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"Just how common is the common law? A historical and comparative perspective."

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In the days of the British Empire, the colonies were expected to maintain consistency with the common law of England as expounded by the English courts and the Judicial Committee of the Privy Council in particular. The Privy Council was the final appellate court for the colonies. In 1879, Sir Montague E Smith, delivering the judgment of the Privy Council on an appeal from the Supreme Court of New South Wales said "it is of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same"¹.

Following federation in Australia in 1901, the Privy Council remained the final appellate court from State Supreme Courts and from the High Court, by special leave, subject to s 74 the *Constitution* (Cth). This was the result of a compromise made with the British government following negotiations about the Imperial Act which was necessary to give effect to the

¹ *Trimble v Hill* (1879) 5 AppCas 342 at 345.

Commonwealth Constitution². One of the features of the compromise was to allow the Commonwealth Parliament to make laws limiting the matters in which leave to appeal could be sought³—but it would be some time before it would be used⁴.

Technically the decisions of the House of Lords did not bind the High Court of Australia. Nevertheless, the High Court adopted the general practice of accepting decisions of that court as decisive, not the least because the House of Lords was the final authority for declaring English law and the Privy Council was made up of its members⁵. One can see here a desire, on the part of the High Court, for cohesion.

The Privy Council was also set on uniformity. On an appeal from the Supreme Court of Ontario in 1927, the Privy Council described the House of Lords as "the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it"⁶.

Apart from the occasional note of defiance in judgments of our High Court⁷, it continued to apply the decisions of the House of Lords. Indeed, it went so far to suggest that where there was a conflict between a decision of

² Sawyer, "Appeals to the Privy Council — Australia" (1969) 2(2) *Otago Law Review* 138 at 139.

³ *Constitution* (Cth), s 74.

⁴ See *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth).

⁵ See, eg, *Webb v Federal Commissioner of Taxation* (1922) 30 CLR 450 at 469 (Isaacs J); *Piro v W Foster & Co Ltd* (1943) 68 CLR 313 at 320 (Latham CJ).

⁶ *Robins v National Trust & Co Ltd* [1927] AC 515 (PC) at 519.

⁷ See, eg, *Davison v Vickery's Motors Ltd (In Liq)* (1925) 31 CLR 1 at 13-14 (Isaacs J).

the House of Lords and the High Court, State courts should follow the House of Lords⁸.

The English Court of Appeal stood on a different footing, given that it was not the final court of appeal in England. One could not be certain that English law was settled by reference to its decisions. Accordingly, our High Court did not feel compelled to follow decisions of that court⁹. Yet almost 75 years after federation, State Supreme Courts were still told that, as a general rule, they should follow decisions of the English Court of Appeal where there is no relevant decision of the Australian High Court¹⁰.

And so it was that for the larger part of the 20th century Australian judge-made law was mostly derived from English precedent. But that was to change. By 1978 the High Court was speaking of there being a common law in and for Australia; a common law which might develop differently from the English common law¹¹.

⁸ *Piro v W Foster & Co Ltd* (1943) 68 CLR 313 at 320 (Latham CJ), 336 (McTiernan J).

⁹ *Wright v Wright* (1948) 77 CLR 191 at 210-211 (Dixon J). But see *Waghorn v Waghorn* (1942) 65 CLR 289 at 297-298 (Dixon J), 301 (McTiernan J).

¹⁰ *Public Transport Commission (NSW) v J Murray-More (NSW) Pty Ltd* (1975) 132 CLR 336 at 341 (Barwick CJ), 349 (Gibbs J).

¹¹ *Viro v The Queen* (1978) 141 CLR 88 at 94 (Barwick CJ), 119-120 (Gibbs J), 130 (Stephen J), 135 (Mason J), 165-166 (Murphy J). See also, eg, *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 563 (Barwick CJ); *Cooper v Southern Portland Cement Ltd* (1972) 128 CLR 427 at 438 (Barwick CJ); *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 (PC) at 241.

Movements towards independence

In a 2014 paper it was observed that in the early 20th century the Privy Council was the highest appellate court for a quarter of the world's population—but now it fulfils that role for just 0.1% of that population¹². It continues to hear appeals from countries such as Antigua and Barbuda, Trinidad and Tobago, the Cook Islands and others¹³. In all the large Commonwealth countries, appeals to the Privy Council were abolished over time and ties to the English common law were loosened.

