

**SINGAPORE ACADEMY OF LAW ANNUAL LECTURE
12 SEPTEMBER 1995**

**“FROM PROCEDURE TO SUBSTANCE AND REFINEMENT OF
LEGAL PRINCIPLE”**

BY THE HONOURABLE SIR ANTHONY MASON*

I count it as a privilege to have been invited to deliver the second in this series of annual lectures organized by the Singapore Academy of Law. The invitation recognizes the bonds that exist between Singapore and Australia, not least of which is the common law heritage that both countries have acquired from the United Kingdom. That heritage is a vital element in the framework of government in our societies. It is an important link between us that is overlooked sometimes when so much emphasis is given to trading relationships.

As the title to this lecture implies, though perhaps with no great clarity, I shall speak of developments both procedural and substantive that have taken place in the courts in Australia in the last decade. The outline which I shall give is by way of provision of information. I do not put forward what we have done as a model for others to follow. Conditions and circumstances vary from country to country and result in differentiation in the characteristics of particular legal and court systems. What is appropriate for Australia, with its large continental land mass and thinly spread predominantly Anglo-Celtic population clustered around coastal cities, is not necessarily appropriate for the City-State of Singapore, the south-eastern gateway to Asia. It is with that preliminary averment that I turn to the topic.

The background to procedural change

As we all know, the common law adversarial system is a time-consuming and expensive model. It is labour intensive and expensive, not only to the users, but also to the government that funds it by providing the judges, court staff, premises and other facilities. The emergence of the litigious society in the United States, with its high expectations of redress through resort to litigation, has been mirrored in Australia on a smaller scale. The consequence has been an enlarged court system at great cost to government. But the enlarged court system has not eliminated delays, and the cost of the system to its users has continued to rise.

It was about ten years ago that initial efforts were made to identify and meet the problems. The initiative came partly from the judges themselves

* A.C., K.B.E.; Chancellor, University of New South Wales; National Fellow, Research School of Social Sciences, Australian National University.

but, more importantly, from governments. It was influenced by the belief, founded on economic rationalism, that you can cut public outlays by enhancing efficiency. So you can. And, so long as you are not compromising the integrity of the relevant function — in this case the administration of justice — there are strong reasons for insisting on enhanced efficiency. In the court system there was certainly a need for it.

At the same time, in the early stages of the move towards greater efficiency, there was justifiable judicial concern that the interests of justice would be sacrificed on the altar of efficiency and cost cutting. Some proposals relating to the courts smacked of the way in which economists would deal with a production plant. There were proposals that salaries and funding should be related to productivity, apparently measured by the number of cases processed. Happily these suggestions did not take root.

Coupled with the demand for greater efficiency were the demands for increased accessibility and judicial accountability. These demands had their parallel in the United Kingdom and elsewhere. Increased accessibility and accountability and greater efficiency do not necessarily go hand in hand. Accessibility and accountability require the provision of additional resources which might otherwise be devoted to a court's judicial work.

Court administration

One outcome which was related indirectly to the efficiency reforms was the decision of the Federal government to grant administrative autonomy to each of the Federal Courts. The High Court of Australia had enjoyed such autonomy since 1979. That autonomy has been extended also to the Federal Court and the Family Court. Each court is given an annual budget designed to cover its operations for the year. Within that budget, it provides its own administration, instead of having its administration provided and financed by the Attorney-General's Department from its general budget. The Federal Courts therefore have their own administration. Their officers are responsible to the Chief Justice or the judges generally. The new system works well. It eliminated a source of friction that existed between the courts and the executive and it has enabled the federal judges to institute case management and procedural reforms which might have been viewed less enthusiastically had they been introduced by the executive itself.

Although the devolution of administrative responsibility to the courts themselves was linked indirectly to efficiency, the principal purpose of the reforms was to reinforce judicial independence. It was felt that the dependence of the courts on the executive government for the provision of administrative services compromised the independence of the courts.

Court management information

The advent of new technology has enabled the courts to gather, assemble and process a wide range of data relevant to court operations. The

information embraces the budget, financial planning, up-to-date financial situation, library services, research (including legal research for use by the judges), training as well as the caseload, case flow management, including caseload disposition in the light of the resources available at any time and the need, if any, for additional resources. There is no question that the new technology has enabled the courts to devise and achieve more efficient administration of their resources so as to meet the caseload and the needs of consumers. Without the new technology, that would not have been possible.

