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"AUSTRALIAN LAW IN THE TWENTIETH CENTURY"

It was suggested by the organisers that we should begin this colloquium by looking in the rear view mirror and recollecting a little of the law's journey since 1900.

Carlyle said that "history after all is the true poetry"[1]. But that view can be contrasted with Lord Chesterfield's that "history is only a confused heap of facts"[2]or Henry Ford's even better known view which he gave in evidence in his libel suit against the *Chicago Tribune* in July 1919[3].

It must be understood, then, that I can seek to give no history of the law in this century. All that I can do is try to bring to mind some of the more important things that have happened in the law since this day in 1900.

Begin, if you will, by recalling that a meeting of judges occurring in this place in November 1900 would have been constituted by Her Britannic Majesty's judges in and for one or more of the several colonies and it would have taken place in a world in which powered flight was but a dream, the automobile a thing of wonder and in which documents for use in court would all have been written in a legible and fair hand.

Of the many things that have changed since then, I want to mention only a few. They are, however, matters that find some reflection in issues that press upon the law, lawyers and the legal system today.

Constitutional change

First and foremost is the fundamental constitutional change that happened in 1901. The "one indissoluble federal commonwealth under the Crown of the United Kingdom of Great Britain and Ireland" in which "the people of New South Wales, Victoria, South Australia, Queensland and Tasmania, humbly relying on the blessing of Almighty God" agreed to unite, is still less than a century old.

The course of constitutional development of this country, since federation, finds reflection in the 195 volumes of the Commonwealth Law Reports as much as it does in the columns of the newspapers or Hansard. Some of those developments can be traced from the Court's recent judgments in *Sue v Hill*[4] where it was held that a person who is a citizen both of Australia and of Great Britain is a citizen of a "foreign power" as that expression is used in s 44(i) of the Constitution.

From the point of view of the observer outside this country, what has happened this century about relations between Australia and the United Kingdom will take their place in a context marked by the end of Empire and the transition of the former colonies to that independence which enables them to take their place in international dealings. Recently, the nature and extent of that transition fell for further consideration by the electors of the country as they considered the Referendum proposals that were put on 6 November 1999. Of those proposals and the outcome of the Referendum I will say nothing.

Interestingly, however, the transition of Australia from colony to independent participant in the affairs of nation states has become a matter of controversy in one other way. Some have suggested that the changes in the relationship between Australia, the United Kingdom and other nation states in the world, caused an unremedied break in sovereignty in this country that leads to the conclusion that all legislation passed in the last 80 years is invalid. Some of these issues were considered in *Joosse v Australian Securities and Investment Commission*[5]. For present purposes what is of interest is that people are thinking about that very difficult concept "sovereignty" and what, exactly, is meant by Australia being an independent and sovereign nation.

There would, I think, be general agreement that the course of decisions in the High Court, since it first sat in 1903, has seen power (or at least politically important power) tend to move from the States to the Commonwealth. The debate between "centralists" and "federalists" is one which has often been conducted through slogans more than reasoning and it is a very large debate about which I can say nothing today. But there is no doubt that the governmental arrangements today are very different from those of 1900 or even 1950.

For Australian lawyers, division of governmental powers between different levels of government is a well-known (if not always well-understood) phenomenon. Notions of limitations on the powers of a parliament and judicial determination of constitutional validity are now not strange to their eyes. But by contrast Dicey's precepts of parliamentary sovereignty (albeit imperial parliament sovereignty) were axiomatic to the 19th century lawyer schooled in British parliamentary traditions. That precept of parliamentary sovereignty has proved immensely influential and durable.

Federal forms of government far from becoming outmoded, may become increasingly common and important in the years that lie ahead of us. Australia, and Australian experience, may therefore have much to offer in this regard. In Europe, what began as an economic community of six fiercely independent nation states is now a much larger grouping having many of the institutions that would be found in a federal union. The European Parliament, the European Court of Justice, and many of the other institutions of the European Union resemble institutions that are found in federated states. And as the European Community takes on greater significance and influence, whether through Currency Union or in other ways, the resolution of questions relating to division of governmental powers between levels of government will look increasingly familiar to Australian constitutional lawyers.

Similarly, in the United Kingdom, devolution to Scotland and Wales will, inevitably, present problems of a kind with which Australian constitutionalists are familiar but which will seem strange in the corridors of Westminster and Downing Street.

Australia, then, may have much to offer other countries as a result of the experience it has had in federal constitutional issues during this century.

Negligence

In the field of private law the "imperial march of negligence" is, perhaps, the most significant single development of the common law this century. That march is by no means at an end.

No doubt it is possible to identify some particular offspring of the snail in the ginger-beer bottle as some of the more interesting participants in that march. Some of those offspring are not yet fully developed but three deserve special mention. First, we have seen recovery for psychological harm become more available. As medical knowledge of psychology and psychiatry improves, will this affect the way in which the law develops? In particular, it seems now to be accepted that psychological harm can build up over time. How does the law cope with that? Take, as an example, the kind of case of which I was told recently, where a country policeman sued the police department for failing to provide him with proper counselling to enable him to deal with repeated exposure to the stress of incidents involving death of or injury to people whom he knew. The plaintiff pointed to no single incident as causing the injury; the complaint was about failing to prevent the cumulative effect of events. Is this to be compensable? The particular action was settled before verdict but claims of this kind may become more common.

