CASE NOTES

EXTRA-MARITAL COHABITATION NOT IMMORAL

Andrews v. *Parker*[1] is an important case on sexually immoral contracts. In April 1968 the plaintiff, a widower, and the defendant, a married woman, commenced to live together as man and wife in the plaintiff's house. About June 1968 the defendant asked the plaintiff what he was going to do about his house. She said that she had left her husband completely and that she wanted some kind of security. She came back to the matter several times. In August 1968 the plaintiff said that he would transfer the house to her on three conditions. These were (to quote the plaintiff): 'Firstly I would have a roof over my head for the rest of my life, secondly that... she would make a will and leave it to my three children, and thirdly, that if she ever went back to her husband she would on principle deed the house back to me.' The defendant agreed to these proposals and in November 1968 the plaintiff signed a memorandum of transfer in the defendant's favour. About Christmas 1968 the defendant started going away for week-ends with her husband and became indifferent to the plaintiff. The plaintiff asked her about the house: 'I was decent enough to give it to you, why don't you be decent enough to give it back to me?' She replied: 'I'm not decent. I'm cunning,...' In February 1969 the defendant told the plaintiff that her husband was coming to live at the house and in March 1969 the defendant's husband moved in. The defendant asked the plaintiff when he would be leaving as the three of them could not live there together. About May 1969 the plaintiff left. In this action the plaintiff sued for recovery of the house. Stable J. gave judgment for the plaintiff.

Stable J. gave three reasons for his decision. First, Stable J. held that the agreement was not one to bring about a state of extra-marital cohabitation, for that state existed already. The agreement, therefore, was not based on an immoral consideration. Stable J. said:

> The original agreement was not one to bring about a state of extra-marital cohabitation, for that state existed already. ... The effect of the agreement in the present case was not to bring about an immoral association, but to provide for what was to happen upon its ending. What the defendant had been putting on her crying turns for was, in the plaintiff's understanding, security in her alleged state of separation, — a security which would be no longer

1 [1973] Qd. R. 93.

> needed upon a return (if any) to the shelter of her husband's arms and a roof of his providing.[2]

The distinction between an agreement which brought about a state of extra-marital cohabitation and one which did not had been drawn before. Thus, in *Croslin* v. *Scott*[3] Bray J. said:

> The testimony of plaintiff is somewhat unsatisfactory and perhaps even contradictory. The evidence probably compelled a finding that there was an agreement entered into between the parties in February, 1948, in which plaintiff accepted her offer to give him the lot in return for his previous services provided he returned to live with her. This agreement would be an illegal one and unenforceable. But viewing the evidence in the light of the rule requiring us to consider the inference most favorable to plaintiff, the court could have found that later and after the parties were living together a new agreement was made, namely, that in consideration of plaintiff performing labor and furnishing materials in the building of the house it was to be deeded to him, and that that agreement was modified when defendant also put money into the house to an agreement that the parties would hold the property jointly. While the parties were then living in a meretricious relationship the court could have found that the continuance of such relationship was not a part of either agreement nor consideration therefor.[4]

The case was remanded to the court below to determine the facts.

Secondly, Stable J. held that if the agreement between the parties was based on an immoral consideration (which he had doubted as a matter of interpretation) then the immorality was not such according to modern standards as to deprive the plaintiff of the right to enforce it. This is the important point of the case. Stable J. said:

> Surely, what is immoral must be judged by the current standards of morality of the community. What was apparently regarded with pious horror when the cases were decided would, I observe, today hardly draw a raised eyebrow or a gentle 'tut-tut'. It is notorious that there are many people living as husband and wife without benefit of clergy — so much so that in this century Parliament has recognised the fact and extended social service benefits to what in the relevant legislation are called 'dependent females'. Children born of such unions are included with those born of regular unions under the provisions of our Testator's Family Maintenance Acts — when formerly bastards had no rights. One cannot help noticing the newspaper discussions which have taken place as to whether it is right for mothers to see that their teenage daughters are provided with 'the Pill' — not because having illicit intercourse is wrong, but because pregnancy is unwanted. Such an attitude is, perhaps, not surprising when it is recalled that in Queensland the illegitimacy rate is just over ten per cent of all births. George Bernard Shaw's Eliza Doolittle (*circa* 1912) thought the suggestion that she have a bath in private with her clothes off was indecent,

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2 *Ibid.*, pp. 101-102.
3 316 P. 2d 755 (California, 1957).
4 *Ibid.*, p. 758.