Court procedures

Various procedures have been adopted with a view to expediting the trial and the appellate processes as well as the hearing itself. In addition, specific measures have been devised to clear up delay and congestion in court lists of cases awaiting hearing. Case management, largely based on the United States model, is now an established procedure. I was about to say an “accepted procedure” but that would be a mistake, because there has been some professional criticism of case management on the ground that it involves additional preliminary hearings and call-overs and thus increases the legal costs of litigants. It is difficult to gauge whether this criticism has any substance.¹ Perhaps the true cause of extra costs is delay by the parties’ legal representatives. In any event, case management results in expedition of the litigious process and that, on balance, is likely to improve the quality of the administration of justice.

Case management is a comprehensive regime for the management of a legal proceeding, in which attention is given to time and the steps to be taken from the commencement to the disposal of the proceeding. It involves the setting of a timetable and supervision of progress through that timetable. Case management includes differential case management. In other words, the management requirement is related to the requirements of the particular case or class of case.

Of course, case flow management does impose a greater burden on judges and court officers. The responsibility of ensuring that cases move forward entails monitoring and continuous communication with the representatives and the parties. Consequently, case management consumes more time than the old *laissez-faire* approach.

In civil litigation, especially without a jury, the courts are now applying the time-saving procedures developed by judges in commercial cases. In directions hearings, efforts are made to reduce contested issues of fact to the fundamentals of the dispute. Specific issues are often formulated by

¹ Access to Justice, Interim Report, June 1995, by Lord Woolf to the Lord Chancellor on the civil justice system, p.33, where it is stated that attempts to monitor the effect of cash management systems in the United States on costs have been inconclusive.

the judge, sometimes by agreement, and, where possible, matters are left to proof by affidavit. Listing and exchange of relevant documents, instead of discovery, are provided for and the evidence in chief of witnesses is given by way of verification of a written statement of evidence. That practice has been criticised on various grounds, including the ground that, particularly in protracted cases, the statement suffers on occasions from complexity due to too much input on the part of the legal representatives. But, on balance, the new practice is thought to be efficient and fair. If possible, submissions are put in writing, particularly on appeal, where the growing trend is to require written argument to be presented in advance of the hearing.

Evidence

Simplification of the rules of evidence would reduce time taken in the trial. A new evidence statute² has been prepared with a view to achieving this object and making provision for the admissibility of materials generated by the new technology.

The evidence of expert witnesses is often given in the form of reports, subject, of course, to cross-examination. Efforts are made to limit the number of experts called in order to reduce the time taken in receiving their evidence. One of the reform proposals under consideration is for the court itself to appoint expert witnesses.³

The initiative in, and the control of, the litigation is, as a result of these procedures, passing from the parties to the judge. The judge is becoming a manager of the litigation process before the case comes to trial. More than that, the judge is becoming, to some extent, a manager of the trial. The judge is now expected, more so than in the past, to take steps to prevent unnecessary waste of time as, for example, in unduly protracted and unprofitable cross-examination. For my part, I consider that a judge should be entitled to set reasonable limits to the cross-examination of a witness. And, likewise, a judge should be entitled to limit the number of witnesses to be called if it emerges that nothing is to be gained by the calling of additional witnesses. Although a much-talking judge is like an ill-tuned cymbal, we should recognize that a more interventionist judge can contribute to an efficient trial without prejudicing its fairness.

2 Act No. 25 of 1995 (NSW) which is yet to be proclaimed. The Act is the result of a decision by State and Territory Attorneys-General to give in-principle support to uniform evidence laws in Australia. The Commonwealth of Australia introduced its Evidence Act 1995 earlier this year. It is in operation.

3 Access to Justice Report presented to the Attorney-General for Australia on 2 May 1994 by the Access to Justice Advisory Committee par. 17.34. This report is to be distinguished from the report under a similar title presented by Lord Woolf to the Lord Chancellor referred to in fn. 1.

List clearing exercises are now undertaken as a matter of course in some jurisdictions. Graphically and unjudicially described by such titles as the “autumn offensive”, they involve the listing of a large number of cases suitable for prompt disposition. This procedure has been effective in reducing backlogs without harmful effects. We forget that there are many cases in which the parties simply want a decision. They are not looking for a long and closely reasoned judgment.

Alternative dispute resolution

Great emphasis is now given to the various forms of alternative dispute resolution. ADR, particularly in the form of conciliation and mediation, is widely used and with success in family law disputes. Commercial arbitration has always been popular and mediation has proved very successful in resolving some high profile commercial and administrative disputes. The attraction of mediation is that it saves the high costs which would otherwise be incurred in long-running litigation. And commercial organisations are looking now to avoid or reduce the heavy legal costs associated with commercial litigation.

