AUSTRALASIAN LAW TEACHERS' ASSOCIATION ANNUAL CONFERENCE 1993 OPENING ADDRESS

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It is four years, two months and two weeks since last I had the privilege of addressing the annual conference of this Association, then using the acronym AULSA[1]. It seems only yesterday, although in truth yesterday was spent on issues concerning Maori fishing rights — an illustration of the operation of the principle of fairness in grey area cases, which was my theme in 1989. In the meantime the Association has become ALTA but there is little I can change as to fairness, except perhaps to add that in the present context recognition should be given to the avowed approach of the High Court of Australia.

Confronted as all Courts are with ever more difficult issues, the High Court under Sir Anthony Mason is becoming, in my respectful opinion, more candid and hence more overtly alive to the need to expound and give effect frankly to basic principles and values. With something not far from execration from more extreme elements in the Australian legal world, the High Court has moved in the direction of granting redress against unconscionable conduct. In different fields of law the movement is exemplified by the cases of *Baumgartner*,[2] *Waltons Stores*[3] and *Mabo*.[4] The first two of those cases preceded the 1989 conference, but internationally it takes time for approaches to make impacts and in any event comparative law was not the subject in 1989. In *Mabo* the High Court had to grapple with issues concerning indigenous peoples, just as we in New Zealand have had to do from a somewhat different point of view in the line of Treaty of Waitangi cases beginning in 1987.[5] To some extent the responses have been animated by the same spirit. Nor have the public reactions been dissimilar.

The main point that I tried to make in 1989 was recognition that deciding a new question — it was unsettled questions to which reference was made throughout — may not be primarily a process of deduction; the search is rather for the solution that seems fair and just after balancing all relevant considerations. Candour in that respect was urged. That might seem innocuous enough. Putting aside candour perhaps, it is hardly more than an account of how the common law has usually worked. Yet it gave rise to no little published indignation on the part of those who supposed, possibly without actually listening to or reading what had been said, that what was being proposed was the abandonment of precedent. Further, as discovered

1 For the speech on that occasion, see 19 Victoria University of Wellington Law Review 421.
2 *Baumgartner v Baumgartner* (1987) 164 CLR 137.
3 *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387.
4 *Mabo v The State of Queensland (No 2)* (1992) 175 CLR 1.
5 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641; *New Zealand Maori Council v Attorney-General* [1989] 2 NZLR 142; *Tainui Maori Trust Board v Attorney-General* [1989] 2 NZLR 513; *Te Runanga o Muriwhenua v Attorney-General* [1990] 2 NZLR 641; *Te Runanga o Muriwhenua v Attorney-General* CA 110/90; judgment 28 June 1990 (unreported); *Her Majesty's Attorney-General v New Zealand Maori Council* CA 175/89; judgment 17 August 1990 (unreported); *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129; *Attorney-General v New Zealand Maori Council (No 2)* [1991] 2 NZLR 147; *New Zealand Maori Council v Attorney-General* [1992] 2 NZLR 576; *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301.

when preparing a speech recently for the Queensland Bar Association, the approach which it embodies got me into the bad books of the authors of that good book on Australian Equity, *Meagher, Gummow and Lehane*.

It was half–flattering to find how much condemnation I attracted in their third edition, somewhat consoling to find that as an ignoramus the authors appeared to classify me with Lords Diplock, Denning and Goff. At the Noosa conference I felt unable to promise them to go straight in future and attempted some feeble defence. The President of the Association pointed out that Meagher JA was recognised in Australia as one of the greatest lawyers of the eighteenth century. The editor of the *Law Quarterly Review* is at the present Conference, happily, and he will confirm that we have both formed the view that it would be lacking in piety to publish my crude observations in his journal.

Some developments relevant to the themes of this Conference have occurred since 1989. In touching on these, let mention first be made of what I now have time to deal with least. The philosophical reflections on concepts and morality in criminal law which, according to the programme, Professor Robinson and Professor Colvin are to present are certainly of profound interest at an abstract level. In the day–to–day administration of the criminal law — and over 21 years on the bench something approaching half my time has probably been spent on this — they do not seem to loom large in importance in relation to criminal guilt. The main trouble is not the criminal law but the criminals; not the definition of crimes but their punishment. It is otherwise as to sentencing. Thus the New Zealand Court of Appeal has spent much time recently on the world–wide problem of sentencing for child abuse and incest: a joint judgment based on a good deal of international material is hoped to be delivered before long. A few years ago there was a Bill, rather half–baked many lawyers thought, intended to revise our Criminal Code. Something better is now available, thanks to the labours of Sir Maurice Casey's Committee, but whether the game of recodification is worth the candle is possibly still not totally clear.

Professor Francis Reynolds QC and Professor Julie Maxton — how agreeable it is to be able to use those descriptions this year — and Professor John Fleming — how agreeable it is to welcome again the international doyen of tort law — are an outstanding and contrasting collection of scholars to deal with contract, tort and equity. I will venture only two observations. First, subject to illegality, public policy and analogous restrictions, the terms and intent of a binding contract must surely be paramount over any other rules. Secondly, the substance of an obligation, rather than its theoretical derivations and the remedies appropriate for its breach, should surely be the starting point. This was brought home when recently I had the opportunity of sitting with and then next day seeing in action from a different perspective the Appellate Division of the Supreme Court of South Africa. When I had the privilege of sitting as a guest on their bench — the first overseas Judge in living memory so I was told, such has been their isolation — I was impressed with the skill, economy and dignity with which a tax case was handled.