A second of the offspring of the snail may not be fully developed but it is already a very big and demanding child. I speak of claims for economic loss arising from negligent misstatement. *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[6] and *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[7] mark the watershed in the area.

Thirdly, there are other kinds of claim for economic loss. Quite obviously we have not heard the last word on claims for economic loss that do not follow from negligent misstatement. What is to happen there?

Will the fears of Cardozo CJ in the well-known passage from *Ultramares Corporation v Touche*[8] of indeterminate liability be realised?

In the 1980s, Professor Fleming was asking whether tort had a future. He raised the question because no fault schemes were being adopted in many jurisdictions and if that happened, what would be left for negligence? Now the threat to negligence may be said to come from a different source - from the statutory cause of action for misleading and deceptive conduct. It may be that misleading and deceptive conduct will bring about the demise of at least some of the hitherto lively offspring of the snail but I doubt that the epitaph for negligence should be written yet.

Unconscionability

What Gleeson CJ referred to some years ago as the Holy Grail of individualised justice has seen life instilled in equitable doctrines. It has also seen the development of the commonly held belief that "unconscionability" is a sufficient statement of reasoning to warrant a conclusion. "Unconscionability" was said by Gleeson CJ to have "an alarming capacity to provoke judicial disagreement as to its application to the facts of even fairly straightforward cases"[9]. It may be that this very uncertainty will come to be seen as making the attempt to analyse cases by reference to it so difficult or unsatisfactory as to warrant discarding reliance upon it. But whether or not that happens, one feature of the emergence of unconscionability as some overarching concept should be identified.

The uninformed observer might think that reference to and reliance upon "unconscionability" as a criterion for decision requires no more than the application of the individual judge's intuitive response to the particular facts and circumstances without resort to any more precise or refined guiding principle. Something of the same approach is reflected in statements that a decision is a "discretionary" decision as if that were a complete and sufficient description of all that needs to be known about the process of making the decision.

Especially is that so in adjectival law like evidence. Sometimes, provisions of the *Evidence Act* 1995 of the Commonwealth and of New South Wales, seem to be treated as if the discretions that are given to judges under those Acts are to be exercised with no signposts, let alone any principles, to guide the judges. On analysis, it can be seen that there are guiding principles but all too often they have not been sufficiently identified before a decision is made.

I mention these two examples of unconscionability and judicial discretion because unless we are to treat judges as philosopher kings, our search must always be for the principles that guide the making of decisions. Resort to a slogan, no matter whether that slogan is, that "the party's conduct was unconscionable", or that there is a discretion which is "to be exercised judicially" seldom, if ever, identifies the relevant principles which should inform the judge's decision. And a failure to identify principle will inevitably lead to inconsistency of results.

The information revolution

The information revolution is upon us. How much longer the revolution will go on and where it will take us, we do not know. Perhaps that will be affected by the litigation between the United States and Microsoft Corporation that has received so much recent publicity. For the moment at least, as the amount of information available increases exponentially, the degree of discrimination being applied to that information diminishes in direct proportion. Nowhere is that to be seen more obviously than in the large "document heavy trial" in which the parties reduce every last document available to them to a database and image bank and then, in the course of trial, attempt to discriminate (unsuccessfully) between what is relevant and what is not, and between what is forensically important and what is not. No longer does a solicitor send to counsel those few documents upon which his or her opinion is sought. Lever arch file upon lever arch file of photocopied documents is dumped on counsel's desk for counsel to winnow as he or she is best able. As transcript analysis techniques improve, and counsel and solicitors become better able to manipulate databases, cross-examination is extended by taking the witness to every possible statement that arguably is inconsistent with what the witness says in court. Whether through fear of suit for negligence or other reasons, every point, good or bad, is taken in a case "in the hope that out of 10 bad points the judge will be capable of fashioning a winner"[10].

While saying something about the information revolution, it is as well to make some reference to the technology that has made it possible. The silicon chip has changed the way in which law is practised. But the silicon chip and related technologies have acquired their own field of legislation and legal learning. As to the former, reference need be made only to the provisions of Commonwealth law that deal with circuit layouts and with copyright in computer programs.

As to the latter subject, the High Court has now had to consider questions of law affecting the computer industry several times. Other courts encounter such problems no less often. Those cases give an interesting insight into the pace of change. One of the earliest Australian cases dealing with computers took place in the District Court of Western Australia in 1980. It concerned the purchase, in 1976, for a price of $12,085, of a Burroughs L6316 minicomputer, equipped with one magnetic tape cassette station. For that price, the plaintiff obtained a machine which the judge described as "capable of performing basic bookkeeping functions" with the aid of a number of "standard package programs in the form of punched yellow tapes". The litigation took a form that has become all too well known. The plaintiff's central complaint was that the machine would not do what he thought it should and what he alleged he had been told it would[11]. What would $12,000 buy now, even if you took no account of 23 years of inflation? What would the machine be capable of doing? How quickly would it do it?

