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COMMENT

LAW MAKING IN AN INTERMEDIATE APPELLATE COURT: THE NEW SOUTH WALES COURT OF APPEAL

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For a generation, most practising and academic lawyers have accepted that judges make law and have the right to do so. In a small but still significant number of cases, the courts must "make" law because the rules or principles arguably applicable are unclear or out of touch with the needs of contemporary society or have not been applied to similar facts. Moreover, even when a court dismisses an action by holding for the first time that there is no rule entitling the plaintiff to succeed, it is arguable that the court still makes law.[1] Under the once fashionable oracular or declaratory theory of judging, the court simply "finds" the relevant rule and mechanically applies it to the factual situation. But this theory of judging, championed by Coke, Hale, Blackstone and other legal luminaries, now stands discredited. Lord Reid described it as a fairy tale. The final blow for any remaining believers in the declaratory theory must have been the open acknowledgement by the Judicial Committee in

* A judge of the Court of Appeal of New South Wales.

[1] S. D. Smith, "Courts, Creativity and the Duty to Decide a Case" (1985) *Uni. of Illin. Rev.* 573 at 586.

Australian Consolidated Press Ltd. v. *Uren*[2] that the common law of exemplary damages in Australia was different from that in England.

Today the issue is not whether but how or when judges should make law.[3] Yet some lawyers would deny to an intermediate court of appeal a law making function.

I

One view is that the only function of an intermediate court of appeal such as the New South Wales Court of Appeal is to correct departures from the existing rules and not to make or remake the rules themselves.[4] This is the rule-error model of appellate judging. Under this model, judicial law making is the prerogative of the ultimate court of appeal. A no less restrictive model is that which claims that the only concern of an intermediate appellate court is "the co-ordination and rationalisation of the general flow of cases passing through the system with the object of achieving an orderly and regulated consistency in the administration of the law by the courts subordinate to it".[5] Under this model, trial courts may "be modestly and moderately adventurous" and ultimate appellate courts may be bold. But an "intermediate court of appeal cannot afford to indulge itself in the process of experimentation and challenge to anything like the same extent as a first instance judge".[6] This co-ordinating function is said to require "the finding of an accommodation amongst a widely ranging series of philosophies amongst judges of first instance".

II

Obviously, an intermediate court of appeal cannot make law as freely as an ultimate court of appeal. The Chief Justice of Australia has recently reminded the Second Biennial Conference of the Australian Bar Association that there is an essential difference between a court of last resort and an intermediate court of appeal.

> Although the members of an intermediate court of appeal may long to soar on the wings of policy, the net of authority casts its threatening shadow over their endeavours. However, a final court of appeal can be persuaded to depart from established precedent and indeed at the present time many such courts, including the High Court of Australia, have shown an increased readiness to do so.[7]

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[2] [1969] 1 A.C. 590.

[3] Followers of the jurisprudential theories of Ronald Dworkin, for example, accept that judges do formulate new rules from time to time. But they argue that the judge, unlike the legislator, has no discretion to take into account a wide range of social values.

[4] *E.g.*, Hopkins, "The Rule of an Intermediate Appellate Court" (1975) 41 *Brooklyn Law Review* 459 at 460.

[5] See the view expressed by an unnamed "N.S.W. judge of great experience and distinction" in Stone, *Precedent and Law* (1985) Butterworths, Sydney, at 34.

[6] *Ibid.*

[7] 'Appellate Advocacy' (1986) 60 A.L.J. 496.

But this does not mean that an intermediate court of appeal should have a law making function less than that of a trial court and, subject to the doctrine of precedent, less than that of an ultimate court of appeal. The adoption of any lesser role by the New South Wales Court of Appeal, for example, would throw an unnecessary costs burden on litigants in this State and increase the workload on an already overburdened High Court. Its adoption would also undermine the beneficial effects which the abolition of appeals as of right to the High Court has had on the workload of that court.

III

Many of the objections to law making by an intermediate appellate court are objections to any form of judicial law making. For the purpose of this Comment, therefore, I shall consider only those objections which contend that an intermediate court of appeal has no place in judicial law making.