> so she hung a towel over the bathroom mirror. One wonders what she would have thought and said to a suggestion that she wear in public one of today's minuscule and socially accepted bikinis, held miraculously in place apparently with the aid of providence, and, possibly, glue.
>
> The point I have, perhaps too laboriously, been trying to make is that notoriously the social judgements of today upon matters of 'immorality' are as different from those of last century as is the bikini from a bustle.[5]

In England the law is governed by a case decided about two years before Eliza Doolittle had her bath. The case is *Upfill* v. *Wright*.[6] There the plaintiff let a flat to the defendant, a spinster. The plaintiff sued to recover rent. The defendant said that she was a prostitute and that she took the flat for the purpose of receiving gentlemen there. The plaintiff's agent, who let the flat, said that he did not know that the defendant was a prostitute until later, but that at the time of letting he knew that she was the kept mistress of a solicitor. The plaintiff's claim was dismissed. Darling J. said:

> The flat was let to the defendant for the purpose of enabling her to receive the visits of the man whose mistress she was and to commit fornication with him there. I do not think that it makes any difference whether the defendant is a common prostitute or whether she is merely the mistress of one man, if the house is let to her for the purpose of committing the sin of fornication there. That fornication is sinful and immoral is clear. The Litany speaks of 'fornication and all other deadly sin', and the Litany is contained in the Book of Common Prayer which is in use in the Church of England under the authority of an Act of Parliament.[7]

On these facts, showing a prostitute receiving visits from a man who is keeping her as his mistress, the decision would be the same even after Stable J.'s decision. But there are various kinds of extra-marital cohabitation. Some, Stable J.'s judgment shows, are not immoral. Stable J. referred to the action of the legislature. This, however, is not a universal test. It is trite law that some things may be legal, yet immoral.

In *Aroomoogum Chitty* v. *Lim Ah Hang*,[8] an action to recover money lent for the purpose of keeping a brothel going, Cox C.J. said:

> Mr. Koek contended that in this Colony the trade was not illegal and called my attention to the Women and Girls' Protection Ordinance No. XIV of 1888 which provides for the Registration of Brothels, but I cannot accept that argument and I hold as I have already said that when the maxim *ex turpi causa non oritur actio* applies, no action lies.[9]

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5 [1973] Qd. R. 93, p. 104.
6 (1910) 103 L.T. 834 (original version of Darling J.'s judgment); [1911] 1 K.B. 506 (revised version of Darling J.'s judgment).
7 [1911] 1 K.B. 506, p. 510.
8 (1894) 2 S.S.L.R. 80.
9 *Ibid.*, p. 82.

Lastly, Stable J. held that, if the contract was illegal, the parties were not *in pari delicto*. Stable J., referring to the plaintiff, said:

> He was caught by a cunning and ruthless woman who on his acceptable evidence — not challenged, not contradicted — said that she had to do what she did so that she would have a place for her husband, and that he was not the first man taken for everything he had. This can only mean that the plaintiff had been, in his ignorance of what he was up against, subjected to a scheme designed to fleece him of his property. I find it hard on the facts as I see them to regard the plaintiff as being, if the contract was illegal, equally at fault with the defendant. I question that her position is better than his so as to preclude his recovery of his property.[10]

Stable J. made this order:

> I find and declare that the plaintiff is entitled to an estate in fee simple of the land described in Certificate of Title No. 360868 Volume 1914 Folio 208 being Subdivision 102 of Portion 241 Country (*sic*) of Stanley Parish of Enoggera City of Brisbane containing an area of 16 perches free from encumbrance. *I order that the defendant within thirty days execute and deliver to the plaintiff or his solicitor all documents necessary to have an estate in fee simple in the said land registered in the office of the Registrar of Titles at Brisbane in the name of the plaintiff free from encumbrance.* I further order that the defendant her servants and agents be restrained and she and they are hereby restrained until further or other order from selling transferring or otherwise dealing with the said land except in pursuance of this order. Further order that the defendant pay the plaintiff's costs of the action to be taxed (emphasis supplied).[11]

