TRIGWELL IN THE HIGH COURT

JUDICIAL OPINION v. LEGAL PRINCIPLE: A CASE OF BAD LAW FROM BAD PHILOSOPHY

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A Statement on Stare Decisis

On the 19th September, 1979, the full High Court, *per contra* Murphy, J., ruled that the 1947 House of Lords decision in *Searle* v. *Wallbank*,[1] because it represented settled law, could not be legally challenged either at the present or at any future time.[2] The High Court could not therefore dispute their Lordship's much criticized opinion that a landowner owed no duty of care to avert injury from animals wandering onto public highways.

This unusually conservative view of precedent was put in extreme form by Barwick, C.J., who said that once a court of high authority had declared the common law on some matter then, if the rule was correct when stated, it remained beyond the power of the High Court to review it. A less rigid view was put in the leading judgment of Mason, J., with whose reasoning Gibbs, Stephen and Aickin, JJ, expressly agreed. For Mason, J., a "settled rule of the common law" could not normally be challenged, and certainly not on the mere basis (as in the present case) that the conditions which brought it into existence no longer obtained. In a "simple or clear case" of such a radical change of conditions, a court might be justified in "moulding the rule" to meet the new circumstances. But because there are "very powerful reasons" why the court should be reluctant to engage in such an exercise, the desirability of departing from the rule in *Searle* v. *Wallbank* "should be left to Parliament".[3]

Neither of these four judges supported Barwick, C.J.'s proposition that they might in principle consider the House of Lords' ruling to have been wrong when made. On the other hand, neither they nor Barwick, C.J. attempted to analyse *Searle* v. *Wallbank* in order to assess the quality of its reasoning, before agreeing they were bound to apply it. Further, this important view of precedent was itself presented largely as a matter of assertion, with only a token discussion of its merits, and no appreciation of its intrinsic arguability. This follows the style

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[1] [1947] A.C. 341.

[2] *State Government Insurance Commission* v. *Trigwell and Ors.* (1979) 26 A.L.R. 67.

[3] *Id.* 78.

adopted a few weeks earlier in *Dugan* v. *Mirror Newspapers*,[4] in which much the same philosophy was deployed in defence of the antique common law doctrine that a convicted felon loses all his civil rights. In each of these cases the rights of the respective plaintiffs were determined finally by the High Court's adoption of a legal philosophy which gave up legal analysis in favour of a claim that rules settled by earlier courts are beyond challenge by present courts.

This approach contrasts so strikingly with the past practice of the High Court itself, and with that of both the House of Lords and the Privy Council, that some major reorganization of principle, or at least a drastic explanation, seems called for. It contrasts with a notable series of High Court decisions limiting and eventually rejecting a similar no-liability doctrine applied to trespassers, which was also both well settled and based on House of Lords authority. It contrasts with the High Court's reasoned rejection of or qualifications to well established no-liability doctrines in such cases as *Goldman*,[5] *Beaudesert*,[6] *Evatt*,[7] *Munnings*,[8] *Perry*[9] and *Caltex*,[10] to take but a selection of recent well known tort cases. It contrasts with the Privy Council's approach in *Cooper*,[11] *McDermott*,[12] *Goldman*[13] and *Evatt*[14] and with that of the House of Lords in *Heller*,[15] *Herrington*[16] and *Dorset Yacht Co.*[17] Nowhere in the judgments in *Trigwell* can we find any discussion of the analogous question in these cases, nor can we find any reason why these important judgments and their assumptions of judicial review of settled law were thought unworthy of consideration. In summary, the High Court is asking us in *Trigwell* to accept an unargued conception of *stare decisis* which apparently requires us to ignore a substantial and impressive part of their own recent judicial history, as well as the practice of superior courts it generally claims to respect.

But this is merely the first of several ironies and paradoxes. For as the 1966 Practice Statement allows, and such decisions as *Herrington* demonstrate, the House of Lords has not itself accepted this theory, and might well have "unsettled" *Searle* v. *Wallbank* by now if that ruling had not since been negated by the 1971 English legislation. The same might be said of the Privy Council, which has never claimed to

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[4] (1978) 22 A.L.R. 439.
[5] *Hargrave* v. *Goldman* (1963) 110 C.L.R. 40.
[6] *Beaudesert Shire Council* v. *Smith* (1966) 120 C.L.R. 145.
[7] *Mutual Life & Citizens Assurance Co. Ltd.* v. *Evatt* (1968) 122 C.L.R. 566.
[8] *Munnings* v. *Hydro-Electric Commission* (1971) 125 C.L.R. 1.
[9] *Public Transport Commission of N.S.W.* v. *Perry* (1976-77) 137 C.L.R. 107.
[10] *Caltex Oil Co.* v. *Dredge "Willemstad"* (1976-7) 136 C.L.R. 529.
[11] *Southern Portland Cement* v. *Cooper* [1974] A.C. 623.
[12] *Commissioner for Railways* v. *McDermott* [1967] 1 A.C. 169.
[13] *Goldman* v. *Hargrave* [1967] 1 A.C. 645.
[14] *Mutual Life & Citizen's Assurance Co. Ltd.* v. *Evatt* [1971] A.C. 793.
[15] *Hedley Byrne* v. *Heller* [1964] A.C. 465.
[16] *Herrington* v. *British Railways Board* [1972] A.C. 877.
[17] *Dorset Yacht Co.* v. *Home Office* [1970] A.C. 1004.

be bound by other decisions, whether of the House of Lords, High Court or itself. But the High Court has now declared that rules of law once settled remain forever, albeit they lose judicial respect amongst the courts which settled them, and we must consider the merits and the implications of this landmark decision.

We should perhaps begin in the most lawyerlike way, by enquiring to what extent this view of *stare decisis,* as a claim about the ground rules of the legal system, can itself be regarded as established or "settled". But clearly it would be unprofitable to contest this by canvassing the countless rules and decisions which have been subsequently rejected by the courts, or even by emphasizing such prominent and important rules as those the High Court itself has in recent years rejected. For there will also be many other cases in which courts have criticized established rules which they nevertheless treated as obligatory. Furthermore, "settled" now threatens to be an elusive notion. For if the *Trigwell* philosophy itself were boldly to be challenged before our present judges, they might well dismiss our catalog of High Court innovations as involving rules insufficiently settled, in order to claim that this philosophy is not itself an innovation. Alternatively, they might claim these to be "simple or clear" cases to which the "very powerful reasons" did not apply. Carried too far, this sort of answer becomes a rationalization for arbitrary conservatism, but to dismiss *Trigwell* on this account would ignore the important issues it raises as to the meaning of the claim that courts must respect the doctrine of precedent.

For perhaps the most striking feature of *Trigwell* is the idea that the High Court of Australia is bound to accept another court's opinion of the law without regard to the legal reasoning on which it is based. This unusual acquiesence, arguably an abnegation of responsibility, ignores a powerful form of legal argument based on the status of that general "risk" principle from which Lord Atkin deduced the manufacturer's duty in *Donoghue* v. *Stevenson,*[18] a principle endorsed by a generation of judges as the foundation of modern negligence theory. For if this principle commands anything like the respect its fame suggests, it ought to have played some role in the *Searle* v. *Wallbank* judgment; accordingly, it should be open to the High Court to ask whether the Lords paid it sufficient regard in supposing it did not apply in respect of wandering animals. Alternatively, can we say the Lords' judgment is beyond review now because they had a power to confer this exceptional status? In short, did they have a duty to justify this exception or a power to create it? If they had this discretionary power, then why did not the High Court also? If not, then why should the High Court treat their opinion as conclusive of the law? Such questions

[18] [1932] A.C. 562.

are themselves part of the more general problem of whether the doctrine of precedent really requires courts to give a higher priority to judicial opinions than to such legal principles.

