Cases in England, New Zealand and Canada were cited where it was held that provocation could reduce the damages. But *Foystin* v. *Katapodis*[14], a High Court of Australia decision in 1962, was applied. Denning J. was brief. "The High Court should be our guide . . ." he said[15]. Winn L.J. was more elegant. He said, ". . . I am completely satisfied myself that the decision of the High Court of Australia is not only correct but also affords, as so often is the case with decisions of that court, most lucid and authoritative guidance for this court . . ."[16].

This attitude also suggests a relaxation of a strict doctrine of precedent and a search for basic underlying reasoning which is applicable to the circumstances.

*Jacob* v. *Utah Construction and Engineering Pty. Ltd.*[17] a decision of the New South Wales Court of Appeal, also suggests a relaxed attitude towards precedents and a quest for uniform reasoning. In that case, the Privy Council decision in *Utah Construction and Engineering Pty. Ltd.* v. *Pataky*[18] was followed and a previous High Court decision[19] was distinguished, the reasoning of the Privy Council being preferred. The Court of New South Wales in that case acknowledged the binding force of decisions of the High Court on the Supreme Court of the State. In precisely similar cases, the High Court decision would be binding notwithstanding that it was inconsistent with the reasoning of the Privy Council in a subsequent case. But where the decision of the High Court is not precisely in point a comparison had to be made between two lines of reasoning and thus, in this case, the Court of New South Wales chose the reasoning of the Privy Council in preference to that of the High Court.

The attitude of the Courts is commendable in that it may promote, and is capable of producing, more logically correct decisions and deeper reasoning as opposed to blindly following precedent. But this attitude should be treated with caution as the choice between various processes of reasonings may not itself be well reasoned and may depend on arbitrary considerations[20]. Furthermore, the reasoning may not be applicable if it relates to a "domestic or internal" matter[21], or if it was developed to meet prevailing economic or social conditions. Such considerations may produce difficulties of analysis. The attitude tends towards flexibility in the law. The doctrine of precedent which is relaxed tends towards certainty. It is the eternal battle of Flexibility against Certainty in yet another disguise.

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14. (1962) 108 C.L.R. 177.
15. [1967] 3 All E.R. 129 at 132.
16. *Id.*, at 135.
17. (1966) 66 S.R. (N.S.W.) 406.
18. [1965] 3 All E.R. 650.
19. *Australian Iron and Steel Ltd.* v. *Ryan* (1957) 92 C.L.R. 89.
20. As it may have *e.g.* in *Jacob* v. *Utah Construction Co.* (1966) 66 S.R. (N.S.W.) 406 where differing reasons were given for preferring the reasoning of the Privy Council.
21. See *Australian Consolidated Press Ltd.* v. *Uren* (1967) 41 A.L.J.R. 66, at 73.

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