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PREFACE

CLARITY OR FAIRNESS: WHICH IS MORE IMPORTANT?

When Karl Marx, applying dialectical method to history, sought to explain the progress of civilisation in terms of thesis and antithesis, resolving into synthesis, he provided an insight which is a useful tool of analysis for development in the law. It is always of interest to watch conflicting tendencies at work in the formulation of legal principle. The purpose of the following notes is to examine, by reference to three specific examples, the working out of a familiar conflict between two important but sometimes competing aspects of justice; that is to say, the need for certainty in the law, and the requirement that the law be adequately responsive to the dictates of fairness in a given situation.

The first example concerns the doctrine of privity of contract. That is a useful starting point for an examination of the problem, because in the course of argument in one of the leading cases on the subject, senior counsel for the party whose interests lay in preserving certainty in the law formulated a proposition which is a famous expression of one aspect of legal policy. In *Midland Silicones Limited* v. *Scruttons Limited* [1962] A.C. 446 at 459 Mr Ashton Roskill QC said: "It is more important that the law should be clear than that it should be clever." Proponents

of certainty in the law could point to many examples of areas in which judges, trying, as they would argue, to be too clever by half, have produced confusion, and have brought about that form of injustice which results when lawyers are unable to give clear advice to their clients and people do not know where they stand. After all, so the argument runs, the law is working at its best when it is clear and predictable, and when people do not need to engage in prolonged and expensive court cases in order to understand their rights and obligations. On the other hand, change and development in the law will frequently be at the price of at least some period of uncertainty, and the common law would indeed be brutal and crude if certainty were the only value it respected.

The doctrine of privity of contract undoubtedly has the merit of clarity. However, almost from the time when it became entrenched in our law, its critics have complained that it has neither equity nor even historical legitimacy. In the decision in which the House of Lords declared the principles to be "fundamental" (*Dunlop Pneumatic Tyre Company* v. *Selfridge and Co Limited* [1915] A.C. 847), Lord Dunedin (at 855) said:

> "My lords, I confess that this case is to my mind apt to nip any budding affection which one might have had for the doctrine of consideration."

In *Beswick* v. *Beswick* [1968] A.C. 58 Lord Reid said in relation to the failure of Parliament to respond to judicial complaints about this doctrine,

> "If one had to contemplate a further long period of Parliamentary procrastination, this House might find it necessary to deal with this matter."

In *Swain* v. *The Law Society* [1983] 1 A.C. 598 Lord Diplock described it as "an anachronistic shortcoming", and in 1987 Professor Flannigan called it "an historical and theoretical error that cannot be justified" ([1987] 103 L.Q.R.).

Over the years various legal techniques have been applied, with considerable success, to mitigate the effects of the doctrine in areas in which its operation would so obviously defeat legitimate expectations that its comprehensive application would be intolerable. For example, the decisions of the House of Lords in *Midland Silicones Limited* v. *Scruttons Limited* (supra) and of the High Court in *Wilson* v. *Darling Island Stevedoring and Lighterage Company Limited* [1956] 95 C.L.R. 43, which prevented stevedores taking advantage of clauses excluding or limiting liability for cargo claims in contracts of affreightment, were ultimately circumvented by a combination of resourceful draftsmanship and the robust application of established legal principles. (See, for example, *New Zealand Shipping Company* v. *A. M. Satterthwaite and Co. Limited* [1975] A.C. 154; *Port Jackson Stevedoring Pty Limited* v. *Salmond and Spraggon (Aust.) Pty Limited* [1980] 54 A.L.J.R. 552). The idea that it was legally impossible to give

effect to the common and clearly expressed intention of the parties to a contract for carriage that an agreed apportionment of risk should apply not only to the parties themselves, but also to their servants or agents who would inevitably be employed in the performance of the contract, involved taking the doctrine of privity of contract to a length which commercial lawyers could no longer accept. It was as if the doctrine of privity mocked the claims of the law of England to be regarded as the primary arbiter of international commercial disputes. It is to be noted, however, that the means used to overcome the difficulty involved the use of established techniques from the law of agency, or the law of trust, to outflank the doctrine rather than directly to confront it.