Obviously, what is needed to assess *Trigwell* is some fundamental reconsideration of *stare decisis,* in order to see how rational and coherent are the assumptions on which judgments are distinguished as distinct from being ruled to be in conflict. For much of what is unacceptable in *Trigwell* can be understood by looking closely at the settled rule theory's implicit claim that the Lords established an exception to a principle rather than that they acted inconsistently with it; what therefore is the sense of this distinction and what bearing does it have on the debate?

Exceptions and Inconsistencies

When a person tells us that although he supports a certain rule, he does not support a particular application of it, the question naturally arises whether he is offering an exception to the rule or is simply being inconsistent. This is a common enough experience in argument and we would normally clarify the matter by considering the sort of explanation which is offered. We would want to know whether there is some rational basis for this exception which would allow his overall position to remain consistent. He might answer us by explaining his view of the point of the rule, suggesting what general value or values it serves, and then showing us that the exception does not reject these values. He can do this by showing that it either pursues them in some non-obvious way or that it qualifies their pursuit in deference to some distinct value he will assume we also respect.

But if he simply insists that his position is logical because he is in effect supporting two rules, a major rule for the standard case and a minor rule for his special case, we would not think this consistency sufficient to deem his position rational or coherent. For such rules will inevitably reflect the more general values he respects, and a promiscuous or unreflective support for any set of rules will risk inconsistency at this more fundamental level. Accordingly, whilst there is nothing illogical in a discriminatory treatment of aboriginals, rules based on this prejudice will necessarily conflict with any claim to respect the principle of fairness, as a general social value requiring equal concern for the welfare of others. Where this is pointed out, he will have to choose either to give up the exceptional rule or to abandon his claim to respect this principle.

Here, his irrationality arises from a failure to apply such a principle consistently, according to its import. The fact that he can nevertheless devise a logical organization of rules will not mitigate his position where this is the case. For the sceptic cannot claim to treat an inconsistent position as equivalent to an exceptional case simply because this is congenial to his argument. Whether his claimed excep-

tion is properly so characterized must be decided by looking at the overall integrity of his position, and especially at those principles on which he wishes to base his case.

Although this observation is hardly a sophisticated one, and represents a view the ordinary man will no doubt take for granted, it is nevertheless ignored by the majority in *Trigwell*. Their judgment, which represents something of an apotheosis of popular legal philosophy, effectively shuts off access to a traditional and formerly respectable line of inquiry *viz.*, the extent to which the rule in question is based on principle. Further, their reluctance to acknowledge this issue cannot easily be excused by questioning the assumption that any such general values exist, as our determined moral sceptic might have done, because such values are expressed in legal principles which can be found throughout the body of the common law.

For in their manifest concern to labor the view that courts do not make law, the majority did not recognize that the central issue in this case was not whether there was a judicial power to legislate (and if so how it should be used) but whether *Searle* v. *Wallbank*, as an exception proposed by the House of Lords in 1947, was really consistent with that principle of negligence liability stated and applied by Lord Atkin in *Donoghue* v. *Stevenson* in 1932, and subsequently acknowledged in numerous House of Lords, Privy Council and High Court opinions since that time. The High Court's important and unargued assumption was that the *status* of this 1947 ruling was conclusively determined by the House of Lords itself, because the High Court's view of precedent required it to accept their Lordship's claim to be stating an exception irrespective of the state of authority and the requirements of principle applicable at that time. In addition, this exceptional status once determined, would have to continue until legislative repeal, irrespective of whether the principles on which it was or could be based might, through changed circumstances, require a different rule. In short, the High Court chose to ask whether they had a right to depart from the *Searle* v. *Wallbank* Rule, but not whether *Searle* v. *Wallbank* had any right to depart from the *Donoghue* v. *Stevenson* principle.

To understand and assess this approach we should commence with an analysis of the speeches in *Searle* v. *Wallbank*. For although the High Court has now adopted a philosophy which makes it unnecessary and indeed irrelevant to consider the reasoning in that case, we can judge something of the merits of this philosophy by seeing what it will accept as conclusive of the common law.

Searle* v. *Wallbank

The facts in *Searle* v. *Wallbank*[19] were uncomplicated. The appellant was riding his bicycle downhill on a public lane, with his

[19] *Supra* n. 1.

light masked in accordance with war-time blackout regulations, when he suffered injury through colliding with the respondent's horse, which appeared suddenly on the road having come through a gap in the hedge verging the latter's land. The lane was bounded on each side by fences or hedges and, although it was 1.30 a.m., there was visibility for some hundred yards. There was no evidence that the horse, at least 30 years old and used on a milk round, was vicious or mischievous. The factual summary from their Lordship's opinions by the editor of the authorized reports concludes: "There was not any evidence that a gap or gaps existed before the horse escaped or that the respondent either knew of any such defects or might reasonably have discovered them",[20] an account which seems to support Graeme Kelly's suggestion[21] that everything said on the duty issue was obiter, because of negligence against the respondent.

The judge at first instance followed two Court of Appeal rulings[22] in deciding that the respondent could not be liable, and the Court of Appeal followed suit. Subsequently, the House of Lords acknowledged that these cases were the only authorities directly in point against the claim that the occupier might owe a duty of care to the appellant.

The leading speech of Viscount Maugham, with whom Lord Uthwatt concurred, was largely taken up with the question, not contended by the appellant, whether any general rule obligated occupiers abutting the highway to prevent animals escaping. After a lengthy disquisition on the history of the enclosure movement, with references to Macaulay, MacAdam, and Pickwick Papers, he ruled against such a duty. He then addressed himself to the appellant's argument that the principle of *Donoghue* v. *Stevenson* applied, and dismissed it by invoking two arguments, neither of which appealed to the precedent force of the earlier Court of Appeal rulings. The first is the flawed technical argument that a jury is not entitled to find negligence unless they can specify the threshold of reasonable care; an argument since discredited because it is perfectly rational for a jury to find that D failed to meet a reasonable standard without being able to say how far below reasonable care his conduct fell. In practice, the tort provides a test for P's compensation rather than a precise guide for D's financial protection, and the same argument has not hindered liability in such other areas as, e.g., running-down cases.

His second argument emphasises the comparative rarity of collisions between vehicles and wandering animals. However, it is unclear

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[20] *Id.* 342.

[21] G. Kelly, "Animals and Highways: Misinterpreted Cases and Ill-Conceived Proposals", (1972) 46 *A.L.J.* 123. Adopted by Chambers, J. in *Jones* v. *McIntyre & Ors.* [1973] Tas. S.R. 1.
it was clear to the Lords that the evidence could not support a finding

[22] *Heath's Garage Ltd.* v. *Hodges* [1916] 2 K.B. 370 and *Hughes* v. *Williams* [1943] K.B. 574.

whether it is based on the duty issue, that is, whether harm was foreseeable in the circumstances (which would have been an application of negligence theory), or the more general question whether this theory could apply in principle. His stress on the rarity of accidents suggests the former, but the thrust of his historical essay seems aimed at the latter. The first interpretation would support Kelly's conclusion, but the second would amount to a refusal to apply *Donoghue* v. *Stevenson* to circumstances which on their face would seem to attract the general theory; a refusal unsupported by any legal argument distinct from that appropriate to the duty question.

Lord Porter's primary reason for dismissing the appeal was that no negligence had been proved, but he also agreed that harm to the appellant was not foreseeable in the circumstances. His views are likewise ambivalent because it is not clear from his speech whether this unlikelihood of injury went to the duty issue or to the question whether the facts could support a finding of negligence. However, neither affects the general question whether negligence theory can apply in respect of wandering animals, and his views remain unclear on this question. However, his failure to consider or advert to *Donoghue* v. *Stevenson* suggests that he did not regard this case as an authority against which the Court of Appeal rulings had to be measured; accordingly, the second reason for his decision was that these rulings were binding on the judge at first instance, although the first preceded *Donoghue* v. *Stevenson* by twenty years and the second simply ignored this House of Lords ruling and its later implications.

