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LAW QUARTERLY REVIEW

LEGAL OBLIGATIONS AND LEGAL REVOLUTIONS

The Hon. Michael Kirby AC CMG

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ABSTRACT

In this article, the author reviews changes he has seen in the law over 34 years of judicial service in Australia. He identifies ten 'revolutions': 1) the decline in the influence of English courts and the rise of disunity in the common law; 2) the growing impact of European and human rights law, but not in Australia; 3) the increasing sensitivity to discrimination and unequal treatment in the law; 4) the reduction of acceptance of formalism; 5) the growth in comparative law analysis; 6) the recognition of the limits to pure realism; 7) the decline in jury trial; 8) the increase in statutory law at the cost of the common law; 9) the importation of statutory limits on civil recovery; and 10) the recognition of the need for values in the law. Many of the developments in contemporary law were not mentioned, or even perceived, 50 years ago. The author concludes that there is no reason to believe that the legal revolutions will abate; raising the question about the coming revolutions that we do not yet recognise.

I served as a judge in Australia for 34 years.[1] For good measure, I was commissioned in Solomon Islands concurrently for 3 years.[2] The

[*] Paper for Obligations VIII, Cambridge University, England, 19-21 July 2016. The author thanks Professor Sarah Worthington for the invitation and Dr James Goudkamp of Keble College, Oxford University, for many suggestions. The latter was his associate (clerk) in the High Court of Australia. His concept influenced some parts of this paper although responsibility for it is that of the author alone.

[**] Justice of the High Court of Australia 1996-2009; Editor in Chief, *The Laws of Australia*, (2009-)

[1] Deputy President of the Conciliation and Arbitration Commission (1975-83); Judge of the Federal Court of Australia (1983-84); President of the Court of Appeal of New South Wales (1984-96); Justice of the High Court of Australia (1996-2009).

earliest purchases I made of a published legal series was typical of a young antipodean law student venturing on legal studies in 1958. The red buckram *Australian Law Journal* contained much news on legal developments in Australia, England and occasionally elsewhere. It also provided detailed reports of decisions of the High Court of Australia and of Australian appeals to the Judicial Committee of the Privy Council. The black buckram, 3 volumed *Weekly Law Reports* brought to my home a constant stream of the authentic voices of the English law, expressed in the Privy Council, the House of Lords (HL), the Court of Appeal of England and Wales and other English courts.

This was how it was in those days in Australia, 50 years after the establishment of nationhood by our Constitution.[3] If I wanted to know anything about the law of obligations (the judge-made law of contracts and of tort) I had it at my fingertips. Statute law, whether Australian, English, or from anywhere else, was not deemed worthy of my time; or at least of the investment of my meagre resources.

I still have those volumes on my shelves; brought up to date over the inferring 65 years. Later the *Commonwealth Law Reports,* the *New South Wales Law Reports* and other series were added. I even later condescended to statutes and legal encyclopaedias.

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[2] President of the Court of Appeal of Solomon Islands (1994-6).

[3] The *Australian Constitution* was enacted by the *Commonwealth of Australia Constitution Act* 1900 (Imp); 63 & 64 Vict. ch.12.

When I was still attending to my legal studies, Lord Parker of Waddington and, later, Lord Denning visited us in Sydney. Our law school class in those days rose in its place as the Law Lords entered the hall. We saw ourselves as a kind of branch office of the law of England. They were from Head Office. That is how we studied and practised law. Few commentators, even senior lawyers, at the time thought that this was odd. Fewer predicted how quickly it would change. But change it did. Today we can look back on the intervening years and identify the legal revolutions that have occurred in the interim. These revolutions have affected the law; including the law of obligations. If we recognise the revolutions, and acknowledge them in our minds, we will better understand the changes that have happened. We may even understand the further changes that are yet to come.

Nowadays, if I think of the law of obligations, my mind tends towards the obligations imposed by international law. By this I mean treaty and other binding international law, such as the *Charter* of the United Nations and the great treaties that have established the international law of human rights.[4] Although not laid down by treaty, there are other obligations that are now accepted as part of international law;[5] certainty as influential and persuasive.[6] Since my judicial retirement in 2009, I have been preoccupied with the obligations of nation states, intergovernmental bodies, international agencies, institutions and even corporations. The

[4] Including the *International Covenant on Civil and Political Rights* (ICCPR); *International Covenant on Economic, Social and Cultural Rights* (ICESCR); *Convention Against all Forms of Racial Discrimination;* the *Convention on the Elimination of Discrimination Against Women;* the *Convention on the Rights of the Child; The Refugee Convention* and so forth.

[5] Such as the *Universal Declaration of Human Rights* (UDHR), adopted and proclaimed by the General Assembly of the United Nations, Resolution 217A(III) of 10 December 1948.

[6] *Charter* of the Commonwealth of Nations, adopted by Commonwealth Heads of Government Meeting and signed by the Queen on Commonwealth Day on 11 March 2013. Available on the website of the Commonwealth Secretariat: *thecommonwealth.org/our-charter*.

obligations of the Commonwealth of Nations and its officials and citizens to comply with international law and to eradicate domestic laws that deprive Commonwealth citizens of equality and fundament human rights.[7] The obligations of United Nations member states to take effective measures against the HIV/AIDS epidemic, including as a price imposed for financial and other international aid.[8] The obligations of a particular state (North Korea) to comply with United Nations human rights treaties on human rights, most of which treaties that country has ratified but ignores.[9]

The obligations and entitlements[10] of pharmaceutical corporations and others concerning essential health care, [11] given the state of international law on the human right of people everywhere to access essential health technologies.[12]

There was comparatively little to help me on these international obligations in either the red buckram or black buckram volumes of the law books on my shelves as a student. The old books are certainly filled with discourse on the developments in the law concerning other legal obligations in Australia, England and other countries. So I must shift gears and return to the places that were once so familiar to me.

[7] Commonwealth of Nations, report of the Eminent Persons Group to the Commonwealth Heads of Government, *A Commonwealth of the People – Time for Urgent Reform* (CHOGM, Perth, October 2011).
[8] United Nations Development Programme, Global Commission on HIV and the Law, *Risks, Rights & Health*, New York, July 2012.
[9] United Nations, Human Rights Council, Report of the detailed findings of the Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea, A/HRC/25/CRP.1 (7 February 2014).
[10] UNDP Global Commission Report above n.8, 104 (recommendation 6.1).
[11] UNDP Global Commission report above n.8, 104 (recommendation 61.) See mandate of the High Level Panel created by the Secretary-General of the United Nations on Access to Health Technologies, November 2015.
[12] *UDHR*, Article 25.1 (Right to a standard of living adequate for health) and 27.2 (Right to the protection of the moral and material interests arising from any scientific… production of which he is the author). See also ICESCR, Article 12.

Necessarily, I will now look at them with different eyes. I will now see different things. It will be for other to assess whether the insights are useful to those whose lives are still preoccupied with municipal jurisdiction.

I have called my survey a study of revolutions. Although lawyers trained in the English law played a great part in many legal revolutions (the United States of America, Ireland and India spring to mind) for most of us the word 'revolution' congers up unpleasant notions. Revolutions mark not the continuity of law but the severance of what was and will be indefinitely. However, if I look back to the legal discipline in which I have participated since the 1950s – a space of 65 years – no other word seems suitable to describe the radical changes. It would be surprising in the extreme if such changes had not brought about many substantive alterations in the content of the law of obligations. And yet the broad features of that content remain remarkably similar and familiar. So what are the ten 'revolutions' that I would identify from my professional journey? This is not an exercise in nostalgia. It is a project for the analysis of legal dynamics

I. HL, JCPC AND DISUNITY OF THE COMMON LAW

By way of link to the English and Imperial judicial institutions, the Privy Council (JCPC) was actually a part of the Australian hierarchy from colonial times. There has never been an intercontinental court with such a vast and significant role in the judicial arrangements of so many countries.

One distinguished Australian judge (Hutley JA)[13] said, rightly in my view, that the JCPC on the whole, had acquitted itself very well in its Australian decisions because it linked our legal and judicial systems to a court of high standing and expertise and of undoubted probity. It connected our law to one of the great legal systems of the world at its metropolis. Its weaknesses (partly later discovered) were in areas such as the recognition of indigenous peoples' legal rights[14] or in comprehending the subtleties of federal constitutionalism. The representatives of the Australian settlers did not provide for a continuance of the JCPC in their original draft of the federal constitution. However, Joseph Chamberlain, and the British Cabinet, insisted. The result was sec. 74 of the *Australian Constitution*. It preserved appeals to the JCPC except in specified constitutional cases and it controlled any process of abolition. Inferentially this was, in part, done to protect British investments in Australia. But it had the advantage of promoting and overseeing the consistent development and application of the common law in colonies and dominions, conformably with understanding of that law as expressed in England.