However, ADR has not yet proved to be as popular as was hoped. That may be due to the fact that in a society and in a profession accustomed to adversarial litigation, ADR is regarded as a second-best option. It may also be that commercial organisations wish to exert pressure on an opponent by resorting to litigation. The notion that ADR is a second best option is associated with the belief that ADR has been seen as a means of reducing the courts’ workload and that is so. It is imperative that ADR is seen as an effective and advantageous form of dispute resolution in its own right. Court annexed ADR is now available in a number of jurisdictions. In my view it will be availed of increasingly. One question, still debated, is whether ADR should be ordered against a party who does not consent to it.

Early case appraisal

In the United States, procedures known as early neutral evaluation or mini-trials are used as a means of resolving and settling cases in advance of an orthodox trial. Procedures requiring the early disclosure of all relevant evidence and for reference of a case for appraisal are under consideration in Australia.⁴

Video link and digital transmission

In the High Court of Australia we hear special leave applications in Canberra on a video link with digital transmission, the applications being presented and opposed by counsel in some other city. Arrangements have

⁴ Ibid.

been made by courts in Australia and New Zealand for trans-Tasman hearings. Evidence can be received by a court using the same facilities. These transmissions save costs.

The criminal trial

Criminal trials have been a particular problem. That is because the volume of criminal cases has been increasing and because the very long criminal trial has emerged to plague the system. Traditionally, trials on indictment have been heard by juries. Indeed, that is mandated in federal cases by s. 80 of the Australian Constitution.⁵ Quite apart from that provision, trial by jury is an integral part of our criminal justice system.

Long criminal trials conjure up the image of trials for commercial or corporate fraud — the Guinness trial springs to mind. But, in Australia, we have had many very long criminal trials outside the area of commercial or corporate fraud. Drug offences and taxation offences are notable examples. In these cases, the number of the offences charged and the inclusion of conspiracy counts has added significantly to the length of the hearing. Prosecutors would do well to limit the number of charges and exclude conspiracy where possible, with a view to avoiding complexity and saving time.

Despite these onerous demands upon the system, significant advances have been made. One is the gradual introduction of a system of video-taping or sound-recording the interrogation of suspects by police officers. Although law enforcement officers were initially sceptical of the value of this reform, it is now regarded as a beneficial reform by police officers and lawyers. It has considerably reduced the time taken in *voir dire* hearings at criminal trials.

Previously, when a confession was alleged not to be voluntary, resort was had to a *voir dire* hearing which often occupied a significant proportion of the time taken at the trial. Video-taping and sound-recording have altered that. They have also reduced the time taken in eliciting evidence from police officers attending the interview. And it is likely that they have resulted in the entry of pleas of guilty in cases where otherwise a plea of not guilty would have been entered. Another advantage is that the video-tape gives the jury a much better understanding of the interview process.

A further advance is the early determination of questions of disputed evidence in advance of the trial. This determination by the trial judge enables the parties to chart their course at an early stage. It also avoids inconvenient interruption of the trial before the jury. Other reforms under consideration are the introduction of plea bargaining which is not presently an accepted procedure in Australia, the disclosure by the defence of its

⁵ In matters of federal jurisdiction.

case in advance of trial, and the admission of evidence by video-link, satellite or telephone.⁶

Computerization

As is the case elsewhere, Australian judges are making increasing use of computers. The use of computers is an inevitable element in the judicial process, in commercial litigation and even in the criminal trial, particularly when it concerns complex commercial transactions. The potential for use of computers in criminal trials, even in trials not concerned with commercial transactions, is illustrated by the Kalajzich inquiry.

In 1988 Mr Kalajzich was convicted of murdering his wife Megan, of conspiring to murder her and of discharging a gun with intent to murder her. An appeal against conviction was dismissed. Subsequently, a Commissioner was appointed under statute to inquire into the guilt of Mr Kalajzich in relation to the three offences.

