

## Law Oration 2012

Presented by: Robert Walker

**“Developing the common law: how far is too far?”**

**Tuesday 4 September, 2012 at Banco Court, Supreme Court of Victoria.**

In *Kleinwort Benson Ltd v Lincoln City Council*<sup>1</sup> Lord Goff addressed the question of when a judge (in practice, it would usually be the collegiate decision of a final appeal court) should effect changes in the common law:

“Nowadays, he derives much assistance from academic writings in interpreting statutes and, more especially, the effect of reported cases; and he has regard, where appropriate, to decisions of judges in other jurisdictions. In the course of deciding the case before him he may, on occasion, develop the common law in the perceived interests of justice, though as a general rule he does this ‘only interstitially,’ to use the expression of Holmes J in *Southern Pacific Co v Jensen* (1917) 244 US 205, 221. This means not only that he must act within the confines of the doctrine of precedent, but that the change so made must be seen as a development, usually a very modest development, of existing principle and so can take its place as a congruent part of the common law as a whole.

Occasionally, a judicial development of the law will be of a more radical nature, constituting a departure, even a major departure, from what has previously been considered to be established principle, and leading to a realignment of subsidiary principles within that branch of the law.”

These are just two short extracts from a luminous speech which led the way in making a radical change in the English common law rule as to mistake of law. The speech as a whole is a good introduction to my topic this evening. Lord Goff was an eminent legal scholar as well as a distinguished judge, and as one of the founding fathers of the English law of unjust enrichment he had strong feelings about mistake of law. He regarded the traditional English rule on mistake of law as antiquated, irrational, and out of step with Commonwealth authority. Nevertheless in his speech he carefully considered, not only the

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<sup>1</sup> [1999] 2 AC 249, 378

arguments in favour of change, but also a number of principled objections to significant changes in the common law being made by judges.

The objections include, first, the uncertainty that may arise as to the scope and limits of any change. Judges are not legislators, and even the highest appeal court must hesitate before laying down the law in a way that goes far beyond the facts of the particular case before it. Second, there is the Court's lack of access to, and lack of capacity to process the complex economic, social and scientific data by which much modern legislation is influenced. Third, there is the declaratory (or to be realistic, retrospective) character of judge-made changes in the law. A retrospective change in the law may cause hardship, possibly amounting to injustice, to large numbers of people who are not concerned in the litigation. Whether the Court can avoid such hardship by directing that its judgment shall be prospective only – that is, that its effect should be limited to future events – is an issue of some difficulty. The fourth objection is the most important of all, and to some extent it underpins all the others. In a representative democracy changes in the law are in general a matter for Parliament, often acting on the advice of an expert law reform commission, and not for unelected judges.

I want to examine these points by reference to a number of topics on which the United Kingdom's highest appeal tribunal – the House of Lords until mid 2009, and since then the Supreme Court – has been asked to make significant changes in the common law. In some of those cases it has declined to do so. In others it has made significant changes, and in at least one of them – the mesothelioma cases starting with *Fairchild*<sup>2</sup> - we may now be wondering whether we took the right course. That is partly because of a swift parliamentary intervention which greatly widened the scope of the judge-made change in the common law. Some may see the episode as a cautionary tale of one arm of government not knowing or understanding what the other arm was about.

In speaking of the common law I do not exclude the body of non-statutory law that we call equity. One of the areas that I shall touch on briefly is concerned with developing the principles and doctrines of equity. It might perhaps be said that the biggest of all the questions as to the future development of non-statutory law is whether it is possible and desirable to achieve (I hesitate to use the f word) the fusion of common law and equity.

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<sup>2</sup> *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32

That is a complex and controversial topic, not least in Australia<sup>3</sup>, and you will forgive me if I do not even think of going there this evening.

Most of the topics that I shall be discussing are issues that have arisen in Australia and other Commonwealth jurisdictions, as well as in England. I shall refer to some of the leading Australian cases and I apologise in advance that my understanding of the Australian authorities is likely to be superficial. They are a reminder that we can no longer refer, if we speak accurately, to the common law: we have the common law of Australia, the common law of (anglophone) Canada, the common law of England, and the common law of New Zealand, quite apart from the United States of America. This was explicitly recognised in the *Invercargill* case<sup>4</sup> in 1996, when New Zealand's court of last resort was still the Judicial Committee of the Privy Council. In an appeal about the tortious liability of official building inspectors for latent defects in buildings the Judicial Committee recognised that the common law of New Zealand had diverged from English law, and that it was the former that the Privy Council had to state and apply:

“But in the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the grounds that conditions in New Zealand are different. Were they entitled to do so? The answer must surely be “Yes.” The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths.”

The judgment went on to refer to the position in Australia<sup>5</sup> and Canada<sup>6</sup>.

The first topic I want to look at is the law of evidence, and in particular two common law privileges which have been under scrutiny in recent years: witness privilege as enjoyed by expert witnesses, and the principle against self-incrimination, especially as involved in civil proceedings arising out of large-scale commercial fraud or piracy of intellectual property rights.

