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Introduction

This book discusses a heretofore unexplored area of Australian legal history by considering Australian contributions to the common law of tort in the first half of the twentieth century. To the extent that the issue has been considered in private law more generally,[1] almost by default it has been assumed that Australian law in substance mirrored developments of the English common law. This was so for both case law and for legislation even though the constraints attached to divergence were different. The common view held both by contemporaries and by later writers was, and is, that there was very little, if any, evidence of Australian exceptionalism in descriptions of private law during the period of this study. Australian courts, both through the rules of formal precedent and informal deference to the superior English courts, simply followed what was dictated in the mother country (the 'cultural cringe' argument).

The aim of this book is to subject this view to detailed critique by considering the evidence contained in Australian cases, and occasionally legislation.[2] Legislation was in theory constrained by the Colonial Laws Validity Act 1865 (Imp),[3] but by the beginning of this study, this legislation had imposed little constraint on legislative authority in private law. But with the Privy Council the superior court in the Australian legal hierarchy for all matters within its jurisdiction, and with decisions of superior English courts varying in the period

[1] There is very little historical analysis of Australian developments in private law and even less for the period of this study. For notable exceptions see P. Mitchell, 'The foundations of Australian defamation law' (2006) 28 *Syd LR* 477; A. Buck, *The Making of Australian Property Law* (Federation Press, 2006); J. Gava, 'Dixonian strict legalism, *Wilson v Darling Island* Stevedoring and contracting in the real world' (2010) 30 *OJLS* 519; J. Gava, 'When Dixon nodded: Further studies of Sir Owen Dixon's contract jurisprudence' (2011) 33 *Syd LR* 157. In intellectual property, see C. Bond, '"A spectacle cannot be owned": A history of the uneasy relationship between copyright and sport in Australia' (2013) 8 *Australian and New Zealand Sports Law Journal* 1; C. Bond, '"This is not a bill to legalize looting": Wartime regulation of enemy-owned intellectual property in Australia' (2015) *IPQ* 79. More generally see B. Kercher, *An Unruly Child: A History of Law in Australia* (Allen and Unwin, 1996) ch. 8.

[2] A. Castles, 'The reception and status of English law in Australia' (1963) 2 *Adel L Rev* 1.

[3] For the Commonwealth, this limitation remained until 1942 (*Statute of Westminster Adoption Act 1942* (Cth)) and for the states until 1986 (*Australia Act 1986* (Cth) s. 2): W. Gummow, 'The Australian Constitution and the end of Empire – a century of legal history' in K. Schultz (ed.), *Legal History Turns* (Federation Press, 2015) 74, 80–81.

of this study between being highly persuasive to virtually binding, the scope for judicial innovation appears limited.[4] At the heart of the book is the argument that Australian contributions to the common law cannot be understood without recognising not only the legal restraints but also the cultural and intellectual milieu in which members of the Australian legal community operated. Seen as part of a community of 'independent Australian Britons' – a phrase used by the historian Keith Hancock in his 1930 historical survey of Australia – a different story emerges as to Australian legal creativity. Australian lawyers had no difficulty in having equal but dual loyalties, loyalties that recognised a distinct kind of Australian patriotism which was not inconsistent with the maintenance of ancestral ties. A commitment to both the universality of the common law in the Empire/Commonwealth, and to the capacity of Australian lawyers to contribute to that common law for the greater good, underpinned their views as to how English legal authority was to be applied in Australia. Rather than hostility, the characteristic mode of engagement was progressive, recognising the limits that a colonial or dominion court had in making wholesale changes but equally careful to ensure that as far as possible the common law, in both theory and in its practical application, was suitable for a country with very different characteristics from England. This more nuanced approach does not reveal that assertions of uniformity with English law are wrong at a global level but by asking the wrong question they seriously undervalue the contribution made by this earlier generation.

