THE LAW OF TORTS IN AUSTRALIA

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In the admirable survey edited by Sir George Paton[1] there is much information about the development of private law in Australia and yet only seven pages are devoted to the law of torts. Since then Professor Fleming has published his magisterial treatise on the subject, but perhaps there is still room for a brief survey of this field as it strikes an observer from England who has had the good fortune to spend some months in Melbourne. This survey is confined of necessity to the law as reflected in the pages of the Commonwealth Law Reports. This does not mean that there is nothing of interest or importance in the various state reports—nobody who has once read a judgment of Sir Leo Cussen or Sir Frederick Jordan, to name only the dead, could make such a suggestion—but simply that space and time here, as elsewhere, impose their limitations. So far as the judgments in the High Court are concerned it must be said at once that they are extraordinarily interesting and stimulating. My pupils have often been told that they will learn more about the essential spirit and genius of the common law from browsing at random in the pages of the English law reports for two distinct periods than from any amount of study of the textbooks. The periods are the 'fifties and 'sixties of last century—the golden age of the common law—and the volumes of the Appeal Cases for the years when Lord Simon was Lord Chancellor. To these I have begun to add the Commonwealth Law Reports since approximately the appointment of Sir Owen Dixon to be Chief Justice. The cases of the greatest interest may conveniently be discussed under the following heads.

(1) *General Principles*

One may start, as in so many branches of Australian law, with a *dictum* of Sir Owen Dixon.

> The law of tort has fallen into great confusion, but, in the main, what acts and omissions result in responsibility and what do not are matters defined by long-established rules of law from which judges ought not wittingly to depart and no light is shed upon a given case by large generalizations about them.[2]

In the *Victoria Park Case* the court (Rich and Evatt JJ. dissenting) definitely refused to accept the proposition that all damage done to

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[1] *The Commonwealth of Australia* (1952).

[2] *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor* (1937) 58 C.L.R. 479, 505.

another is tortious until the reverse is shown; on the contrary, the principle which governs the decision is that the onus lies on the plaintiff to establish that the defendant's conduct falls within some distinct and established category of tortious liability. So the defendant, who had erected on his own land a tower from which he was able to broadcast descriptions of races on the plaintiff's premises, went free because the plaintiff was unable to establish that such conduct was within the ambit of trespass, nuisance, or infringement of copyright. 'The law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide'.[3]

This case (and in particular the *dictum* of Sir Owen Dixon) illustrates very well two of the main features of the judgments of the court. First, there is the predominance of the notion of justice according to law. The litigant is entitled to have his case decided, not *ex aequo et bono,* or according to some feeling of what is required by the political and social fashions of the day, but, in the words of Roscoe Pound, according to authoritative precepts applied by an authoritative technique. The assumption of the court is that there exists an antecedent body of authoritative doctrine which can be discovered and expounded by a process of intellectual reasoning.[4] Secondly, it is apparent that the court believes that its exposition of this body of doctrine in any given case should be as full as possible. It is truly remarkable how many recent decisions provide a full historical investigation of the origin of any particular rule or set of rules together with a critical survey of their present scope. One gains the impression that the court has both the time and the will to travel beyond the points raised by counsel in their arguments in an effort to provide a complete restatement of the branch of law under review. For example, one can find an exhaustive treatment of the distinctions between trespass to chattels, conversion, and detinue;[5] of contributory negligence;[6] and of the action *per quod servitium amisit.*[7] Whether because of pressure of work or other reasons few English judgments—particularly in the appellate courts—are on such a scale.[8] It is also

[3] *Ibid.,* 494, *per* Latham C.J.

[4] Sir Owen Dixon has expounded this view in a notable series of extra-judicial statements: (1956) 29 *Australian Law Journal* 468 and (1957) 31 *Australian Law Journal* 240.

[5] *Penfolds Wines Pty Ltd v. Elliott* (1946) 74 C.L.R. 204. The ascertainment of the *ratio decidendi* of this case is not easy: Paton and Sawer, '*Ratio Decidendi* and *Obiter Dictum* in Appellate Courts' (1947) 63 *Law Quarterly Review* 461, 469. Whether for this reason or another the High Court has in recent years increasingly adopted the practice of giving joint judgments.