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<sup>3</sup> See for instance the preface to the 4th (2002) edition of Meagher Gummow & Lehane's *Equity: Doctrines and Remedies* (ed Meagher Heydon & Leeming)

<sup>4</sup> *Invercargill City Council v Hamlin* [1996] AC 624, 640

<sup>5</sup> *Bryan v Maloney* (1995) 69 ALJR 375; and see *Woolcock St Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 paras 48-57 (McHugh J), 184-190 (Kirby J)

<sup>6</sup> *City of Kamloops v Nielsen* (1984) 10 DLR (4<sup>th</sup>) 641

The justification for the general immunity of witnesses is to enable them to give their testimony frankly and fearlessly, subject only to the criminal sanction of perjury. In relation to expert witnesses the privilege originally served mainly as a protection against a civil action for defamation brought by someone on the other side who was aggrieved by the expert's evidence. In the 19<sup>th</sup>-century case of *Seaman v Nethercliffe*<sup>7</sup> Mr Nethercliffe was a handwriting expert who had given evidence in a probate action that the propounded will was a forgery. The judge was critical of his evidence and the jury found for the validity of the will. Shortly afterwards Mr Nethercliffe gave evidence for the defence in a criminal case and was asked in cross-examination if he was aware of the judge's comments in the earlier case. The cross-examiner then stopped but Mr Nethercliffe went on to exclaim, "I believe that will to be a rank forgery, and I shall believe so to the day of my death." For these remarks Mr Seaman, an attorney who had witnessed the will in question, sued him for slander. The judge, Lord Coleridge CJ, held that he was entitled to witness immunity.

It was only in the second half of the 20<sup>th</sup>-century, with the development of tortious liability for negligent misstatement, that expert witnesses found themselves liable to be sued, not by the other side, but by their own lay clients. The expert might have been instructed primarily to advise on finding a solution to a particular problem, rather than solely with a view to giving evidence in court.<sup>8</sup> But that demarcation problem did not arise in *Jones v Kaney*<sup>9</sup>. Mr Jones had suffered physical and psychiatric injuries in a road traffic accident. Liability was admitted, but quantum was in dispute, especially in relation to post-traumatic stress disorder. Ms Kaney, a consultant clinical psychologist, was instructed as an expert witness for Mr Jones. She discussed the matter with the other side's expert on the telephone, and then signed a joint report, drafted by the other expert, which was very damaging to her client's case. She said that she had been put under pressure to concur in statements which did not represent her professional opinion. Mr Jones was not allowed to make a last-minute change of expert, and had to settle for a relatively low sum. He sued Ms Kaney for breach of a duty of care owed to him.

Those were the circumstances in which Ms Kaney's claim to witness privilege was challenged in a leapfrog appeal to the Supreme Court. The arguments for maintaining the privilege were the traditional ones already mentioned: the need to protect honest

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<sup>7</sup> (1876) LR 1 CPD 540

<sup>8</sup> As in *Palmer v Durnford Ford* [1999] QB 483 (whether a tractor engine had been competently repaired), *Landale v Dennis Faulkner & Alsop* (1994) 5 Md LR 268 (whether an operation for spinal fusion would give pain relief) and *Stanton v Callaghan* [2000] 1 QB 75 (whether imperfect underpinning of a house could be remedied by infilling with polystyrene).

<sup>9</sup> [2011] 2 AC 398

witnesses from harassment, and encourage frank and fearless testimony. On the other side was the need to avoid injustice. As Lord Wilberforce had said over twenty years before,<sup>10</sup> immunity from action

“... depends upon public policy. In fixing its boundary, account must be taken of the counter-policy that a wrong ought not to be without a remedy.”

[That was said in the context of advocate’s immunity. In *Jones v Kaney* there was a difference of opinion in the Court as to how far there is a helpful analogy between these two types of immunity. The duty of an advocate is obviously different from the duty of a witness. Lord Hoffmann said in the *Hall* case<sup>11</sup> that a witness’s only duty is to tell the truth. But one feature that the issues of advocate immunity and witness immunity have in common is the difficulty of drawing a line between activity in (or closely related to) court and preliminary activity of an advisory or remedial nature.]

The outcome was a decision, by five to two, to end the privilege for expert witnesses. The majority took the view that the privilege can no longer be justified for remunerated professionals who are able to protect themselves by insurance, and that there is no strong reason to think that the withdrawal of immunity would have a chilling effect on the readiness of professional men and women to act as expert witnesses. I should however add that some commentators have suggested that, even before *Jones v Kaney*, paediatricians have been less willing to give evidence in cases of suspected child abuse, in consequence of *Meadow v General Medical Council*,<sup>12</sup> decided by the Court of Appeal in 2006. In that case witness immunity was held not to protect an eminent paediatrician from being struck off the register after he had given evidence for the prosecution at the trial of Mrs Sally Clark. She was convicted in 1999 of the murder of her two infant sons, who died in their cots in 1996 and 1998. The paediatrician’s evidence was gravely flawed in that he gave unsound evidence about statistics and probability, topics in which he had no expertise.

In the important case of *D’Orta-Ekenaike*<sup>13</sup> the High Court of Australia, on appeal from the Court of Appeal of Victoria, considered and affirmed the immunity of advocates (Kirby J expressing no opinion as to work in court and dissenting as to work done out of court). The judgments are lengthy and full of interest, but for present purposes I note that

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<sup>10</sup> *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 214

<sup>11</sup> *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, 698

<sup>12</sup> [2007] QB 462

<sup>13</sup> *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1

the decision also reaffirms witness immunity, and sees both immunities as based on the need for finality in litigation. This is emphasised in the judgment of the plurality<sup>14</sup>:

“A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.”