This is a key insight in understanding the relationship between the English common law and the common law of the Empire. What to a modern generation of lawyers seems an impossible compromise between legal independence and legal subservience was not at all implausible to a group that had grown up with multifaceted loyalties. The compromise was not always convenient. Assertions that the common law was the same throughout the Empire hid the fact that in its application Australian lawyers and judges were adapting it to suit the needs of a quite different Australian society. At times this could be explained as simply the application of general principles to concrete facts but in some cases it seems as much a mantra as a critical evaluation of the nature of the relationship between English and Australian law. It was perhaps inevitable that the loosening of formal ties between Britain and its constituent Empire would lead to

[4] Privy Council decisions stressed the importance of uniformity in application of the common law to the effect that the decisions of superior English courts should be followed in colonial courts: see *Trimble v. Hill* (1879) 5 App Cas 342; *Robins v. National Trust Company* [1927] AC 515. In the 1940s the High Court of Australia accepted that it should consider itself bound by the Court of Appeal and House of Lords (as well as the Privy Council) if there was no local distinguishing feature (*Waghorn v. Waghorn* (1942) 65 CLR 289; *Piro v. W Foster & Co. Ltd* (1943) 68 CLR 313). This was more formalised than previous statements from members of the High Court, which held that House of Lords' decisions were binding by 'judicial courtesy' but that it was not bound to follow decisions of any other court albeit that Court of Appeal decisions would carry great weight: *Brown v. Holloway* (1909) 10 CLR 89, 102–103 (O'Connor J); *Davison v. Vickery's Motors Ltd* (1925) 37 CLR 1, 13–17 (Isaacs J).

greater normative acceptance of the value of divergence but this took time. By the late 1930s Hancock himself struggled to reconcile the inexorable logic of separation that greater independence would bring with his lived understanding that the collective ideal – now morphing to a Commonwealth – retained important practical meaning for each of the elements of the old Empire. As he put it, 'common sense seemed to be finding a middle way between dependence and disruption'.[5] While dependence was the dominant characteristic of Australian private law in the period of this study, that dependence was rooted in a shared understanding of the limits of divergence that was allowed without causing disruption.[6] For this reason it is worth looking at what Australian lawyers actually did as opposed to what they say they did. Only by a detailed critique of decisions made by Australian lawyers, made in light of the need to balance dependence and disruption, can we understand whether, and if so how, creativity and innovation took place within the wider societal constraints that operated to limit those attributes.

Why the Time Period?

There are a number of reasons why the first half of the twentieth century was chosen as the time period for this study. The creation of the Australian federation in 1901, and the High Court in 1903, provided for the first time a court that could speak with one voice for a 'new' country. While Australian nationalism was not born on 1 January 1901, the dynamics that influenced legal development were different after the creation of the Commonwealth than from the colonial period of the nineteenth century. Talk of an 'Australian' approach to a particular area of law had a new dimension when an Australian court could speak for Australian law as a whole. It also provided formal legal authority that bound the Supreme Courts of the Australian states, something that required the High Court to consider its own view on how cases from the mother country were to be interpreted. Despite the Commonwealth's limited legislative competence over private law,[7] the new federal structure provided the framework within which 'Australian' private law would need to develop.

While 1901 provides a convenient starting point for this study, it is more difficult to justify a specific date for its end. The process by which the political and cultural dynamic in which Australian lawyers operated changed was slow and subtle and historians argue over the point at which there was fundamental

[5] W.K. Hancock, *Survey of British Commonwealth Affairs Vol 1: Problems of Nationality 1918–1936* (Oxford University Press, 1937) 44.

[6] See, for example, Isaac Isaacs' view that, apart from decisions of the House of Lords, any English decision 'is sure to receive our traditional and unfeigned respect. But, short of emanation from a supreme source, every potion should at least be tasted and appraised before being swallowed': *Davison v. Vickery's Motors Ltd* (1925) 37 CLR 1, 14.

[7] There is no general power to legislate for private law in the enumerated areas of legislative power given to the Commonwealth in s. 51 of the Australian Constitution.

change in the Anglo-Australian relationship. Most place the date well after the Second World War.[8] It is not necessary for the purposes of this study to engage with these debates in any detail. The earliest period in which historians have recognised the potential demise of the traditional Anglo-Australian relationship is the end of the Second World War. By ending the study at the end of the war, it is possible to consider Australian legal development in the same broad context as applied at the beginning of the study. While that context was not static, it lacked the seismic changes in Australia's geopolitical relationships that characterised the second half of the twentieth century. The factors that led to the decline of British influence were largely in place by the end of the Second World War with the result that the normative force of the claim that Australian law should follow the English slowly diminished from this point.[9] How the post-war environment affected perceptions of Australian judicial independence in private law is a question that also requires detailed historical investigation[10] but that is another, quite different project from the one undertaken in the book.

