

**The Australasian Institute of Judicial Administration
Banco Court, Brisbane
24 May 2018**

"The Adaptability of the Common Law to Change"

**The Hon Susan Kiefel AC
Chief Justice of Australia**

It might be thought that there can be no question about the ability of the common law to change – it is its hallmark. Its ability to adapt to change is what is often said to set it apart from codified civilian law. But what is spoken of here is slow and incremental development. The change of which I speak today is of a more sudden and substantial kind. It is sometimes said to be necessitated by changes in social conditions, thinking or values. Whatever is understood to be the reason for the need to change existing law, there may be limits to the means by which change can be effected if the common law is not to fragment. It may be questionable whether some landmark cases recognise such a limitation.

No one can doubt that the common law has developed through change brought about by external and internal influences. From its earliest inception it has been punctuated by periods of evolution, for example in the late medieval period when its actions and remedies were reshaped. It has adapted itself over time to the needs of commerce and society, such as the conditions brought about by the industrial revolution. It has bent to the winds of war, including in the 20th century. And now it must adapt to new technology in the application of some of its rules.

Most of these changes occur over relatively lengthy periods of time, or at least that is how we see it in hindsight. We tend to think of the common law developing at an orderly, unhurried pace. In *Lister v Romford Ice and Cold Storage Co Ltd*¹ Lord Radcliffe went so far as to say that its movement may be

¹ *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 591–2.

imperceptible at any distinct point in time. We may not be able to say how it gets from one point to another but somehow by some means, he said, there is a movement which takes place. I am not entirely sure whether this lack of insight on the part of common law courts is particularly reassuring. It may nevertheless be accepted that the common law is perceived as developing incrementally and that this is seen as a virtue. It is not considered to be desirable for the law to make sudden radical departures from its rules or suddenly to create wholly new ones. This is because it may be productive of feelings of uncertainty about the stability of the law which may lead to a loss of confidence in the courts. It may lead to legislative responses which are not always consistent with the proper development of the common law.

Nevertheless one would think that there must have been periods when this type of change has been countenanced by the courts. It might be expected that in the period of great change regarding the forms of actions that there were some sudden developments or that, later, rules were promptly put in place to meet particular exigencies of shipping and of commerce. The industrial revolution created many novel situations to which the law was required promptly to respond. And of course during times of emergency, such as the two World Wars of the last century, the courts departed suddenly from their strict views about the liberty of the subject and legislation which interfered with it.

The law of negligence, more so than other areas of law, may be seen as prone to development, to extension and to change. Situations may arise which could not have been foreseen when rules for duty, breach or damages were stated in earlier cases. In Australia there was a period in the mid 1980s and the 1990s in which there were a number of significant decisions in this and as well as other areas of the law. Their significance is confirmed by the introduction in many States of legislation which sought to limit liability in negligence².

² See e.g. *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (WA); *Civil Liability Act 2002* (Tas).

In *Jaensch v Coffey*³, Justice Deane said that there were rare “landmark” cases in which a final appellate court concludes that it is entitled, indeed obliged, to reassess the content of some rule or rules. A leading example is of course *Donoghue v Stevenson*⁴ which held a manufacturer liable in negligence to the ultimate consumer for injury caused by its product. Up to this point, English law had generally limited the manufacturer’s liability to damages suffered by the initial purchaser of the product. This decision was applied the following year in Australia in *Australian Knitting Mills Ltd v Grant*⁵. Cases such as these serve to remind us that large decisions often arise from fairly mundane circumstances: in *Donoghue v Stevenson* the decomposed remains of a snail in the bottle of ginger beer; in *Grant’s case* woollen underwear.

Lord Atkin is regarded by some as having employed inductive reasoning in his seminal speech in *Donoghue v Stevenson*. Having observed that it was “remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty [of care]”⁶, he surveyed decisions dealing with particular facts and circumstances in order to arrive at the general principle – that a duty of care is owed to a person whom the law would regard as one’s neighbour. We have become so accustomed to this concept that it is difficult for us to appreciate how large a step it may have seemed at the time.

Jaensch v Coffey, which was decided in 1984, was to take the idea of a neighbour even further. It declined to follow previous authority which had stood for nearly 60 years⁷ and which post-dated *Donoghue v Stevenson* and *Grant’s case* and allowed a person who had not been injured in an accident in which another had

³ *Jaensch v Coffey* (1984) 155 CLR 549 at 599; [1984] HCA 52.