I think, with great respect to those who hold the contrary view, that the proposition that the role of an intermediate court of appeal is to find "an accommodation amongst a widely ranging series of philosophies amongst judges of first instance" cannot be accepted. The adoption of that role places an intermediate court in a most unsatisfactory position. For it requires the court to abandon the comparative certainty and predictability of the rule-error model but does not allow the court to declare the rule or principle which it thinks is the proper solution of the problem. Instead the intermediate court is required to select that rule which strikes a balance between the competing views of trial judges. The choice, therefore, must surely be between the rule-error model or a model which enables the intermediate court to make law when necessary by giving effect to what it considers is the appropriate rule.

IV

One argument put forward for denying to an intermediate appellate court a law making function is the claim that the volume and nature of its work make it an unsuitable tribunal for "law making". Most of its work, it is said, is concerned with finding and applying legal rules, with evaluating facts and evidence, and with determining questions of evidence and procedure. This class of appellate work which is the inevitable by product of appeals as of right constitutes the main part of an intermediate appellate court's work. So much contact with this class of judicial work is said to induce habits of mind unsuitable to the creative work of judicial law making. But, if this proposition is true for intermediate courts, it is equally true for trial courts. If the proposition were accepted, only ultimate appellate courts should engage in judicial law making.

Although most judicial work is concerned with "the disinterested application of known law", my experience on the appellate bench is that intermediate appellate courts do have a legitimate choice open to them

in a substantial number of civil cases. Appellate courts including intermediate courts reverse about 30% of all judgments brought before them. This figure together with the not inconsiderable number of dissenting judgments in appellate courts are an indication of the choices that courts have in many cases. Of course, many reversals in intermediate courts are on questions of fact and not on law. However, a significant number of reversals on issues of fact or on evidentiary or procedural matters occur only because the courts expressly or impliedly refuse to create, extend or modify legal rules. Nonetheless, it must be conceded that in most cases (more than 80% in the New South Wales Court of Appeal) the facts, rather than any real choice as to the formulation of the legal rule, are dispositive of the appeal. There still remains, however, a significant number of cases where an intermediate court of appeal has a creative role open to it. Moreover, continual observation of the practical operation of legal rules in diverse evidentiary contexts should be an aid rather than a hindrance to the formulation of better legal rules and principles. The nature of an intermediate court's work in my opinion is not a sufficient ground to deny it a law making role.

V

Intermediate courts of appeal, however, have notoriously heavy case loads. In 1985 the Court of Appeal, which is the busiest appellate court in Australia, heard 227 civil appeals and 468 summonses in its original jurisdiction or as ancillary to appeals in the Court. Well over 300 of the summonses were "short matters" concerned with applications for leave to appeal, for stays of execution of judgments, and for procedural orders and take up less than 20% of the Court's hearing time. While the case load of the Australian appellate courts is small compared to that of (say) United States appellate courts, the disposition of appeals by full oral argument means that the judges of our courts have less out-of-court time than United States appellate judges who drastically limit the time for oral argument. Nevertheless, it seems clear that appellate judges in Australia are able to devote more time than their United States counterparts to individual cases. It has been said that a United States appellate judge should not determine more than 300-350 appeals annually.[8] However, the work load of many United States appellate judges is considerably higher than that figure. The annual case load of a judge in the Court of Appeal is below 250 matters; about 50% of them are "short matters". Volume of work is not of itself, therefore, a reason why Australian intermediate appellate courts should confine themselves to an error correcting role.

VI

However, one by-product of the volume of litigation in intermediate appellate courts is that the judges of those courts invariably sit in a number

[8] Note, "The Second Circuit: Federal Jurisdiction Administration in Microcosm" (1963) 63 *Columbia L. Rev.* 874.