The role of the House of Lords is not mentioned, still less preserved, in the Australian Constitution. However, for two reasons, up to the mid-1970s, it was treated as, effectively, part of Australia's hierarchy. The first reason was the realistic appreciation by Australian lawyers that the same judges who served in the HL also sat in the JCPC. Secondly, the leading judges of Australia, for utility and as part of their view of their

[13] F.C. Hutley, "The Legal Traditions of Australia as Contrasted with those of the United States" (1981) 55 *Australian Law Journal*, 63.
[14] Discussed in *Mabo v Queensland* [No.2] (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1, see *Anonymous* (1722) 2 PWms 75 [24 ER 646] (JCPC); *The Director of Aboriginal and Islanders Advancement v Peinkinna* (1978) 52 ALJR 286 at 291 (JCPC).

own professionalism, repeatedly applied HL authority and declared that the Australian courts should do likewise.[15] Even where the High Court of Australia had pronounced on the subject of a case, it was a "wise general rule of practice" that a conflict with authority of the HL should be resolved by following its statements on "matters of general legal principle".

The reasoning behind that conclusion was that the settlers had brought the common law of England to Australia. The HL was the highest authority on the content of that law in England. Therefore, its rulings should be obeyed. Nobody bothered much to consider the supervening command of the text of the *Australian Constitution* to discern a different autochthonous obligation. This was the era of the assumption of a single global common law for British societies. The search of the judges was to find and declare what it was. Those with the most reliable lamp to find the way were the highest judges of England.

Three developments then intervened. The first was political: a growing realisation, in and after the First World War, of Australia's separate nationhood and the adoption, for the dominions, of the *Statute of Westminster* 1931 which disclaimed the general power of the Imperial Parliament to enact statute law binding on them without their request and consent.[16] These steps confirmed the termination of the earlier parallel belief in a single Crown, with a single allegiance throughout the British Empire. Secondly, even Australian judges who were foremost in respect and deference to the law lords began to find decisions that they

[15] *Piro v W. Foster & Co Ltd* (1943) 68 CLR 313 at 320 per Latham CJ.
[16] Brought into force in Australia by the *Statute of Westminster Adoption Act* 1942 (Cth), s2 with retrospective effect to 3 September 1939.

regarded as unconvincing and even frankly wrong.[17] Thirdly, Justices were appointed to the High Court of Australia, who had served as Federal Attorney-General, inclined to read the Constitution with new eyes. They were more willing to doubt that the pronouncements in England were necessarily best for the differing social and economic conditions of Australia.[18]

In the heyday of the British Empire, the JCPC would not countenance divergence on the part of colonial courts from authority in England pronounced by the HL.[19] However, as time went on, the JCPC acknowledged the entitlement of the High Court of Australia to express its own opinions where those opinions conflicted with a HL precedent.[20] These developments did not stop the leading advocates at the Bar from citing decisions of the English courts as gospel. Right up to 1985, the Court of Appeal for England and Wales was almost uniformly described in Australia as "The Court of Appeal". Yet by 1966 there were separate courts of appeal in Australia. I was serving on the New South Wales court by 1984. It takes decades – sometimes longer – for lawyers' minds to be released from their law school notes and the report series that they purchase in their earliest student years.

The correct principle was eventually stated by the High Court of Australia in *Cook v Cook* in 1986.[21] Save for the special status of the

[17] As Dixon CJ said of *DPP v Smith* [1961] AC 290 in *Parker v The Queen* (1963) 111 CLR 610 at 632-633. Contrast his earlier opinion in *Wright v Wright* (1948) 77 CLR 191 at 210.
[18] The reference is to G.E. Barwick in "Precedent in the Southern Hemisphere" (1970) 5 *Israel Law Review* 1 at 28-29. See also Murphy J in *Viro v The Queen* (1978) 141 CLR 88.
[19] *Robbins v National Trust Company* [1927] AC 515 at 519.
[20] *Australian Consolidated Press Ltd v Uren* [1969] 1d 590; *Geelong Harbour Trust v Gibbs, Bright and Co.* See also S. Elias CJ, "Lord Bingham, a New Zealand Appreciation" in Mads Andenas and D. Fairgreive (eds), *Tom Bingham and the Transformation of the Law* (OUP, Oxford, 2009) at 241, 242 (hereafter Bingham, Transformation).
[21] (1986) 162 CLR 376 at 399.

JCPC, during the time when appeals from Australian courts went to London, no foreign or off-shore court, not formally part of the Australian constitutional judicature, now had any authority to bind the decision-making of Australian judges. That did not mean that reasons from overseas could not be cited. In fact, repeatedly English authorities are quoted to shine light upon local legal problems. This is particularly so in the fields of contract and tort law that remain largely governed by the common law. Professor Andrew Burrows was astonished to discover, in his empirical survey for Obligations VII, the extent to which reports from Canada, New Zealand and elsewhere cite and utilise English judicial reasoning.[22] However, this should not be surprising. It causes no astonishment to someone raised in common law jurisdictions overseas, outside the United States of America. The Americans have at least 52 jurisdictions of their own to draw upon. In any case they are bedevilled by an isolationist and exceptionalist mentality. We, who grew up with the JCPC, know that drawing in analogous areas upon the writings of highly intelligent and experienced judges in England is often extremely useful. The JCPC encouraged a mode of comparativist thinking and working. It is peculiarly suited to the context of global contracts and global torts. What is perhaps more surprising is that the process is now reciprocal. The reasoning of the JCPC and HL (and now the Supreme Court of the United Kingdom) increasingly draws upon decisions from other common law countries. Australian cases still sometimes lead the way in the area of torts and contracts.[23]

[22] A. Burrows, "The Influence of Comparative Law on the English Law of Obligations", Obligations VII, in published proceedings (forthcoming, 2016).
[23] Burrows, *ibid*, section (2) 'Results of Survey'. See also M.D. Kirby, "Australia's Influence on the House of Lords" in Blom Cooper, B Dickson and E. Drewry, *The Judicial House of Lords 1876-2009* (hereafter JHL), 339 at 345

Back in my student days, it was comparatively rare for the JCPC or HL to refer to overseas common law decisions, on the law of obligations or anything else, save for any particular area of the law that might be under consideration in the JCPC. However, on the cusp of the creation of the Supreme Court of the United Kingdom, two facilitating developments occurred. First, great English judges appeared who were open to the intelligence and utility of overseas reasoning. Lord Bingham and Lord Woolf were foremost amongst these.[24] As Professor Burrows has painstakingly collected the examples, I will not repeat them. The English exemplars had an Australian advocate of comparativism in Mason CJ. He led the High Court of Australia with creativity in a golden age both in constitutional and private law.[25] Such open-mindedness was encouraged by a number of considerations. Chief among them was the advent of electronic legal information. Suddenly advocates were released from control by the red and black buckram series on their shelves. Research in comparative materials from high Commonwealth courts was available in black buckram in the form of *Law Reports of the Commonwealth.*[26] Information at our fingertips – sometimes too much information – has made it easier to search and find in electronic sources examples, wisdom and occasionally inspiration.

As chance would have it, I presided in the last Australian appeal decided by the JCPC.[27] The appeal was dismissed and a graceful ceremony followed. Now the glue that holds together the principles of the common law is that appropriate to free peoples with their own problems,

[24] See e.g. In the case of Lord Bingham, in Bingham, Transformation, 866, citing his the Mann Lecture "There is a World Elsewhere". See also Lord Neuberger in *FHR v Cedar Capital* [2015] 1 LRC 63 at [45].
[25] Cf Mason CJ in N.J. Mullany and M. Linden, *Torts Tomorrow – A Tribute to John Fleming* (LBC, Sydney, 1998), 1 at 9.
[26] Lexis/Nexis, London. The LRC series has been published since 1985. It contains leading cases from all Commonwealth countries. The author is an editorial consultant.
[27] *Austin v Keele* (1987) 10 NSWLR 283 (PC).

societies and institutions. Reason, persuasiveness and utility now control comparative borrowing. Fortunately, by those criteria, there is still much of use that can be found far way. This is not only in the settler dominions. Nor only in expositions of the common law or of global decision-making on template statutes derived from England in earlier times.[28] Nevertheless, the idea of a single common law is now dead. The planets move on a different trajectory. There is respectful, (sometimes less than respectful) disagreement. This occasionally leads to sharp exchanges of judicial words which provokes sharp responses.[29] What will happen as statute law continues to replace common law and as judges arise who never read those black buckram law reports from London, remains to be seen.

II. *EUROPEAN AND HUMAN RIGHTS LAW: IMPACT AND NON-IMPACT*

Subject to whatever occurs after the Brexit plebescite, it seems inevitable that the laws of England (including in the field of Obligations) will continue to be affected by the law of the European Union and the human rights law emanating from Strasbourg. Years ago, Lord Denning perceived European law as an incoming tide.[30] To some extent this prediction has been vindicated. The European Human Rights Convention, as incorporated by the *Human Rights Act* (UK) 1999, has influenced many important decisions on the private law of obligations,

[28] J. Goudkamp and D. Nolan, "Contributory Negligence in the 21st Century: an Empirical Study of First Instance Decisions". (Forthcoming). This study refers to published decisions applying the *Law Reform (Contributory Negligence) Act* 1945 (UK) which abolished the common law rule and replaced defeat of claims by apportionment.