My former Federal Court colleague, Paul Finn, has observed that the Supreme Court of Canada only started to part ways with the House of Lords in the mid-to-late 1950s¹⁴. Even then, the language of the majority judgments of that Court was seen as the language of distinction, not explicit disagreement on law¹⁵. By the late 1960s it was still unclear whether the Canadian Supreme Court would continue to regard itself as bound by earlier decisions of the Privy Council, since there did not appear to have been any case in which it had declined to follow Privy Council precedent¹⁶. This was despite the fact that the jurisdiction of the Privy Council over Canada

¹² Clarry, "Institutional Judicial Independence and the Privy Council" (2014) 3 *Cambridge Journal of International and Comparative Law* 46 at 51.

¹³ Judicial Committee of the Privy Council, "Role of the JCPC" (2019) accessed at <<https://www.jcpc.uk/about/role-of-the-jcpc.html>>.

¹⁴ Finn, "Unity, Then Divergence: The Privy Council, the Common Law of England and the Common Laws of Canada, Australia and New Zealand" in Robertson and Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (2016) 37 at 42.

¹⁵ Curtis, "Stare Decisis at Common Law in Canada" (1978) 12 *University of British Columbia Law Review* 1 at 12.

¹⁶ Whitehead, "The Supreme Court of Canada and the Stare Decisis Doctrine" (1967) 15 *Chitty's Law Journal* 146 at 146.

formally ended in 1933 in respect of criminal matters and in 1949 regarding civil matters¹⁷.

It has been remarked that for decades after the abolition of appeals to the Privy Council “the Supreme Court of Canada continued to bear the appearance of an English court applying English law in Canada”¹⁸. Paul Finn considers that a distinctively Canadian jurisprudence for the common law was only assured with the enactment of the Canadian Charter of Rights and Freedoms in 1982¹⁹.

In Australia, the movement towards independence occurred in the early 1960s. Sir Owen Dixon, who you will know as one of our leading jurists, propelled the movement. But this marked a distinct change of approach on his part. In 1942, speaking at the Annual Dinner of the American Bar Association, he said that²⁰:

“[Australian courts] are studious to avoid establishing doctrine which English courts would disavow. For we believe that no good can come of divergences between the common law as administered in one jurisdiction of the British Commonwealth and as administered in

¹⁷ Supreme Court of Canada, “Creation and Beginnings of the Court” (15 February 2018) accessed at <<https://www.scc-csc.ca/court-cour/creation-eng.aspx>>.

¹⁸ Robertson and Tilbury, “Unity, Divergence and Convergence in the Common Law of Obligations” in Robertson and Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (2016) 1 at 3.

¹⁹ Finn, “Unity, Then Divergence: The Privy Council, the Common Law of England and the Common Laws of Canada, Australia and New Zealand” in Robertson and Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (2016) 37 at 44.

²⁰ Dixon, “Two Constitutions Compared” (1942) 28 *American Bar Association Journal* 733 at 735.

another. We think that it can best be avoided by continuing to recognise the high persuasive authority of the decisions given in the Strand and at Westminster. ... Surely the first duty of the peoples who share in the possession of the common law is to stand resolute in its defence and to hold fast to the conception of the essential unity of the culture which it gives them."

In 1963, in the seminal case of *Parker v The Queen*²¹, he was to revise that view. The issue before the High Court in that case was whether the jury should have been directed that they might find the prisoner acted upon provocation, which would have reduced the homicide to manslaughter. In *Director of Public Prosecution v Smith*²², the House of Lords had held that a man is presumed to intend the natural and probable consequences of his acts. Sir Owen Dixon could not bring himself to accept that view. He said²³:

"Hitherto I have thought that we ought to follow decisions of the House of Lords, at the expense of our own opinions and cases decided here, but having carefully studied *Smith's Case* I think that we cannot adhere to that view or policy. There are propositions laid down in the judgment which I believe to be misconceived and wrong. They are fundamental and they are preposterous which I could never bring myself to accept."

²¹ (1963) 111 CLR 610.

²² [1961] AC 290.

²³ *Parker v The Queen* (1963) 111 CLR 610 at 632 (citations omitted).

And he concluded²⁴:

"... I think *Smith's Case* should not be used as authority in Australia at all. I am authorized by all the other members of the High Court to say that they share the[se] views".