By contrast with his brothers, Lord du Parcq faced squarely the issue of a general negligence liability, citing *Fardon* v. *Harcourt Rivington*[23] in illustration. Although he qualified this by saying that, "nothing done by the animal which is contrary to its ordinary nature"[24] could attract this liability, he did not proceed to consider whether the horse had wandered onto the road "contrary to its nature", and based his opinion on his view that there was insufficient evidence to support the finding of negligence. He was sufficiently emphatic on this point as to express his regret that the Court of Appeal should have given leave to appeal on the erroneous assumption that the case might turn on some other issue of law.

What is notable about these speeches is that, if we gave up the claim that the Lords could make the law whatever they liked, we could

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[23] [1932] L.T. 391. In this case the House of Lords applied general negligence theory, *four months prior* to *Donoghue* v. *Stevenson*, to resolve a claim by a plaintiff who lost his eye through an unusual accident caused by the defendant's dog, left in a locked, parked car, having become excited and broken the rear window just as the plaintiff was passing. Although the Lords ruled that he must fail for lack of evidence of negligence, Viscount Dunedin, Lord Atkin and Lord MacMillan accepted and applied the principle that a duty of care arose in such circumstances of foreseeable harm.

[24] *Supra* n. 19 at 360.

hardly avoid the conclusion that their reasoning is in substance *per incuriam* a principle they were required to respect. No real attempt was made to provide a justification consistent with this respect, by putting a principled case for the exceptional treatment of occupiers keeping animals near highways.

Such a case could in theory have been argued by treating the factual circumstances as akin to those of the nineteenth century, so that causal responsibility for the collision would have been difficult to attribute to the occupier.[25] This denial of a duty might have been supported by arguing that road traffic had to accept the risk of stray stock, and that a collision would inevitably involve contributory fault, which remained a complete defence until 1945. But if we gave the Lords the benefit of this kind of argument we would be acknowledging that the validity of such an exception depended on the realism of its factual account, as well as subsequently discredited doctrines of assumption of risk and contributory fault.

So the major criticism of *Searle* v. *Wallbank* is that the decision was non-principled in the technical sense that it both failed to apply an important principle of law and failed to justify adequately the case for an exception. This was arguably due to a deeper assumption that such a decision gains its validity from the authority of the court itself, rather than from its conformity with legal principles acknowledged and applied in past cases. The same may be said of the High Court in *Trigwell*. For their ruling against the Trigwell's claim was based primarily on a view of precedent which required no analysis of legal principle. Because *Trigwell* is itself now the major authority for this approach, the judgments must be considered with some care.

State Government Insurance Commission* v. *Trigwell & Ors.

The case came to the High Court on appeal from King, J. of the Supreme Court of South Australia. The Trigwells had sued for personal injuries sustained in a collision between their vehicle and one driven by Miss Rooke, who had been killed in the collision. In an action against the Insurance Commission as her third party insurer, the Trigwells also alleged that their injuries were due to the presence of two sheep on the highway which Miss Rooke had collided with immediately before the accident, and that the second respondents, the Kerins, were liable as occupiers for negligently allowing the sheep to stray. King, J., following an earlier decision by the Full Supreme Court,[26] ruled that *Searle* v. *Wallbank* precluded any action against the Kerins. This was upheld on appeal to the High Court, with Murphy, J. dissenting on the ground that *Searle* v. *Wallbank* was no longer good law.

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[25] As discussed *infra*, pp. 562-3.
[26] *Bagshaw* v. *Taylor* (1978) 76 L.S.J.S. 475.

The judgment of Mason, J. was clearly seminal to the High Court's treatment of *Searle* v. *Wallbank,* and Gibbs, Stephen and Aikin, JJ. each began their judgments with a statement that they had read and agreed with all he had to say on the matter. Mason, J. disposed of the respondent's central argument, that the opinion given by the Lords in 1947 was now questionable, in a few short paragraphs, the point of which was to explain and moderate the following proposition:

> The decision has been much discussed, indeed criticized, but its effect is to settle what has been the common law of England from early times.[27]

There follows an account of when and why an ultimate court of appeal can depart from "settled" law:

> I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify what has been thought to be a settled rule or principle of the common law on the ground that it is ill-adapted to modern circumstances. If it should emerge that a specific common law rule was based on the existence of particular conditions or circumstances, whether social or economic, and that they have undergone a radical change, then in a simple or clear case the court may be justified in moulding the rule to meet the new conditions and circumstances. But there are very powerful reasons why the court should be reluctant to engage in such an exercise.[28]

He then summarizes the familiar reasons against a court acting as a legislator and concludes:

> These considerations must deter a court from departing too readily from a settled rule of the common law and from replacing it with a new rule. Certainly, in this case they lead to the conclusion that the desirabiilty of departing from the rule in *Searle* v. *Wallbank* is a matter which should be left to Parliament. It is beyond question that the conditions which brought the rule into existence have changed markedly. But it seems to me that in the division between the legislative and the judicial functions it is appropriately the responsibility of Parliament to decide whether the rule should be replaced and, if so, by what it should be replaced.
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> The determination of that issue requires an assessment and an adjustment of the competing interests of motorists and landowners; it might even result in one rule for urban areas and another for rural areas. It is a complicated task, not one which the court is equipped to undertake.[29]

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[27] *Supra* n. 2 at 76.
[28] *Id.* 78.
[29] *Ibid.*

The judgments of Gibbs, Aickin and Stephen, JJ. added little to Mason, J.'s view of the status of *Searle* v. *Wallbank*. Gibbs, J. strongly endorsed the settled rule doctrine:

> Although the rules of the common law develop as conditions change, a settled rule is not abrogated because the conditions in which it was formulated no longer exist. It is now fashionable to criticise the rule in *Searle* v. *Wallbank* as anachronistic, inconsistent with principle and unsuitable to modern conditions, but it is by no means obvious that it would be a reasonable and just course simply to abolish the rule. The question whether the rule should be altered, and if so how, is clearly one for the legislatures concerned rather than for the courts.[30]

Aickin, J. put a fairly stiff test for departing from the settled rule:

> It is not necessary or useful to attempt to state definitely in what circumstances it is proper for this Court to change what is found to be the present state of the common law. At the least one would require to be completely satisfied, not merely that the circumstances had radically changed, but also that some suggested change or some suggested new rule would necessarily work greater justice in all the circumstances in which it might apply.[31]

Stephen, J. supported the settled rule doctrine by citing Bray, C.J. from *Bagshaw* v. *Taylor*[32] for his account of the reasons why a change of the rule must be left with Parliament. Barwick, C.J., because he was of the opinion that the *Searle* v. *Wallbank* ruling would be correct if the matter arose for the first time in 1979, did not find it necessary to consider the effect of changed circumstances on the common law. However, he repeated views he had expressed some weeks earlier in *Dugan* v. *Mirror Newspapers*[33] to the effect that once a court of high authority has declared the law, and that declaration was correct when made, then the High Court cannot subsequently alter the law, however inappropriate to the times. This more extreme view, which might be expected to induce some reluctance to state the law on any arguable issue, was not shared by his colleagues.

The *Trigwell* judgments are notably brief in disposing of the appeal and no more than four, of the twenty-one pages of majority judgment, are devoted to *Searle* v. *Wallbank's* status. There was no serious discussion of case law, including the several state supreme court rulings on the matter, no analysis of *Searle* v. *Wallbank* or the law it was said to embody, no consideration of the developing body of authority dealing with the reconciliation of *Donoghue* v. *Stevenson* with traditional "no duty" areas (exemplified in the important if difficul

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[30] *Id.* 73.
[31] *Id.* 94.
[32] *Supra* n. 26.
[33] *Supra* n. 3.