[6] *Alford v. Magee* (1952) 85 C.L.R. 437.

[7] *Attorney-General for N.S.W. v. Perpetual Trustee Co. (Ltd)* (1952) 85 C.L.R. 237; on appeal, [1955] A.C. 457. In *I.R.C. v. Hambrook* [1956] 2 Q.B. 641, 665, Denning L.J. said: 'It seems that the limitations on this action had been forgotten. It was the courts of Australia which brought them to light in a series of judgments marked by much historical research'.

[8] Although some of the judgments of Devlin J. are comparable in form and substance—*e.g., Phipps v. Rochester Corporation* [1955] 1 Q.B. 450.

noticeable that the High Court is prepared to cite the relevant cases and academic literature, not only from Australia and England, but from any jurisdiction in the British Commonwealth. On the other hand, fewer American cases appear to be cited each year.[9] This is in accord with the English trend. The reason probably is not merely the unmanageable bulk of American law, but also the fact that such judgments as are available often appear to be couched in rather vague and impressionistic terms. The modern American lawyer seems to display some irritation at the notion that the patient and cautious analysis of legal concepts from within their own four corners is capable of yielding profitable results.

But this emphasis on the importance of consistency and logical analysis does not mean that the judgments of the High Court are either ultra-conservative in effect or pedantic and indigestible in style. They certainly do not display the worst characteristics of what Sir Maurice Amos called 'the legal mind'.[10] The court has never hesitated to reach a novel conclusion if it thinks it necessary to do so. Examples may be found in decisions relating to the scope of the action for loss of services;[11] the scope of clauses in contracts purporting to exempt parties from liability for negligence;[12] and the liability of occupiers to trespassers.[13] Nor does the mass of authority cited in the judgments give the impression of an ill-constructed practitioners' digest, as the judgments of McCardie J. in England sometimes used to do. Indeed, one of the most striking features of some of the court's recent decisions is the fact that they are so often cast in a calm and lucid style of great distinction. On occasion they remind one of the achievements of the nineteenth-century masters like Blackburn and Willes: the tangled mass of previous authorities is set on one side and the conclusion stated with an easy assurance which gives the impression that no other decision is possible.[14]

We may now survey very briefly some of the leading decisions in different parts of the law of torts.

(2) *Parties*

(a) *Master and servant*

On the distinction between a servant and an independent con-

[9] See the statistics in Paton, *op. cit.*, 14.
[10] (1933) 49 *Law Quarterly Review* 27—an article which deserves to be better known.
[11] *Perpetual Trustee Co.* case (1952) 85 C.L.R. 237.
[12] *Wilson v. Darling Island Stevedoring & Lighterage Co. Ltd* (1955) 95 C.L.R. 43.
[13] *Thompson v. Bankstown Corporation* (1952) 87 C.L.R. 619.
[14] It is worth comparing the judgments as to mistake in *Smith v. Hughes* (1871) L.R. 6 Q.B. 597 and *Cundy v. Lindsay* (1878) 3 App. Cas. 459 with the later attempts on, and more particularly off, the bench, to explain this branch of the law. It is not only that the Victorian judgments had the virtue of being right; they flow with an effortless clarity of style, unencumbered by the tedious citation of authorities, which at once distinguishes them as masterpieces.