An editorial in the *Australian Law Journal* published shortly after the decision in *Parker* suggested that it had not been necessary for the High Court to discuss *Smith*, as it did not actually govern the outcome of *Parker*²⁵. Regardless of whether that be right, it is no doubt correct to observe that the statements in *Parker* served "to affirm the status and authority of the High Court and the freedom of its judges to decide according to their own views unfettered by any obligation to follow the decisions of the English courts, saving ... of course, those of the Privy Council"²⁶.

Some three years later in *Uren v John Fairfax & Sons Pty Ltd*²⁷, a case involving the question of when exemplary damages might be awarded in a defamation case, the High Court again declined to follow the House of Lords²⁸. The matter went on appeal to the Privy Council. Not only was the appeal dismissed, but the Privy Council's judgment made it clear that it would not now overturn High Court decisions merely because they differed

²⁴ *Parker v The Queen* (1963) 111 CLR 610 at 632-633 (citations omitted).

²⁵ "Australia and the English Courts" (1963) 37(1) *Australian Law Journal* 1 at 1. Cf *Parker v The Queen* (1963) 111 CLR 610 at 632 (Dixon CJ): "I do not think that this present case really involves any of the so-called presumptions but I do think that the summing-up drew the topic into the matter even if somewhat unnecessarily..."

²⁶ "Australia and the English Courts" (1963) 37(1) *Australian Law Journal* 1 at 1.

²⁷ (1966) 117 CLR 118.

²⁸ *Rookes v Barnard* [1964] AC 1129.

from English decisions; it would do so only if it considered them to be wrong²⁹. Divergence was for the first time expressly sanctioned. Lord Morris of Borth-y-Gest, delivering the judgment of their Lordships, said³⁰:

"There are doubtless advantages if, within those parts of the Commonwealth ... where the law is built upon a common foundation, development proceeds along similar lines. But development may gain its impetus from any one and not from one only of those parts. The law may be influenced from any one direction ... [I]n matters which may considerably be of domestic or internal significance the need for uniformity is not compelling."

Parker and *Uren* predated legislative moves to abolish appeals to the Privy Council. The first such step occurred in 1968, when appeals from the High Court concerning cases involving the Constitution or a Commonwealth statute or instrument were effectively prohibited³¹. Appeals to the Privy Council from the High Court were abolished entirely in 1975³² and from any Australian court in 1986, by the *Australia Act 1986*³³.

The High Court case of *Parker* was regarded in New Zealand as showing "a robust determination not to follow even the House of Lords

²⁹ *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 (PC) at 241.

³⁰ *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 (PC) at 238.

³¹ *Privy Council (Limitation of Appeals) Act 1968* (Cth), s 3. See also s 4, abolishing appeals "from a decision of a Federal Court (not being the High Court) or of the Supreme Court of a Territory."

³² *Privy Council (Appeals from the High Court) Act 1975* (Cth), s 3.

³³ *Australia Act 1986* (Cth), s 11; *Australia Act 1986* (Imp), s 11. See also *Law and Justice Legislation Amendment Act 1988* (Cth), s 41.

where it felt the House had gone wrong"³⁴. Yet it was to be some years before the New Zealand Court of Appeal, then the highest appellate court for that country, would follow the lead of *Parker* and *Uren*³⁵; coinciding with "increasing consideration ... being given from 1970 [by New Zealand courts] to decisions of the High Court of Australia and the Supreme Court of Canada"³⁶.

This was championed by Sir Robin Cooke, who was elevated to the Court of Appeal in 1976 and became its President in 1986, having been appointed to the Privy Council in the interim³⁷. He encouraged departure from English law when it was warranted³⁸. He was later to become Baron Cooke of Thorndon and sit as a member of the House of Lords³⁹, but I assume he nevertheless maintained those views. In a case in 1994 he observed that "[w]hile the disharmony may be regrettable, it is inevitable now that the

³⁴ *Re Manson (deceased), Public Trustee v Commissioner of Inland Revenue* [1964] NZLR 257 at 262. See further at 271: "... whether we should adopt ... the more independent and robust approach which seems to have been followed in the High Court of Australia."

³⁵ See, eg, *Jorgensen v News Media (Auckland) Limited* [1969] NZLR 961 at 979 (North P); *Bognuda v Upton & Shearer Ltd* [1972] NZLR 741 at 757 (North P), 771-772 (Woodhouse J).