[29] *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 149 [131] ("It was a grave error for the Court of Appeal to have taken this step." Cf Keith Mason, "Throwing Stones; Cost Benefit Analysis of Judges being Offensive to Each Other" (2008) 82 ALJ 260. Justice Mason retired as President of the Court of Appeal soon after the criticism and contested it in his farewell address: (2008) 82 ALJ 758-759.

[30] *H.P. Bulmer Ltd v J. Bollinger* SA [1974] ch. 401 at 418 per Denning MR.

although not all.[31] The alternative, as Lord Bingham pointed out, was that tort law would be left "essentially static, making only such changes as are forced upon it, leaving difficult and in human terms, very important problems to be swept up by the Convention".[32]

Well-known decisions in which European Convention law has influenced the English exposition of the common law of torts include *Reynolds v Times Newspapers Ltd,*[33] creating a defence of responsible journalism to liability in defamation in light of Article 10 of the Convention thereby protecting freedom of speech, and *Campbell v MGN Ltd*,[34] extending the action for breach of confidence to protect privacy so as to promote compatibility with Article 8 of the Convention. Although the *Reynolds* defence was later abolished by the *Defamation Act* 2013 (UK), the relevant provision did not change the law much because the statute creates a seemingly similar defence.

The development of the law of defamation in Australia took a different course in *Lange v Australian Broadcasting Corporation*,[35] later elaborated in a decision on privacy law in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*.[36] In the Australian cases, as necessarily in decisions in Canada and United States, the express constitutional requirements relevant to free speech profoundly influenced the development of the local common law. Nothing less could be

[31] *JD v East Berkshire Community Health NHS Trust* [2005] UK HL 23 noted Bingham, Transformation, 830 at 861.
[32] *JD Case* [2005] UKHL 23 at [49].
[33] [2001] 2 AC 217 (HL).
[34] [2004] UKHL; [2004] 2AC 457.
[35] (1997) 189 CLR 520.
[36] [2001] HCA 63; (2001) 208 CLR 199.

expected. In the same way, the legal environment (I refrain from labelling it as 'constitutional') of EU law and Convention law in the United Kingdom cannot but influence the way judges approach local decision-making. In law, context is always critical.[37]

Thus, in the recent decision of the Supreme Court of the United Kingdom in *Michael v Chief Constable of South Wales,*[38] an important decision was reached concerning the approach to be taken to the legal duty of care on the part of a police authority. The case concerned the right of the family of a murdered woman to recover damages from a police authority for an alleged breach of the duty of care to assign priority to the woman's telephoned alert to police shortly before she was murdered by her former domestic partner. In part, the decision involved reconsideration of the earlier reasoning of the House of Lords in *Hill v Chief Constable of West Yorkshire*.[39] But, in part, it also concerned a claim in negligence brought under the *Human Rights Act* 1998 (UK) for breach of the duties of police as public authorities to safeguard the deceased's right to life under Art 2 of the *European Convention*. Most the treatment of the case in the Supreme Court concerned the claim by the relatives framed in negligence as propounded according to the *Caparo* test.[40] A majority of the Supreme Court in *Michael*[41] dismissed the claimants' appeal in terms that, without formally overruling *Caparo*, appears to have given the "three stage test" there stated a "very

[37] *R v Secretary of State for the Home Department; ex parte Daly* [2001] 2 AC 532 at 548, which Simon Brown LJ called "the most quoted dictum in all of administrative law": *R (Persey) v Environment Secretary* [2002] EWHC 371 at [43].
[38] [2015] UKSC2; [2015] 2WLR 343 [55].
[39] [1989] AC 53; [1988] 2 All ER 238.
[40] *Caparo Industries PLC v Dickman* [1990] 2 AC 605; [1990] 1 All ER 568.
[41] Lord Neuberger, Lord Mance, Lord Reed, Lord Toulson and Lord Hodge; Lady Hale and Lord Kerr dissenting.

significant knock".[42] For present purposes, it is enough to point to the ways in which claims under statute potentially have the ability to muddy the waters of the English common law, unless the judges perform surgery to ensure their compatibility. This, sometimes but not always, happened.

Most countries of the common law are not parties to the *European Convention*. Save for Ireland and Malta, only the United Kingdom has signed up. Most civilised countries, anyway, have their own human rights charters, including Commonwealth countries that are probably closest to the authority and reasoning of the English courts. (I would single out Canada, New Zealand and South Africa). Australia alone holds out against this trend. There is no comprehensive Bill of Rights in the Australian Constitution. Attempts and recommendations to establish even a statutory statement of rights have so far failed to gain political traction.[43] Only two sub-national jurisdictions (the State of Victoria and the Australian Capital Territory) have enacted broad statutory provisions.[44] Thus, for the law of obligations in Australia, where there is but one national common law,[45] the likelihood of increased divergence from other common law jurisdictions is considerable, if not certain. The ambit for direct help depends upon close, or at least analogous, expressions of the law in the jurisdiction of suggested comparison. As those jurisdictions decline in number, the utility of the reasoning of JCPC and other English courts seems destined to decline. A very clear

[42] J.Goudkamp, "A Revolution in Duty of Care?" (2015) LQR 522 (Case Comment) – forthcoming.
[43] G.Robertson, *The Statute of Liberty,* Vintage, 92 ff.
[44] *Charter of Human Rights and Responsibilities Act*, 2006 (Vic); *Human Rights Act* 2004 (ACT). A Queensland statute is under consideration.
[45] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 563; *Esso Australia Resources Inc v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [23].

instance of this development occurred 30 years ago in the *Spy Catcher* litigation.

Following decisions of the English courts,[46] an application was made by the Attorney-General for the United Kingdom to assert rights to an injunction in Australia against the publication in that country of the book *Spy Catcher*. In the Court of Appeal of New South Wales (where I then participated) the application was rejected.[47] I held, in reasoning that was substantially followed on a further appeal to the High Court of Australia,[48] that whatever might be said about the development of the principles of private law concerning the breach of confidence and enforcement of obligations in the English cases, it was not open to the United Kingdom Government to invoke that country's public law in an Australian court in private *inter-partes* litigation. In earlier decades a different result might well have ensued. It shows what happens when notions of the unity of the Crown and of the common law fray and unravel.

Without a constitutional or statutory charter of rights in Australia, attempts have sometimes been made to adapt the common law so as to conform to statements of human rights in international law, as applied universally by civilised countries. This was an approach that I repeatedly propounded in the Court of Appeal of New South Wales.[49] A similar principle informed the reasoning of the majority of the High Court

[46] The decisions of the UK courts in *Spycatcher* included *Attorney-General v Guardian Newspapers Ltd* [No.2] [1990] 1 AC 109.
[47] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 (CA).
[48] *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 50.
[49] *Gradidge v Grace Bros Pty Ltd* (1988) 193 FLR 414.

of Australia in its important decision in *Mabo v Queensland* [No.2].[50] However, whereas the English development of the common law adapted and moulded itself to provisions of the *European Convention* as applied by the *Human Rights Act* 1995 (UK), the scope for judicial elaboration was much more restricted in Australia.[51] There the "dualist" rule is generally applied strictly to invocations of international law.

My attempts to construe the *Australian Constitution* and statute law in accordance with the international law of human rights were declared by some judges to be heretical. [52] It has so far made little headway. All of this is to say that the shared features of the contemporary legal systems in the common law are increasingly differentiated: making analogical reasoning as between them more problematic. Even when confined to the common law, its content will inevitably reflect its context. To this truism must be added an element that certainly exists in the minds of many Australian lawyers. The embrace by the United Kingdom of European law, in the form of the Council of Europe, EEC and now the EU, are viewed, like the border interrogations at Heathrow Airport as a clear signal that the United Kingdom has embarked on a new and different post-imperial journey.

Likewise, with human rights law, many Australian lawyers regard this too as a product of non-English, European natural law thinking. An Englishman (they will say, meaning thereby to include Australians and others like themselves) enjoys every right there is unless it is taken away

[50] (1992) 175 CLR 1 at 42.
[51] *Al Kateb v Godwin* (2004) 219 CLR 562 at 586-595 [50]-[73] per McHugh J, cf at 617 [152] ff of my own reasons.
[52] See *Roach v Australian Electoral Commission* (2007) 233 CLR 162.

or reduced by a clear and lawful prescription. Human rights is basically European thinking about the content of law. It is not the true doctrine of traditional English Protestant legal thinking.[53] More than a few judges and lawyers in Australia regard their country as a distant citadel, protecting the flame of English law and preserving the true common law in the antipodes. They are waiting until English lawyers come to their senses and abandon this foreign contagion.