tractor and the extent of liability for the acts of the latter there is an important decision in *Torette House Pty Ltd v. Berkman*[15] and useful *dicta* by Dixon C.J. in *Zuijs v. Wirth Bros Pty Ltd.*[16] The vexed question of whether the act or omission in issue has been done in the scope of the servant's employment is reviewed in *Bugge v. Brown*[17] and *Deatons Pty Ltd v. Flew.*[18] The interesting recent decision in *Darling Island Stevedoring Co. Ltd v. Long*[19] not only reviews the ill-defined rules which regulate whether the breach of a statutory duty gives an action for damages to one thereby injured but also contains some illuminating *dicta* on the true meaning and basis of the whole doctrine of vicarious liability—a problem which has been much discussed in England in the last few years. Fullagar J. firmly supported the traditional view that the master's liability is truly vicarious—he is liable 'for a breach of duty resting on another and broken by another'. Kitto and Taylor JJ. supported the new view that a master is only liable for the acts as distinct from the torts of his servant. This was apparently first put forward (without any citation of authority) by an English Chancery judge sitting *ad hoc* in the King's Bench Division[20] and has since received an amount of support which is surprising in view of the many difficulties to which it gives rise.[21] The High Court has not yet discussed the question whether a master who has been held vicariously responsible for his servant's wrongdoing is entitled to be indemnified by that servant either at common law or under the contribution statutes as he can in England under the decision in *Lister v. Romford Ice Co.*[22]

(b) *Husband and wife*

Two important decisions containing characteristic joint judgments should be noted—*Toohey v. Hollier*[23] and *Tooth & Co. v. Tillyer.*[24] In the first the court permitted a husband in an action *per quod consortium amisit* to recover damages for all practical disadvantages he had suffered in consequence of his wife's impaired bodily condition even though it fell short of a total loss of *consortium.* In the second the court refused to permit the plaintiff employers, who had been obliged to pay compensation under the Workers Compensation Act to the defendant's wife for injury she had suffered as a result of his wrongdoing, to claim against the defendant under the statutory right of indemnity given to an employer who had paid compensation in circumstances creating a legal liability in some other person for the simple reason that the defendant was not under any legal liability

[15] (1940) 62 C.L.R. 637. [16] (1955) 93 C.L.R. 561, 571. [17] (1919) 26 C.L.R. 110.
[18] (1949) 79 C.L.R. 370. [19] [1957] Argus L.R. 505.
[20] *Twine v. Bean's Express Ltd* [1946] 1 All E.R. 202 (Uthwatt J.).
[21] *Staveley Iron & Chemical Co. v. Jones* [1956] A.C. 627.
[22] [1957] A.C. 555. [23] (1955) 92 C.L.R. 618. [24] (1956) 95 C.L.R. 605.

to his wife. In each case opinions to the contrary which had been expressed in the Court of Appeal were put aside as 'abstract and theoretical' or 'metaphysical unreality'. There does not seem to be any danger that the exhaustive review of the law in which the court is apt to indulge on these occasions will lead it into over-refinements unsuitable to the practical task of satisfying the demands of litigants in modern society.

(c) *Personal representatives*

Some important decisions under the Fatal Accidents Acts have considered points on which there is not clear English authority: *Woolworths Ltd v. Crotty*,[25] *Partridge v. Chick*,[26] *Lincoln v. Gravil*,[27] and *Kain & Shelton Ltd v. Virgo*.[28]

(3) *Defamation*

In *Lee v. Wilson*[29] it was held that a statement which is perfectly true of A may nevertheless be defamatory of B, of whom the defendant has never heard and has no reason to know. Thus in Australia the doctrine established by *Hulton v. Jones*[30] that liability for libel does not depend on the intention of the defamer but on the fact of defamation has been fully accepted. It is interesting to note that the exact point raised in *Lee v. Wilson,* though no doubt always implicit in *Hulton v. Jones,* was not raised in England until six years later, when the Court of Appeal in *Newstead's Case*[31] came to the same conclusion. It is perhaps surprising that the powerful Australian newspaper interests have not pressed for reform along the lines of the English Defamation Act 1952. So far as defences are concerned, *Bailey v. Truth & Sportsman Ltd*[32] indicates that Australian courts are not prepared to follow the opinion of Phillimore J. in *Mangena v. Wright*[33] that fair comment can be pleaded even if the facts on which it is based are contained in the inaccurate statement of another made on a privileged occasion—*e.g.,* during a parliamentary debate. *Jackson v. McGrath*[34] also indicates reluctance to extend the absolute privilege which protects statements made by one officer of state to another in the course of duty.