³⁶ Finn, "Unity, Then Divergence: The Privy Council, the Common Law of England and the Common Laws of Canada, Australia and New Zealand" in Robertson and Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (2016) 37 at 49.

³⁷ See, eg, McLay, "Sir Robin Cooke" (2006) 37 *Victoria University Wellington Law Review* 335 at 335.

³⁸ See, eg, Cooke, "Divergences—England, Australia and New Zealand" [1983] *New Zealand Law Journal* 297 at 297, 299.

³⁹ *The London Gazette* (Number 54227), 28 November 1995, 16139; *The London Gazette* (Number 54368), 11 April 1996, 5171; *The Edinburgh Gazette* (Number 23969), 12 April 1996, 907.

Commonwealth jurisdictions have gone on their own paths without taking English decisions as the invariable starting point"⁴⁰.

The case went on appeal to the Privy Council. It was not overturned. Once again, the Privy Council accepted divergence. In its judgment it was said that "[t]he ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths ... [and] the Court of Appeal of New Zealand should not be deflected from developing the common law of New Zealand"⁴¹. And tellingly, perhaps, it added: "Whether circumstances are in fact so very different in England and New Zealand may not matter greatly. What matters is the perception"⁴². Appeals to the Privy Council from New Zealand courts ended with the establishment of its Supreme Court in 2004⁴³.

It remains to add that Singapore abolished appeals to the Privy Council in 1994⁴⁴. The Hong Kong Court of Final Appeal "replaced the ... Privy Council ... as the highest appellate court in Hong Kong after 30 June 1997"⁴⁵. The Court of Final Appeal of Hong Kong is unique amongst common law courts because it is made up of permanent judges and non-permanent judges drawn primarily from judges who have retired from other common law

⁴⁰ *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 at 523.

⁴¹ *Invercargill City Council v Hamlin* [1996] AC 624 (PC) at 640.

⁴² *Invercargill City Council v Hamlin* [1996] AC 624 (PC) at 642.

⁴³ See *Supreme Court Act 2003* (NZ) s 2-3. Although judgment in the last appeal was not handed down until 3 March 2015: *Pora v The Queen* [2015] UKPC 9.

⁴⁴ Supreme Court of Singapore, "Structure of the Courts" (13 August 2019) accessed at <<https://www.supremecourt.gov.sg/about-us/the-supreme-court/structure-of-the-courts>>.

⁴⁵ Hong Kong Court of Final Appeal, "A Brief Overview of the Court of Final Appeal" accessed at <<https://www.hkcfa.hk/en/about/overview/index.html>>.

courts such as the Supreme Courts of the United Kingdom, Canada and New Zealand and the High Court of Australia⁴⁶.

Why the Shift?

It is no coincidence that these movements away from a uniform common law occurred in the post-World War II period. Those of you of more recent generations may not appreciate the sense of change felt by countries after that war. It was a time when national identities were forged. Countries such as Australia no longer regarded their society as the same in every respect as England⁴⁷. And of course England itself was headed to a stronger alliance with Europe.

This view was reflected in judgments of the High Court. In *Viro v The Queen*, Gibbs J said that "[d]iversity is certainly not to be encouraged for its own sake"⁴⁸. He further said that, nevertheless⁴⁹:

"It has become possible to say that the common law for Australia is not necessarily the same as the common law of England or of some other part of the British Commonwealth ... Part of the strength of the common law is its capacity to evolve gradually so as to meet the changing needs of society. It is for this Court to assess the needs of

⁴⁶ See *Hong Kong Court of Final Appeal Ordinance* (Cap 484).

⁴⁷ See, eg, Clarry, "Institutional Judicial Independence and the Privy Council" (2014) 3 *Cambridge Journal of International and Comparative Law* 46 at 51, 54; Walpole, "The Development of the High Court's Willingness to Overrule Common Law Precedent" (2017) 45 *Federal Law Review* 291 at 298-299.

⁴⁸ *Viro v The Queen* (1978) 141 CLR 88 at 119.

⁴⁹ *Viro v The Queen* (1978) 141 CLR 88 at 119-120. See also at 94 (Barwick CJ), 130 (Stephen J), 135 (Mason J), 165-167 (Murphy J).

Australian society and to expound and develop the law for Australia in the light of that assessment."

Part of the judicial method utilised in developing the common law necessarily involves a judge's perceptions of changes to society, so that the common law may be adapted to meet them.