House of Lords speeches in *Dorset Yacht Co.* v. *Home Office*),[34] and only token reference was made to the opposed American and Canadian positions. The impression which emerges is that because the judges were primarily concerned to state a conservative philosophy of precedent, they did not see any argument of principle in favour of the Trigwell's right to sue.

Nevertheless, this settled rule theory of precedent expresses a distinctive philosophy of law and such a philosophy is really no more than a set of assumptions about the ground rules which govern the legal system. Because such assumptions must meet ordinary standards of rationality and coherence before they are entitled to our respect, those underlying the *Trigwell* ruling need to be carefully probed.

We might begin by considering the logic underlying Mason, J.'s judgment. He is not bound to follow *all* the rules settled by superior courts, but he may depart from them only in special cases. When such cases occur he is free to ignore precedent and fashion a new rule as if he were a legislator, alive to the social and economic ramifications. A feature apparently inhibiting this in the present case was his sense of the complexity of a legislative solution, suggesting that if he felt confident as to what the best rule would be, he might be inclined to substitute it for that settled by the Lords in 1947.

It is clear that for Mason, J. and his fellow judges even this limited law making power is an invidious one.[35] Further, because the reluctance to use it to review a settled rule is based on general moral and political grounds, no legal reasoning determines its use in any particular case; accordingly, the judgments in *Trigwell* are little more than reminders of the general reasons why judges ought not to make law. Such a view excludes any sense that the rule could be settled by judicial opinion and still be wrong, e.g. through being contrary to

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[34] *Supra* n. 17.

[35] Reflected in an ambivalence about the relative status of this judicial power as against precedent itself which, in Mason, J.'s judgment, is especially evident in the troublesome notion of 'settling' the law. Of *Searle* v. *Wallbank* he says, ". . . its effect is to settle what has been the common law of England from early times". (*Supra* n. 2 at 76). But this statement is supported by showing that that decision was correct because it applied a previously settled doctrine, and we are left uneasily between the claim that the Lords were correct because they applied a settled rule, and the claim that the rule was correctly settled because the Lords applied it. Again, a little further on, "My conclusion is then that we should accept that what was and has been the common law of England was correctly decided by *Searle* v. *Wallbank*" (*Id.* 78), which similarly blurs the question whether *Searle* v. *Wallbank* was correct because it conformed with the common law, or because the Lords exercised a power to say what the common law was. Finally, "I do not doubt that there are some cases in which an ultimate court of appeal can and should vary or modify *what has been thought to be* a settled rule" (*Ibid.* italics added). Is there really an intelligible distinction between a settled rule and a rule the courts have consistently applied as authoritative, or is this also an instinctive attempt to hedge bets? For if law making is questionable activity, it will be more diplomatic to suggest that the rule to be changed was in retrospect merely a set of opinions about the law rather than the law itself.

principle. For it did not occur to the judges that *Searle* v. *Wallbank* might be tested against *Donoghue* v. *Stevenson* and its principle that the duty not to be negligent did not depend upon the proof of some "pedigree" duty to be found in nineteenth century cases, but arose from the *fact* of the defendants having created a significant risk of harm. Despite this principle having dominated the subsequent development of negligence liability, no member of the High Court considered it relevant to their decision.

The failure to see this as an issue indicates a deep assumption that the formal *opinion* of the House of Lords was sufficient of itself to conclude the validity of a proposed exception to *Donoghue* v. *Stevenson*. For it can only be this belief in their power to make law that requires us to treat the Lords' refusal to apply this important legal principle not as a failure to apply the law, but rather as a new legal qualification to the principle. It is only when this process leads to an intolerable situation that our reviewing court might choose to exercise the same power to qualify or reject the exception. The ironic result is that the reviewing court must reluctantly claim discretionary power to patch up these errors of the past; but the errors of the past are binding in the meantime because their validity is assumed to depend on the fact that they themselves were exercises of judicial power, rather than that they conformed to legal principles we must respect.

This produces a striking paradox. For if *Searle* v. *Wallbank* must be respected as law because the House of Lords thought this non-liability was an exception to principle, then this means it is law because the House of Lords 'made' it such, rather than because the state of precedent and principle in 1947 would have required that result, either then or subsequently. But if the House of Lords have this authority to create an exception to *Donoghue* v. *Stevenson,* how do we reconcile this with our High Court's present view that even the highest courts are not able to make law? If the House of Lords lacks this power then why should we give their ruling even a moderate, much less a conclusive, respect?

We must not underrate the strength of this objection, for it is clear enough that, if the House of Lords had applied *Donoghue* v *Stevenson* back in 1947, our present High Court would also have treated this as correct law, and foreclosed any landowner's attempt to argue an exceptional status. That is, whichever way the House of Lords had turned at that time would, in the High Court's view, have to be treated as legally correct, from which it follows that the High Court is saying the House of Lords could make the law which ever way it liked on the matter.

But this is a remarkable conclusion, because the majority of the High Court did not get into this awkward position by accident, but at least in part through their determination to state the strongest cas

they could against the idea, frankly espoused by Murphy, J. in Australia, and championed for many years in England by the Master of the Rolls, that judges have a quasi-legislative power to make new rules, according to their discretion. For the majority stressed that any departure from *Searle* v. *Wallbank* would require a "legislative" role, and it is the emphatic denunciation of a resort to this role in *Trigwell* which forms the basis, and limits the reasoning, of their decision against liability.

So in order to justify their refusal to review *Searle* v. *Wallbank,* the High Court has to claim that judges lack power to make law. But *Searle* v. *Wallbank* can only be law because judges chose to make it such; it is law now either because the Lords chose this rule in 1947 or because the High Court chose to continue it in 1979.

This contradiction in reasoning is due to the fact that the High Court's view of precedent is itself the product of a general philosophy of law which allows them to prefer judicial opinions to legal principles. For their refusal to engage major issues of legal principle can only be explained by a theory which gives such principles an intrinsically arbitrary status, conceding that courts have discretion whether or not to apply them, and a right to select those they wish to promote. Without a *commitment* to these more general standards of value, a rule of law will appear as just a generalized expression of a court's opinion how to resolve a dispute, or a series of consistent opinions of this kind, and the common law is just the sum total of these opinions. Conflicting past decisions of superior courts cannot therefore be differentiated in terms of their legal validity, but only by the reviewing court exercising its own opinion as to which it prefers. The advantage of this theory is that judges can remain free to apply a previous court's opinion without asking whether it conformed with legal principles; but the price of securing this advantage is acceptance of the proposition that the ultimate test of a valid rule is the reviewing court's decision to support it.

The conservatism of the *Trigwell* ruling therefore depends on a belief that the general legal principle of *Donoghue* v. *Stevenson* has no precedent force of its own. The fact that it was used by Lord Atkin to infer the manufacturer's duty, and by later courts to develop a wide range of negligence duties, is of no consequence; what is important on this view is the opinion acknowledging liability for negligence, not the reasoning on which it is based.

We must, in fairness, distinguish two interpretations of the resulting conservatism. The first is that the majority believed, with Murphy, J., that they had a right to adopt either a conservative or an activist approach, and simply exercised this choice in favour of the former. The second is that they believed themselves obligated to apply the immunity rule because of its endorsement by the Lords and the

lack of any precedent for liability. But this latter belief can be sustained only by refusing to face two crucial questions: first, what constitutes an exceptional case to release them from this obligation; secondly, how did the rule get its obligatory status in the first place? It is precisely because, in the absence of a principled approach, these questions cannot be answered other than by an appeal to the power of their opinion, that we cannot avoid the conclusion that the majority, however unwittingly, are also deeply committed to the same concept of judicial power as Murphy, J. Although they might believe themselves obligated by a "settled rule", such a belief cannot be reconciled with any rational account of the origin of rules and exceptions in the common law.