Mr Kalajzich was a wealthy businessman who, at the relevant time, controlled a hotel and lived with his wife. Mr Elkins, who was a security guard and manager at the hotel and the principal witness for the prosecution at the trial, gave evidence that Mr Kalajzich instructed him to find a person who was willing to kill his wife. Through others, Mr Elkins secured the services of Mr Canellis who later withdrew from the undertaking, to be replaced by Mr Vandenberg. According to Mr Elkins' evidence, after Mr Vandenberg had made an abortive attempt to shoot Mrs Kalajzich, and had obtained another gun provided by Mr Canellis, Mr Vandenberg entered the matrimonial home through a door left open by Mr Kalajzich and fired two shots which killed Mrs Kalajzich instantly. Mr Canellis assisted the police and was given immunity from prosecution. Mr Elkins then agreed to cooperate with the police. He pleaded guilty to the charge of conspiracy and was sentenced to a term of imprisonment. At the trial, Mr Kalajzich alleged that he was the victim of a conspiracy to pervert the course of justice to which Elkins, Canellis and police officers were parties.

The Commissioner, who was assisted by senior and junior counsel, gave counsel leave to appear for Messrs Elkins and Canellis. Two counsel appeared for Mr Kalajzich. Other parties were also represented by counsel. The Legal Aid Commission offered Messrs Elkins and Canellis \$22,000 each to gain access to independent legal advice but otherwise refused legal aid for representation during the inquiry. The inquiry was estimated to be lengthy and it was conducted substantially with the aid of computers. It was for that reason that Mr Elkins and Mr Canellis sought legal aid for

⁶ Access to Justice Report, *ibid.* pars 18.34 to 18.46. See also the Crimes (Criminal Trials) 1993 Act (Vic) which provides for a preliminary directions hearing in advance of the criminal trial and for the filing of a defence response to the prosecution case. The directions hearing resembles a directions hearing in a civil action.

expert representation as they were not computer-literate and were unable to master the task of reading, analyzing and understanding the written and electronic data in a way that could be expected of counsel assisted by experts. The New South Wales Court of Appeal stayed the hearing so far as it affected the interests of the two men and so far as it would, without proper and reasonable representation, constitute a breach of the requirements of procedural fairness. The High Court of Australia set aside the order.

The joint judgment in the High Court⁷ sets out the way in which the inquiry was conducted by means of computers:

“... The commissioner and others have computer screens before them. Documents are not shown to witnesses in hard copy, nor are they available in that form in the inquiry room. Instead, they are stored on computer and flashed on a screen for the witnesses to examine. Similar arrangements have been made in relation to the transcript. Mastery of this equipment requires some training or experience. The way in which the inquiry is being conducted is sophisticated and an advance on the ordinary procedures which have hitherto been followed in courts, tribunals and inquiries.”

No doubt some complex trials could be more conveniently and expeditiously undertaken with the use of computers. If the accused is not computer literate, cannot reasonably be expected to become so and cannot afford expert assistance then, in order to secure a fair trial, it would be necessary to provide the accused with the means of obtaining the requisite expert assistance. Otherwise there is the risk that a fair trial could not be had. In practice it may become a question of balancing the benefits to be obtained by conducting a computerised trial against the benefits of conducting a trial by orthodox means. That may be a question for the future.

The Access to Justice report

The outline which I have given so far would not be complete without some reference to the report of the Access to Justice Advisory Committee,⁸ established by the Australian government. The main thrust of the report was to make recommendations designed to make the justice system more accessible, fairer and more effective. So far as the courts are concerned, the report recommended the development of court charters and performance indicators with a view to providing a better service for litigants and the public. It also advocated development of more efficient procedures.

⁷ *NSW v Canellis* (1994) 124 ALR 513 at 519.

⁸ See fn. 6.

The changing role of the courts

The new emphasis on accessibility and efficiency and the reforms which I have outlined clearly recognise the vital importance of the justice system within the framework of a modern democracy. In keeping with that philosophy, the changes have brought about a pronounced alteration in the relationship between courts and litigants. Court registries and staff provide much more information and assistance to litigants and their representatives than was the case in earlier times. The days when court registries could expect parties and lawyers to fend for themselves are a thing of the past. That is important and it will have consequences in an era in which a growing proportion of litigants are unrepresented. Unrepresented litigants occupy a disproportionate amount of registry time.

Moreover, the emphasis given by government to accessibility, along with indications that the system will become more accessible and efficient, is likely to generate higher expectations of resort to litigation and may encourage resort to litigation as a means of achieving ends.

The procedural reforms are centred upon the theme that the courts will move from a passive role in dealing with litigation, leaving the initiative to the parties and their legal advisers, to an active role in processing and shaping the litigation. So the judge becomes a manager, instead of a mere ring-keeper. As such, the judge can alleviate some of the harsher aspects of the adversarial model. In this way our system should become more efficient and accessible without compromising its essential fairness.