It will be recalled that the plaintiff's third condition was 'that if she ever went back to her husband she would on principle deed the house back to me'. What would have happened if the plaintiff's action had been classified as an action for specific performance? If the contract was illegal, the plaintiff's claim would have failed. An action for specific performance is an action to enforce the contract. In an action to enforce the contract it does not matter whether the parties are *in pari delicto*. A guilty party cannot enforce the contract. It may well be that the defendant is more guilty. But this does not improve the plaintiff's position.

In *Tierney* v. *Kingsley Distributors Pty. Ltd.*[12] a written agreement made between vendor and purchasers contained a clause that 'the retail selling price of the Television Artscope Magnifying Lens shall at no time be less than fifteen guineas'. This clause contravened s.62 (2) (a) of the *Profiteering Prevention Act*, 1948-1959, which prohibited a condition that the purchaser would not sell or supply the goods at less than a stipulated sum. The purchasers claimed damages arising from the

10 [1973] Qd. R. 93, pp. 104-105.
11 *Ibid.*, p. 107.
12 [1967] Qd. R. 604.

vendor's repudiation. The vendor pleaded illegality. The purchasers contended that s.62 (2) (a) was designed to protect the buyer. Douglas J. said:

> It seems to me that the purpose of s.62 (2) (a) is to protect the general public from the consequences of agreements between persons, be they seller or buyer, or supplier or person supplied, who between them seek to come to the type of agreement specified in s.62 (2) (a). It is not designed to protect the buyer, or person supplied.
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> Should it be possible to construe the section in the sense argued for on behalf of the plaintiffs, I do not think that the rule above stated from *Browning* v. *Morris* would be of assistance to them. Under the rule in that case the only factor which would give the plaintiffs a right of recovery would be that they were not *in pari delicto*. This does not, as it were, restore the agreement to life so that an action for damages for breach of agreement can lie. The only remedy which the plaintiffs would have is by way of an action for money had and received.[13]

The same opinion was expressed in *Severance* v. *Knight-Counihan Co.*[14] The case concerned a contract for sale of an employer's goods to his employee, made to defraud his creditors. The employee sought to enforce the contract. He contended that he was not *in pari delicto* because he acted under the influence of his superior. Traynor J. said:

> If the parties are not *in pari delicto* the party who is only slightly at fault can also recover money paid under an executory contract. ... Such relief is even granted to a party equally at fault, if he repudiates the contract before the illegal part of the bargain is executed.... The granting of relief, however, to one who repudiates an illegal contract is entirely different from granting relief to one who seeks to enforce it. A court will not enforce an illegal contract merely because one party's fault was slighter than the other's.[15]

Stable J. must have classified the action as one analogous to an action for delivery up and cancellation of documents. The case which Stable J. cited in this passage was one where the court set aside a conveyance executed under a champertous contract:

> On the facts I do not hold the plaintiff as being *in pari delicto* with the defendant, assuming the agreement to have been illegal. In such a case it was laid down by Knight-Bruce L.J. in *Reynell* v. *Sprye* (1852) 1 De G. M. & G. 660 at p. 679; 21 L.A. (*sic*) Ch. 633, at p. 651; 42 E.R. 710, at 717, that where the parties to an illegal contract, or one against public policy, are not *in pari delicto*, and public policy is considered as advanced by allowing either, or at least the more excusable of the two to sue for relief against the transaction, relief is given to him.[16]

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13 *Ibid.*, p. 608.
14 177 P. 2d 4 (California, 1947).
15 *Ibid.*, p. 9.
16 [1973] Qd. R. 93, p. 105.

The order to execute and deliver documents was a technicality rendered necessary by the conveyancing law. The order might look like an order for specific performance, but it was not such an order.

