Chapter 3

Trespass, The Action on the Case and Tort

M Lunney

> Do not tell me that the Plantagenets matter not to us in Australia. Or that the clanking chains of English legal history can be ignored by contemporary Australian lawyers.[1]

Nowhere is this statement by retired High Court judge Michael Kirby more true than in the law of obligations in Australia. To a modern reader, a chapter entitled as is this chapter will seem something of an oddity. The action on the case will most likely be unfamiliar, and a distinction between "trespass" and "tort" may seem misconceived: in the modern law trespass is a tort. We can only try to understand these categories by returning to the mind-set of the lawyers who used these terms and to do that requires us to understand the legal regime of 14th century England. That legal regime had two characteristics that have no modern parallel: a diffuse and decentralised court structure, and a formal system of procedure that dictated substantive legal development.

Centralised and local courts

A key feature of the medieval legal system was the division between central or royal courts, on the one hand, and a wide variety of local or regional courts on the other.[2] Organised royal justice, in the sense of providing formal mechanisms for disputes between the King and individuals or between private individuals themselves, dates from the reign of Henry II (commencing in 1154). But it should not be thought that the introduction of royal justice was in any sense at the expense of the pre-existing local court structures that dealt with the vast majority of disputes. This is particularly important in relation to what we now describe as the law of torts, because the early functions of royal courts were primarily to

1 Kirby, "Is legal history now ancient history?" (2009) 83 *Australian Law Journal* 31, 41.

2 These courts are considered in detail in Pollock & Maitland, *The History of English Law Before the Time of Edward I* (2nd ed, CUP, Cambridge, 1923), Vol I, Ch 3.