This is in striking contrast to the judgments in *Jones v Kaney*, in which finality, and the need to avoid collateral litigation, receive only a passing mention in one judgment<sup>15</sup>. *Burrell v The Queen*<sup>16</sup> is another recent decision of the High Court of Australia which attaches special weight to finality. I do not recognise the same tendency in recent United Kingdom jurisprudence, possibly because we have had so many serious miscarriages of criminal justice, including not only Mrs Clarke but also the Birmingham Six and the Guildford Three.

[In his dissenting judgment in *D’Orta-Ekenaike* Kirby J made some observations<sup>17</sup> that might be thought to anticipate the majority view in *Jones v Kaney*:

“I am far from convinced that a witness should enjoy an absolute immunity from suit in respect, say, of a report, prepared for a fee out of court on behalf of a party where that report contains negligent mistakes or omissions that cause reasonably foreseeable damage to that party.”

He also agreed with some observations of Lord Hoffmann as to whether the issue of advocate’s immunity should be left to Parliament<sup>18</sup>.

“I do not think that your Lordships would be intervening in matters which should be left to Parliament. The judges created the immunity and the judges should say that the grounds for maintaining it no longer exist.”]

In 2007 the immunity of an expert witness was raised confirmed by the Court of Appeal of New South Wales in *Commonwealth v Griffiths*. [Mr Griffiths had been convicted at trial of manufacturing a prohibited drug, methcathinone. His conviction, which was set aside on appeal, was based on expert evidence in the form of a certificate

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<sup>14</sup> Para 34; the discussion continues to para 42

<sup>15</sup> [2011] 2 AC 398, para 60 (Lord Phillips)

<sup>16</sup> (2008) 238 CLR 218, para 15, citing *D’Orta-Ekenaike*

<sup>17</sup> Para 324

<sup>18</sup> Para 343, citing *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, 704-705

of analysis signed by Mr Ballard, an analyst employed by the Australian Government Analytical Laboratories. Mr Griffiths sued Mr Ballard and his employer. His pleaded case was that Mr Ballard had manipulated the analysis, in breach of a duty of care, by recalibrating his apparatus so as to obtain a positive result, although dishonesty was not alleged. The Court of Appeal relied heavily on *D'Orta-Ekenaike* in upholding the striking-out of the claim. It saw the debateable issue as how far back in time the immunity reached. In the leading judgment, Beazley JA considered at length the English case of *Evans v London Hospital Medical College*<sup>19</sup>. That was a claim against a medical school and three pathologists who were potential expert witnesses in a criminal prosecution for murder. Mrs Evans was charged with murdering her infant son as a result of faulty forensic evidence – in that case, by contamination in the laboratory of organs taken from the child's body. In the end the prosecution offered no evidence against her, as a result of a conflicting report by a more experienced pathologist, but Mrs Evans had to endure a lengthy remand. Quite apart from *Jones v Kaney*, I regard *Evans* as at best a borderline decision, although it was approved by the House of Lords in a group of cases<sup>20</sup> concerned with the liability of local authorities for deficiencies in their protection and care of children.]

Judges in all common law jurisdictions have been more reluctant to interfere with the privilege against self-incrimination. It too was, I suppose, created by judges (though as the distinguished editor of the Australian edition of Cross on Evidence comments<sup>21</sup>, its origins are remarkably obscure). It has historically had a central position in English law and civil liberties. It has been described as “deep rooted in English law”<sup>22</sup>. But as Lord Mustill observed in 1992 in an appeal about the statutory powers of the Director of the Serious Fraud Office<sup>23</sup>

“Nevertheless it is clear that statutory interference with the right is almost as old as the right itself. Since the 16<sup>th</sup> century legislation has established an inquisitorial form of investigation into the dealings and assets of bankrupts which is calculated to yield potentially incriminating material, and in more recent times there have been many other examples, in widely separated fields, which are probably more numerous than is generally appreciated.”

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<sup>19</sup> [1981] 1 WLR 184

<sup>20</sup> *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633

<sup>21</sup> 8<sup>th</sup> Australian ed. (2010) p851 (Justice Heydon)

<sup>22</sup> *Lamb Chi-Ming v the Queen* [1991] 2 AC 212, 222

<sup>23</sup> *R v Director of the Serious Fraud Office Ex parte Smith* [1993] AC 1, 40

Lord Mustill went on to explain that these statutory exceptions differed in their aims and their methods, including their drafting techniques. At that date some but not all of them provided that information obtained under compulsion should not be admissible in any criminal proceedings. This safeguard was extended to the others, by amending legislation, in advance of the coming into force of the UK Human Rights Act.

In a recent appeal to the Supreme Court<sup>24</sup> we were shown a list of 25 statutory exceptions to immunity from self-incrimination, and counsel did not guarantee that the list was exhaustive. The majority of these have the general legislative aim of obtaining information for the purposes of civil proceedings (including insolvency proceedings) arising out of commercial fraud or copyright piracy. There is a strong countervailing public interest in victims of serious fraud or piracy obtaining an effective civil remedy. But in every case the immunity has been curtailed by statute, and the House of Lords has disapproved of any attempt by judges to fashion equivalent non-statutory procedures, even with added safeguards<sup>25</sup>. As Lord Neuberger MR put it in the Court of Appeal in the recent case, which was concerned with breaches of duties of confidence by phone-hacking (Lord Neuberger refers to the privilege as PSI):<sup>26</sup>

“I would take this opportunity to express my support for the view that PSI has had its day, provided that its removal is made subject to [a safeguard against the admission of the material in criminal proceedings]. Whether or not one has that opinion, however, it is undoubtedly the case that, save to the extent that it has been cut down by statute, PSI remains part of the common law, and that it is for the legislature, not the judiciary, to remove it, or cut it down.”