The recent decision of the High Court in *Trident General Insurance Co. Limited* v. *McNiece Brothers Pty Limited* [1988] 62 A.L.J.R. 508 raises the question whether that court may be shaping up for a more direct encounter with the doctrine of privity. The judgments in the case provide an interesting example of a variety of judicial attitudes towards the fundamental question of the resolution of the tension between the requirement of certainty and the requirement of fairness. The High Court upheld the decision of the New South Wales Court of Appeal, whilst a number of the justices protested that the actual reasoning of the Court of Appeal amounted to a rejection of the doctrine of privity of contract. Some members of the High Court sought to solve the problem by going along with the ultimate conclusion reached by the Court of Appeal, but on the basis of the formulation of a specific and limited exception to the fundamental doctrine. Other members of the court reached the same result by the technique, similar to that earlier referred to, of circumventing the doctrine by applying to the circumstances of the case other equally well established principles of law and equity. One member of the court took the view that if the doctrine were to be rejected then it was for Parliament to do so by means of legislation, which would be better able than judicial decision to define and control the limits of the modification of the doctrine.

A number of States in Australia have already enacted laws modifying the doctrine to some extent, and the actual problem that arose out of *Trident* has now been dealt with by specific legislation in the area of insurance law. Nevertheless, that case provides an excellent example of the ways in which judges with authority to change the law respond to a problem which is, at bottom, one of reconciling the need for certainty with the requirement of fairness.

The second example is an area of the law in which the High Court has moved in favour of what might be regarded as equity, or at least a degree of flexibility, whilst the House of Lords and the Privy Council have opted for certainty. I refer to the contrasting approaches in relation to the recovery of damages in tort for what is sometimes called "pure economic loss", exemplified by the decision of the High Court in *Caltex Oil (Aust.) Pty Ltd* v. *The Dredge "Willemstad"* [1976] 136 C.L.R. 529 and the decisions of the House of Lords in *Leigh and Sillavan Ltd* v.

Aliakmon Shipping Co. Ltd [1986] A.C. 785 and the Privy Council in *Candlewood Navigation Corp.* v. *Mitsui OSK Lines* [1986] A.C. 1. If ever there were a principle of law that has little to commend it except clarity it is what the Americans call the "bright line" rule which distinguishes between a claim for economic loss suffered by the victim of a tortfeasor who has a proprietary or possessory interest in property damaged by the tortfeasor's conduct, on the one hand, and a claim by a victim who has no such interest, on the other. The artificiality of a rigid distinction between pure economic loss and economic loss consequential upon injury to a plaintiff's property is self-evident. Nowhere is this better illustrated than by the actual facts involved in *Candlewood.* Any number of simple examples can be used to make the point. Thus, if a tortfeasor negligently damages a coal loader being used by a coal exporter, and the coal loader is put out of operation for a substantial time, the exporter will be able to claim damages for the economic loss sustained if the exporter has a proprietary interest in the coal loader, but the position will be otherwise if there is merely a contractual right to use the coal loader. The fact that corporations are involved and the actual owner of the coal loader is a parent or a wholly-owned subsidiary of the exporter, or a joint venture company in which a number of exporters have shares, will make no difference. The reason for strict adherence to the rule, of course, is the fear of indeterminate liability that would result from its abandonment. Consequently, when departure from the rule is proposed, an argumentative onus lies upon whoever is proposing departure to formulate an alternative which will satisfy the requirements of justice in the instant case, without at the same time opening the floodgates to unacceptably wide consequences. Rightly or wrongly, the English courts have taken the view that all that the High Court has done is to subject an admittedly arbitrary principle to an equally arbitrary qualification and, in the process, has destroyed the only real attribute which the principle proposed ever had; that is to say, its certainty. An argument to the effect that the House of Lords had itself already done the same thing in *Morrison Steamship Co. Limited* v. *Greystoke Castle (Cargo Owners)* [1947] A.C. 265, when advanced in the Privy Council, was not greeted with applause.