In *D'Orta-Ekenaike v Victoria Legal Aid*⁵⁰, the High Court refused to follow other common law countries which had removed the immunity of advocates from suit. It was pointed out that the United Kingdom had been subject to changes in its constitutional and other arrangements⁵¹. This is an indirect reference to its membership of the European Union and being a signatory to other European treaties. Indeed, in the decision of the House of Lords on this topic, *Arthur J S Hall & Co (a firm) v Simons*⁵², reference was in fact made to the absence of the immunity in European countries, the inference being that it had not been seen as necessary there⁵³. The majority in *D'Orta-Ekenaike* said⁵⁴: "where a decision of the House of Lords is based ... upon the judicial perception of social and other changes said to affect the administration of justice in England and Wales (or the United Kingdom more generally) there can be no automatic transposition of the arguments found persuasive there to the Australian judicial system."

⁵⁰ (2005) 223 CLR 1.

⁵¹ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [59] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

⁵² [2002] 1 AC 615.

⁵³ *Arthur J S Hall & Co (a firm) v Simons; Barratt v Woolf Seddon (a firm); Harris v Scholfield Roberts & Hill (a firm)* [2002] 1 AC 615 at 680-681 (Lord Steyn), 695 (Lord Hoffman), 721-722 (Lord Hope).

⁵⁴ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [60] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

Examples of divergence and convergence

It may be of interest to look at some examples of divergence and convergence. I will not be suggesting that any pattern emerges or that they tell us any more than that the common law courts continue to look to each other's jurisprudence, but that when they are for some reason unpersuaded, they do not feel compelled to follow. In my conclusion, I shall touch on the exercise that the courts are undertaking in this process.

The immunity of advocates, which I have mentioned, is one area where the High Court has remained steadfast in its view that public policy considerations require the immunity to be maintained, although more recently it confined it to the conduct of an “advocate which contributes to a judicial determination”⁵⁵. It has not regarded the immunity as anachronistic, as the courts of other countries such as New Zealand⁵⁶ and Canada⁵⁷ have done, for it sees the need to have finality in litigation as of overarching importance to the administration of justice⁵⁸.

It is perhaps no surprise that there will be divergences with respect to criminal law; that after all was the starting point of the movement away from English precedent.

⁵⁵ *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1 at [37] (French CJ, Kiefel, Bell, Gageler and Keane JJ). See also *Kendirjian v Lepore* (2017) 259 CLR 275.

⁵⁶ See, eg, *Lai v Chamberlains* [2007] 2 NZLR 7.

⁵⁷ See, eg, *Demarco v Ungaro* (1979) 95 DLR (3d) 385.

⁵⁸ *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1 at [35]-[36], [46], [52] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

Opinions have differed with respect to liability for extended joint criminal enterprise, a form of liability as an accessory to a crime. The Australian position is that a person who did not themselves commit a crime, such as murder, is nevertheless guilty of it where he or she is a party to an agreement to commit another crime and foresees that death or serious bodily injury might be occasioned by a co-venturer acting with murderous intention and he or she, with that awareness, continues to participate in the agreed criminal enterprise⁵⁹.

Although the doctrine of extended joint criminal enterprise is clearly capable of a wider application, it has particular relevance to the criminal activities of street gangs. In cases such as this, it is very difficult for the prosecution to prove the intentions of all involved. Australian law holds them liable if they could foresee the possibility of someone being seriously injured and did not withdraw from those activities. The Supreme Court of the United Kingdom and the Privy Council in *R v Jogee*⁶⁰ took a different view. It was held that "equating foresight with intent to assist rather than treating the first as evidence of the second" was an error⁶¹. The recent decision of our High Court in *Miller v The Queen*⁶² maintained the previous stance of the Court. It did not agree with the English approach and did not consider that the doctrine had been shown to be productive of injustice in Australia⁶³.

⁵⁹ *McAuliffe v The Queen* (1995) 183 CLR 108 at 113-117 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ).

⁶⁰ [2017] AC 387.

⁶¹ *R v Jogee* [2017] AC 387 at [100]. See also at [76], [85]-[87], [94].

⁶² (2016) 259 CLR 380.

⁶³ *Miller v The Queen* (2016) 259 CLR 380 at [39] (French CJ, Kiefel, Bell, Nettle and Gordon JJ). See further at [45].