The position in Australia is similar. Any curtailment of a general civil liberty is pre-eminently a matter for Parliament, and although there are numerous statutory exceptions, they must be in clear words. As was said in the High Court in *Sorby*<sup>27</sup>

“The privilege against self-incrimination is deeply ingrained in the common law. The privilege is that the statute will not be construed to take away a common law right, including the privilege against self-incrimination, unless a legislative intent to do so clearly emerges, whether by express words or necessary implication.”

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<sup>24</sup> *Phillips v Mulcaire* [2012] UKSC 32

<sup>25</sup> *A T & T Istel Ltd v Tully* [1993] AC 45

<sup>26</sup> Reported with *Gray v News Group Newspapers Ltd* [2012] 2 WLR 848, para 18



I now turn to substantive law, and I want to begin with the extraordinarily swift development of the English law of personal privacy. The speed of change has been remarkable, not least because in *Wainwright v Home Office*<sup>28</sup>, decided in 2003, the House of Lords firmly rejected an invitation to extend the common law, and gave as one of their reasons the coming into force of the Human Rights Act 1998. *Wainwright* was a claim by a middle-aged mother and her son (a young man with learning difficulties) who had been humiliatingly strip-searched when visiting her other son in prison. These events occurred before the Act came into force on 2 October 2000. Lord Hoffmann observed<sup>29</sup>:

“There seems to me a great difference between identifying privacy as a value which underlies the existence of a rule of law (and may point the direction in which the law should develop) and privacy as a principle of law in itself . . . this is an area which requires a detailed approach which can be achieved only by legislation rather than the broad brush of common law principle. Furthermore, the coming into force of the Human Rights Act 1998 weakens the argument for saying that a general tort of invasion of privacy is needed to fill gaps in the existing remedies.”

But paradoxically, as events have turned out, the Human Rights Act has been the driving force behind this development of the common law. The Act imposes a statutory duty on public authorities not to act in a way that is incompatible with a Convention right (a right, that is, under the European Convention on Human Rights). But the national press and its suppliers, the paparazzi and the private eyes, powerful as they are, are not public authorities, and so the Act did not provide a direct remedy against even the most blatant invasions of privacy by the press.

But an indirect route emerged. During the interval of about two years before the passing of the Act and its coming into force there was a vigorous debate among UK legal scholars between the “verticalists” and the “horizontalists”. The verticalists saw the Act as having top-down effect only, between the state and its emanations on the one hand, and the citizen on the other. The horizontalists saw it as affecting legal relations between citizens and non-public bodies also. The statutory duty to construe legislation compatibly with Convention rights certainly extends that far, because it is quite general. In addition, the horizontalists argued that because under the UK Act (unlike the Charter of Human Rights and Responsibilities of Victoria) the term “public authority” is defined as including

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<sup>27</sup> *Sorby v Commonwealth* (1983) 152 CLR 281, 309 (Mason, Wilson and Dawson JJ)

<sup>28</sup> [2004] 2 AC 406

<sup>29</sup> paras 31, 33, 34

the court,<sup>30</sup> the court is under a further statutory duty to mould and extend the common law, if necessary, to ensure that the court's own decisions are compatible with Convention rights.

This view (although supported by some eminent academics, including the late Sir William Wade<sup>31</sup>) was generally regarded with scepticism, and does not seem to have been put forward in argument in any of the early cases. But it was deployed, and was accepted in principle, by the Court of Appeal in the case of *A v B Plc*<sup>32</sup>. In that case the anonymised plaintiff, a celebrity footballer and a married man – the first of many such footballers to tread that path – sought an injunction to restrain publication of a news story about his sexual indiscretions. Lord Woolf stated,

“The Court's approach to the issues which the applications raise has been modified because, under section 6 of the 1988 Act, the Court, as a public authority, is required not to act ‘in a way which is incompatible with a Convention right’. The Court is able to achieve this by absorbing the rights which articles 8 [right to private and family life] and 10 [freedom of expression] protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.”

So the new right is founded on principle. It is a development from the long-established action for breach of confidence, which had since the 19<sup>th</sup> century (at latest) been available for the protection of trade secrets and (much more rarely) confidential matters of a personal nature.<sup>33</sup> An important intermediate step in its development was the decision of the House of Lords in the Spycatcher case, *Attorney-General v Guardian Newspapers Ltd (No 2)*<sup>34</sup>. As many of you will remember, that case was concerned with the memoirs of a former British counter-espionage officer, then retired and living in Australia, whose book, Spycatcher, was eventually published in 1987. That was after fiercely-fought litigation in the Supreme Court of New South Wales, in which the British Cabinet Secretary was cross-examined by Mr Malcolm Turnbull. The case ended in the High Court of Australia<sup>35</sup> but for present purposes the point to note is that in later

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<sup>30</sup> Human Rights Act 1998 section 6(3)(a)

<sup>31</sup> Some of the academic material was cited in argument in *Wainwright* [2004] 2 AC 406, 412

<sup>32</sup> [2003] QB 195, para 4

<sup>33</sup> As in *Argyll v Argyll* [1967] Ch 302

<sup>34</sup> [1990] 1 AC 109

<sup>35</sup> *Attorney-General (UK) v Heinemann Publishers Australia Pty* (1988) 165 CLR 30 on appeal from (1987) 10 NSWLR 86

proceedings in England the House of Lords restated the law of confidence in very general terms, not necessarily dependent on a pre-existing contractual or fiduciary relationship. But the Lords refused any further injunction because the relevant information was already irretrievably in the public domain.