It is not surprising that this belief in judicial power as the ultimate test of valid law leaves major conflicts of high judicial opinion as matters essentially of socio-historical interest. This is evident in Mason, J.'s short treatment of the respondent's argument that the non-liability for animals on the highway was illogical in the context of a well settled strict liability for damage done by animals wandering onto the property of neighbours:

> The explanation for this apparent illogicality is, of course, to be found in the historical facts. As Neville J. said in *Heath's Garage Ltd.* v. *Hodges* (at p. 382): "In my opinion the experience of centuries has shown that the presence of domestic animals upon the highway is not inconsistent with the reasonable safety of the public using the road".[36]

There is no sense that this plausible explanation might reflect the underlying principle that a negligence liability depends on the creation of a significant danger. For it is not unreasonable to suppose that Neville, J.'s ruling against liability in 1916 reflected his understanding of its requirement at the time. A respect for this principle (no less for his reasoning) would support a case for liability where the facts now show that serious public danger arises when stock are left to wander onto high-speed urban expressways. But the principle has somehow been left by the wayside, and we are left only with the stock of past opinions and the rules these opinions are said to exemplify. This intrinsically superficial view of precedent tells us that the law we must respect is the opinions, not the principles from which they were derived.

By contrast, the dissenting judgment of Murphy, J. is built on some analysis of case law, critical literature, law reform reports and a consideration of the candour and other merits of the settled rule theory of precedent. The essence of his approach is found in his claim to be entitled to do what past judges appear to have done with precedent.

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[36] *Supra* n. 2 at 77.

rather than what a prevailing theory of precedent requires, and its flavour is suggested in the following passage:

> The argument that an apparently unjust decisional law should not be abrogated by a court, because it would do so after hearing only the litigants and not after a general inquiry, is unsound. The judges in *Searle* v. *Wallbank* made their decision without the benefit of such an inquiry. The argument is curiously twisted when this Court is asked, without such inquiry, to recognize for the first time a rule made by another court whose decisions do not bind it. The reports of the law reform bodies to which I have referred did conduct such inquiries and the tenor of all of them is that *Searle* v. *Wallbank* should not be part of the law.[37]

What is of most interest in Murphy, J.'s judgment is that, despite his well-known philosophy that judges should make law by reference to social goals, what emerges is virtually an example of principled decision-making. For no attempt has been made to consider, as a legislature surely would, what would be the *ideal political solution* having regard to arguments about cost allocation, insurance, strict liability, onus of proof, effect on the farming community, etc. Rather, the decision is made to turn on the appropriate relationship between a general principle of tort liability and a subsequent claim supported by the same high authority, that this principle was inapplicable to a case coming within its terms:

> The inquiry into the suitability (or applicability) of *Searle* v. *Wallbank* in South Australia in 1836 is not the point; the real question is whether the 1947 *Searle* v. *Wallbank* should be recognized in South Australian common law as an exception to the 1932 principle in *Donoghue* v. *Stevenson*.[38]

Murphy, J.'s consideration of the social impact of the immunity rule in fact stopped well short of any quest for an ideal solution. It was sufficient for his judgment to show that, because the factual assumptions behind this rule could no longer be sustained, the rule itself could not be protected from the authority of the negligence principle.

Although Murphy, J. professes the view that judges must act as legislators where the law is unclear or unjust, his judgment would not be out of place with the opposed philosophy of Blackstone, Coke and Hale. For what Murphy, J. has done is to treat the negligence principle of *Donoghue* v. *Stevenson* on its merits as an important legal standard, and not simply as a rule or doctrine to be cut down by judicial opinions in conflict with it, much less to be replaced by some legislatively ideal rule as, e.g., strict liability. This primary respect for the *substance* of a legal principle is quintessentially a respect for the common law itself,

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[37] *Id.* 93.
[38] *Id.* 94.

because it preserves the important distinction between the body of legal principles (and the rights they give rise to) which make up the common law, and the sometimes fallible decisions of authoritative courts as to what these principles require in particular cases.

By contrast, the majority judgments treat the decisions of authoritative courts as more important than the legal principles themselves, so that the relevance of a legal principle (and the rights it supports) depends in the end on whether a court chooses to treat it as relevant, and not on whether it applies on its terms to the case in hand. This attitude is sometimes defended on the ground that it maintains stability and predictability of doctrine, an argument which ignores the point that, wherever appropriate, the appellate court judges can rest their innovations on the authority of their own opinions. The many important developments in Australian tort law over the past fifteen years have in fact coincided with a High Court bench in which this philosophy has largely prevailed.

It is interesting to contrast Murphy, J.'s approach with that taken by Gibbs, J., who insisted that, "although the rules of the common law develop as conditions change, a settled rule is not abrogated because the conditions in which it is formulated no longer exist".[39] But to 'develop' a rule is logically to replace it with another rule, either wider in scope or more restricted; hence development necessarily involves abrogation of rules. The crucial question for Gibbs, J. is why he is not prepared to acknowledge the development of those rules which express the principles of negligence liability, so that *Searle* v. *Wallbank* is abrogated. Alternatively, on what basis does he support the Lords' refusal to allow this development in 1947? Gibbs, J. wishes to suggest that somehow these rules can still be developing without the judges deliberately making changes in the law, and one gets the sense that he might allow gradual, minor modifications but not the dropping of such major doctrine as *Searle* v. *Wallbank*. But although one cannot both affirm that the common law can develop and deny that judges can change rules, the instinct which leads Gibbs, J. to suggest that the law develops in some sense on its own account is not out of place. For this idea makes sense where a commitment to legal principles as obligatory standards of judgment leaves no room for discretion to pursue 'legislative' goals.

Despite this, his failure to distinguish between principles and rules prevents Gibbs, J. seeing that it is precisely because *Searle* v. *Wallbank* is inconsistent with principle that it should not be applied. Instead, such inconsistency is seen as just another factor which can set up a case for legislative reform. As a judge, he cannot interfere unless he chooses to take the plunge into the judicial version of this legislative

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[39] *Id.* 73.

mode, presumably something to be done only where, like Aickin and Mason, JJ., he is also confident of the ideal legislative solution.[40]

It is notable that when we come to this philosophical nerve centre of *Trigwell* we can find no acknowledgment or discussion of these awkward questions. This is not surprising where judges subscribe to a philosophy which allows no *legal* reasons for choosing whether to review legal rules or to stand aside and leave this to the legislature.[41] For their unwillingness to consider rules in the context of those principles which give them point commits them to accept conflicting decisions of superior courts by treating the later ruling as an exception, however irrational the result. Ironically, Murphy, J. as the professed champion of judicial legislation, has refused to apply a House of Lords' ruling, not out of a preference for some ideal policy solution, but by adopting what in effect amounts to a "legalism" of the kind Sir Owen Dixon would have understood. The majority judges, under the guise of a conservative attack on the idea of judicial law-making, have refused to acknowledge established legal principle because of their paradoxical but implicit assumption that courts of sufficient authority have an ultimate discretion to shape the common law.

Settled Law and Unsettled Law

The above conclusion could be challenged by a definition of "settled law" which would allow it to mean something other than being ruled on by an ultimate appellate court. In order to succeed, such a definition would have to avoid the paradox that the High Court's refusal to review *Searle* v. *Wallbank* was based on their assumption that the House of Lords had a power they themselves lacked, that is, to 'make" their decision valid by so decreeing it.