The Court of Final Appeal in Hong Kong subsequently favoured the Australian position⁶⁴. It observed that the abolition of the doctrine “creates a serious gap in the law of complicity in crime”⁶⁵. The doctrine, it said, is valuable “for dealing with dynamic situations involving evidential and situational uncertainties”⁶⁶.

An example of an area of law where there has been both divergence and convergence is the civil law relating to penalties. In recent times, the topic has arisen in Australia in relation to fees charged by banks for late payment.

Australia might stand alone among common law countries in adhering to the view that an equitable jurisdiction to relieve against penalties continues to exist, which is not limited to obligations enlivened by breach of contract, as at common law⁶⁷. The Supreme Court of the United Kingdom considers that the common law took over this area of the law in dealing with penalties⁶⁸. As my colleague Justice Patrick Keane observed, the difference might be accounted for by views of history, 18th century decisions of courts of equity and the effect of the *Judicature Acts*⁶⁹. Nevertheless, Australia seems to stand alone. The Court of Appeal of New Zealand favoured the

⁶⁴ *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640 at [58].

⁶⁵ *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640 at [58].

⁶⁶ *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640 at [71]. See also at [58].

⁶⁷ *Andrews v Australian and New Zealand Banking Group Limited* (2012) 247 CLR 205; *Paciocco v Australia and New Zealand Banking Group Limited* (2016) 258 CLR 525.

⁶⁸ *Cavendish Square Holdings BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2016] AC 1172; [2015] UKSC 67.

⁶⁹ Keane, "Penalties: Divergences and Convergences?" (Asia-Pacific Judicial Colloquium 2019, Singapore, 29 May 2019) 6-7.

English approach in *obiter dicta*⁷⁰. The final Courts of Canada, Singapore and Hong Kong have yet to consider this question, but their present position appears to align with contract law⁷¹.

On the other hand, the Supreme Court of the United Kingdom and the High Court seem closer in their approach to what *amounts* to a penalty. In the English and Australian cases referred to, both jurisdictions have moved away from the previously well-established dichotomy between a genuine pre-estimate of damage and a penalty. Instead, in determining whether a contractual provision amounts to a penalty, they have adopted a broader approach, which takes account of the effect on the innocent party's interests and what is necessary to protect them⁷².

Tort law has always been a fertile area for comparative law. Concepts such as causation and damages are to be found not only in common law systems but also in civilian systems. And complex issues such as these throw up difficult questions. It is no wonder that we look to the experience of other courts.

⁷⁰ *127 Hobson Street Ltd v Honey Bees Preschool Ltd* [2019] NZCA 122 at [40]-[42].

⁷¹ See, eg, *Warner Music Hong Kong Ltd v Soliton (HK) Ltd* [2019] HKDC 192 at [37]; *Bank of China (Hong Kong) Ltd v Eddy Technology Co Ltd & Ors* [2019] 2 HKLRD 493 at [38]; *Nanyang Medical Investments Pte Ltd v Leslie Kuek Bak Kim & Ors* [2018] SGHC 263 at [120]-[124]; *Ricardo Leiman & Anor v Noble Resources Ltd & Anor* [2018] SGHC 166 at [195]-[197], [215]; *Hon Chin Kong v Yip Fook Mun & Anor* [2017] SGHC 286 at [121]; *Capital Steel Inc v Chandos Construction Ltd*, 2019 ABCA 32 at [68]; *Sherry v CIBC Mortgages Inc*, 2016 BCCA 240 at [74].

⁷² See *Cavendish Square Holdings BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2016] AC 1172 at [29], [31]-[32] (Lords Neuberger and Sumption), [152] (Lord Mance), [225], [246], [255] (Lord Hodge); *Paciocco v Australia and New Zealand Banking Group Limited* (2016) 258 CLR 525 at [29], [55] (Kiefel J), [158]-[159], [164] (Gageler J), [256], [270] (Keane J).

In 2010, our High Court held in *Tabet v Gett* that the loss of a chance of a better medical outcome is not compensable damage⁷³. A doctor was held negligent for failing to order a CT scan which would have revealed that a patient had a brain tumour. She suffered irreversible brain damage. But the trial judge was not persuaded, on the balance of probabilities, that an earlier discovery would have led to a different outcome.

This is conformable with the approach in a decision of the House of Lords⁷⁴, which held that a mere percentage reduction in the prospects of a favourable outcome (that was already less than probable) was not a recoverable head of damage.