In *A v B Plc* the English Court of Appeal recognised the principle of privacy but discharged the judge's injunction on the ground that there was a sufficient public interest in the footballer's adultery being disclosed. The court took the opportunity of laying down fifteen guidelines – rather prescriptive and detailed guidelines, it must be said, at that early stage in the development of the law – as to how the court should strike the balance between personal rights of privacy and the public interest in freedom of expression. The guidelines have not all been followed. In particular, later authorities do not attach much significance to the claimant being a “role model” for the young.<sup>36</sup> As the law and practice have developed since the decision of the House of Lords in the case of the celebrity model Naomi Campbell,<sup>37</sup> more significance has been attached to whether a celebrity claimant is in truth more concerned with preserving his commercial sponsorship contracts than with protecting his family; or has made unfounded suggestions of blackmail against someone with whom he has had a liaison; or has previously publicly denied the aberrant conduct (such as use of cocaine) which the press has disclosed.

The development of this branch of the law in England has undoubtedly been accelerated by the egregious conduct of the British press, and the readiness of the legal profession to encourage highly-paid footballers, TV personalities and other celebrities to seek prior restraint in the form of an *ex parte* injunction, which sometimes prohibits publication even of the fact of the injunction being granted. These so-called super-injunctions – secret justice, you might say, available only to the super-rich – have raised serious issues which were addressed last year by the Lord Chief Justice and the Master of the Rolls<sup>38</sup>. Some high-profile occasions on which *ex parte* injunctions have been discharged for material non-disclosure, together with the truly remarkable public inquiry now being conducted by Lord Justice Leveson, seem to have calmed the frenzy.

The leading Australian authorities in this area are the decisions of the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*<sup>39</sup> (the case about

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<sup>36</sup> There are some trenchant comments on this in an essay by Sir Stephen Sedley, *Sparks and Ashes* (2011) p314

<sup>37</sup> *Campbell v MGN Ltd* [2004] 2 AC 457

<sup>38</sup> JCO News Release 19 May 2011

<sup>39</sup> (2001) 208 CLR 199

filming in a possum processing factory) and *Australian Broadcasting Corporation v O'Neill*<sup>40</sup> (the case of allegations of murder against a man already convicted of multiple murders). These cases will be well known to you all and it would not be appropriate for me to discuss them in detail, even if time allowed. But it is worth noting that in *Lenah Game Meats* Gleeson CJ suggested<sup>41</sup> as a test of personal confidentiality whether “disclosure . . . would be highly offensive to a reasonable person of ordinary sensibilities”; probably a rather more stringent test than the English test of “a reasonable expectation of privacy”. *O'Neill* is of particular interest for the scholarly but trenchant exposition by Heydon J of the rule in *Bonnard v Perryman*<sup>42</sup>. That long-standing rule in the law of defamation (no prior restraint where the defendant intends to plead justification) may need to be revisited in England in relation to the threatened publication of lurid personal allegations which may be actionable whether false or true. Both cases show the High Court of Australia’s interest in the special character of proceedings in which an injunction is, for practical purposes, the only relief sought.

Next I want to say something about causation in the tort of negligence, and in particular the debate about equating exposure to risk with actionable loss. This is a very complex subject and I do not intend to go far into the technicalities of statistics and epidemiological evidence. For present purposes I want to focus on the court’s general approach to developing the common law in this area. As a preliminary point it may be noted that in most common law jurisdictions the tort of negligence has in general received relatively little statutory codification or development, although the Parliament of New South Wales has, following the Ipp Report, undertaken the heroic task of formulating principles of causation in statutory form<sup>43</sup>.

Both the House of Lords and the High Court of Australia have been invited, but have declined, to make a radical departure in the field of clinical negligence. The problem is that of late diagnosis of illness, and its causal effect. In the English case, *Gregg v Scott*,<sup>44</sup> there was, as a result of a general practitioner’s error, a delay of nine months in the diagnosis of cancer of a lymph gland in a 43 year old man. In the Australian case, *Tabett v Gett*,<sup>45</sup> there was a delay of only 24 hours (but potentially a crucial 24 hours) in a six-year old girl being examined by CT scan and EEG. In each case the finding on the

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<sup>40</sup> (2006) 227 CLR 57

<sup>41</sup> para 42

<sup>42</sup> [1891] 2 Ch 269

<sup>43</sup> Civil Liability Act 2002 (NSW) section 5 D, considered in *Strong v Woolworths Ltd* (2012) 285 ALR 420

<sup>44</sup> [2005] 2AC 176

<sup>45</sup> (2010) 240 CLR 537

expert evidence was that there was less than an even chance that early diagnosis would have led to the patient's recovery. In each case the court declined to accede to an argument that the "loss of a chance" approach should be adopted in the context of clinical negligence. "Loss of a chance" is a familiar approach in claims for pure economic loss, such as a claim against a lawyer for carelessly permitting his client's cause of action to become statute-barred. But it would have been a momentous step to bring it into the field of personal injuries.