It would be wrong to liken the new model judge to a judge in the European civil law system. But there is now some convergence between that system and ours. However, our system still involves a determination on the cases presented by the parties.

From procedure to substance

In making our system of justice accessible and efficient with the object of securing “attainable justice”, the principles of substantive law have a part to play. The complexity of substantive law can itself add significantly to the length of litigation and costs. So reform of evidence and procedure should be accompanied by the elimination of unnecessary complexity in our substantive statute and judge-made law. Hence, the Federal Attorney-General has set up a task force to convert our unwieldy taxation and corporation laws into plainer and shorter laws. Of course, in the case of judge-made law, the primary object of a justice system is to achieve just outcomes.

Criminal law

That has been the central thrust of many significant judgments of the High Court in recent years. I begin with the criminal law. We recognised the

existence of jurisdiction in superior courts to grant a permanent stay of criminal proceedings for abuse of process where the circumstances, as, for example, delay in bringing the case on for trial, are such as to generate the likelihood of an unfair trial.⁹ The exercise of the jurisdiction is exceptional because courts have power to make orders with a view to minimising the risks of an unfair trial.¹⁰ The exercise of the jurisdiction will not only protect the interests of the individual in not being subjected to an unfair trial, but it should also enhance efficiency by causing the prosecution to be ready for trial within a reasonable time. One unwanted consequence of the jurisdiction is the prevalence of unmeritorious applications for a stay which can result in delaying the trial and fragmenting the criminal process. The courts must be alert to limit this development.

Another important decision was the formulation of the rule of practice that, whenever police evidence of a confessional statement alleged to have been made by the accused while in police custody is disputed and not reliably corroborated, the judge should warn the jury of the dangers of convicting on the basis of that evidence alone.¹¹ A factor taken into account by the court in reaching that conclusion was the fact that arrangements for audio-visual recording of interviews of suspects were well advanced and that persons whose interviews were otherwise recorded would stand at a relative disadvantage. The formulation of this rule and the introduction of the new form of recording interrogations will have the beneficial effect, it is hoped, of inducing law enforcement officers to seek out other evidence of the commission of offences rather than placing too much reliance on disputed confessions.

The third criminal case I should mention is *Dietrich v The Queen*.¹² There the High Court decided that where an indigent accused charged with a serious offence, who, through no fault on his part, is unable to obtain legal representation, applies to the trial judge for an adjournment or stay, then, in the absence of exceptional circumstances, the trial should be adjourned or stayed until legal representation is available. The Court recognized that absence of legal representation in the adversarial system could lead to a trial being unfair, thus resulting in a miscarriage of justice. *Dietrich v The Queen* not only enhances the prospect of a fair trial, it also enhances the efficiency of the criminal process by decreasing the risk that a trial judge will be compelled to conduct a serious criminal trial with the accused unrepresented, that being a difficult undertaking for a trial judge.

⁹ *Jago v District Court (NSW)* (1989) 168 CLR 23.

¹⁰ *Ibid.* at 31.

¹¹ *McKinney v The Queen* (1990–1991) 171 CLR 468.

¹² (1992) 177 CLR 292.

Torts

The High Court has also endeavoured to simplify the common law by eliminating unnecessary categories and distinctions. Thus, the Court has subsumed the various bases on which occupiers of premises may be held liable under the general principles of negligence.¹³ Hence the obligations of occupiers to persons entering premises are manifestations of the general duty of care. Likewise, we have recognized that a solicitor, in common with other professional persons, is liable in tort as well as contract for negligence in the performance of work for a client.¹⁴ And perhaps even more significantly, we have taken the view that the liability arising under *Rylands v Fletcher*¹⁵ may be regarded as a subset of general liability in negligence for a breach of the general duty of care.¹⁶

The relationship of proximity has been identified as the central element in the duty of care, imposing an overriding limitation on the test of reasonable foreseeability.¹⁷ In the more settled areas of negligence involving physical injury or damage caused by a negligent act, reasonable foreseeability is generally an adequate indication that the relationship of the parties with respect to that damage has the requisite proximity.¹⁸ But that is not the case where the plaintiff seeks to recover pure economic loss where known reliance or dependence or the assumption of responsibility will be an essential element.¹⁹ In any event, the requisite proximity must exist with respect to the negligent class of act alleged and the kind of damage which has been sustained.²⁰ In cases of economic loss resulting from negligent misstatement the element of reliance will usually be present.