III. *NON-EQUALITY, DISCRIMINATION AND EQUALS*

The common law of England was not always a great vehicle for the protection of the rights of women to legal equality or the protection of minorities. As Sir Stephen Cretney once pointed out,[54] as late as 1923, Lord Chancellor Birkenhead refused to grant a wife's appeal against an order declining her the divorce she sought, for reasons that would now seem prejudiced and even cruel. Although the husband's feelings could be given "little account":[55]

> *"She must look forward to a loneliness from which she can escape only by a violation of the moral law. To some this may appear a harsh and even an inhumane result; but such, my Lords, such is the law of England. Your Lordships cannot, because of the sympathy which you must all feel for this unhappy victim of our marriage law, impeach the chastity of a woman, equally innocent, who is also entitled to the sympathy and shelter of the law [the co-respondent]"*

[53] This despite the fact that the human rights legal revolution in the United Kingdom was based on the UDHR and other law beginning with the UN Charter of 1945, drafted by Anglo American lawyers.
[54] Chapter 36 in JHL, "Family Law" at 670.
[55] *Rutherford v Richardson* [1923] AC 1 at 12.

There were many decisions of many courts throughout the common law world that rejected notions of equality. [56] Sometimes these occurred in the exposition of the principles of the common law; often in the interpretation of statutes. Many decisions of courts throughout the common law held that a "person", as expressed in legislation, did not include a "woman". For every such case in England, there many elsewhere. In its doctrines and procedures the common law was, to put it bluntly, often patriarchal and misogynist. Lingering traces remain that are impervious to judicial correction. I trust it will not appear impertinent to readers in the United Kingdom when I acknowledge that the appointment of Brenda Hale in 2004 as a Lord (sic) of Appeal in Ordinary was a sharp break with a very old tradition. But why has there been no follow-up over more than a decade? In Australia, Canada, the United States and South Africa the record is now much more equal. Only in India and in darkest Africa do nation states rival England in the low numbers of women appointed to final courts.

To those who insist on "merit", as an essential precondition to judicial appointment, it is a concept (which will be very familiar to tort lawyers) that is opaque and self-fulfilling. Anyone in doubt should read an analysis by Justice Susan Kenny of the Federal Court of Australia. [57] She criticises the pace of change as unacceptably slow; based on stereotypes; and fed by pessimism that change will ever come. Female values and approaches in judicial performance should not be eliminated. Reflecting the life experiences of half of humanity is hardly a

[56] *Nairn v University of St Andrews* [1909] AC 147; *Weinberger v Inglis* [1919] AC 606; *Vicecountess Rhonnda's claim* [1922] 2AC 339. C.f. Baroness Brenda Hale, "Non-Discrimination and Equality" in JHL, 574 at 575.

[57] S. Kenny, "Women at the IP Bar: A Case for Impeaching for Unpacking the "Merit" Ideal" (2015) 103 *Intellectual Property Forum* 19.

contemporary feature of an acceptable legal and judicial profession. In a number of decisions in the High Court of Australia the perspective of Justice Mary Gaudron, the first woman Justice of the Court, was quite often distinctive because she viewed problems from a non-male perspective. Standout cases include the award of damages for gratuitous services provided to an injured person by his wife. [58] Another related to a contest over the custody of children of a foreign mother, where in separate reasons Justice Gaudron and I both dissented. [59]

Justice Gaudron's values and approaches in Australia were often similar to those expressed later by Baroness Hale in the United Kingdom.[60] In *Glaidon v Godin-Mendoza*[61] the latter wrote of homosexual relations in a way that few, if any, male law Lords would have done:

> "*Homosexual relationships can have exactly the same qualities of intimacy, stability and inter-dependence that heterosexual relationships do… [M]arried and unmarried couples, both homosexual and heterosexual, may bring up children together… Homosexual couples can often have exactly the same sort of inter-dependent couple relationships as heterosexuals can… [M]ost human beings eventually want more than [casual and transient relationships]. They want love. And with love they often want not only the warmth but also the sense of belonging to one another which is the essence of being a couple… In this, people of*

[58] *Van Gerven v Fenton* (1992) 175 CLR 327.
[59] *U v U* (2002) 211 CLR 238
[60] Brice Dickson, "Hard Act to Follow" in JHL, above at 254, 259.
[61] [2004] 2 AC 557 at [142], noted S. Cretney, "Family Law" in JHL, above, 670, 671.

homosexual orientation are no different from people of heterosexual orientation."

I can affirm from my own life experience every word written by Brenda Hale. Her insights (and her persistence in explaining them) were beneficial to judicial decision-making and to society. These have not been insights common to male predominating institutions. To the contrary, the English common law on criminal offences severely penalised gay men. It spread violence and prejudice against them throughout the world. It has taken a long time for things to change, both in criminal and civil law. In most common law countries, even today, there is no change. Even recently, respected final courts of appeal, armed with human rights principles, have rejected change.[62] Or they have actually reversed decisions below that had invalidated the penal law as incompatible with constitutional equality principles or privacy norms.[63]

Judges of the current age who are more cosmopolitan in their legal knowledge and interests, and more willing to look to international and human rights sources, as influencing in part the context of the law, are more likely to confront the ignorant and unjust laws inherited from the

[62] *Banana v State* [2000] 4LRC 621 (Zim SC) but see dissenting reasons of Gubbay CJ; *Lim v Attorney-General* [2013] 4 SLR 1059 (HC); [2015] 1 SLR 26 (CA). *Government of Negeri Semblam v Khamis*, unreported, Court of Appeal (Mal), October 2015.
[63] *Suresh Kumar Koushal v Naz Foundation* (2013) 15, SCALE, 55; (2014) 1SCC 1, reversing *Naz Foundation v Delhi* (2009) 4 LRC 838 (Delhi HC).

solely male judges of the past on matters related to women, gays, people of different races and other minorities.[64]

This was a legal revolution that had to come. In many places it is still unfolding, but slowly. However, it is bound to continue its trajectory. The composition and values of the judiciary of the common law will not be immune from these changes. The changing composition of the courts will rightly influence the changing content of the law.

IV. *FROM FORMALISM TO REALISM*

The subject matter of law is constantly in a state of flux. Nevertheless, there are some comparative certainties, more I suggest in contract than in tort law. In contract law the first rule "is that contracts are made to be performed, not broken". [65] Many subsidiary rules flow from the duty of the courts to be the upholders, not destroyers, of the bargains entered by competent parties. In the field of tort, the common law is generally struggling to advance from a solution expressed in terms of a category or classification to a broader genus that appears appropriate when later courts endeavour to reconcile the direction in which past instances seem to be pointing. This, after all, was the genius of Lord Atkin's rationalisation of the earlier law in *Donoghue v Stevenson:* [66]

[64] M. Andenas and Fairgrieve, Ch10 in Bringham Transformation, 831 at 846-851; Brenda Hale "Non-Discrimination and Equality" in JHL, 574 at 578, 587.
[65] *PS & N Ltd (BVI) v Micado Shipping Ltd (Malta)* (The Seaflower) [2000] 2 *Lloyd's Rep* 37 per Lord Bingham, cited by Sir Bernard Rix, in "Lord Bingham's Contribution to Commercial Law", Ch. 7 in Bingham Transformation, 665 at 681.
[66] [1932] AC 562 at 580.

> *"The liability for negligence… is no doubt based upon a general public sentiment for moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise in limit the range of complainants and the extent of their remedy."*

Lord Atkin's test was that: [67]

> *"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour."*

But that demanded a definition of who the "neighbour" was for legal purposes. And the answer given was basically circular and certainly unclear:

> "*… Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."*

It was this idea that led, in turn, to the suggested elemental requirement of "proximity", in an endeavour to confine somewhat the class to whom an enforceable legal duty was owed. But that single word was no better than Atkin's multiple word description. Hence courts in many jurisdictions of the common law world have been struggling with ways of expressing the ambit of the legal "duty of care" that will yield practical and useful guidance to lawyers seeking to predict judicial outcomes and

[67] *Loc cit*

to prevent those outcomes appearing excessive, mutually incompatible and unacceptably expensive to society as a whole and to individuals living in it.

In Australia (as in Canada, New Zealand and other countries of the common law) many judicial decisions have been delivered in the hope of providing greater precision to the law of civil obligations. Some general rules were stated, such as that "the law does not impose duties of care to take positive action".[68] But no sooner was the supposed rule stated but it admitted exceptions. [69] In an attempt to provide at least a methodology that would assist trial and intermediate courts to approach the problems in a consistent way, the House of Lords in *Caparo Industries PLC v Dickman*[70] propounded a "three way test": (1) reasonable foreseeability of harm; (2) the relationship of 'proximity' or 'neighbourhood'; and (3) whether it was 'fair, just and reasonable that the law should impose a duty of a given scope upon the tortfeasor for the benefit of the claimant.