Divisions which exist in respect of this matter are not limited to Australia and the United Kingdom. The "bright line" approach holds sway in the United States, where the courts are not infrequently confronted with one of the clearest examples of the horrors which the old principle was designed to prevent. A great deal of internal commerce takes place on inland lakes and waterways in the United States, and negligently navigated vessels which collide with one another can, and often do, produce huge blockages and consequent economic loss to all manner of people who have no connection with any property damaged by such collisions. Such practical problems bring home the force of the consideration that it is one thing to demonstrate the apparent injustice and "draconian operation" of a legal principle, and another thing again to formulate a better one. Supporters of the Australian approach however, are justified

in their observation that the history of the law of tort in this century consists in large part of the rejection of unduly narrow and rigid principles and their replacement by principles which were, at least for a time, regarded as "opening the floodgates".

The third example concerns what might be described, like Prohibition, as "an experiment noble in purpose". It relates to the attempt by the High Court, from which it has ultimately resiled, to bring about a more just, but unfortunately less clear, set of rules relating to self-defence in homicide cases. In *Viro* v. *The Queen* [1978] 141 C.L.R. 88 and *R* v. *Howe* [1958] 100 C.L.R. 448 the High Court departed from the law as enunciated for England in *Palmer* v. *The Queen* [1971] A.C. 814. Briefly, the English approach was that where an accused believed upon reasonable grounds that it was necessary in self-defence to do what he or she did (or, to be more accurate, if the jury entertains a reasonable doubt about that matter) he or she is entitled to be acquitted, whereas, if the opposite position obtains then (subject to any other relevant considerations) he or she is guilty of murder. In *Howe* and *Viro* the High Court sought to set up an intermediate possibility, according to which the result might be manslaughter. This undoubtedly had the merit of making the law more responsive to the individual circumstances of a particular case. The relevant principles were expressed in an elaborate and complicated formula designed to take account, not only of the various factual possibilities that might exist, but also of the problems that arise having regard to the need to bear in mind considerations of onus of proof. In the end, on this occasion, the requirement of certainty triumphed. In *Zecevic* v. *Director of Public Prosecutions* [1987] 61 A.L.J.R. 375 the High Court acknowledged the enormous difficulties which trial judges were having in instructing juries in terms adequate to communicate the principles enunciated by the High Court, and decided that in future in Australia the law would be as it had been stated in England in *Palmer.* In the area of criminal justice, it may be observed, certainty is of particular importance. The fact that the relevant principles must all ultimately be explained to, and applied by, a jury, reflects the more basic consideration that matters of crime and punishment should be capable of being dealt with in terms that are reasonably clear and readily understandable. Fine distinctions and nice elaborations are the stuff of which revenue law is made, but they are generally alien to criminal law.

In his work, *The Common Law* (1882 Ed, at p. 127) Oliver Wendell Holmes contended that "the tendency of the law must always be to narrow the field of uncertainty". Most lawyers of the late twentieth century would take leave to doubt the validity of that proposition. Indeed, the seeds of its destruction are to be found in the same passage, where the great jurist points out that the common experience of lawyers is that a general distinction, which once seemed clear enough when stated broadly, becomes less and less satisfactory as borderline cases fall for resolution. As the three examples given above demonstrate, a struggle may then emerge

between a desire to maintain the distinction in the interests of certainty, even at the cost of a degree of unreasonableness and a desire to modify the distinction or abandon it altogether, in the interests of other elements of justice. The outcome of the struggle will vary from case to case, and from time to time. Advocates, including those of the judicial variety, will express their views in argumentative language. When a rule is castigated as "draconian" it is likely that just around the corner is a blurring of a previously accepted distinction. When an argument is characterised as "opening the floodgates" we can safely predict that certainty is about to regain the ascendancy. The important thing is to recognise that there is no answer to the question posed as to the relative importance of clarity and fairness. The two are simply in a permanent state of competition.

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