Although we held that, in ordinary circumstances and in the absence of a relevant inquiry and of reliance, a local authority does not owe a duty of care to a subsequent purchaser of a building to avoid loss or injury to that purchaser arising from negligent inspection of the building by the authority's inspectors while the building is in the course of erection,²¹ we later held that the builder of a house owes a duty of care to a subsequent purchaser.²² In terms of proximity, it makes little sense to draw a distinction between the physical damage the building owner would suffer as a result of negligent construction and the economic loss a subsequent purchase would sustain.

13 *Australian Safeway Stores Pty. Ltd. v Zaluzna* (1987) 162 CLR 479.

14 *Hawkins v Clayton* (1988) 164 CLR 539.

15 (1868) LR 3 HL 330.

16 *Burnie Port Authority v General Jones Pty. Ltd.* (1993) 120 ALR 42.

17 *San Sebastian Pty. Ltd. v The Minister* (1986) 162 CLR 341 at 355; *Bryan v Maloney* (1995) 128 ALR 163 at 166.

18 *Jaensch v Coffey* (1984) 155 CLR 549 at 581–582; *Hawkins v Clayton* (1988) 164 CLR 539 at 576.

19 *Hawkins v Clayton* *ibid.*

20 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 443–444, 466–468, 501–502.

21 *Sutherland Shire Council v Heyman*, *ibid.*

22 *Bryan v Maloney* (1995) 128 ALR 163.

Underlying all these decisions relating to the duty of care as a unifying influence in the law of tort is the central importance of the neighbourhood principle as stated by Lord Atkin in *Donoghue v Stevenson*.²³ Some might say that the neighbourhood principle has been taken too far, that the effect has been to encourage litigation and make the costs of insurance, particularly in areas of professional practice, prohibitive, and that the principles of tort law should promote a greater degree of self-reliance. If a change of that kind is to take place on those grounds, then it seems to me that legislative action is required.

In this context I should mention also the decision in *Rogers v Whitaker*²⁴ where the High Court laid down two important propositions: (1) that, except in the case of an emergency or where disclosure would prove damaging to the patient, a medical practitioner has a duty to warn the patient of a material risk inherent in the proposed treatment; and (2) the fact that a body of reputable medical practitioners would have given the same advice as the medical practitioner gave does not preclude a finding of negligence. The acceptance of the second proposition involved a rejection of the approach taken by the House of Lords in *Bolem v Friern Hospital Management Committee*.²⁵

On my arrival in Singapore, I was given a copy of the March issue of the Singapore Academy of Law Journal. It contains an article by Mr Terry Kaan on “The Physician’s Duty to Warn”. The article referred to *Rogers v Whitaker* — approvingly, I am glad to say. But the point I wanted to make was that the article discusses relevant authorities in Singapore, Malaysia, England, Australia, the United States and Canada. And that, it seems to me, is the comparative approach that courts of last resort, like the High Court of Australia and the Supreme Court of Canada, are now taking.

It has been suggested, particularly in the United States, that high insurance costs arising from large awards in negligence cases, as well as impact upon professional reputation, has had an adverse impact on medical practice and the emergence of defensive medicine. The potentially unlimited liability of professional advisers, such as accountants, architects, engineers and lawyers, has excited proposals in Australia to “cap” the liability of professionals. That again is a matter for legislatures rather than courts.

Equity and contract

A parallel to the neighbourhood principle can be found in the development by the High Court of Australia of the historic equitable concept of unconscionable conduct. That concept infuses many equitable doctrines²⁶

²³ (1932) AC 562 at 580–581.

²⁴ (1992) 175 CLR 479.

²⁵ [1957] 1 WLR 582.

²⁶ See Sir Anthony Mason, “The Place of Equity and Equitable Doctrines in the Contemporary Common Law World” (1994) 110 Law Quarterly Review, 238.

and it has been the mainspring of a number of refinements of equitable principles brought about by High Court decisions. Again, some might say that unconscionability has been taken too far. Commentators point to *Stern v McArthur*²⁷ as a borderline case. There the Court (by a majority of three to two) granted relief against forfeiture and ordered specific performance of an instalment contract for the sale of land on which the purchasers built a house with the knowledge of the vendors. The purchasers defaulted in payment of instalments and, ultimately, they failed to comply with a notice to complete and the contract came to an end. Here, it is said, the notion of what is unconscionable may have been translated into what is unreasonable or unfair. However, you should bear in mind that, along with Brennan J (now Chief Justice Brennan), I was a dissident in *Stern v McArthur*.