"Settled" is clearly ambiguous, and we must distinguish (1) a clear, decisive ruling by a supreme appellate court (that is, the House of Lords, Privy Council or High Court) from (2) a view of the law adopted and applied by the lower courts over a substantial period of

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[40] The notion that there could ever be an ideal legislative solution is an attractive myth, no less when it serves as a pretext for or against judicial intervention. For governments have a constitutional *right* to choose particular social goals, and thereby to favour regional or group interests (e.g., motorists or graziers) in advancing the overall public welfare. The fact that courts lack competence to do this is less crucial than the fact that they have no similar right to favour one against the other. This important point is blurred where judicial restraint is explained by an appeal to the *complexity* of some postulated ideal solution. Present legislative answers to *Searle* v. *Wallbank* include ordinary negligence (U.K.), negligence with onus of proof reversed (N.Z.), and strict liability (Recommended by the Ireland Law Commission).

[41] Aickin, J. says, "It is not necessary or useful to attempt to state definitely in what circumstances it is proper for this court to change what is found to be the present state of the common law" (*supra* n. 2 at 94). On the contrary, so long as judges assume this approach, it will be impossible in principle to determine whether the old rule applies, however crucial to the claims of the litigants. It will simply depend on the choice of strategy and social goals preferred by the judge who claims this discretion.

time, and so acknowledged by text book authors, etc. The first interpretation is unacceptable for the most obvious reasons. For the law that none of these three courts is bound either by its own previous decision or by those of the other two is itself well-settled, and is exemplified by an impressive list of rulings, now including some of the leading authorities of the common law. Moreover, it is the freedom from an *obligation to comply* with earlier rulings which prevents this interpretation from assisting *Trigwell*; no support can be found merely in the *policies* of conservatism and restraint these courts will from time to time deem it useful to profess.

According to the second meaning, the High Court's explanation will be that the House of Lords simply acknowledged a long settled no-liability doctrine and the High Court must agree with the Lords' assessment, not because they gave it, but because it happens to be historically correct. The High Court perspective would be that in *Searle* v. *Wallbank* the House of Lords followed earlier decisions in which the courts were not prepared to uphold the plaintiff's claim for damages for negligent injury due to an escaping animal. Since this view had not been disturbed in the interim, then it must be treated as settled law, binding in 1947 and thereafter.

But even on the historical approach this perspective must be rejected, because it is refuted by *Donoghue* v. *Stevenson* itself. For in this case the House of Lords ruled that the lack of any precedent decision for such an action on the case against a manufacturer could not suffice to prevent his liability for negligent injury, and this ruling now occupies a central and unquestioned position in the theory of tort law.

The cases refusing liability for animals cannot therefore be more significant legally than those cases, e.g., *Langridge* v. *Levy*[42] and *Winterbottom* v. *Wright*,[43] which refused to entertain a liability for negligent manufacture, and our general conclusion must follow that this conception of settled law cannot be sustained consistently with any genuine respect for the House of Lords' decision which has laid the foundations for the modern law of Negligence. In *Searle* v. *Wallbank* the Lords would be wrong in law to suppose that these earlier denials could have much bearing on the question, because they were by 1947 supposedly committed to respect a process of argument used by Lord Atkin and his colleagues and adopted in so many succeeding cases. The argument is simply that such nineteenth century opinions are not decisive where a relevant legal principle will sufficiently justify the liability. Moreover one can accept this, as Lord MacMillan did, without conceding that the legal principle involved was Lord Atkin's

[42] (1837) 2 M. & W. 519.
[43] (1842) 10 M. & W. 109.

risk principle. It follows that, because reliance on such cases was no valid argument in *Searle* v. *Wallbank,* they cannot provide substance for the High Court's claim that the law was settled prior to the Lords' ruling. Anyone who supposed this in 1947 should have realized that this "law" had been quite fundamentally "unsettled" by 1932.

But even without *Donoghue* v. *Stevenson* this second idea of "settled law" would be dubious, since it proposes that a series of bad decisions can accumulate a kind of prescriptive right to be treated as if they were good law, even if the earlier cases in this series could not have survived a test of principles then, or if the later cases would not survive it now. In effect it amounts to a claim that a superior court is bound by a series of decisions of an inferior court simply through their repetition. Although this claim preserves a degree of consistency, it does so in a distinctively superficial way. For it ensures consistency with a series of opinions of what the law requires, when closer analysis might reveal these opinions to be inconsistent with the basis on which rules have been formulated in other cases, dealing with the same interests and rights of litigants; that is, inconsistent with the overall weight of available precedent.

In the end, it is difficult to avoid the conclusion that this settled rule idea can work only as a stratagem for a conservative policy. For there is really no sustainable distinction between a rule of law and a settled rule of law; the only difference of point is that rules will differ by degree in respect of their authorititative status, that is, some rules are simply more controversial than others on the question of their consistency with the total body of precedent, including its principles.

Principled Decision-making

In order to question the direct claim that judges may have this power to choose the role of precedent, we have to consider the strength of the case which says that legal principles, whether expressed or implicit in decisions, are not only an important part of the body of binding common law standards, but are perhaps the most fundamental legal standards we have. This involves the view that such principles are not merely considerations which judges ought to reflect on before making decisions, but that they will also *require* decisions of various kinds, in much the same way that common law rules do.

This idea that legal principles are to be taken seriously because they are also *obligatory* standards has only in recent years escaped from the backstage store room of judicial rhetoric, and has managed to do this only through the trenchant and imaginative attacks which Ronald Dworkin has mounted against the assumptions of contemporary legal positivism. According to positivist legal philosophy, expressed in our legal traditions chiefly through the writings of John Austin and Jeremy Bentham and in this century given extraordinary sophistication

and a new impetus in the brilliant analyses by Herbert Hart of Oxford, law is essentially a model of rules, and principles do not fit into this model other than as part of a very general array of background values which judges are free to take into consideration if they so choose, when these rules are vague or in conflict.

Dworkin[44] has attacked this philosophy because it presents the law as merely an affair of rules and treats rules as the embodiment of judges' opinions. According to this picture, all problems of conflict must be reconciled by the exercise of a claimed power to make new law, a power constrained only by a never-clearly-defined duty to respect the back-log of rules already made by previous courts' exercise of the same power. For Dworkin such a philosophy is unacceptable both because it lacks realism and because it offends our notions of democratic theory and justice: First, because judges have no political mandate to legislate solutions to resolve disputes about rights; secondly, because it is unjust to penalize parties by retrospectively changing the law on which their dispute arose.

For Dworkin the defects of the positivist theory are in the end critical because they allow the legal system to deviate from a commitment to the ideal that each citizen has equal value. This fairness ideal, requiring an equal concern for the individual's welfare and an equal respect for him as a person, constitutes the ultimate political philosophy from which Dworkin defends his philosophy of law. When he argues that past decisions and rules are important primarily because they exemplify and respect the legal principles they embody, and that it is to these principles we must go to find answers for hard cases, he does so on the basis that no other approach can comparably maximize the consistency of our treatment of present litigants with the treatment our courts have accorded others in the past, where the same principles and the same substantive rights have been in dispute.

It is important to note that the thrust of the fairness argument does not lie in any uncritical fidelity to history. As Dworkin emphasizes, this past treatment is important only because it describes the totality of rights which government is *presently* committed to protect; statutory and judge-developed law provide the evidence of this commitment, but it is the commitment itself which determines the fairness in point.

Because his legal philosophy is embedded in such a political principle, it is distinctively *prescriptive,* inviting support by asking us

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[44] The campaign has been developed through a series of articles, commencing with the now famous analysis of the logic of principles in the *Chicago Law Review* of 1967 entitled "The Model of Rules". The substance of these articles, with additions, appeared in book form in *Taking Rights Seriously* (Duckworth, 1977). Although the discussion surrounding his views is undoubtedly the central controversy in contemporary legal philosophy, very little of this argument has yet filtered through to the world of practising lawyers and judges who must work with and rely on the very assumptions these philosophies are now contesting.

to consider the moral priority of this principle in our own philosophy of government. But, to the puzzlement of some critics, it is no less a *descriptive* theory, arguing for a more sophisticated account of the actual operations of a legal system, and proposing a less superficial theory of precedent. The descriptive account is controversial in an altogether distinct fashion, since it claims that conscientious judges will characteristically pursue principled decision-making where they are not led astray by a philosophy which invites them to free-wheel when things get difficult.