The harmony is not coincidental. This decision of the House of Lords was carefully considered by the High Court in *Tabet v Gett*⁷⁵. It has also been discussed in New Zealand⁷⁶. Both the Australian and the New Zealand courts further considered the case law in Canada⁷⁷.

And in the area of vicarious liability for institutional abuse, such as has occurred at homes and in schools for children, the courts of Australia⁷⁸, New

⁷³ *Tabet v Gett* (2010) 240 CLR 537.

⁷⁴ *Gregg v Scott* [2005] 2 AC 176.

⁷⁵ See *Tabet v Gett* (2010) 240 CLR 537 at [14]-[19], [59]-[62] (Gummow ACJ), [66] fn 135 (Hayne and Bell JJ), [119], [124], [131], [140]-[150] (Kiefel J).

⁷⁶ See, eg, *Accident Compensation Corporation v Ambros* [2008] 1 NZLR 340 at [36], [41]-[44], [71].

⁷⁷ See, eg, *Tabet v Gett* (2010) 240 CLR 537 at [20], [62] (Gummow ACJ), [139]-[149] (Kiefel J); *Accident Compensation Corporation v Ambros* [2008] 1 NZLR 340 at [38], [44], [56], [60], [66].

⁷⁸ See, eg, *Prince Alfred College Inc v ADC* (2016) 258 CLR 134.

Zealand⁷⁹ and Hong Kong⁸⁰, have looked to earlier English⁸¹ and Canadian⁸² decisions, for guidance. In *Prince Alfred College Inc v ADC*, the High Court drew from English and Canadian precedents relating to vicarious liability to establish an approach to liability which requires that consideration be given to the role assigned by the employer to the offender and the closeness of its connection to the offending⁸³. The Supreme Court of the United Kingdom has recently widened vicarious liability in other areas⁸⁴, but our High Court has not taken that path.⁸⁵

Conclusion

The former President of the Supreme Court of United Kingdom, Lord Neuberger, has said that it is "highly desirable for ... [common law] jurisdictions to learn from each other, and at least to lean in favour of harmonising the development of the common law around the world"⁸⁶. There can be no doubt that our courts look to each other's decisions reaching a conclusion on the same point. This can be seen in each of the areas I have mentioned. It sometimes leads to a division of opinion, as in the doctrine of extended joint criminal enterprise or the law of penalties. On other occasions,

⁷⁹ See, eg, *S v Attorney-General* [2003] NZLR 450.

⁸⁰ See, eg, *Yeung v Mei Hoi v Tam Cheuk Shing* [2015] 2 HKLRD 483.

⁸¹ See, eg, *Lister v Hesley Hall Ltd* [2002] 1 AC 215.

⁸² See, eg, *Bazley v Curry* [1999] 2 SCR 534; *Jacobi v Griffiths* [1999] 2 SCR 570.

⁸³ See *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at [80]-[81] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

⁸⁴ *Mohamud v WM Morrison Supermarkets plc* [2016] AC 677.

⁸⁵ *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at [72]-[73], [83] (French CJ, Kiefel, Bell, Keane and Nettle JJ).

⁸⁶ *FHR European Ventures LLP v Mankarious* [2015] AC 250 at [45].

our courts have built on the experience and precedent of other common law courts, as seen in areas of tort law. Whether one court adopts the approach of another depends largely upon whether it is persuaded to do so. This cannot be a bad thing.

Importantly, there is more critical analysis now being undertaken by the courts than in the past. The obligation to follow English precedent, which our courts were formerly under, stifled the development not only of Australia's common law but also of the common law of other jurisdictions with a colonial past.

There is another important benefit which flows from the ability of the courts to form their own opinions and their desire, nevertheless, to understand how other courts have approached the same issue. It is that they undertake the exercise of comparison. One starts with the state of authority in one's own country and then looks to that of the others. In that process, not only do our own courts learn about the law as applied elsewhere, but also they identify differences, the basis for them and analyse key elements in reasoning. By the process of comparison, their own law is brought into much sharper focus and is subject to deeper critical analysis.

It remains to mention that delegates from the final courts I have mentioned from the Asia-Pacific region—those of Australia, New Zealand, Canada, Hong Kong and Singapore—meet every two years to discuss matters of common interest and concern. Much of the discussion is taken up with areas of divergence and convergence. And very occasionally the final appellate court from the United Kingdom is invited to address and join us. How things have changed.