For those who may be interested, I have consigned to the footnotes a catalogue of cases recognizing the availability of unconscionable conduct as a separate remedy,²⁸ relief against forfeiture in relation to a rescinded contract of sale,²⁹ promissory estoppel,³⁰ estoppel as an overarching doctrine rather than as a series of discrete rules,³¹ unjust enrichment as a basis for relief even in circumstances where the mistake is one of law rather than fact³² and the abolition of privity of contract in relation to actions by third parties on insurance contracts expressed to be for their benefit.³³

I mentioned *Stern v McArthur* because it throws up the tension which exists between the policies underlying the old classical conception of contract, viz. freedom of contract and *pacta sunt servanda* and, on the other hand, the desire to obtain just outcomes, though in a principled fashion. One can understand the desirability of ensuring predictability and certainty in the working out of contracts between commercial and financial organizations well capable of looking after themselves. But those considerations may be required to give way to others when the parties concerned or one of them are less capable of looking after themselves. It is in this area that the developments of principle, which I have mentioned, have taken place mainly. And it is in this area that pressures for fairness in contracts and the terms of contracts have increased. Now that the United Kingdom is subject to the E.E.C. directives in relation to good faith and

27 (1988) 165 CLR 489.

28 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621.

29 *Legione v Hately* (1983) 152 CLR 406; *Stern v McArthur* (1988) 165 CLR 489.

30 *Waltons Stores (Interstate) Ltd. v Maher* (1988) 164 CLR 387.

31 *The Commonwealth v Verwayen* (1990) 170 CLR 394.

32 *Australia & New Zealand Banking Group Ltd. v Westpac Banking Corporation* (1988) 164 CLR 662; *David Securities Pty. Ltd. v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Pavey & Matthews Pty Ltd. v Paul* (1987) 162 CLR 221; *Baltic Shipping Co. v Dillon* (1992–1993) 176 CLR 344; *Commissioner of State Revenue v Royal Insurance Australia Ltd.* (1994) 126 ALR 1.

33 *Trident General Insurance Co. Ltd. v McNiece Bros Pty. Ltd.* (1988) 165 CLR 107.

fairness in contracts, the major common law jurisdictions are moving away from the old adversarial conception of the interests of contracting parties and of parties negotiating a contract. In such a world one wonders how long the entirety of the reasoning in *Walford v Miles*³⁴ where the House of Lords refused to accept the validity of a contract to negotiate in good faith can stand. That decision seems to rest on the notion that the interests of parties negotiating a contract are essentially adversarial. Why that should necessarily be so is by no means apparent.

Public law

Australia has a sophisticated federal system of review of administrative decisions, involving judicial review on various grounds, including those set forth in the Administrative Decisions (Judicial Review) Act 1975 (Cth) and merits review by the Administrative Appeals Tribunal. The impact of this system of review has a significant impact on administrative decision making. Administrators are now more conscious of the requirements of administrative law, particularly of the need to afford procedural fairness. Judicial review has extended to a decision of an executive council³⁵ and to a decision of a minister or representative of the crown.³⁶

The executive practice of acceding to international conventions without incorporating them into our domestic law constitutes a growing problem. Traditionally an unincorporated convention forms no part of Australian law. But in some circumstances a breach of a convention obligation can be litigated before an international tribunal. We have held that, in formulating the common law, it is legitimate for a court to have regard to the provision of a convention, particularly one which declares fundamental rights.³⁷

Very recently, the High Court held³⁸ that it was legitimate to regard art. 3(1) of the U.N. Convention on the Rights of the Child, an unincorporated convention, as giving rise to a legitimate expectation. The article provided that in all actions concerning children “the best interests of the child shall be a primary consideration”. The Minister’s delegate had refused an application by Mr Teoh for resident status and decided that he should be deported. He was serving a lengthy prison sentence for offences relating to heroin. He was the father or step-father of seven children who were Australian citizens. The delegate did not take account of art. 3(1). The Court decided that the Convention generated a legitimate expectation that the article would be implemented. On this footing the delegate was obliged to give notice and the opportunity of a hearing to the children (or their parents acting on their behalf).

³⁴ [1992] 2 AC 128.

³⁵ *FAI Insurance Ltd. v Winneke* (1981–1982) 151 CLR 342.

³⁶ *The Queen v Toohey: Ex parte Northern Land Council* (1981) 151 CLR 170.

³⁷ *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 at 42 per Brennan J; *Dietrich v The Queen* (1992) 177 CLR 292 at 306 per Mason CJ and McHugh J, at 320 per Brennan J.