of panels. A view of the law which commands the unanimous support of one panel of judges may be unanimously rejected by another panel of judges of that court. If the members of one panel lay down a new rule, it may not have the support of other members of the court. On a number of occasions, different panels of the English Court of Appeal have had different views concerning a principle or the interpretation of a statute. One of the primary objects in setting up an appellate court is to produce uniformity in decision making in the jurisdiction. Apprehended or perceived inequality of treatment in decision making at the appellate level would be a serious blow to the administration of justice. However, the doctrine of *stare decisis*, as it affects an intermediate appellate court's own decisions, has worked well enough in practice to overcome the fears which the notion of a creative intermediate court sitting in panels sometimes engenders. In New South Wales, a decision of the Court of Appeal is binding on that court, however constituted, unless it is shown to be clearly wrong.[9]

VII

A more significant objection to a law making function in an intermediate appellate court is the effect that it has on the rule that the intermediate court is bound by the decisions of the ultimate court of appeal. In many cases an intermediate court can only develop or modify the law by techniques which unsettle or cause the collapse of doctrine and which create uncertainty. If a principle or rule has the support of the ultimate court, the only legitimate technique for avoiding its operation is by distinguishing the rule or principle. However, a case can only be distinguished when the evidence permits a finding that the material facts of the instant and precedent case are different. High authority enjoins lower courts "to accept loyally the decision of the higher tiers": *Broome* v. *Cassell & Co.*[10] The distinguishing of an ultimate court's decision carries the danger that the intermediate court will interpret as non-material what the ultimate court thought was a material fact. And the inevitable result of a continuing process of distinguishing a line of authority is the collapse of doctrine which *ex hypothesi* still has the support of the ultimate court of appeal. Moreover, courts in Australia are presently bound by the rule that the removal of entrenched common law principles, whether or not they have the approval of the High Court, is a matter for the legislature and not for the courts.[11]

Accordingly, critics of a law making role for the intermediate courts argue that they should confine themselves to drawing the attention of the ultimate court of appeal to supposed deficiencies in the law. They argue that the intermediate courts should find the necessary facts, analyse the problem, and merely suggest the possible solutions. It is not a view which

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[9] *Richardson* v. *Mayer* [1964-5] N.S.W.R. 105; *Bennett & Wood Ltd.* v. *Orange City Council* (1967) 67 S.R. (N.S.W.) 426.

[10] [1972] A.C. 1027 at 1054.

[11] *Dugan* v. *Mirror Newspapers Ltd.* (1978) 142 C.L.R. 583; *S.G.I.O.* v. *Trigwell* (1979) 142 C.L.R. 617; *Public Service Board* v. *Osmond* (1986) 60 A.L.J.R. 209.

I accept. Nor is it, I believe, the view which the Court of Appeal has adopted in recent years.

VIII

While "the net of authority" admittedly circumscribes the freedom of an intermediate appellate court, it is easy to exaggerate its restraining tendency. Large areas of common law and equity remain open to development by the lower courts. The Court of Appeal of New South Wales deals essentially with problems governed by the principles and rules of the common law and equity. After two years on the Court, my impression is that the "net of authority" does not prevent the Court from making a significant contribution to the proper development of these principles and rules.

If the Court of Appeal were to adopt the rule-error model of appellate judging—leaving desirable changes in the law to the legislature or the High Court—a significant part of New South Wales law would be the subject of outdated rules and principles for lengthy periods. The work load of the High Court and its obligation to give preference to constitutional cases make it impossible for that court to carry the burden of making necessary changes in the law of New South Wales. In 1985 the High Court granted special leave to appeal against decisions of the Court of Appeal in only eleven cases.

Indeed, it is arguable that the interests of the High Court are best served by the intermediate appellate courts in Australia adopting an expansive "law making" role. The abolition of appeals as of right gives the High Court a wide discretion as to what cases it will take for decision. It is open to it, before granting special leave to appeal against a decision making or applying a doctrinal change, to wait for a period until the full effects of the change have been worked out in the lower courts. Delay in hearing these cases would assist the High Court in avoiding a premature commitment for or against any change in a doctrine.

Recommendations for the general codification of the law have foundered. The doctrines of the common law and of equity will continue to represent for the foreseeable future a significant body of New South Wales private law. Even those who regard legislation as the only proper form of lawmaking cannot realistically expect the legislature to use valuable parliamentary time in the continuing supervision and amendment of all private law doctrines. The void has to be filled by the courts of New South Wales including the Court of Appeal.