In *Gregg v Scott*, decided in 2005, the House of Lords was split three-two. Lord Nicholls (who with Lord Hope was in the minority) saw it as a case of an obvious injustice which the Court should correct, and not leave to Parliament:<sup>46</sup>

"More fundamentally, if a claim is well-founded in law as a matter of principle, as I believe claims of this nature are, the duty of the courts is to recognise and give effect to the claim. If the Government considers that some or all of the adverse consequences of medical negligence should be borne by patients themselves, no doubt it will consider introducing appropriate legislation in Parliament."

But the majority viewed the proposed change as going beyond the judicial function. Lord Hoffmann quoted the words of Lord Nicholls himself in *Fairchild*:<sup>47</sup>

"To be acceptable the law must be coherent. It must be principled. The basis on which one case, or one type of case, is distinguished from another should be transparent and capable of identification. When a decision departs from principles normally applied, the basis for doing so must be rational and justifiable if the decision is to avoid the reproach that hard cases make bad law."

Lord Hoffmann added:<sup>48</sup>

"I respectfully agree. And in my opinion, the various control mechanisms proposed to confine liability to loss of a chance within artificial limits do not pass this test. But a wholesale adoption of possible rather than probable causation as the criterion of liability would be so radical a change in our law as to amount to a legislative act. It would have enormous consequences for insurance companies and the National Health Service. In company with my noble and learned friends, Lord Phillips of

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<sup>46</sup> [2005] 2 AC 176, para 54

<sup>47</sup> [2003] 1 AC 32, para 36

<sup>48</sup> [2005] 2 AC 176, para 90

Worth Matravers and Baroness Hale of Richmond, I think that any such change should be left to Parliament.”

In *Tabett v Gett*, decided five years later, the High Court was unanimous. Almost the whole of the Court saw the proposed change as a radical step which would alter the traditional balance between plaintiff and defendant in clinical negligence cases.<sup>49</sup>

In *Fairchild*, by contrast, the House of Lords did develop a new principle of causation to deal with the particular problem posed by mesothelioma. It is a form of cancer that affects mesothelial cells lining the internal chest wall. It is invariably fatal. In the present state of medical science it is generally thought to be caused only by the inhalation of asbestos fibres, and to be an indivisible disease in that the inhalation of a single fibre is capable of causing the cancer. I put this rather tentatively because medical science is capable of advancing, and in the recent case of *Amaca v Booth*, which went to the High Court of Australia,<sup>50</sup> the judge seems to have accepted evidence, upheld in the higher courts, that mesothelioma is divisible, at least in the sense that every exposure to asbestos made a “material contribution”<sup>51</sup> to the mesothelioma contracted by the plaintiff’s deceased husband. But so far the UK cases have proceeded on the basis of expert evidence that the disease is indivisible.

Other features of the disease are that it has a very long period of latency (the minimum period is sometimes put at ten years), and it cannot be detected until it has reached an advanced stage. The consequence is that a workman who in the course of his working life is exposed to asbestos in several different employments may eventually develop mesothelioma and (on the scientific view prevalent in the UK) there may be no way of identifying the period of employment during which the fatal inhalation of asbestos occurred. All the employers exposed the unfortunate workman to the risk of a fatal disease, and one at least must have been legally responsible for it, but in many cases it is impossible, on a traditional approach to legal causation, to prove which is responsible. In these circumstances the House of Lords decided to adopt a new rule, narrowly circumscribed, to avoid injustice to claimants. [That injustice was vividly described by Lord Bingham:<sup>52</sup>

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<sup>49</sup> (2010) 240 CLR 537, paras 59 (Gummow ACJ), 68 (Hayne and Bell JJ), 102 (Crennan J) and 151 (Kiefel J). Heydon J confined his judgment to a close analysis of the evidence.

<sup>50</sup> (2011) 283 ALR 461

<sup>51</sup> See *March v Stramore Pty Ltd* (1991) 171 CLR 506, 514

<sup>52</sup> Para 33; see also paras 60-62 (Lord Hoffmann) and 155 (Lord Rodger)

“On the other hand, there is a strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so, when the harm can only have been caused by breach of that duty and when science does not permit the victim accurately to attribute, as between several employers, the precise responsibility for the harm he has suffered. I am of opinion that such injustice as may be involved in imposing liability on a duty-breaking employer in these circumstances is heavily outweighed by the injustice of denying redress to a victim.”]

Professor Jane Stapleton, who has a world-wide reputation in this area of the law, has commented that all but one of the law lords were concerned to avoid using legal fictions when presenting the new rule:

“They explicitly refuse to present this new rule in terms of the legal fiction that ‘on the evidence’ factual causation was sufficiently established. An awareness of these *Fairchild* judgments should galvanise American tort lawyers to appreciate that, although it has gone virtually unremarked, most US asbestos cases have so far proceeded on the basis of legal fictions.”<sup>53</sup>

All the law lords, but perhaps Lord Rodger in particular,<sup>54</sup> were conscious of the difficulty of setting the limits of a judge made rule:

“Identifying, at an abstract level, the defining characteristics of the cases where it is, none the less, proper to apply the principle is far from easy. The common law naturally and traditionally shies away from such generalisations especially in a developing area of the law.”

He went on to suggest six conditions as necessary, though they might not always be sufficient, to establish liability under the new rule.