The volume of law

While we may blame computers for many things, we cannot blame them for one other very important change that has happened in the last 25 years of this century. The volume and complexity of legislation passed by legislatures in this country (and, for that matter, in other comparable countries) and the volume and complexity of common law developed in this country has increased markedly. Fifteen years ago at the centenary dinner of the Victorian Bar I suggested that the Ten Commandments are only 295 words long and cover the whole field of life. In the *Crimes Act* of this State alone the legislators then took more than

90,000 words to cover only part of the field. (The rest used to be in the *Matrimonial Causes Act* .)

No longer can one say to a jury "the accused took the horse, surely you do not need to leave the jury box to do your duty?". First, one must give the jury a *Domican* warning, a *Fauré* warning, and take three days to recite an imperfect history of the week of evidence and argument that has preceded it. Whether these developments are good or bad is for you and for others to consider. What is important is that the law has become much more complicated.

And the pace of legislative change, which has seen the size of the annual volume of Acts of the Parliament of the Commonwealth increase from 488 pages in 1901 to 7521 pages in 1997, will not diminish. Indeed it may be thought that if the privatisation of activities previously conducted by government continues, more and more legislation will be seen to be necessary to regulate such bodies.

I have said nothing about the changes that have happened to the way in which the legal profession is organised or the way in which it works. Those subjects are too large to deal with this morning. You may, however, have been interested to see the announcement earlier this week that a new trans-Atlantic firm of ShawnCoulson had participated in what it called "a formal brand development process" and has "adopted the positioning line, 'World Wise', to describe its brand of providing legal services" and to serve as the "operating credo for ShawnCoulson and to the marketplace". As the commentator in *The Times* asked, "Does the depersonalisation of legal services signify that law is now just a commodity available by the yard?"

Challenges

All of these changes I have mentioned have taken place against the background of profound social change. No matter what aspect of society is considered, the period between 1900 and 1999 has seen turmoil, upheaval, evolution, revolution and always change upon change. Often enough the law and, in particular, the judges have had to deal with the effects of these changes. Twenty years ago, the then Chief Judge of the United States Court of Appeals for the Second Circuit, Judge Irving R Kaufman, wrote[12]:

"If there is any lesson to be drawn from the political turmoil of recent years, it is the indispensable need for a judiciary able to serve, in the words of Edmund Burke, as a 'safe asylum' during times of crisis[13] . Federal judges have been increasingly entrusted with basic and vital questions regarding the structure of our society and its allocation of wealth and power, ranging from the admissions policy of a California medical school[14] and the landing rights of the Concorde[15] , to governmental funding for abortions[16] and possession of subpoenaed White House tape recordings[17] ."

All these issues can find echoes in Australian judicial decisions. But so too can be found echoes of Chief Judge Kaufman's observation of what followed in the United States:

"No institution, of course - and least of all one composed of unelected officials who serve for life - can hope to resolve issues of such significance without frequently incurring the wrath of many members of the society. Displeasure with the outcome or trend of decisions provokes cries for replacing objectionable judges with others less irritating and more pliable. It is hardly surprising that the increased prominence of

our courts in nearly every aspect of human endeavour coincides with a period of renewed agitation to place constraints on federal judges."[18]

These then are the challenges that lie before us all. Like anything in the law there is no single instant solution to any of them. Inevitably there are competing tensions which must be resolved. In one respect, however, some things will not change. At the end of a trial, at the end of an appeal, the judge will be compelled to reduce a complex slice of human experience with all its subtlety, to what is, in essence, a one line answer: "A wins; B loses."

1 Carlyle Essays: Boswell's Life of Johnson.

2 Lord Chesterfield, Letters, 5 February 1750.

3 "History is Bunk".

4 (1999) 73 ALJR 1016; 163 ALR 648.

5 (1998) 73 ALJR 232; 159 ALR 260.

6 [1964] AC 465.

7 (1968) 122 CLR 556 and (1968) 122 CLR 628.

8 174 NE 441 at 444 (1931).

9 Gleeson, "Individualised Justice - The Holy Grail", (1995) 69 *Australian Law Journal* 421 at 426.

10 *Ashmore v Corporation of Lloyd's* [1992] 1 WLR 446 at 453 per Lord Templeman; [1992] 2 All ER 486 at 493.

11 *Tuckey v Burroughs Ltd* (1980) 1 SR (WA) 201.

12 Kaufman, "Chilling Judicial Independence", (1979) 88 *Yale Law Journal* 681 at 681.

13 Burke, *Reflections on the Revolution in France* , ed by T Mahoney (1955) at 242.

14 *Regents of University of California v Bakke* 98 S Ct 2733 (1978).

15 *British Airways Board v Port Authority* 564 F 2d 1002 (2d Cir 1977),

16 *Beal v Doe* 432 US 438 (1977).

17 *United States v Nixon* 418 US 683 (1974).

18 Kaufman, "Chilling Judicial Independence", (1979) 88 *Yale Law Journal* 681 at 681.