Why the Law of Tort?

The law of tort is particularly suitable for the kind of bottom-up, finely-grained research which forms the basis of this book. The law of tort is the general law of the land (as opposed to contract law, for example, which depends largely upon the voluntary conduct of the parties). As a consequence, its subject matter reflects a wide variety of common situations. The way that the law responds to this variety of interactions between members of the community, frequently although not always unregulated, provides insight into both the role that law plays in a community and how that law is applied in practice. For this project, the law of tort was particularly suitable because it allowed for an examination of how this general law, created in England, was applied in very different Australian contexts. While this phenomenon was not captured in an indigenous Australian text published during the period of this study – perhaps because of its largely common law base[11] – the

[8] F. Bongiorno, 'Comment: Australia, nationalism and transnationalism' (2013) 10 *History Australia* 77, 79.

[9] A position formally reached in *Parker v. R* (1963) 111 CLR 610 when a unanimous High Court declared that it was free to depart from decisions of the Appellate Committee of the House of Lords.

[10] For differing views as to the effect of the Australian environment on the need to adapt the common law, see G. Barwick, 'Law and the courts' in A.F. Madden and W.H. Morris-Jones (eds.), *Australia and Britain: Studies in a Changing Relationship* (Sydney University Press, 1980); M. Lunney, 'Goldman v Hargrave' in P. Mitchell and C. Mitchell (eds.), *Landmark Cases in the Law of Tort* (Hart Publishing, 2010) ch. 8.

[11] There were a wide variety of general texts for non-lawyers (e.g. C.H. Chomley, *Law for Laymen: An Australian Book of Legal Advice and Information, Clear, Concise and Practical* (Fraser and Jenkinson, 1907) and specific texts on some areas of private law including real and personal property, hire purchase, banker and customer, landlord and tenant, marriage and divorce, principal and agent, insurance and intellectual property (especially patents). The Australian content in most of these works related to specific legislation passed in the various

reality of tort law litigation evidences the efforts of Australian lawyers to make their mark on the British common law they regarded as their own.

Whether this study is seen as a valuable insight into tort *law* or whether it is seen as a largely disassociated historical exercise will depend on the reader's views as to the inter-relationship between formal legal rules and their surrounding political, economic and social environments. Those scholars who see law in one form or another as self-contained may think this contribution has little to do with law, although it is hoped the wider contexts explored in the book will be recognised as valuable historical studies in their own right. Conversely, those lawyers who at varying levels see law affected by and affecting non-legal spheres of society will find abundant examples of that interaction detailed in the book.

While this is primarily a legal history of tort law, an important consequence of the research approach taken is that the book is at some levels accessible to a wider audience than lawyers. Because tort law frequently deals with the commonplace, the potential for its history to be explained to a wider audience is increased as the subject matter of disputes is intelligible to non-lawyers. Tort law's polymerous coverage – protecting interests in the person, land, and reputation from intentional, negligent and blameless conduct – allows the law's role to be explored in a diverse range of factual situations. By introducing a broader audience to this tentacled area of law, it is hoped that its potential value to other disciplines can be recognised and exploited. Tort law was intertwined with the important political, social and intellectual currents during the period covered by this book and by understanding how it operated we learn much more than mere insights into the legal rules themselves.

Approach

The approach adopted in this book is largely one of 'law in context' modelled (but never emulating as this is impossible) on work of a similar style by the late A.W.B. Simpson. The materials used in the research are largely Australian. Apart from primary legal sources (reported and unreported court cases, and legislation), a wide range of secondary literature, both legal and non-legal, informs the arguments in the book (although consistent with the approach of the book I have looked primarily to Australian literature to evaluate how these contributors saw their own contribution to the common law). The important and innovative features of the book are the extensive use of contemporary newspaper and periodical literature. The digitisation of large swaths of newspapers from

states and territories. In defamation, where there was statutory amendment to the common law, Australian texts too were published: see E.H. Tebbutt, *The Statute Law Relating to Defamation and Newspapers Etc.* (Law Book Co. of Australasia, 1909); J. Moriarty, *The Law of Actionable Defamation, Whether Spoken or Written in the State of New South Wales* (F Cunninghame and Co., 1909).

the period covered by the book opens up the possibility of contextual analysis of legal development in ways not (at least in practice) previously possible. At least one chapter (Sport and Recreation) draws on this source to access previously unknown litigation in this important facet of Australian life. The book also draws on court and government records.