I felt the attraction of the *Caparo* approach. [71] I said as much in many decisions. [72] The approach attracted academic favour in Australia.[73] I persisted. But my judicial colleagues were never convinced. I think that many of them were unwilling to admit so candidly to a role for policy and

[68] E.g. *Pyrenees Shire Council v Day* (1988) 192 CLR 330.
[69] *Ghantous v Hawkesbury City Council* (2000) 206 CLR 512; *Brodie v Singleton Shire Council* (2001) 206 CLR 512.
[70] [1990] 2AC 605 at 617-618 per Lord Bridge of Harwich.
[71] *Pyrenees Shire Council v Day (1988) 192 CLR 330* at 420-427 [296]-[253].
[72] *Romeo v Conservation Commission* (NT) (1998) 192 CLR 431 at 476-477 [117]-[121]; 484-485 [138]-[140]; *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 286-291 [289]-[302]; *Crimmins v Stevedoring Industry Finance Committee,* (1999) 200 CLR 1 at 80-86 [223]-[235]; *Brodie* (2001) 206 CLR 512 at 604-605 [241].
[73] N. Catter, *Duty of Care in Australia* (1999), 173; Witting, "The Three Stage Test Abandoned in Australia? Or Not?" (2002) 118 CLR 214.

judicial line drawing that a candid examination of the cases would have demanded.

In the end, I surrendered.[74] I did so admitting that I found the suggested alternative,[75] of looking for the so called "salient features" in the facts and comparing them to previous decisions, pretty unhelpful. Busy lawyers and intermediate judges scarcely have the time to engage in the lengthy analysis so required by final courts. Thus, in *Perre,* every Justice of the High Court of Australia wrote separately in expressing their respective conclusions. The report of the decision covered 141 closely printed pages. There is no *ratio decidendi* for the reasoning. This is the aspect of common law decision-making that drives civil lawyers to despair about its discursive methodology.

The decision of the United Kingdom Supreme Court in *Michael v Chief Constable of South Wales*[76] suggests that the judicial divisions in that court are similar to those that earlier emerged in Australia. The majority,[77] dismissed the claimants' appeal on the basis of the well-established rule that an alleged tortfeasor does not ordinarily owe a duty of care to control the conduct of third parties.[78] They held that case did not fit within the classical exceptions to that rule. *Caparo* was not specifically overruled. However, it seems to have been suggested that Lord Bridge in that decision had been misunderstood. The third suggested "test" was *Caparo* being little more than the provision of labels. Likewise, "proximity" was criticised as unhelpful and circular,

[74] *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 626 [238].
[75] In *Sullivan v Moody* (2001) 207 CLR 562.
[76] [2015] 2WLR 343.
[77] Lord Neuberger, Lord Mance, Lord Reed, Lord Toulson, Lord Hodge.
[78] Ibid at [57] and [116] per Lord Toulson.

providing "no yardstick for answering the question that it poses".[79] This echoed similar earlier criticisms in Australia. Likewise, Lord Toulson's conclusion that: [80]

> "*The development of the law of negligence has been an incremental process rather than giant leaps. The established method of the courts involves examining the decided cases to see how far the law has gone and where it has refrained from going. From that analysis it looks to see whether there is an argument by analogy to extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence. Often there will be a mixture of policy considerations to take into account."*

This approach clearly reflects the deep judicial inclination to be seen as applying a legal norm (even an unarticulated and opaque one) rather than indulging in a "discretionary judgment" that involves nothing more than the application of the unexplained values of the decision-maker.

As an alternative to judicial law reform one of the most notable 'revolutions' that has occurred in the law in the United Kingdom, Australia, and other common law countries over the past 50 years has been the result of the work of full-time, professional law reform bodies. I played a part in this development in Australia, when the Federal Parliament and Government followed the lead of Lord Scarman's Law

[79] Ibid, [134].
[80] Id [102].

Commission of 1965 and created the Australian Law Reform Commission in 1975. [81]

On both sides of the world, the work of professional law reform bodies has proved highly influential, including in the field of private law. Reports of the Law Commission of England and Wales (even those unimplemented reports on contract law initiated by my friend Aubrey Diamond) have proved influential. [82] In Australia, the innovative and bold report on *Insurance Contracts*[83] worked a great change, resulting in the simplification and rationalisation of the law. It has proved influential beyond Australia, including in recent reports such as that of the Law Reform Commission of Ireland. [84] To some extent, the borrowing of legal ideas through the decisions of the courts has been replaced or supplemented by the exchanges between law reform agencies. If the funding and implementation of law reform reports has not always been as wholehearted and substantial as was expected in Lord Scarman's day, the work of institutional law reform goes on. A conference celebrating the achievements of the law commissions in the United Kingdom over 50 years has been concluded recently. The papers will be available in time for Obligations VIII. [85]

V. *COMPARATIVE LAW AND ISOLATION*

Although comparative law borrowing was always a feature of the common law, enforced throughout the British Empire by the decisions of

[81] *Law Reform Commission Act* 1973 (Cth), s6.
[82] Law Commission of England and Wales, *Contracts*. Professor Diamond served as a Law Commissioner 1971-76.
[83] Australian Law Reform Commission, Insurance Contracts ALRC 20, 1982.
[84] Ireland, Law Reform Commission, *Consumer Insurance Contracts*, July 2015, 35-37, 101-102, 110.
[85] http://www.law.com.ac.uk/pres/news/2015/05/conference.

the JCPC and the HL, it remains the fact that most of the comparisons were borrowed from England. Few instances made the journey in the opposite direction. In part, this was because of the methodology of Bench and Bar and the limited resources earlier available for awareness of useful comparisons. In part, it grew out of the self-confidence, sometimes arrogance, of the leaders of the judiciary and legal profession in the heyday of the Empire. In part, access to, and use of, European legal concepts were restrained by linguistic difficulties. [86] In part, the difficulty of comprehending foreign legal concepts existed because of lack about knowledge of their context and the centuries of legal developments that had gone before. [87]

Nevertheless, even in the 19th century, English scholars and writers were willing to praise "comparative jurisprudence" in the "maturer systems" [88] as helpful to ascertaining "a system of universal principles of positive law". [89] Sir Frederick Pollock in 1905 was critical of those who rejected comparative research which he felt had recently "revolutionised our legal history and transformed our text books." [90]

Today, there are many scholars, and some judges, who espouse the value of comparative law scholarship. Justice Stephen Breyer of the

[86] Jane Stapleton, "Benefits of Comparative Tort Reasoning: Lost in Translation" in Andenas, Bingham Transformation, 773 at 800.
[87] John Austin, *Austin on Jurisprudence* (1869, London), ii at 1107, cited Andenas and Fairgrieve, Bingham Transformation at 866.
[88] *Campbell v UK* (1992) 15 EHRR 137; *Shofman v Russia* (2007) 44 EHRR 35.
[89] J. Jowell, "What Decisions Should Judges Not Take" in Andenas and Fairgrieve, *Bingham Transformation*, 131 at 136.
[90] Sir Frederick Pollock, "The History of Comparative Jurisprudence", [1903] *Journal of the Society of Comparative Legislation*, 74.

Supreme Court of the United States is one of them. [91] Lord Bingham was another.[92] Many, especially jurists from the antipodes far away, are cautious[93] or even hostile.[94] Amongst other problems of doctrine they often cite the perils, of unprincipled "cherry picking" and the dangers of embracing legal approaches that are imperfectly understood by common lawyers.

Nevertheless intellectual isolationism is scarcely a viable stance for lawyers to take in the age of the internet, Skype; international trade and torts; global media; transcontinental travel and even conference series such as the Obligations conferences. There must be care, prudence and good reasons for borrowing from one jurisdiction to another. Those reasons, however, may simply be the value of finding someone else in another place who expresses more clearly and briefly a normative principle for the law that seems precise, applicable and helpful to a problem in hand. The advance of the German legal concept translated as "proportionality" is a case in point. In the Belmarsh case, *A v The Secretary of State for the Home Department,*[95] a panel of nine law lords examined the proportionality of the control order regime governing terrorism suspects under United Kingdom legislation. The government argued that the Court should not review the order on proportionality grounds because the applicable common law principle required respect for the democratic institutions not the assertion as a new rule by the courts. However, the HL decided, by a clear majority, that anti-terrorism

[91] S. Breyer, "Keynote Address" (2003) 97 ASIL Proceedings, 265.
[92] "There is a World Elsewhere: the Changing Perspective of English Law" (1992) 41 *ICLQ.* See Andenas and Fairgreive, *Bingham Transformation*, 866.
[93] See e.g. Stapleton, above n. 86, 811.
[94] See e.g. McHugh J, in *Al Kateb v Godwin* (2004) 219 CLR 562 at 586 ff [50].
[95] [2005] 2AC 68.

orders had to be proportionate in their generation. There are similar decisions, invoking a like principle in discrimination law; human rights law; and judicial review.

Occasionally, developments in comparative law have entered English law because of the provisions of European treaties. On other occasions it has jumped into the reasoning of English judges, simply because they have considered it a more useful way of explaining what is being done than the formulae that have hitherto been adopted in common law reasoning. [96]

The field of comparative law borrowing is large and ever growing, from within and beyond common law jurisdictions. One can be confident in saying that this process will continue to expand. The barriers of resistance and hostility towards the legal categories and reasoning of lawyers in non-English speaking jurisdictions are breaking down. Somewhat belatedly globalism has met the common law.