E. K. Teh

THE DEMISE OF SEARLE v. WALLBANK

(*Jones* v. *McIntyre & Others*[1])

Lawyers nowadays recognise three primary judicial control devices to avoid liability in actions for Negligence. The first is found in the judge's question whether harm to the plaintiff is sufficiently in prospect that a duty of care for him arises; the second is the remoteness issue, whether the damage complained of is (since *Wagon Mound No. 1.*) unforeseeable,[2] and the third rests in the judge's responsibility to see that the state of the evidence can support a jury finding in favour of negligence.[3] Although issues of law, the close dependence such questions bear to the particular facts of the case deprives them of the precedent power to govern other cases. One must also concede, consistently with relevant post-*Donoghue* v. *Stevenson* decisions, that the general theory of Negligence appears limited by exceptional non-duty areas. Whether these immunity areas are fundamentally exceptional to or really inconsistent with the general theory is itself a major controversy in contemporary tort law, and one where various arguments are currently jostling for influence.[4] But the authorities which presently mark out these areas must raise in places the issue whether we are in the realm of some such non-duty area. This issue presents no control device for the court because it depends on the state of precedent whereas the other issues depend on the state of the facts.

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1 1973 *Tas. Law Soc. Rep.* No. 2.

2 The distinctness of this issue from the first is secured by the degree of sophistication available in the categorization of kinds of damage and methods of causing damage implicit in post-*Wagon-Mound* decisions. Nevertheless, there are also cases where it seems a matter of taste which rationale one invokes as *e.g.*, in those financial loss cases where all the financial loss caused is too remote.

3 An alternative means of applying what is substantially the same control is to emphasize that the relevant standard of care precludes a finding of negligence in the circumstances. Of course the standard must be left in general terms, any particularisation will usurp the jury function.

4 The status of financial loss actions must be regarded as uncertain despite *French Knit Sales Ltd.* v. *N. Gold & Sons Ltd.* [1972] 2 N.S.W.L.R. 132: See *Spartan Steel* v. *Martin & Co.* [1972] 3 W.L.R. 502 and *Dutton* v. *Bognor Regis Urban District Council* [1972] 1 Q.B. 373. The old doctrine of 'tumble-down houses' affirmed in *Cavalier* v. *Pope* [1906] A.C. 428 is probably no longer good law: *Dutton* v. *Bognor Regis* (*supra.*), and the long-troublesome immunity against trespassers is almost certainly ended: *Herrington* v. *British Railways Board* [1972] 2 W.L.R. 537. Contemporary judicial approaches to this meta-theoretical problem of Negligence law remain dogmatic and unimaginative. Contrast *e.g.*, the importance of the general issue of law involved with the various resolutions proposed by the Lords in *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] A.C. 1004.

In the years immediately succeeding *Donoghue* v. *Stevenson* we would not expect to find any clear appreciation of the nature and relationship of these various conceptual matters, for it was only at some indeterminate stage between *Grant* v. *Australian Knitting Mills*[5] in 1936 and *Bourhill* v. *Young*[6] in 1943 that the general theory expressed in Lord Atkin's broad proposition was taken for granted. Even that latter case exhibits conceptual confusion in the various rationales given for the non-recovery of the pregnant fishwife. But for a while at least, until authoritative courts reaffirmed previous non-duty areas with a full regard for that general theory, we would excuse any judge for blurring the distinction between non-duty areas exceptional to the theory and non-duty areas merely awaiting its application but handicapped by a factual context such that sufficient risk of harm or real negligence would be very difficult to prove. This consideration would also explain why in 1916, in circumstances of largely uninclosed highway lands with little motor-driven traffic, a judge might confidently pronounce that risk of harm to road users by wandering animals is unrealistic, and even assert this as a matter of law.[7] In a pre-*Donoghue* v. *Stevenson* sense this could be said without ambiguity, but after that case the assertion might simply exemplify predictable applications of the foreseeability question. The standard nature of this factual evidence might well leave the foreseeability issue (in post- *Donoghue* v. *Stevenson* terms) an invisible one, in much the same way that we do not expect judges explicitly to incant foreseeability in such standard 'harm' areas as manufacturing and motor-car driving at the present time.