The book is not 'the' history of Australian tort law from 1901 to 1945; it does not attempt to provide a comprehensive account of all possible tort law developments in the period under review. The research approach adopted made such a task impractical in both the time required and the length of any resulting book. Rather, the research proceeded by way of a comprehensive review of decided cases involving a tort issue. The choice of subject/theme for inclusion was based on what was found in the sources and inevitably involves some value judgements. For example, while there were literally thousands of cases on motor vehicle accidents, they have been largely ignored as a genre in this book because I thought they had little to add to an understanding of the way the Australian legal community interacted with English law. To a lesser extent the same is true of workplace accidents. The fact that other authors might perhaps reach different conclusions simply demonstrates the tremendous opportunities this kind of historical approach has for histories of Australian private law. I have also omitted any analysis of the impact of Australian law on its indigenous communities. This is a question of vital interest for many Australians and there is now a considerable literature on this question for legal developments both during the period of this study and outside it. This book in no way attempts to undermine or discredit this perspective on Australian legal development but it is not the only perspective and what makes this book unique is its attempt to explain tort law development through the quite different lens of British race patriotism.

The book is very much rooted in a national approach to the question of Australian legal identity. While there may be scope for transnational histories of private law based on this research methodology, there remains a dearth of core national histories of private law at the end of Empire. While British race patriotism played a role in the construction of identity in other old settler colonies, as the historian James Curran has written, 'the very novelty of Australia's response to the rise of mass nationalism is intellectually engaging in its own right'.[12] As part of the common law family, Australian lawyers were not insular: apart from developments in England, approaches in other common law jurisdictions of the Empire and Commonwealth, as well as in the United States, were absorbed and synthesised as thought appropriate.[13] But while references to the common law had their transnational dimensions, it was the special

[12] J. Curran, 'Australia at empire's end: Approaches and arguments' (2013) 10 *History Australia* 23, 29.

[13] 'In this court some trouble has been taken to preserve consistency of decision, not only with English courts, but also with those of Canada and New Zealand': *Waghorn v. Waghorn* (1942) 65 CLR 289, 297 (Dixon J). More generally, Isaac Isaacs' notebooks demonstrate a remarkable breadth of comparative common law learning ('Papers of Sir Isaac Isaacs, 1883–1969', NLA, MS2755, Series 3, Boxes 4 and 5, Items 10–360).

bilateral relation with the mother country's law that dominated Australian legal discourse and which is at the core of this book. While there have been some very good broad scale transnational histories of private law,[14] they do not replicate the kind of detailed critique and analysis of national identity and national law which is the subject matter of this study and which give it its core academic value as an exploration of an important aspect of Australian intellectual history.

The book is structured around an introductory framing chapter that attempts to place Australian lawyers within the intellectual and cultural environment in which they operated. The following eight chapters are based around a two-fold thematic approach. Some chapters have a relatively doctrinal classification (such as negligence and liability for nervous shock) while others are more abstract (environment, sport and recreation). Within that classification, some chapters consider a multitude of cases and other legal material while others consider considerably fewer legal sources (such as 'In Defence of King and Country' in which the focus is the remarkable *Shaw Savill and Albion Co. Ltd v. Commonwealth* litigation).[15]

Whatever the style, all of the chapters focus on a common question. In light of the existing law, to what extent could Australian developments be considered innovative? Writing in 1995, Bruce Kercher argued that it was too simple to state that in its first fifty or sixty years the High Court merely copied English law.[16] Using three tort law decisions of the High Court from the period of this study, Kercher noted that the High Court dealt with unwanted English precedents in three ways: deflecting legal principles by discovering new aspects of them, avoidance on the basis of factual distinctions, and head-on confrontation. As he notes, this led to a number of questions including whether the reason for avoidance was explicable in cultural, political, social or economic explanations, and that if a different rule was thought appropriate for Australia, how it would be justified within accepted common law methods.[17] The grand aim of this book is to attempt to answer in broad terms the profound questions Kercher is asking in one area of Australian private law. It is written in the belief that it 'is just as important to discover what the judges decided as the rules they apparently followed'.[18] If this study reveals that Australian law was more innovative than has previously been thought, this is not an attempt to create a hagiography around an earlier group of lawyers. Nor is it to reinforce any notion of the 'black armband' view of Australian history.[19] It is simply to affirm

[14] See, e.g., P. Karsten, *Between Law and Custom* (Cambridge University Press, 2002), esp. 363–450.