There was one point, potentially of crucial importance, that the law lords deliberately refrained from deciding. Although there were two other separate appeals

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<sup>53</sup> Stapleton, *Benefits of Comparative Tort Reasoning: Lost in Translation* in Tom Bingham and the Transformation of the Law, ed Andenas and Fairgrieve (2009) OUP p781, referring also to her earlier article *Two Causal Fictions at the Heart of US Asbestos Doctrine* (2006) 122 LQR 189

heard and reported together with *Fairchild*, in none of them was the court asked to determine whether liability, if established, was joint and several (and if several, how damages were to be apportioned between the defendants). That was, it seems<sup>55</sup> because all the risks were covered by solvent insurers, who agreed on apportionment of the damages. Lord Hoffmann noted that this point was not before the House and should be left for consideration when it arose. But it was in a way crucial to the nature of the change in the common law that the House was making.

This became apparent when the point did arise three years later in *Barker v Corus UK Ltd*<sup>56</sup>, another group of cases in which some of the employers – and, more importantly, their insurers – were insolvent, so that informal apportionment between all the employers was not feasible. The House of Lords decided by four to one, with Lord Rodger dissenting, that there was not joint liability, but several liability for an apportioned part of the damages. Much of the argument turned on the nature of mesothelioma as indivisible damage. The heart of the majority view is in Lord Hoffmann’s opinion<sup>57</sup>. He said that the lower courts’ adoption of joint liability,

“would be unanswerable if the House of Lords in *Fairchild* had proceeded upon the fiction that a defendant who had created a material risk of mesothelioma was deemed to have caused or materially contributed to the contraction of the disease. The disease is undoubtedly an indivisible injury . . . but only Lord Hutton and Lord Rodger adopted this approach. The other members of the House made it clear that the creation of a material risk of mesothelioma was sufficient for liability.”

[He referred to the majority speeches and drew this conclusion:

“Consistency of approach would suggest that if the basis of liability is the wrongful creation of a risk or chance of causing the disease, the damage which the defendant should be regarded as having caused is the creation of such a risk or chance. If that is the right way to characterise the damage, then it does not matter that the disease as such would be indivisible damage. Chances are infinitely divisible and different people can be separately responsible to a greater or less degree for the chances of an event happening, in the way that a person who buys

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<sup>54</sup> Para 169

<sup>55</sup> This is the explanation suggested by Lord Phillips in *Sienkiewicz v Greif (UK) Ltd* [2011] 2 WLR 523, para 35

<sup>56</sup> [2006] 2 AC 572

<sup>57</sup> Paras 31 to 35.



a whole book of tickets in a raffle has a separate and larger chance of winning the prize than a person who has bought a single ticket.”]

Lord Rodger dissenting<sup>58</sup>, asked why the majority was “spontaneously embarking upon this adventure of redefining the nature of the damage suffered by the victims?” He referred to the rule that a tortfeasor who is jointly liable may in practice have to bear more than his fair share of the damages, and continued:

“That is a form of rough justice which the law has not hitherto sought to smooth, preferring instead, as a matter of policy, to place the risk of the insolvency of a wrongdoer or his insurer on the other wrongdoers and their insurers. Now the House is deciding that, in this particular enclave of the law, the risk of the insolvency of a wrongdoer or his insurer is to bypass the other wrongdoers and their insurers and to be shouldered entirely by the innocent claimant. As a result, claimants will often end up with only a small proportion of the damages which would normally be payable for their loss. The desirability of the courts, rather than Parliament, throwing this lifeline to wrongdoers and their insurers at the expense of claimants is not obvious to me.”

Parliament agreed with Lord Rodger, and reversed this decision very promptly (and it has to be said, with very little consultation). There was a suitable Bill before Parliament, and within weeks of the decision an amendment to the Bill was introduced. It became section 3 of the Compensation Act 2006, which imposes on each tortfeasor joint and several liability for the whole of the damage caused by mesothelioma. The result of this combination of common law development and statutory extension can be seen in *Sienkiewicz v Greif (UK) Ltd*<sup>59</sup>, on which Professor Stapleton has made some trenchant comments<sup>60</sup>.

If we stand back it is not easy to discern, from the pronouncements of the House of Lords and the Supreme Court in the different areas that I have looked at, any clear policy as to what is, and what is not, off-limits for the development of the common law by a court of last resort. A lot seems to depend on judicial intuition. But the cases suggest that it is

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<sup>58</sup> Paras 86 and 90

<sup>59</sup> [2011] 2 WLR 523

common law rules which might be described as “lawyer’s law” – such as witness immunity, or mistake of law – that the judges are most ready to develop. Lord Goff had passionately-held views about mistake of law, but it is not a topic that is much talked about on the Clapham bus. Conversely issues which potentially have large social and economic consequences, such as causation in clinical negligence and industrial diseases, are generally best left to Parliament.

Sometimes, however, governments are reluctant to bring forward measures responding to a perceived social problem. There may be various reasons for this, including congestion of the legislative programme, lack of consensus as to the correct solution, or simply a feeling that controversial legislation might be a vote-loser rather than a vote-winner. A striking example is the real social problem of unmarried cohabitants who, being young and in love, buy a house or flat with no clear agreement or understanding, either written or oral, as to the beneficial ownership of the property. If in due course the relationship ends in tears, the question of beneficial ownership may have to be resolved by the court in expensive litigation which neither side can afford.