Although these considerations should caution us against any superficial reading of *Searle* v. *Wallbank*,[8] it has taken nearly twenty-six years to propound the view that the case was never an authority for the general proposition of law for which it is famous, and that the contrary supposition rested on a simple failure to appreciate these subtleties. The major text-book writers[9] have criticised the decision precisely because they accepted its authority for the no-duty ruling,[10] but contended that such a ruling was a mistaken rigidification of a once generally true

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5 [1936] A.C. 85.

6 [1943] A.C. 92.

7 *Heaths' Garage Ltd.* v. *Hodges* [1916] 2 K.B. 370 *per* Neville J. at 383, 'the prima facie harmlessness of domestic animals as frequenters of the highway is, I think, established as a legal doctrine . . .'

8 [1947] A.C. 341.

9 Except Heuston, editor of *Salmond on Torts*, 15th ed., who thinks it '. . . well suited to the robust conditions of life in the English countryside, although less suited to crowded urban areas', and doubts the need for reform (p. 447). James, *General Principles of the Law of Torts*, 3rd ed., also supports the doctrine as 'practical' (p. 266). Neither discusses the point in issue, which lies in the disposition of responsibility for securing such a policy, and the precise nature of the controls appropriate to its pursuit.

10 Fleming, *Law of Torts*, 4th Ed., p. 309; *Winfield and Jolowicz on Torts*, 9th ed., p. 400; Street, *The Law of Torts*, 4th ed., p. 23; Higgins, *Elements of Torts in Australia*, p. 195; Millner, *Negligence in Modern Law*, p. 215. See also Goodhart in (1950) 66 *L.Q.R.* 456.

proposition of fact into a rule of law.[11] Consistently, recent decisions in the New South Wales District Court,[12] the New Zealand Court of Appeal,[13] the Court of Session of Scotland[14] and the Supreme Court of Canada[15] have all approached the question on the assumption that *Searle* v. *Wallbank*, whatever its merits, unquestionably ruled out the possibility of Negligence liability for straying animals.

Despite this solidarity of opinion, Graham Kelly's reconsideration[16] of the judgments in that case has set up a strong case that this criticism is ill-founded and has thus served ironically to perpetuate a generally denounced[17] rule. Kelly's analysis, aided by some hints in recent English decisions, has now been taken up by Chambers J. of the Tasmanian Supreme Court, who has ruled explicitly that:

> ... all the opinions expressed in the House of Lords contemplated the possibility of liability in the respondent for negligence in allowing his animal to stray on to the highway, but all members of the House were for dismissing the appeal on the ground that in the particular circumstances there was no evidence to support a finding of negligence.[18]

In support of this somewhat startling conclusion Chambers J. follows Kelly's analysis of the three judgments delivered in the Lords. Dealing first with Viscount Maugham, he brings out the considerable emphasis this Lord placed on the reasonableness of the land owner's behaviour in the circumstances, and finds additional Court of Appeal support[19] for the conclusion that Viscount Maugham's decision was either one 'of fact' or a decision 'on the facts'. Whilst the passages cited undoubtedly support this interpretation, a certain ambivalence arises from the following connected assertions:

> ... the above considerations seem to me to be conclusive to show that no such duty to road users as the appellant relies on could possibly have existed before the advent of fast traffic on made-up roads.... No facts in my opinion have been established which would tend to show that farmers and others at some uncertain

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11 Or, and additionally, a treatment of predictable but particular inferences of law as if they were required by legal precedent.

12 *Reyn* v. *Scott* (1968) 2 D.C.R. (N.S.W.) 13; noted 43 *A.L.J.* 171. See also Mason J.A. (*obiter*) in *Hill* v. *Clark* [1969] 2 N.S.W.R. 733, at 741.

13 *Ross* v. *McCarthy* [1970] N.Z.L.R. 449.

14 *Gardiner* v. *Miller* [1967] S.L.T. 29.

15 *Fleming* v. *Atkinson* (1959) 18 D.L.R. 81.

16 'Animals and Highways: Misinterpreted Cases and Ill-conceived proposals', (1972) 46 *A.L.J.* 123.