Next day a differently constituted bench created a rather different impression. A doctor who had learnt that a patient had Aids disclosed this to local medical colleagues on the golf course. They may have told their wives; at any rate the rumour spread. There was also a suggestion that the doctor's receptionist may have been responsible. Was the doctor liable in damages for breach of confidence to the estate of his patient, now deceased?

The essential question would appear to be, and so the international audience of Judges and practitioners generally thought, what was the substance of the physician's duty of confidence and what were its exceptions. Yet at the outset of the hearing at least an hour was consumed in a minute analysis of the pleadings and debate whether the cause of action was delict, contract or something else. This was the reverse of the process that we in New Zealand followed in the Spycatcher case,[6] also concerned with breach of confidence.

The greatest change in New Zealand law in the four years or so has been the enactment of the New Zealand Bill of Rights Act 1990. The consolidating and amending Human Rights Act 1993 is companion legislation. While the Bill of Rights Act refers specifically to New Zealand's commitment to the International Covenant on Civil and Political Rights, and while the New Zealand Act is not declared to be supreme law and may be overridden by sufficiently express statutes, the Canadian Charter of Rights and Freedoms was probably the precedent most influential in its content. Probably, too, Canadian jurisprudence has been that which the New Zealand Courts have most consulted in the many cases already coming before us under the 1990 Act. We do not automatically follow Canadian decisions, but we certainly profit from them. The new Human Rights Act contains what may be the most sophisticated and elaborate list of prohibited grounds of discrimination (more than 50) to be found in any legislation anywhere. Its enforcement system, by way of mediation or more if necessary, based on the structure of Human Rights Commission, a distinct Complaints Review Tribunal and full rights of appeal to the ordinary Courts, has unique features. The major significance of the two measures made very appropriate the planning for opening papers by Mr Justice Tarnopolsky and Margaret Mulgan, the Chief Human Rights Commissioner.

The Association is fortunate in having secured at short notice the participation of Professor Webber. A brief conversation with him has been enough to satisfy me on two cardinal points. He understands that for the Judges human rights jurisprudence calls for an approach subtly yet unmistakably different from more traditional and I think rather easier adjudication. And he also understands that for the Judges these cases are hard and sometimes worrying work.

Peter Bailey may be expected to touch on the stimulus and the tensions created by the High Court of Australia's new and bolder approach to fundamental constitutional values. After all, largely a Bill of Rights such as we have articulates concepts underlying democracy. It encourages the Courts to give effect to those values but its absence does not emasculate the Courts. Indeed despite the New Zealand Bill of Rights the New Zealand Courts can be helped by the thinking of the High Court of Australia in relation to democratic rights. This is illustrated by the *Wharekauri* case.[7] In holding that a Court will not seek either to compel or to restrain the introduction of a Bill into Parliament, we saw this as a corollary of the principle identified by the High Court in the *Australian Capital Television* and *Nationwide News* cases, to be discussed by Mr Bailey, that an implied right to freedom of expression in relation to public and political affairs necessarily exists in a system of representative government.

6 *Attorney–General for England v Wellington Newspapers Ltd* [1988] 1 NZLR 129, where the report of the three stages of the case begins.
7 See footnote 5.

The news of the death of Walter Tarnopolsky has come as a blow. As well as office as a Judge of the Ontario Court of Appeal he was distinguished on a number of other grounds. The most noteworthy are perhaps his consultant's role in the drafting of the Canadian Charter and his membership of the United Nations Human Rights Committee. He was a person of international renown but I had not met him before the recent South African conferences on human rights, a Judicial Colloquium at Bloemfontein and a linked gathering of the Centre for Advanced Legal Studies of the University of Witwatersrand. He was a man with whom it did not take long to establish friendship. I was so absorbed by his conversation during an aircraft journey that my guidebook on South Africa was left in the plane. Later I talked with him after his return from visiting a game park; he was truly excited by that experience and seemed so full of life and enthusiasm. It is a tragedy that he is gone.

Tarnopolsky would have agreed that one outstanding point emerged from Bloemfontein. In the awesome problems facing the attempt to reconstruct South Africa the central part envisaged for a judicially enforceable Bill of Rights and a set of declared Constitutional Principles is extraordinarily revealing. It is testimony to the deep–seated sense that, while economic progress is vital, in a society of clashes of interests and differences of races a system of independent adjudication is no less so. Values have to be proclaimed and protected. An independent judiciary and legal profession, including its academic branch, is their ultimate protection. It seemed that South Africans, perhaps not of all but at least of most persuasions and racial origins, recognise as much. This is one further significant piece of evidence that as civilisation matures the role and rule of law are increasingly seen as at its heart.

It is to be expected that this will be a lively and far from quiescent conference. May I respectfully ask you to remember two things. First you, primarily teachers of law, are exercising the freedom of speech which we all cherish; but with your educational responsibilities it is accompanied by a kind of trusteeship. Secondly, whatever differences may emerge on matters broad or narrow (and I confidently predict that there will be many) it is the permeating force of law, its underpinning of society, which we must all be trying to serve.