Many common law countries, including most of the states of Australia,<sup>61</sup> have enacted laws giving the court a statutory discretion to resolve these issues in cases where the cohabitation has achieved a degree of stability (such as after two years’ duration, or shorter if the couple have a child). In England the Law Commission has considered this issue at length but has failed to find a solution that it can recommend to Parliament. Parliament has therefore done nothing. In these circumstances the court has had no option but to try to develop trust law concepts to provide a solution. The problems of trying to balance fairness of outcome with predictability of outcome are formidable. The latest case is the decision of the Supreme Court in *Jones v Kernott*<sup>62</sup> (not to be confused with *Jones v Kaney* that I mentioned earlier). Our efforts have met with less than universal approbation (to say the least) from legal scholars. But it is not open to judges, faced with a difficult question, to say “pass”.

The same can be said, with even more conviction, as to issues which – often as a result of advances in medicine, human biology and biochemistry – raise difficult and controversial ethical questions: human fertilisation and embryology, surrogacy, genetic modification, assisted suicide, and indeed the very definition of death. Parliament has

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<sup>60</sup> Factual Causation, Mesothelioma and Statistical Validity (2012) 128 LQR 221

<sup>61</sup> De Facto Relationships Act 1984 (NSW); Property Law (Amendment) Act 1987 (Vict); De Facto Relationships Act 1996 (SA); Property Law (Amendment) Act 1999 (Qd)

passed fairly comprehensive legislation in the field of human fertilisation and embryology, although the swift advance of science and technology in this area has already raised some difficult questions as to the meaning and application of the statutory provisions<sup>63</sup>.

In the field of human mortality, by contrast, Parliament has shown a marked reluctance either to clarify or to change the law. The Mental Capacity Act 2005 has given some statutory guidance as to determining what is in the best interests of an incapable individual. But apart from that, there is no statutory guidance as to the circumstances in which medical professionals can take action (such as switching off life support equipment) that will bring about the death of a patient for whom (as many would think) continued life appears to have no meaning, purpose or value. It is now twenty-three years since the Hillsborough football stadium disaster in which many died and many more suffered serious injuries. One of those most seriously injured was Tony Bland, then aged seventeen. He was crushed and suffered hypoxic brain damage which reduced him to a persistent vegetative state. His brain stem remained alive but the cortex of his brain was completely inactive. He could breathe without mechanical support, so that there was no question of switching off life support equipment. If his death was to be brought about it had to be by the withdrawal of nutrition and hydration. The final extinction of his life would be slow, and distressing to those who were caring for him; Tony Bland himself was incapable of feeling anything.

That was the chilling issue that the House of Lords had to face almost twenty years ago.<sup>64</sup> It has also arisen in other common law jurisdictions.<sup>65</sup> I do not propose to discuss the arguments, or the obvious intellectual embarrassment which the House of Lords found in discussing the distinction, elusive in this context, between acts and omissions. But I draw attention to Lord Mustill's observations<sup>66</sup> as to the role of the court. After referring to the creation of a new common law exception to the offence of murder, Lord Mustill said:

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<sup>62</sup> [2012] AC 776

<sup>63</sup> Human Fertilisation and Embryology Acts of 1990 and 2008; *R(Quintavalle) v Secretary of State for Health* [2003] 2 AC 687

<sup>64</sup> *Airedale NHS Trust v Bland* [1993] AC 789

<sup>65</sup> *Cruzan v Director, Missouri Department of Health* (1990) 110 SCt 2841; *Nancy B v Hotel-Dieu de Quebec* (1992) 86 DLR (4<sup>th</sup>) 385; *Auckland Area Health Board v Attorney-General* (1993) 1 NZ LR 235

<sup>66</sup> p890

“This approach would have had the great attraction of recognising that the law has been left behind by the rapid advances of medical technology. By starting with a clean slate the law would be freed from the piecemeal expedients to which courts throughout the common law world have been driven when trying to fill the gap between old law and new medicine. It has however been rightly acknowledged by counsel that this is a step which the courts could not properly take. Any necessary changes would have to take account of the whole of this area of law and morals, including of course all the issues commonly grouped under the heading of euthanasia. The formulation of the necessary broad social and moral policy is an enterprise which the courts have neither the means nor in my opinion the right to perform. This can only be achieved by democratic process through the medium of Parliament.”

That was nearly twenty years ago, and as I have already noted, there has been almost no legislative activity in this sensitive area. So as Lord Browne-Wilkinson said<sup>67</sup> in the same case:

“The judges’ function in this area of the law should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society. If Parliament fails to act, then judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises. But in my judgment that is not the best way to proceed.”

[The most recent English judgment in this area is that of Baker J in a case reported as *Re M (Adult Patient)(Minimally Conscious State: Withdrawal of Treatment)*.<sup>68</sup>]

In conclusion, I repeat that judges cannot simply say “pass”. In the absence of legislative action they must resolve justiciable issues brought before them, however much they may feel that parliamentary intervention would have been the better and the more democratic course. As Lord Bingham said in another sensitive case about childcare,<sup>69</sup> it is ultimately the duty of the court to give effect to its own judgment:

“That is what it is there for . . . once the jurisdiction of the court is invoked its clear duty is to reach and express the best judgment it can.”

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<sup>67</sup> p880

<sup>68</sup> [2012] 1 WLR 1653.

<sup>69</sup> *Re Z (A Minor)(Identification: Restrictions on Publication)* [1997] Fam 1, 33

So sometimes, when Parliament refrains from addressing a new problem, the court has no option but to give the best judgment that it can.