(4) *Negligence*

The criterion of reasonable foresight as a general test of liability appears to be accepted, although there has been much less discussion than in England of the true scope of the neighbour principle pro-

[25] (1942) 66 C.L.R. 603. [26] (1951) 84 C.L.R. 611.
[27] (1954) 28 *Australian Law Journal* 179. [28] (1958) 31 *Australian Law Journal* 907.
[29] (1934) 51 C.L.R. 276. [30] [1910] A.C. 20. [31] [1940] 1 K.B. 377.
[32] (1938) 60 C.L.R. 700.
[33] [1909] 2 K.B. 958. There has recently been some inconclusive discussion of this point in England: *Grech v. Odhams Press* [1958] 2 All E.R. 462.
[34] (1947) 75 C.L.R. 293.

pounded by Lord Atkin in *Donoghue v. Stevenson.*[35] Apart from *Chester v. Waverley Corporation,*[36] in which the court (Evatt J. dissenting at length and persuasively) reached the rather cautious conclusion that on the facts the shock suffered by the plaintiff was not within the reasonable contemplation of the defendants, and *Shaw, Savill and Albion Co. v. The Commonwealth,*[37] in which liability was (hardly surprisingly) denied for damage done in the course of active operations against the enemy, there is little to record. The High Court has not been troubled with either of the problems raised by the troublesome decisions of the Court of Appeal in the *Polemis Case*[38] or *Candler v. Crane, Christmas & Co.*[39] The prophecy may be ventured that when the issue of liability for loss caused by careless statements is raised for decision the court may find the views of Lord Denning on this topic to have greater persuasive effect than it has sometimes ascribed to his utterances.[40]

On the related but distinct question of the appropriate standard of care to be observed in any particular case there is much evidence to show that Australian courts, like those in England, are quietly abandoning the 'featureless generality' that the defendant is bound to take the care of a reasonable man in favour of the more helpful formulation in terms of risk. This is particularly noticeable in cases dealing with the duty of an employer to take reasonable care for his servant's safety, which are now apparently arising in Australia with almost the same frequency as in England. Examples will be found in *Key v. Commissioner for Railways,*[41] *Mummery v. Irvings Pty Ltd,*[42] and *Hamilton v. Nuroof (W.A.) Pty Ltd.*[43] (The last case contains a useful critical explanation by Dixon C.J. of the oft-cited words of Lord Dunedin in *Morton v. William Dixon, Ltd.*[44]) Actions against medical practitioners seem to be much rarer in Australia than in England—*Hocking v. Bell*[45] seems the only case of significance. On the other hand, drunken drivers of motor vehicles have caused at least two cases of first-rate importance, containing invaluable statements about negligence, contributory negligence, and assumption of risk—*Insurance Commissioner v. Joyce*[46] and *Roggenkamp v. Bennett.*[47] On *res ipsa loquitur* there are invaluable judgments in *Davis v. Bunn*[48] and *Mummery v. Irvings Pty Ltd.*[49] The latter case contains some trenchant criticism of the recent tendency in England (see *Moore v. Fox (R.) & Sons Ltd)*[50] to ascribe to the maxim the effect of putting on the defendant the onus of disproving negligence.

[35] [1932] A.C. 562. [36] (1939) 62 C.L.R. 1. [37] (1940) 66 C.L.R. 344.
[38] [1921] 3 K.B. 560. [39] [1951] 2 K.B. 164.
[40] See the very persuasive article by Fullagar J. in (1951) 25 *Australian Law Journal* 278. [41] (1941) 64 C.L.R. 619. [42] [1956] Argus L.R. 795. [43] (1956) 96 C.L.R. 18.
[44] [1909] S.C. 807. [45] (1947) 75 C.L.R. 125. [46] (1948) 77 C.L.R. 39.
[47] (1950) 80 C.L.R. 292. [48] (1936) 56 C.L.R. 246. [49] [1956] Argus L.R. 795.
[50] [1956] 1 Q.B. 596.