[15] Some well-known cases were excluded as 'stand-alones' not justifying a chapter: see, for example, *Penfolds Wines Pty Ltd v. Elliot* (1946) 74 CLR 204, and *The Balmain New Ferry Co. Ltd v. Robertson* (1906) 4 CLR 379; [1910] AC 295 discussed in M. Lunney, 'False imprisonment, fare dodging and federation – Mr Robertson's evening out' (2009) 31 *Syd LR* 537).

[16] Kercher, above n. 1, 171.

[17] Ibid.

[18] Ibid.

[19] A phrase brought to prominence by Prime Minister John Howard in the Robert Menzies Lecture in January 1996 where he said: 'The "black armband" view of our history reflects a

that Australian lawyers were part of a wider community that saw British race patriotism as core to its identity. As the common law was a component of that affinity it is hardly surprising that Australian law formally mirrored the common law of the mother country. But affinity was not subservience, and the legal independent Australian Britons recognised a place for Australian interests just as much as their colleagues in other fields. They sought to fashion a law that implemented those interests when the opportunity arose and this book is about recognising their efforts, however imperfect or misguided they might seem to a different generation. It is about rescuing this generation of lawyers 'from the enormous condescension of posterity'.[20]

As tort law in this period was largely the product of common law decision, the focus of the book is on judicial decisions. As appellate courts had greater scope for creativity than trial courts, more time is spent in the Banco Courts of the state Supreme Courts, and in the High Court, than at first instance in the Supreme Court or in lower courts. But given the greater availability of lower court decisions through easy and searchable access to many newspapers, it would be remiss to avoid all consideration of what was happening at 'grass roots' level and in several chapters the decisions of magistrate and district courts are included in the analysis.[21] While the book is not a history of judicial figures, it is impossible to write a book of this nature without making some assessment of the quality of the judiciary deciding the cases being discussed. These judgements too are personal and are reflected in the judges whose views are most discussed in the book: in the High Court, Griffiths, Isaacs, Dixon and Evatt, in New South Wales, Jordan, and in Victoria, Cussen. The reputations of these judges have lasted into modern times but this study allows a modern reader to see why they were respected in their own times. Legislators played a much less significant role in tort law in the period of this study (which postdates the introduction of the defamation code in Queensland) because legislative developments usually followed earlier English developments. The notable exception is the Law Reform (Miscellaneous Provisions) Act 1944 (NSW), which in its quest to end the shadow of *Victoria Railway Commissioners v. Coultas* over claims for nervous shock extended the law well beyond the pre-existing English common law, a development discussed in detail in Chapter 6.

Ultimately, the aim of this book is to challenge the reader to think differently about private law development in Australia in the first half of the twentieth century in two related ways. The first is to suggest that, the constraints imposed by judicial deference, formal and informal, to English and Privy Council decisions were not the straight-jackets that they might with hindsight have seemed. As discussed in Chapter 2, it is not that these limits were not real

belief that most Australian history since 1788 has been little more than a disgraceful story of imperialism, exploitation, racism, sexism and other forms of discrimination.'

[20] S. Macintyre, *A History for a Nation: Ernest Scott and the Making of Australian History* (Melbourne University Press, 1994) 211. The quote is originally from E.P.Thompson, *The Making of the English Working Class* (Victor Gollancz, 1963) 12.

[21] See, especially, 'Sport and Recreation', Chapter 10.

and did not impose boundaries, but rather that it required something other than outright conflict to avoid being 'dressed down' by an appeal to the Privy Council. But perhaps more important is that common law development took place in a political and social context that made outright conflict unthinkable, at least for a class that was an important part of the established order. Australian lawyers of the period were not interested in setting up their own independent legal rules or system. They saw themselves as part of a wider entity, the British race. Only by understanding this self-conception can we hope to understand both what Australian lawyers were doing and why they were doing it so as to fully appreciate the scope of tort law development in Australia between federation and the end of the Second World War.