Whether one confronts Dworkin's theory as a better political philosophy of law, or because it gives a truer picture of what "actually happens", it is clear that his approach presents the problem of the hard case, the resolution of a dispute about conflicting, obsolete or unclear rules, as very much an *intellectual* problem, rather than a problem of policy choices.[45]

Dworkin has argued the view that legal principles are not merely obligatory standards, but that their obligatory force outranks that of rules. This is because rules and doctrines derive their validity from the legal principles they embody. In support he argues that principles do not lose their obligatory character as standards governing decisions because they are intrinsically more general standards, whose requirement is therefore more implicit than that of rules. It is, in his view, just because principles exhibit this quality of having to comprehend a wider array of situations, and also because they have a dimension of "weight" which rules lack, that they require a higher order of judicial craftsmanship to apply. In answer to the familiar positivist apology that hard cases make bad law, Ronald Dworkin insists that these are the cases which indubitably make good judges.

Such a theory leaves no room for judicial law making as a discretionary pursuit of selected social goals. The judges' duty in the hard case is to respect and to apply relevant principles according to their institutional force, that is, consistently with their influence in past cases. This will sometimes require him to fashion a rule to give more accurate expression to their requirement, and at other times to reject

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[45] It is virtually impossible to give any satisfying account of the philosophy of principles developed by Dworkin without an extensive essay, including a comparable analysis of the positivist philosophy of law-making to which it is opposed and against which it must be understood. The simplistic account given here is intended primarily to suggest the nature of an alternative philosophy of law which avoids the specific defects which make *Trigwell* such an unsatisfactory decision. Although the arguments deployed in the text come either directly or indirectly from that expanding body of ideas generated by Ronald Dworkin's writings, their force does not depend upon any assumption that his philosophy of law is itself non-problematic. The assumption is that *Trigwell* is indefensible from any rational standpoint, because of its contradictory claims about the power to settle and unsettle rules of law. Nevertheless, *Trigwell's* defects are more obvious to those who see legal principles as standards of judgment with an intrinsic obligatory force, a view which is of the essence of Dworkin's philosophy.

a rule clearly inconsistent with them. But he is not free to ignore them, nor to choose a policy of qualified respect, giving them more or less weight according to his own views or the requirements of some conservative or activist strategy he favours.

A Principled Solution to *Trigwell*

In order to see how such a principled approach would treat the Trigwells' claim, we need only to insist that judges view rules in terms of the principles they embody and the rights these principles support. The reason these principles are to be taken seriously, and applied according to their essential point, is because they are not just accidents of history, but that they reflect the conscientious efforts over many centuries of judges' attempts to do justice between parties in conflict. In a general sense they constitute the most rational explanation we can find for the great body of decisions and rules to be found in the official reports of this activity. In the law of torts these principles are inevitably expressions of ideas of fairness, having regard to the nature of the interests for which protection is sought, and the nature of those interests and freedoms the defendant is claiming.

Accordingly, in *Trigwell* we would not be entitled to ignore the principle which imposes a duty to be careful where risk of injury to others is attendant on one's conduct or enterprise. Although it took time for the English courts to acknowledge, the essential fairness of this general proposition has not been seriously challenged since Lord Atkin applied it against the class of manufacturers in 1932. Since then the argument has been whether certain relationships, or certain kinds of injury, might involve distinct principles which would set up a stronger case either for no protection, or for some appropriate qualification to the idea that creation of a risk of harm is sufficient to impose a duty of care.[46]

In nineteenth century England the question who created the relevant risk as between animal graziers and road users would be sufficiently in contention as to question the applicability of this principle. For although lands were commonly not fenced from roads, and animals were normally transported to market and elsewhere by walking them along highways, the risk posed to road users was minimal in the circumstances of prevailing motor-car design and usage. The

[46] According to the logic of a principled argument, the mere fact that the principle in contention is relevant does not bind the judge to rule in accordance with it. If the principle is to govern the decision it must not be qualified or overborne by other principles of greater institutional weight. Such other principles are responsible, e.g., for the immunities and special qualifying rules applicable to omissions, tumble-down houses, negligent statements, financial loss, barristers in court, and occupier's liability for dangerous premises. These areas do not show that the risk principle is of arbitrary relevance, but that it is presently considered to be outweighed by countervailing principles having to do with considerations of fairness, remoteness, freedom of expression, etc.

plausible claim could be put that in the 1890s the presence of an automobile was itself a special danger introduced into a relatively peaceful environment, a danger which the plaintiff himself brought onto the scene and which was wholly within his control.

These circumstances would set up the case for an exception on the ground that Lord Atkin's proposition was no longer tenable. But as these circumstances changed, as fences became common and eventually standard practice on metropolitan and even country roads, as stray animals ceased to be expected traffic on highways, and as motor car drivers became accustomed to lawful road speeds which would be dangerous in the extreme in the presence of stray stock, then the case for exceptional treatment lost its authenticity. In the 1980s the factual circumstances are virtually the reverse of those in the 1890s, and the presence of a cow on a high speed urban expressway is now an exceptional danger. Further, the relevant environmental danger is now under the control of the landowner whereas it was controlled by the car driver in 1890.

If the High Court had in this way considered the no liability doctrine according to its point, and sought the most rational and consistent interpretation of *Donoghue* v. *Stevenson* with some regard for its role as an institutional endorsement of a general legal principle to govern negligent injury, then they may or may not have agreed that *Searle* v. *Wallbank* was good law (that is, a justified exception) in 1947. But it is hardly conceivable that they would have concluded it still to be a justified exception in 1979.

Clearly, such an approach will not ensure unanimity of view, because good judges will differ in their judgment of these matters. But this arguability in practice is the price one pays for having standards sufficiently general to maintain consistency of treatment of these broader issues, and would be cause for complaint only by those who dream of general standards which could somehow guarantee their correct interpretation. It is important to distinguish argument about the requirement of such principles from the policy debate which arises when a power is claimed to make rules to pursue social goals. Arguments of general welfare and social policy do not arise where the judge's commitment is to respect and apply principles which have determined past claims of right.

The High Court did not undertake this sort of principled approach because their positivist philosophy is incompatible with the idea that such principles can have obligatory status. Lord Atkin's risk principle may have historical and "jurisprudential" significance, but it lacks intrinsic legal force in their theory of precedent. Hence it cannot be used as a test of the Lord's speeches in *Searle* v. *Wallbank* nor for that matter against their own decision to ignore it. Despite the prestige courts and scholars have accorded Lord Atkin's famous speech, it is

on this view merely impressive oratory; for in the end the manufacturer's liability is said to come simply from the exercise of a judicial power to create it, rather than from any compelling force in that principle which he cogently argued could provide the most rational explanation for the previous cases.

This is why a similar act of judicial power is now sought to "legislate" a new rule for wandering animals. For this view sees the law of negligence simply as the product of such particular decisions to make law, and not in terms of the principles such decisions express and characteristically claim to respect. Because such a view encompasses both conservative and activist roles it inevitably avoids enquiry into the criteria for use of this law making power. The resulting debate as to the proper role of the judges, whether they should be more or less reformist, can have little effect on judicial attitudes. For the difference between Murphy, J. and the majority can hardly rise above the level of a claim that more or less judicial intervention is in the long run best going to promote general welfare or some vision of the ideal society.