VI. *REALISM AND ITS LIMITS*

In olden days, judges indulged in the fairy tales of the declaratory theory of the judicial function.[97] Over the past 50 years, however, there has been a growing candour in expositions about the judicial role, including the acknowledgment of the creative function of the judges, especially in

[96] *R (Carson and Reynolds) v Secretary of State for Works and Pensions* [2006], 1 AC 173 at [14] per Lord Hoffmann.
[97] Lord Reid, "The Judge as Lawmaker" (1972) 12 JSPTL 22 at 25.

the higher courts.[98] As the duty of care cases demonstrate, many judges feel anxious about asserting too directly their function in creating new principles. But on the whole, the greater judicial transparency about what is actually going on in the courts has been fairly well accepted. Certainly this is so amongst the knowing members of the legal profession and the academy.

In the field of tort law, the growing influence of important academic scholars has promoted a greater willingness on the part of judges to tackle problems realistically and from a practical point of view. Thus, from the first edition of his text *The Law of Torts*, Professor John Fleming was determined to adopt and justify this approach: [99]

> *"[I propose] an altogether fresh approach, both in point of substance and in arrangement, with a view to presenting as realistic a description of the modern, mid-20th century, operation of tort law as seems to be both possible and desirable in the interests of practitioner and student alike."*

It was with this in mind that Fleming paid particular attention to aspects of the operation of tort law that had earlier been neglected, including the assessment of damages; the shift towards statutory no-fault compensation schemes; and the impact of insurance on the ambit of tort liability. His aim was to bridge the gulf that has frequently existed

[98] M.D. Kirby, *Judicial Activism*, Hamlyn Lectures 2004 (Sweet & Maxwell, London) 61.
[99] J.G. Fleming, *The Law of Torts* (1st Ed, Lawbook Co., Sydney, 1957), iii.

between the exposition of tort law in the 'books' and 'law in actual operation'. [100]

At the time this approach was advocated by Fleming it presented a great challenge to "the strict and complete legalism" propounded then, as still now, by conservative judges. Yet soon after his arrival to teach law in Australia, Fleming ventured criticism of a decision of the High Court of Australia about a case involving an action *per quod servitium amicit* in *Attorney-General for New South Wales v Perpetual Trustee Co Ltd*. [101] He regarded the decision as artificial and appealed for greater realism:[102]

> *[T]he traditional devotion to precedent must be attenuated in order to permit legal rules to develop in correspondence with the changing attitudes with the community. It would be a matter for regret if a final authority pronouncement, at this stage in particular, should be interpreted as limiting or foreclosing the area for future experiments through the judicial process."*

Fleming's appeal was supported by a review of his book in New Zealand, from the safety of 800 miles physical distance and strict anonymity on the part of the reviewer.[103] Fleming had no time for the law as an "occult, arcane [or] oracular" mystery.[104] He declared himself

[100] Ibid.
[101] (1952) 85 CLR 237.
[102] J.G. Fleming, "Action per Quod Servitium Amisit: Challenge to Judicial Technique" (1952) 26 ALJ 122.
[103] Anon (1983) 4 *Auckland Law Review* 430 at 432
[104] J.G. Fleming, *The Law of Torts* (3rd Ed, Lawbook Co., Sydney, 1965), p v

to be "more concerned with the effect of the operation of legal rules, their aims and reasons, than with the mechanistic problems of internal consistency of decisions within the framework of any given system of precedent".[105] His chosen discipline was the law of torts. It was an especially fertile field for the legal realist. However, Fleming's teaching was highly influential beyond torts and even beyond the law of obligations. One hopes that his successors will maintain and extend his tradition.

Certainly, it had a large impact on Australian practising lawyers and eventually judges. That impact has been beneficial. In one field, however, the call for realism has not been rewarded with as much attention as it probably deserves. I refer to the significance of insurance (its existence; prevalence; availability; and significance) for the outcome of tort litigation. Everyone knows that motor vehicle negligence claims are paid out of a fund created pursuant to compulsory statutory third party insurance. Yet solemnly, the litigation, and much else, is carried on as if insurance were totally irrelevant, even non-existent. Years ago, in the Court of Appeal of New South Wales, I attempted to inject an element of realism, grounded in the statutory insurance regime.[106] Later attempts were even less successful. Courts and lawyers feel more comfortable in applying the familiar myth that insurance is immaterial as if the named litigants were at personal risk of financial burdens (although compulsion or prudence has required them to insure against that very risk).

[105] *Kars v Kars* (1996) 187 CLR 354 at 376, per Toohey, McHugh, Gummow and Kirby JJ.
[106] In *Cotogno v Lamb* (1986) 5 NSWLR 559. See also *Cotogno v Lamb* (1987) 164 CLR 1.

After a lifetime of observing how judges operate, Lord Bingham[107] remarked that judges should "should [give] … reasons [that are] full and genuine." He supported the opinion of Lord Cooke of Thorndon: "I am against hidden policy factors. Major premises should not be inarticulate, although they do not need constant restatement. A just decision is surely more likely if the judge recognises a responsibility to be frank'. [108] Still, one cannot deny the suspicion that, on occasion, a duty of care is rejected because the Court apprehends that, if a duty were held to exist, securing insurance would be impossible or prohibitively expensive to obtain in the future. Such a reason is rarely explicitly stated, probably because the Court has no evidence before it of what the insurance position might be if a duty care were held to exist". [109] Generally, there is no evidence about insurance because it is compulsory and everyone knows it exists. Or because it is deemed legally irrelevant and therefore any attempt to provide the evidence would be rebuffed.

Similar considerations affect the attempt to introduce more empirical economic analysis into reasoning on obligations. Also in the Court of Appeal of New South Wales, in *Cekan v Haines,* [110] I expressed regret at the "failure of the common law to develop more than a general notion of the economic consequences of asserting the requirements of reasonable care". I described this as "one of the chief defects in the law of negligence as it has developed". The case concerned damage to an intoxicated prisoner who had injured himself in falling, apparently

[107] Tom Bingham, *The Business of Judging* (Oxford, 2000) 28-30.
[108] Lord Cooke, "Fairness" (1989) 19 VUWLR 421.
[109] Discussed in Conrad Schiemann, "The Movement Towards Transparency in Decision-making" in Andenas and Fairgreive, *Bingham Transformation,* Ch.10, 477 at 480-481.
[110] (1990) 21 NSWLR 296 at 307; A.F. Mason, "The Interaction of Statute Law and Common Law" (2015) 27 *Judicial Officers' Bulletin* (NSW), 87.

deliberately, on his head in a police lock up. His claim against the State for damages was unanimously rejected. To the argument in support of the provision of video cameras and prompt intervention, I offered a list of considerations similar to those that may later have been in the minds of the judges of the Supreme Court of the United Kingdom in *Michaels:*[111]

> *"The costs of implementing the regime posited; the marginal utility of surveillance as a means of preventing deliberate injury; the experience of other similar countries; the legitimate claims to privacy and other rights of other persons."*

In his comment on *Cekan*, Fleming drew attention to the early judicial attempts in the United States to formulate, in almost algebraic terms, a ratio between the probability of injury and the cost of prevention.[112] Similar considerations arose in the decision in Australia that overruled the *Bolam* test for medical negligence.[113] Evidence was given at the trial in the Australian case that the condition, said to have been caused "by negligent omission to advise of risks, arose only once in approximately 14,000 such procedures".[114] Yet because the risk was total blindness in an eye, it was one that the High Court of Australia held should have been notified to the patient, whatever the professional view on the subject held by specialist medical opinion.

[111] [2015] 2WLR 343.
[112] J.G. Fleming, "The Economic Factor in Negligence" (1992) 108 LQR 9.
[113] *Rogers v Whittaker* (1992) 175 CLR 479. See now *Wallace v Kam* (2013) 250 CLR 375.
[114] *Rogers* (1992) 175 CLR 479 at 482.

Whilst not questioning the outcome of *Cekan*, Fleming commented: [115]

> *"It must ... remain of concern, reflected in widespread agitation for prison reform, that the courts on their part can do nothing to encourage the modernisation of antiquated facilities."*

Once again, Fleming was teaching the Australian legal profession, and the judges, that the individual case in tort was important for compensation to the claimant. But it also assumed an additional importance and equally significant character: that of setting the standards of a civilised society to be of observed by "neighbours" living together in the same community". [116]

It seems likely that future decisions of courts in the vexing area of the legal duty to care will continue to explore a more empirical candid and analysis. If only because of the limitations of linguistic explanations of judicial outcomes to explain the considerations actually critical to their decisions.