17 *E.g.*, *Millner*, a 'pusillanimous decision', a 'ludicrous eccentricity', *op. cit.*, at 215; *Fleming*, a 'singular pique of doctrinaire conservatism', *op. cit.*, at 309.

18 *Jawes* v. *McIntyre & Others*, 1973 *Tas. Law Soc. Rep.* No. 2 at p. 6. The action arose out of the collision of two motor vehicles travelling in opposite directions on a public highway. It was alleged that the adjoining landowner had negligently failed to fence in his cow, whereby its sudden appearance on the highway caused one driver to veer to the wrong side and so bring about the collision.

19 *Per* Pearson L.J. in *Ellis* v. *Johnstone* [1963] 2 Q.B. 8, at 30; *per* Cohen L.J. in *Wright* v. *Callwood* [1950] 2 K.B. 515, at 525.

> date in our lifetime became subject for the first time to an onerous and undefined duty to cyclists and motorists which never previously existed.[20]

Viscount Maugham's opinion is further clouded by his emphasis on the impossibility of specifying an intelligible standard of care as a basis for not acknowledging a duty area. Although a matter of some controversy[21] this proposition has a respectable pedigree.[22]

Lord Porter concluded that he would:

> ... dismiss the appeal primarily because no negligence on the part of the respondent has been proved, but also, on the ground that on the facts established, it has not been shown that he was in breach of any duty which he owed to the appellant.[23]

The interposition of 'on the facts' lessens ambiguity by indicating that the absence of duty was a conclusion based on the narrower issue of foreseeability. The remaining judgment was delivered by Lord du Parcq who expressly accepted that a duty of care to avoid negligence was available subject to certain (unspecified) reservations.[24] Lord Thankerton,[25] in the style of the times, said he agreed with Lords Porter and du Parcq as well as with Viscount Maugham. Lord Uthwatt, as Viscount Maugham expressed it, concurred 'in the judgment which has been proposed'.[26]

There appears therefore to be a strong case that at least two and arguably all of the delivered judgments reach their decision without reliance on the immunity doctrine and are in fact inconsistent with it.[27] Having thus agreed with Kelly's analysis, Chambers J. nevertheless concluded[28] that 'English Law' presently required proof of 'special circumstances'[29] to support such a duty. One might quibble with this conclusion precisely because this revelation of *Searle* v. *Wallbank* releases English Courts from the supposed no-duty rule, in which case whether or not it is a matter of 'realism'[30] it may well be correct legal theory so

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20 [1947] A.C. 341, at 352, 353.

21 *E.g.*, not accepted by Fletcher-Cooke, 'Responsibility for Animals Straying on to Highway', (1947) 10 *M.L.R.* 324, 325.

22 *E.g.*, the classical exposition by MacDonald J. in *Nova Mink Ltd.* v. *Trans Canada Airlines* [1951] 2 D.L.R. 241.

23 [1947] A.C. 341, at 357.

24 *Ibid.*, at 359.

25 *Ibid.*, at 353.

26 *Ibid.*, at 353.

27 The New Zealand Court of Appeal, *per contra*, has stated that *Searle* v. *Wallbank* was taken to the House of Lords precisely to test whether *Donoghue* v. *Stevenson* had affected the earlier view of the law, and was so treated by the Lords: *Ross* v. *McCarthy* [1970] N.Z.L.R. 449.

28 1973 *Tas. Law Soc. Rep.*, No. 2, p. 13.

29 Based on a predictable but not particularly successful device for creating exceptions to *Searle* v. *Wallbank*: *Wright* v. *Callwood* [1950] 2 K.B. 515.