Caltex: Law-making or Principled Decision-making?

A significant feature of this debate about principles versus judicial power, is the evidence of the High Court's appreciation of principled decision-making on those occasions when it agrees to change the law, whatever legal philosophy it professes. For the tradition of principled argument is sufficiently entrenched in the court's common law practice that it will normally govern those hard cases which involve conflicting rules or obsolete doctrine. A recent example can be found in the several different judgments given by a unanimous High Court in the *Caltex case,* each attempting for the first time to spell out a financial loss liability according to the principle of *Donoghue* v. *Stevenson* (and thereby throwing out one of the most rigidly settled rules in the whole of the law of torts), and at the same time proposing qualifying doctrines designed to respect the rational basis of past immunity for financial loss.

In *Caltex Oil Aust. Pty. Ltd.* v. *The Dredge "Willemstad"*,[47] the captain of a ship dredging Sydney Harbour negligently damaged a submerged pipeline which carried Caltex oil from their depot to the refinery, and they sued for damages to cover the cost of arranging road transport in lieu. Since Caltex did not own the pipe, this financial loss could not be recovered in the conventional way, by showing that it was consequential on, or a measure of the cost of, some physical damage for which the dredge's owner was liable to them. In these circumstances the full High Court rejected the long standing common law rule, applied consistently since at least *Cattle* v. *Stockton Waterworks Co.*,[48] that

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[47] *Supra* n. 10.
[48] (1875) L.R. 10 Q.B. 453 at 457.

financial loss due to negligence was not recoverable in the law of torts. By contrast with *Trigwell,* these scholarly and imaginative judgments are based on a comprehensive analysis of the body of relevant case law and principle.

Each judgment considers the underlying reasons inhibiting financial loss liability in the past, and asks whether the considerations on which such reasoning has been based can be accorded appropriate respect without the general ban for all cases. The theme of all these judgments is that this long settled rule might be shown to conflict with a better analysis of the law. The judgments are not, however, the same; each comes to a different conclusion as to the appropriate limitations of liability because each judge has had to interpret for himself the weight and requirement of the principles he is applying. Accordingly, each offers a different verbal formula to express this conclusion. Because there is a considerable degree of overlap, lower courts will find this a workable if difficult doctrine, at least in cases where the facts are not too dissimilar from *Caltex* itself.

To describe such a decision as exemplifying a principled approach does not necessarily imply it contains much open discussion of the more general legal principles contending for and against liability. More characteristically it is evidenced simply by a determination to find the most rational explanation of the past case-law, to express this finding in appropriate legal standards, and to apply these standards to resolve the dispute. Much principled decision making is more or less intuitive in this sense. What we will not find in this case is any evidence express or implied, that any of the judges considered the utilitarian or policy benefits of a liability ruling against the public policy benefits of the older doctrine. For despite the assumptions of a quasi-legislative discretion, there is no hint of any concern with the effects on big business, industry, lawyers, insurance, the balance of payments, the gross national product, or any other scale of public benefit or social welfare.

This is in sharp contrast with the judicial style assumed in recent years by the Master of the Rolls in this same area of financial loss. During the seventies a number of cases involving arguments on financial loss came before the English Court of Appeal, and although this court consistently held to the no liability view, Lord Denning, after initially trying to develop a doctrinal approach to define exceptions, has since given this up for a frank avowal that it is all just a matter of policy and law making. The combination of this philosophy with a natural candour has led him openly to avow that his job is simply to make the best rule he can according to those policies which seem to him to make most sense. So we find him, in *Spartan Steel* v. *Martin & Co.*,[49] actually listing in his judgment the particular policies for and against a

[49] [1973] Q.B. 27.

liability in that case, and repeating this procedure in *Dutton* v. *Bognor Regis U.D.C.*[50] This is surely the logical approach for adherents of judicial law making and its concern to explain exactly how the decision is reached shows commendable respect for the parties. However, candour is only one of the judicial virtues, and the arbitrary selection and appraisal of appropriate policies suggests that this aproach is neither simpler nor more fair than a studied retreat to first principles.

The Rationale for Principled Decision-making

The point of a principled approach to the resolution of disputes is neither to pursue some conception of general welfare, nor to maintain a respect for the law as such. Rather it is to ensure, so far as human ingenuity can, that all citizens are treated with equal respect by the law in determining their legal interests and rights. The reason why a court must satisfy itself that the opinions of past courts and the rules they declare and apply are consistent with these more general legal standards, is to ensure that the parties in dispute are treated consistently with the past treatment of litigants in like cases, arguing comparable interests.

For the crucial question is what amounts to a relevant "like" case, and this can in the end be decided only by an assessment of the relevant legal principles and the rights they give rise to. If it is conceded that a judge's fundamental duty is to pursue justice by applying the rules of law to the case at hand, then the principles thesis argues that this underlying goal of justice requires him in hard cases to apply the principles on which such rules are based to the rule in contention. Otherwise, the parties in dispute are accorded merely technical respect because they are denied the benefit of those substantive standards of judgment which shape the rules for others within the system.

The conventional view assumes that the responsibility to treat like cases alike can be satisfied by showing that some rule covers the case. Any relevant rule of the legal system will do so long as it is not overborne by some other rule of higher judicial rank. This view confuses *stare decisis* with *res judicata* in that it treats judicial opinion as confirmatory of the law rather than the law itself as confirming the validity of the opinion. But the requirement of finality in the resolution of any particular dispute has nothing to do with the continuing process of interpreting the relative legal weight of claims of right of the kind disputed in *Searle* v. *Wallbank* and *Trigwell*. This process requires us to ignore neither the fallible scholarship of judges nor the fact that changing conditions will from time to time determine the appropriate requirement of the principles from which these claims of right draw their support.

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[50] *Dutton* v. *Bognor Regis U.D.C.* [1972] 2 W.L.R. 299.

The conventional denial of the role of principled argument in favour of a judicial discretion to "legislate" rules in difficult cases reflects the view that a legal decision gains its validity from the judge's authority, rather than from the principles of the common law. Because this suggests a kind of institutional hubris difficult to reconcile with democratic theory, it is usually covered by an appropriate rhetoric, such as the "settled rule" formula in *Trigwell*. Although this *looks* like a doctrine, it is easy to see that the judges' inability to consider what makes a settled rule and when and why some settled rules are dispensable, effectively marks the reservation of a simple discretion for all the difficult cases.

Such a discretion is inescapable for a theory which sees the common law as merely the aggregate of past decisions, rather than the most rational and coherent account of the rights they enforce. Accordingly, our contemporary judge must choose either to apply the latest or most authoritative opinion of a senior court or boldly to interpose his own opinion as to what the best legislative solution would be. Because this theory leaves no alternative between thus applying rules and "making law", it is largely responsible for the radical and unpredictable swings between conservative and activist rulings of the High Court in recent years.[51] This will no doubt continue for as long as our judges subscribe to a theory which treats rules and rule-making as all-important, which assumes that rules are in the end only judicial opinions, and which does not acknowledge the underlying principles of the common law and the substantive rights they protect.

If we can stand back and view such a theory as a set of assumptions whose credibility is open to question, then we might be persuaded to prefer the theory which requires judges to analyse and assess legal opinions in terms of such principles and rights. We might then agree with Dworkin that it is the hard cases, those which pose this difficult task, which make the good judges. But there is another point to this reminder, for such cases will also challenge the judge to test his legal philosophy; when bad law results it is often because this philosophy was bad rather than because the case was too hard.

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[51] Perhaps their most radical intervention in the common law is the unanimous ruling by three High Court judges in *Beaudesert Shire Council* v. *Smith* (1966) 120 C.L.R. 145, a ruling so clearly inconsistent with so many common law principles that the Australian legal profession has generally ignored it as having anything to do with the law of torts.