⁴ *Donoghue v Stevenson* [1932] AC 562.

⁵ *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387; [1933] HCA 35.

⁶ *Donoghue v Stevenson* [1932] AC 562 at 579.

⁷ *Chester v Waverley Municipal Council* (1939) 62 CLR 1; [1939] HCA 25.

been injured or been present at the scene of it to recover damages. The plaintiff had suffered nervous shock as a result of being involved in its aftermath. This new conception of duty was to be based upon a “relationship of proximity”. It was not to endure⁸.

There are other examples of developments in the law of negligence in Australia in this period. Applying the concept of proximity, in *Bryan v Maloney*⁹ a purchaser of a house was able to recover damages in negligence from the original builder. In the law of tort more generally it was held in *Burnie Port Authority v General Jones Pty Ltd*¹⁰ that there was no further need for the rule regarding the escape of dangerous things, which had been stated long ago in *Rylands v Fletcher*¹¹.

There were important changes to other areas of the law at this time. The use of promissory estoppel in *Waltons Stores v Maher*¹² comes immediately to mind. *Marion’s case*¹³ concerned the question whether a court could lawfully authorise the sterilisation of an intellectually disabled teenage girl. *Teoh’s case*¹⁴ may not strictly have changed the law, but arguably changed it the frame through which the Court assesses laws when it held that the ratification of international instruments such as the Convention on the Rights of the Child creates a basis for a legitimate expectation¹⁵. Of course *Mabo (No 2)*¹⁶ needs no explanation.

⁸ See e.g. *Hill v Van Erp* (1997) 188 CLR 159; [1997] HCA 9; *Sullivan v Moody* (2001) 207 CLR 562; [2001] HCA 59.

⁹ *Bryan v Maloney* (1995) 182 CLR 609; [1995] HCA 17.

¹⁰ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; [1994] HCA 13.

¹¹ (1868) LR 3 HL 330.

¹² *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; [1988] HCA 7.

¹³ *Secretary, Department of Health & Community Services v JWB & SMB* (1992) 175 CLR 218; [1992] HCA 15.

¹⁴ *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; [1995] HCA 20.

¹⁵ But compare *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6; *Plaintiff S10/2011 v Minister for Immigration*

That there were so many landmark cases in this period may in part be attributable to the fact that there was at least one very significant event which occurred at this time. One cannot underestimate the importance of the final abolition of appeals to the Privy Council as a driver of change. It was to be regarded as placing the development of an Australian common law in the hands of the High Court for the first time. The need for changes in the law was also explained in cases at this time by reference to changes in society. The answer to the question whether such social changes are occurring and whether they warrant change to the law depends largely upon the perception of judges. Some may be more sensitive to societal change and more amenable to reform.

In *Jaensch v Coffey*, Justice Deane said that a final appellate court may be obliged to reassess a legal rule “if the law is not to lose contact with the social needs which justify its existence and which it exists to serve”¹⁷. Even Chief Justice Gibbs, who was more often a voice of caution as well as of reason, said in that case that the courts are “not necessarily constrained to follow earlier decisions when they appear to be out of accord with contemporary principles”¹⁸.

In *Gala v Preston*, Justice Brennan said that “[i]n a society where values change and where the relationships affected by the law become increasingly complex, judicial development of the law is a duty of the courts”¹⁹. On the other hand he dissented in *Bryan v Maloney* on the basis that the courts are not suited to consider questions about the economic effects of extending the liability of builders for negligent construction to remote purchasers of buildings²⁰. On that occasion it

and Citizenship (2012) 246 CLR 636; [2012] HCA 31; *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326; [2015] HCA 40.

¹⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1; [1992] HCA 23.

¹⁷ *Jaensch v Coffey* (1984) 155 CLR 549 at 600; [1984] HCA 52.

¹⁸ *Jaensch v Coffey* (1984) 155 CLR 549 at 555; [1984] HCA 52.

¹⁹ *Gala v Preston* (1991) 172 CLR 243 at 262.

²⁰ *Bryan v Maloney* (1995) 182 CLR 609 at 644; [1995] HCA 17.

fell to his colleagues, Chief Justice Mason and Justices Deane and Gaudron, to say that in determining whether a novel category should be recognised by the law of negligence the courts should assess “community standards and demands”²¹.