(5) *Contributory negligence*

Here the outstanding feature is a great trilogy of cases—*Alford v. Magee*,[51] *Fitzgerald v. Penn*,[52] and *Pennington v. Norris*[53]—which contain a most elaborate survey of the complex set of rules on this topic. The conclusions arrived at are not markedly different from those contained in recent English cases but the reasoning is fuller and more cogent. The result may perhaps be said to illustrate some of the points made by the modern school of empirical philosophy whose devotion to linguistic analysis is having so beneficent an effect on the law. One should not beat one's head against the wall by asking broad open questions of the type: What is the last opportunity rule? How far has the last opportunity rule survived the apportionment legislation? Instead one should ask the narrower contextual question: In the circumstances of this case is it right to ascribe the entire responsibility for the disaster to one of the parties to the action, even though the misdoings of the other may also be regarded as a relevant cause?

(6) *Dangerous premises and chattels*

(a) *Nuisance*

The leading cases of *Victoria Park Racing and Recreation Grounds Co. Ltd v. Taylor*[54] and *Torette House Pty Ltd v. Berkman*[55] have already been noted.

(b) *Lawful visitors and trespassers*

The recent case of *Watson v. George*[56] considers in detail the scope of the rule laid down in *Maclenan v. Segar*[57] to govern the liability of the occupier to those who enter under contract. In *Aiken v. Kingborough Corporation*[58] the position of those who enter as of right was considered more fully than in any English case. The duties owed to invitees and licensees appear to remain much as they were settled by the great jurists of the nineteenth century. In England, as is well known, the courts created such difficulties for themselves that Parliament was obliged to enact the Occupiers' Liability Act 1957, which purports to simplify the law on this topic. It will be interesting to see whether the High Court can find any grounds for distinguishing *Horton's* case[59] if and when the issue is raised before it, for few decisions of the House of Lords in modern times have had a more uniformly unenthusiastic reception. Perhaps the High Court will be able to adopt the simple view that it need not be followed since it has been abrogated by the Act of 1957. The High Court has in any

[51] (1952) 85 C.L.R. 437. [52] (1954) 91 C.L.R. 268. [53] (1956) 96 C.L.R. 10.
[54] (1937) 58 C.L.R. 479, *supra*, especially pp. 35-36, nn. 2 and 3.
[55] (1940) 62 C.L.R. 637, *supra*, n. 15. [56] (1953) 89 C.L.R. 409.
[57] [1917] 2 K.B. 325. [58] (1939) 62 C.L.R. 179. [59] [1951] A.C. 737.

event shown itself sympathetic to the recent subtle English development whereby a distinction is drawn between the liability of an occupier of premises in respect of the dangerous structural condition of those premises, which falls to be governed by the strict invitee-licensee categories, and his liability in respect of current operations carried on on those premises, which is regulated by the ordinary principles of negligence.[60] The most daring decision to this effect is *Thompson v. Bankstown Corporation*,[61] in which the court selected as the basis of its decision the rule which imposes on those who carry on a dangerous activity (in this case the supply of electricity) a high standard of care, rather than the rule which exempts an occupier from any duty to a trespasser. An English court would probably have adopted the view expressed in the dissenting judgment of Webb J.—the infant plaintiff was technically a trespasser on the pole on which he was electrocuted and a court is not entitled to disregard even technical trespasses when allocating legal responsibility.

(c) *Dangerous chattels*

It is enough to note that while in *Adelaide Chemical Co. Ltd v. Carlyle*[62] it was held that sulphuric acid is a thing dangerous *per se* it was held in *Smith v. Leurs*[63] that a 'shanghai' is not within this category.

(7) *Conspiracy*

Finally it may be noted that a majority of the court in *McKernan v. Fraser*[64] recognized the realities of life on the waterfront when it held that the defendants were acting with the legitimate object of furthering the interests of their union when they coerced a shipping company into refusing employment to the plaintiffs by the threat of calling out their own members. This anticipated by a decade the decision in *Crofter Hand Woven Harris Tweed Co. Ltd v. Veitch*.[65] These cases have been approved by most academic jurists as well as all trade unionists.

[60] *Commissioner for Railways v. Hooper* (1954) 89 C.L.R. 486.
[61] (1953) 87 C.L.R. 619. [62] (1940) 64 C.L.R. 514.
[63] (1945) 70 C.L.R. 256. [64] (1931) 46 C.L.R. 343. [65] [1942] A.C. 435.