VII. DECLINE AND FALL OF JURY TRIAL

Fifty years ago, in most parts of Australia and elsewhere, claims in tort and contract were generally decided by civil juries. In New South Wales, such juries were comprised of four citizens, chosen from a panel. The judge instructed the jury on the law. They returned their verdict and

[115] Fleming above n.113, 12.
[116] *Cole v South Tweedheads Rugby League Football Club* (2003) 217 CLR 469. Cf. M.D. Kirby, "Of Advocates, Drunks and Other Players - Plain Tales from Australia" (2011) 23 Denning Law Journal.

judgment was entered. Appeal was difficult, save for material legal misdirections. Cases had to be simplified down to their bare bones. Lawyers learned skills in brief advocacy, explanation and trial techniques. Juries commonly reflected general community values, sometimes softened allegedly by sympathy for the disadvantaged and injured. It was an efficient system, with definite advantages. It began to be demolished after 1970 in most parts of Australia, although it lingered on in the State of Victoria. [117] It fell out of favour with intellectuals who questioned the capacity of lay jurors to decide complex factual questions accurately. They also objected to unreasoned justice which might be hiding unrevealed errors.

Now the civil jury trial is almost extinct in Australia. For a time, civil juries could still be summoned in defamation cases and in claims in which fraud had been pleaded. However, even there, the exceptions have been whittled away to near vanishing point. In my early days in the law, it was generally thought that juries favoured claimants and were unfairly biased against defendants whom they knew to be insured. Later, as experience changed, it was representatives of defendants who sought trial by jury and claimants who opposed. In the end it did not matter because the facility was withdrawn. Recently the New South Wales Bar Association suggested that the reintroduction of civil jury trial should be considered. However, the suggestion went nowhere because courtrooms for forty years have been built without a jury box or facilities for jurors.

[117] See e.g. *Naxakis v Western General Hospital* (1999) 197 CLR 269.

The result has been a great lengthening of trials; the introduction of intensive case management ; the proliferation of appeals; the explosion of written submissions; a profound increase in legal costs; and a great expansion of judicial reasons in the attempt to make them 'appeal proof'.

Similar developments have arisen in the United Kingdom, even in defamation cases, where civil juries had survived. However, the *Defamation Act* 2013 (UK) consigned them to oblivion. Effectively, the Act terminated the last instances where civil juries were available: defamation actions and deceit and malicious falsehood cases. In Australia, in the federal *Constitution*,[118] a provision exists for jury trial in certain criminal trials. However, the provision is much weaker, and has been construed more narrowly, than the United States provision which applies to civil as well as criminal cases.[119]

It is unlikely that jury trial for cases of legal obligations will be restored. It is ironic that the system was abolished because it was thought that jury trial was too slow and cumbersome and that juries were unduly sympathetic to claimants. The outcome has been a costlier trial system: so costly that most claims now have to be sent off to mediation before trial. There the resolution is normally achieved by reference to market forces and the prospective costs of litigation rather than legal principles or entitlements on the merits.

[118] *Australian Constitution*, s80.
[119] *United States Constitution*, Article III, Sixth, Seventh and Fourteenth Amendments.

The pressure to channel claims arising out of legal obligations into alternative dispute resolution may be another instance where an elite procedure, developed by specialists, ultimately grew so cumbersome that it sapped life out of the creature and caused it to look elsewhere to survive. Those who ponder on the serious uncertainty of a body of law (such as the law of negligence) need to reflect on Darwin's Rule of Variation. According to Darwin,[120] all living things require an internal capacity to regenerate and alter if they are to survive in a changing environment. The consequences of the death of the jury trial for the future elaboration of tort and contract law is a subject worthy of close study.

VIII. STATUTES AND THEIR INTERPREATION

Those who were taught the law of obligations, as I was more than 50 years ago, spent most of their time reading very closely judicial reasoning. Statutory law did not generally make a prolonged appearance except where the *Crimes Act* or *Criminal Code* had to be studied. And even then, at least in statutory jurisdictions, the statute was understood as giving effect to pre-existing common law notions. [121] Corporations law required scrutiny of the *Companies Act* 1936 (NSW) and its equivalents. But as this was less than 250 pages in length (being modelled on an earlier United Kingdom Act) it was not a great burden. Contrast the mass of statutory law that exists today and the rate at which, in Australia and elsewhere, it continues to pour out of national and subnational legislatures.

[120] Charles Darwin, *The Origin of Species*, John Murray, London, 1859. Ch.4.2 "Rule of Variation".
[121] The position was different in Australia in the jurisdictions (then Queensland, Western Australia and Tasmania) that had adopted a *Penal Code*. See *Barlow v The Queen* (1997) 188 CLR 1, 31-32.

In the United Kingdom too, and elsewhere in the countries of the common law, the role of judges has generally become that of expounding the meaning of the written law (statutes, regulations, bylaws, ordinances, rules of court etc). The role of judge-made law is in rapid retreat. This is less so in torts and contracts than elsewhere. But even there, statute is playing an ever increasing role. Where it applies, the statute (so long as it is constitutionally valid where that is an issue) will narrow the scope for the operation of the common law.

This development has had many side effects. Some of them concern the rules of statutory interpretation today, compared to earlier times. In 1993, in *Pepper v Hart,* [122] the HL adopted a principle that the rule excluding reference to parliamentary material as an aid to statutory construction should be relaxed, provided the legislation was ambiguous or obscure; that the material proffered was a statement by the minister or equivalent parliamentary promoter of the Bill; and that the statement was clear. Only Lord MacKay LC dissented, his view no doubt informed by his perspectives as a Cabinet Minister and his consciousness of budgetary considerations.[123] This step in *Pepper* was quickly followed in most common law countries and followed up with legislative provisions which expanded the sources of admissible materials still further.[124]

[122] [1993] AC 593 at 604.
[123] M. Beloff, "The End of the 20th Century: The House of Lords 1982-2000" in JHL, 232 at 241.
[124] See e.g. *Acts Interpretation Act* 1901 (Cth), s.15AB.

The construction of contracts broke away still further from the ancient restrictions. Lord Hoffmann was defensive of these developments: [125]

> *"The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded."*

In addition to the use of statutory materials, academic writing is now increasingly received both to assist in the interpretation of the language used in legislation and promote the achievement of sound policy, understood by reference to permissible considerations.[126] The previous law, often restricting decision-makers to the interpretation of the critical words viewed largely in isolation, resulted from an ideal of law that its meaning was objectively ascertainable without room for doubt. As that notion was increasingly seen as illusory, the disputable character of written words came increasingly to be understood. Text, context and purpose emerged as the predominate features that would aid construction.[127] The evaluative role of the decision-maker is now increasingly acknowledged. Given the huge expansion of statutory law, the exposition of the law of obligations in the future will remain (as in the past) with the judges. But increasingly it will be sourced to a legislative mandate.

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[125] *West Bromich Building Society v Investors Company Scheme* [1998] 1 WLR 896, 912 (HL).
[126] This can be controversial. See e.g. Beloff above n.123 at 242. cf. *Roy v Kensington & Chelsea LBC* [1992] 1AC 624 at 653.
[127] M.D. Kirby, "Statutory Interpretation: The Meaning of Meaning" (2011) 35 *Melbourne University Law Review* 209; *ibid*, "The Never Ending Challenge of Drafting and Interpreting Statutes" (2014) 36 *Melbourne University Law Review* 140.

The phenomenon of expanded statutory law is also likely, in the years ahead, to revive once again the hope of expressing the contract law of England (and of those who live under the same or similar rules) in statutory form. In the United Kingdom, pressure to that end is likely to come from European and other civil law trading partners. In Australia, the same pressure is likely to be felt from the nation's principal trading outlets: China, Japan and the Republic of Korea. Merchants and business people in such countries, who ask to see a trading partner's contract code are astonished to be told that none exists. The notion that many important questions in contract law can only be decided finally, after extensive litigation over many years and in a final national court and then perhaps by reference to judicial decisions written in faraway in England,[128] are likely to be increasingly unacceptable. Parties to contracts will insist on the selection of a different applicable law and probably reference to an arbitral tribunal far from Australia. Or perhaps to investor state tribunals untroubled by the letter of local law and more concerned with its impact on investments. The integrity of courts in Australia may sometimes be seen as an advantage. But the uncertainty of outcomes will be increasingly viewed as intolerable. The same theme may emerge in the United Kingdom. In the end, a solution for dispute resolution that maximises both integrity and certainty will prevail.

The golden age of judicial exposition of the law of obligations is fading. Availability, predictability and relative certainty have brought us to the age of statute. This revolution too will not be reversed.

[128] See e.g. *Koompahtoo Local Aboriginal Council v Sanpine* (2007) 233 CLR 115. The majority applied *Hongkong Fir Shipping Co. Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26.

IX. *STATUTORY RESTRICTIONS ON LIABLITY*

Once the law begins its journey towards the exposition of the applicable rules in statutory form, the safety valve of judicial discretion and merit evaluation is removed. What remains is simply what the lawmaker – or investor - has provided in advance. Factors that will influence the lawmaker's disposition will include any relevant constitutional or human rights provisions; the assessment of new judicial tribunals of the impact of particular decisions on investment; and an awareness of the risk that judges at least, who will have the last say in interpreting national statutory provisions, may construe seriously unjust language, so as to diminish its impact, so far as the statutory language permits, and investor tribunals tolerate, that approach.

Nevertheless, over the past 40 years, legislatures in many jurisdictions have enacted provisions to abolish common law remedies; substitute statutory entitlements; and then to limit those entitlements sometimes in unjust ways.