It is not difficult to find statements in judgments which recognise the need for the law to be developed to meet changing social and economic conditions and habits of thought²². It has been accepted that the courts deal with substantial areas of the law which remain untouched by statute and that it is for the courts to develop the law in these areas consistently with the needs of modern society²³. The social or economic change must be significant to warrant a change to the law. It has been said that a “radical change” may in a clear case justify the court moulding a legal rule to meet the changed conditions²⁴.

Occasionally there may be a case where a court is able to make statements concerning changes in social attitudes. *R v L*²⁵, which was heard by the High Court in 1991, was one. The husband in that case was charged with two counts of the rape of his wife. He challenged the validity of the statute creating the offences. The proposition for which he contended was that all Commonwealth legislation relating to marriage, and conjugal rights in particular, preserved the view of the common law that there was a continuing obligation on the part of a spouse to consent to sexual intercourse. This was said to be a legal consequence of marriage. The Court did not have to change the common law in that case to reach a just outcome, one which reflected modern social norms, for the Court did not accept that earlier courts had ever expressed such a view, even if commentators had. The Court observed²⁶:

²¹ *Bryan v Maloney* (1995) 182 CLR 609 at 618; [1995] HCA 17.

²² See e.g. *Myers v DPP* [1965] AC 1001 at 1021.

²³ Ninian Stephen, “Judicial Independence – A Fragile Bastion” (1982) 13 *Melbourne University Law Review* 334 at 344-5.

²⁴ *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617 at 633; [1979] HCA 40.

²⁵ *R v L* (1991) 174 CLR 379; [1991] HCA 48.

²⁶ *R v L* (1991) 174 CLR 379 at 390; [1991] HCA 48.

“In any event, even if the respondent could, by reference to compelling early authority, support the proposition that is crucial to his case, namely, that by reason of marriage there is an irrevocable consent to sexual intercourse, this Court would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage.”

Cases which offer the opportunity for the Court to make an observation of this kind must be relatively rare. The limited nature and extent of disputes coming before the courts will not often provide a forum for debate about societal values or thinking. They can sometimes be found in decisions involving the criminal law. The judgment of Justice Deane in *Dietrich v The Queen*²⁷, which was decided in this period, for example, contains statements about social attitudes towards persons being charged with serious criminal offences and having no representation. But can landmark cases always be said to actually reflect a change in societal values or thinking?

It is somewhat doubtful that English and Scottish societies in 1932 had any attitude towards the liability of a manufacturer to a consumer or that the Australian community in 1984 turned its mind to whether a person who had suffered nervous shock in the aftermath of an accident should be compensated. The panicked reaction observable in the media to the decision in *Mabo (No 2)* did not suggest that that decision reflected a view then widely held amongst the community.

Lord Atkin’s reasons in *Donoghue v Stevenson* might be better understood by reference to his sense of injustice and a belief that society would agree with that view. It is difficult to accept that the rule his Lordship stated can be said to be the product of the individual cases to which he referred. The language employed by Lord Atkin tends to support this analysis. He spoke of providing a remedy when

²⁷ *Dietrich v The Queen* (1992) 177 CLR 292 at 336-7 (Deane J); [1992] HCA 57.

there is “so obviously a social wrong”²⁸. A “social wrong” might be understood in context to refer to something which society would regard as a wrong. His allusion to biblical concepts leaves little doubt that he believed that the moral values of society at that time were reflected in the principle he stated. The Court in *Jaensch v Coffey* may have reasoned in much the same way, believing that right-thinking members of society would not consider it just to deny compensation to a person in the position of that plaintiff. The Court in *Mabo (No 2)* may not have felt so certain. It was more likely appealing to a future understanding and acceptance of the decision that it had reached about the common law.

A judge’s belief that society would accept that an injustice would follow if the law was not changed must be based upon some underlying moral or ethical value or standard attributable to society. Adapting what Sir Owen Dixon famously observed²⁹, the law may be adapted to “meet the demands which changing conceptions of justice and conscience” may require. But, he cautioned, it should be motivated by “deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice” than the political or sociological perspective of the individual judge. Nevertheless it cannot be denied that it is the individual judge who forms an opinion about what society views as just. The judge is the lens through which the common law views society and as such may be long or short in its sightedness.