30 This depends on one's view of the general attitudes to such questions current in the Court of Appeal and House of Lords. At the very least they would seem indeterminate: *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] A.C. 1004.

to conclude.[31]

This reluctance was nevertheless responsible for the second noteworthy feature of *Jones* v. *McIntyre & Others*, for Chambers J. expressly refused to follow the 'English position' so described. He took the strong and fairly novel ground that, on the supposition that the House of Lords decision, although wrongly represented, was against him, nevertheless it did not technically bind him and he could and therefore did reject it.[32] Such a view has been on the cards since the High Court's advice in *Parker* v. *The Queen*[33] that it would no longer defer its own interpretation of common law doctrine to that of the House of Lords, and since the Privy Council's 1967 ruling that substantive common law doctrines might be different in Australian States from those prevailing in the United Kingdom.[34] This latter ruling has recently led Cross D.C.J. of the New South Wales District Court similarly to conclude[35] that *Searle* v. *Wallbank* is inapplicable to Australian conditions. Although the Privy Council's view has been emphasized more recently by the Chief Justice of the High Court of Australia in the context of occupier/trespasser doctrines,[36] the High Court itself has so far avoided the problem as it affects State Courts in relation to the House of Lords. Of the High Court judges in *Skelton* v. *Collins*[37] only Owen J. faced the question. He left the somewhat equivocating advice that, where a House of Lords decision was relevant, but no High Court decision was directly in point, then the State Court '... will no doubt follow the decision'.[38]

The judgments of Cross D.C.J. and now Chambers J. suggest that this observation may survive more as hopeful anticipation than as authoritative directive. As the *Australian Law Journal* points out, the

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31 An anachronism, in that the *Animals Act* 1971 now reverses *Searle* v. *Wallbank*. Interesting issues of legal theory underlie the assumption. Some lawyers would want to argue that the error's long persistence would tend to validate it. Although a common proposal where conflicting cases are in question, there is no authority in the theory of precedent for so treating a mistaken interpretation. Again, one might insist that the subsequent Court of Appeal decisions applying *Searle* v. *Wallbank* would at least bind the English High Court and lesser tribunals, simply on their own weight. But this overlooks the possibility that the High Court can (and perhaps must) apply the reasoning to be expected from the next Court of Appeal decision *i.e.*, that this no-duty doctrine is an unauthorized departure from the general theory laid down by the House of Lords in *Donoghue* v. *Stevenson* and is therefore inconsistent with rather than exceptional to that theory. Despite the antagonism shown when it went to the House of Lords, *Broome* v. *Cassell & Co. Ltd.* ([1971] 2 Q.B. 354) remains an important reminder of this fundamental problem of reconciling 'correct' with 'authoritative' expositions. For another example, where the lower court's bid was vindicated, see *Skelton* v. *Collins* (1966) 39 A.L.J.R. 480.

32 1973 *Tas. Law Soc. Rep.* No. 2, at 13.

33 (1963) 111 C.L.R. 610.

34 *Australian Consolidated Press Ltd.* v. *Uren* [1969] 1 A.C. 590.

35 *Reyn* v. *Scott* (1968) 2 D.C.R. (N.S.W.) 13.

36 *Cooper* v. *Southern Portland Cement Ltd.* (1972) 46 A.L.J.R. 302.

37 (1966) 39 A.L.J.R. 480, decided after *Parker*'s case but several months before the Privy Council judgment in *Uren*'s case.

38 *Ibid.*, at 498. The headnote's suggestion that Taylor J. and Windeyer J. support this proposition is not clearly indicated in their respective judgments.

subsequent statement in *Uren*'s case, that the law may gain its impetus from any one of the parts of the Commonwealth, suggests that the preference shown by both judges for the recent view of the Full Supreme Court of Canada over that of the older House of Lords, may be taken as a case of 'responsible judicial insubordination, exercised to good ends and for acceptable reasons'.[39]

Max Atkinson

39 (1969) 43 *A.L.J.* 171. This case-note has avoided consideration of the merits of the rule in *Searle* v. *Wallbank*, now abolished by statute in England and New Zealand, and by common law in Canada and Scotland. The general tenor of Australian views has been in favour of ordinary negligence. This simplistic approach is questioned in Morison, Sharwood & Phegan, *Cases on Torts*, 4th ed. at 811, where the authors suggest that some legislative consideration of the standards appropriate to urban and rural areas may be preferable to a system requiring *ad hoc* decisions on the facts of each case. The question is likely to remain open pending the fundamental re-examination of Australian compensation schemes now current under the National Commission on Compensation and Rehabilitation.