An example of radical statutory reform was the New Zealand *Accident Compensation Act.*[129] This followed a report of an inquiry chaired by Sir Owen Woodhouse, a distinguished New Zealand judge. That inquiry concluded that the cost of delivering compensation through the litigious system for compensation for accidents through the common law

[129] *Accident Compensation Act* 1972 (NZ).

litigation was disproportionate to the amounts at stake in contest. Accordingly, a statutory scheme was substituted. The money that would otherwise be expended (and the risks assumed) in court proceedings were in future to be subsumed by the new scheme. It was hoped that administrative costs involved would be much lower and that benefits (although smaller than provided by the common law on an indemnity basis) would be adequate and justified by the reduction of the risks of total failure. A similar scheme was recommended in Australia by the same judicial author. However, it was abandoned in 1975 when the Whitlam Government in Australia which had promoted it, was dismissed by the Governor-General (Sir John Kerr) and replaced by a government that did not favour such a change.

Views differ about the implementation of the accident compensation scheme in New Zealand. The aggregate fund for benefits has been whittled away by successive governments, strapped for funds to keep the scheme viable. So far, nothing as bold as the New Zealand experiment has been enacted in other countries although various comprehensive schemes have been enacted in some United States and other jurisdictions. In any case, a large ambit of non-accident torts remains outside the operation of the New Zealand law.

In Australia, having avoided by a whisker the New Zealand type reform, the available damages in tort cases soon had to face other severe restrictions on recovery introduced by states and territories throughout

Australia in 2002-2003.[130] This legislation is substantially uniform, except for the Northern Territory of Australia. The provisions enacted have required courts, considering the assertion of a duty of care, to take into account whether the risk was not foreseeable; was insignificant; or where a reasonable person in the defendant's position would not have taken precautions against the risk of harm. It attempts to regulate the operation of the causation principle in negligence claims more closely; it introduces special provisions excluding liability for "inherently dangerous" activities; and it has tempered significantly the common law rules of negligence on such matters as the negligence of professionals; and the ambit of any non-delegable duty. It also introduces a concept of proportionate liability; controls recovery by 'good Samaritans' and volunteers; limits the of public authority liability to cases of actual knowledge of a particular risk; deletes recovery for injury suffered in the commission of a crime (in some states); restricts damages for wrongful birth; and (in some states) disentitles intoxicated plaintiffs from claiming damages, providing a rebuttable presumption that will have a similar consequence for liability in other states.[131]

The restrictive legislation is complex but its purpose is plain. It is to cut back very substantially on entitlements of people harmed by others, as declared during recent decades by the courts of law. The objective was explained by Justice David Ipp, a Judge of Appeal in New South Wales.[132] He chaired a panel that introduced proposed reforms.

[130] *Civil Law (Wrongs) Act* 2002 (ACT); *Civil Liability Act* 2002 (NSW); *Personal Injuries (Liability and Damages) Act 2002* (NT); *Civil Liability Act* 2002 (Qld); *Civil Liability Act* 1936 (SA), as amended; *Civil Liability Act* 2002 (Tas); *Wrongs Act* 1958 (Vic) (as amended); and *Civil Liability Act* 2002 (WA).
[131] P. Vout, *Torts* (The Laws of Australia, 2nd ed, 2007), Thomson Reuters, Sydney [33.2.40- 33.2.90, pp 34-41].
[132] D. Ipp in Andenas and Fairgrieve, *Bingham Transformation*, "Recent Reforms In Australia To The Law Of Negligence With Particular Reference To The Liability To Public Authorities" 701.

However, the changes enacted went beyond his proposals. They were justified by politicians who quoted insurers contending that Sydney was the second most litigious city in the world (after Los Angeles);[133] that some forms of insurance could not be procured (as for negligence by country hospitals); and that governments needed to reduce the costs of 'green slip' compulsory motor insurance, inferentially in order to survive elections.

In the end, legislators in Australia went considerably further than the advice the Ipp panel had recommended. [134] The resulting 'mish mash', according to Justice Ipp, "seems irreparable now"[135] At the very least, the haste, uniformity and radical nature of the imitations that were introduced probably represented a substantial demonstration of the disapproval of what lawyers and judges had been doing over the precious decades. This was the more surprising because, in the years immediately prior to 2002-3, the judicial decisions favouring claimants came to an abrupt end in the Australian courts themselves.

The most disappointing feature of the restrictive legislation enacted in Australia was the blatant emphasis of its political advocates on reducing the costs of compulsory insurance, at a price that many injured people would be denied most, or any, damages for wrongs undoubtedly done to them by others. Such people are now thrown back on their families or on community or social services where available. In the result the law has shifted the balance in a harsh and uncompassionate way. In doing

[133] Ibid 702.
[134] Id 706.
[135] Id 703.

so, it has reflected other changes in society by which economics has trumped community solidarity in the name of popular politics. There is little that judges can now do in the affected area of the law of obligations but apply the resulting statutory law. The perceived justice or injustice of the outcome is regarded as immaterial.

X. *RECOGNITION OF THE NEED FOR RELEVANCY*

In his chapter on the law of torts in the analysis of the history of the House of Lords,[136] Robert Stevens proclaims that the "modern law of torts is dominated by decisions of the House of Lords". He declares that contract law includes many leading cases from the Court of Appeal or even first instance judges. But in the law of torts, their Lordships were "hyperactive". So that it was "unsurprising" that, in a relatively short period of time, the outcome was perceived as a "mess".[137]

Although both the praise and the blame in this opinion laid too much at the door of the senior English judges, it must be remembered that the focus of the book, and Robert Stevens' context, was the Judicial Board of the House of Lords, 1876-2009. In the 20th and 21st century, some of the credit, and doubtless a disproportionate part of any suggested blame, had to be shared by judges of the common law "beyond the seas".

[136] R. Stevens "Torts" in Adnenas and Fairgreive, *Bingham Transformation*, 628 at 652.
[137] Citing D. Ibbetson, "How the Romans Did For Us: Ancient Roots Of the Law of Negligence" (2003) 25 UNSWLJ 475.

Stevens made a good point in arguing for the advantage of having judges who decide real cases on legal grounds, entrusted with constitutional as well as private law responsibilities. This is the case in Canada, Australia, New Zealand, Ireland, India and most common law jurisdictions other than the United States. Stevens' view was that resolving "banal issues", doubtless many in the field of the law of obligations, was an antidote to judicial grandeur delusions, although he is too polite to describe them quite so bluntly. He concludes:[138]

> *"Perhaps paradoxically, a court which is forced to deal daily with issues which to the layman may appear unimportant, such as snails in bottles of ginger beer, will more competently, impartially and uncontroversially deal with the questions of great constitutional weight, which it is also required to answer. It is important for the law to be as boring as possible. The law itself is compromised if a cynical or "realistic" view is allowed to take hold."*

Depending on the constitutional language (or treaty law or human rights charter) that Stevens has in mind, constitutional questions, for good or bad, are sometimes of their nature incapable of being boring. But so, as I have tried to show, are many cases of private law. Including the puzzling progeny that followed the ginger beer bottle purchase in Paisley by poor Mrs Donoghue.

[138] Stevens, above n.136, 652.

In addition to the many legal revolutions that I have collected, it must be acknowledged that a sea change has come over the institutions and practitioners of law after our tradition, throughout the world. In many countries, we are now attempting to ensure a greater diversity in the intake into the law. We are seeking to support vulnerable lawyers as they study, practise and even become judges. We are looking afresh at subjects of poverty law. We are encouraging greater engagement of the law with civil society. We are promoting various forms of legal aid so that equality before the law will not be an empty ideal. We are increasingly realising the huge practical importance of the law of costs, which can often be far from boring. We try constantly to enhance access to law with new technology. We are more deeply concerned about miscarriages of justice than was sometimes the case in the past.

These concerns give rise to new institutions; new appeal rights; and innocence clinics. We encourage more reliable empirical research about the actual question of the law. Learned professors find the outcomes truly astonishing. They nowadays say so even more directly than John Fleming did in days of yore.[139] We are not only more interested in other legal systems. We are even willing to look beyond the law of England to 'foreigners', whom, we concede, may occasionally have useful things to say to us. Including in the law of obligations. So long as they translate it into English.[140]

[139] A reference to the acknowledgement by Professor Burrows in his paper for Obligations VII, above.
[140] These are some contemporary features of the law in Australia (and doubtless elsewhere) collected in M.D. Kirby, "Unmet Needs for Legal Services in Australia: Ten Commandments for Australian Law Schools" in La Trobe University, (2016) 34 *Law in Context* series, 115.

None of the foregoing features of the law and the modern legal profession was important, or even much mentioned 50 years ago. Yet, these are features that struggle to make our judiciary, practitioners and scholars today fit for purpose. There is no reason to think that the legal resolutions will abate. This prospect is exciting, not boring. To maintain the rule of law, dressed in the raiments of justice, we must keep it moving. On the basis of past experience, the true challenge is to foresee the legal revolutions that are must around the corner.