Justice Brennan had said in *Gala v Preston*³⁰ that it is sometimes necessary for the courts to develop the law where legislative law reform languishes. Political will, it may be observed, appears to have followed rather than preceded the decision in *Mabo (No 2)*. What his Honour said points to the question whether, in the circumstance where change is seen to be necessary, it should be made by the courts or by the legislature.

²⁸ *Donoghue v Stevenson* [1932] AC 562 at 583.

²⁹ Sir Owen Dixon, “Concerning Judicial Method” (1956) 29 *Australian Law Journal* 468 at 476.

³⁰ *Gala v Preston* (1991) 172 CLR 243 at 262; [1991] HCA 18.

At this point in the process of decision-making in a case a conclusion whether the law *will* be changed should not have been reached. Change to the law requires more than that it may be seen as justified by the injustice which might be wrought in a particular case. In landmark cases the question to which Justice Brennan's statement points will sometimes be presented not the least because of the substantial nature of the change.

It may be unsurprising that Justice Murphy took the view that there is a positive duty on the courts to effect change and that it is an abdication of their responsibility to maintain an unjust, inhumane rule. He even went so far as to criticise courts and judges which "justify their inaction by the excuse that the legislature can abolish it"³¹. He was speaking of a decision of the Court to maintain the rule of the common law that a felony prisoner whose death sentence was commuted to life imprisonment could not sue for a wrong such as defamation during the currency of the sentence. His Honour had some measure of academic support for this view³².

On another occasion³³ Justice Murphy observed that traditionally the legislature has left "the evolution of large areas in tort, contract and other branches of the law to the judiciary". It has done so on the assumption that judges will adapt the law to social conditions. It is when judges fail to discharge their responsibility that Parliament is required to intervene, he suggested. This statement perhaps overlooks that Parliament can also be expected on occasions to intervene when it is thought that the courts are changing the law in a particular direction too much or too quickly.

³¹ *Dugan v Mirror Newspapers Ltd* (1978) 142 CLR 583 at 612; [1978] HCA 54.

³² See e.g. A R Blackshield, "The High Court: Change and Decay" (1980) 5 *Legal Service Bulletin* 107 at 109-110.

³³ *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617 at 651; [1979] HCA 40.

The answer to the question whether the courts should effect the change necessary to meet the demands of justice in a particular case has been said to lie in judicial method. In his well-known lecture on judicial method³⁴, given at Harvard University in 1955, the year before Lord Radcliffe's observations in *Lister v Romford Ice and Cold Storage Co Ltd*, Sir Owen Dixon suggested that there were three permissible ways in which the common law could be developed. The first is by extending the application of settled principles to new cases; the second by reasoning from the more fundamental of settled legal principles to a new conclusion; and the third, by deciding that a category is not closed to circumstances which could not have been foreseen but which may be subsumed within the existing category. His Honour was speaking of limits to the development of the common law which inhere in accepted judicial method and which, it may be inferred, are necessary for the coherence of the law. It may be doubtful that he considered this to be "strict legalism", given that he would later express regret at using those words³⁵, although others would continue to view his approach in this way.

Another way of identifying the limits necessary for a change to the law in a particular case may be to acknowledge that the development of the law is not, like its history, necessarily linear and a gradual progression. Some changes to the law have not been and will not be incremental. This is so even if that is a proper description of the common law viewed retrospectively and over a long period of time. On occasions the common law has found it necessary to abolish a rule, to push the boundaries of a conception, to modify existing rules and occasionally to state a new one.

This is not to say that there are not limits to the nature and extent of the change which may be effected. Those limits might be seen as imposed by a need to maintain the shape and structure of the common law. In some cases a change

³⁴ Sir Owen Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 472.

³⁵ Philip Ayres, *Owen Dixon* (2003) 222.

to its rules will not be deleterious; it could be advantageous. If its shape and structure can be maintained then the newness of the rule, the extent of the departure or the change in direction should not prevent the common law being adapted. Sir Gerard Brennan accepted that the court was not free to fracture the skeleton of principle which gives the body of our law its shape and internal consistency³⁶. That was said in *Mabo (No 2)*. Views may differ about whether in particular cases the courts exceed the limits of change. And those views in turn may change over time.

³⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 29; [1992] HCA 23.