³⁸ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353.

The Australian government intends to legislate to eliminate any legitimate expectation that might otherwise arise from an unincorporated treaty. The government introduced into Parliament on 28 June 1995 the Administrative Decisions (Effect of International Instruments) Bill. The Bill provides that a ratified but unimplemented treaty does not give rise to a legitimate expectation that an administrative decision will be made in conformity with the treaty, nor, that if the decision is to be made contrary to the treaty, an opportunity will be given for the affected person to make submissions against the decision.³⁹

As Australia has acceded to many treaties which have not been incorporated, the apparent gap between Australia's domestic law and its international obligations is significant. And that is because conduct within national boundaries has become the subject of treaty regulation.

Of all the Court's recent decisions, *Mabo v Queensland (no. 2)*,⁴⁰ in which aboriginal customary possessory title to unoccupied crown land was recognized, is the best known. Perhaps the real importance of *Mabo* lies not in what it decided but in what it generated — a genuine and dedicated move to achieve a settlement with the aboriginal people which will lead to a united Australia.

I conclude my comments on public law with a reference to two developments: first, the acceptance of the principle that a statute will not be construed as abrogating or qualifying common law or fundamental rights unless there is an unmistakable expression of intention so to do;⁴¹ and secondly, the discovery of the implication in the Australian Constitution of freedom of communication as to political discussion,⁴² using that term in a wide sense, and its consequential impact on the law of defamation, thereby reducing the extent of the protection given by the common law to defendants defamed in the course of political discussion.⁴³ The implication may have an impact upon the common law of contempt.

Concluding comments

What I have said indicates that the significant procedural changes that have taken place in the Australian justice system have been accompanied by significant alterations in the principles of judge-made law. Those alterations display five principal characteristics. First, there has been a departure from legal formalism with its emphasis on rigid rules and fixed

³⁹ Administrative Decisions (Effect of International Instruments) Bill, clause 5.

⁴⁰ (1992) 175 CLR 1.

⁴¹ *Coco v The Queen* (1994) 120 ALR 415.

⁴² *Nationwide News Pty. Ltd. v Wills* (1991–1992) 177 CLR 1; *Australian Capital Television Pty. Ltd. v The Commonwealth* (1992) 177 CLR 106.

⁴³ *Theophanous v Herald & Weekly Times Ltd.* (1994) 124 ALR 1; *Stephens v Western Australian Newspapers Ltd.* (1994) 124 ALR 80.

categories to a more realistic form of jurisprudence, in which relevant interests are identified and balanced. The emphasis has been, both in private law and public law, on substance rather than form. Although that approach has opened the way to a reconsideration of relevant principles, it has, for the most part, resulted not in an abandonment of existing principle and the substitution of something quite different, but rather the refinement of existing principle in order better to provide just outcomes and to bring greater harmony to the relevant principles. Secondly, that refinement of principle has been achieved by adopting in some instances, e.g. negligence, restitution and estoppel, an overarching approach to doctrine instead of proceeding incrementally in a more traditional fashion, case by case. Thirdly, we have seen the emergence of an Australian common law, which differs in some respects from its English counterpart, this development being a consequence of the elimination of the appeal to the Privy Council from Australian courts. Fourthly, the Court's decisions in the field of public law have focused attention on some issues critical to Australia's future development and have given clearer shape to the framework of democratic government in Australia, especially in recognising the possessory land rights of the indigenous people of Australia and freedom of communication as to political discussion, a freedom with which legislation prohibiting the use of words calculated to bring the Industrial Relations Commission or its members into disrepute was inconsistent and therefore invalid.⁴⁴ Finally, the substantial use by the judges of academic materials and comparative law decisions has been a feature of the High Court's work.

To take up the last point. The Court has been fortunate to have the benefit of a very well organised library and library services with a research capacity. The Court has profited from the expansion that has taken place in Australian legal publication, covering text books, monographs and specialist law journals. The Court's use of comparative materials is very similar to that of the Supreme Court of Canada and the New Zealand Court of Appeal. And the Court is well positioned to take account of the increasing impact which international and regional developments are likely to have on Australian law.

In conclusion, I express the hope that the legal contacts between Singapore and Australia will continue to grow. With the renewed emphasis on regional co-operation in this part of the world, closer legal links between Singapore and Australia are not only desirable, they are essential.

⁴⁴ *Nationwide News Pty. Ltd. v Wills*, see fn. 42.