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Jürgen Basedow, Ulrich Drobnig, Reinhard Ellger,
Klaus J. Hopt, Hein Kötz, Rainer Kulms,
Ernst-Joachim Mestmäcker

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Deciding Cases without the Guidance of Statute or Precedent

HORST K. LÜCKE

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Predicting future events is no easier in law than in any other field. Rapid technological advances and ever-changing societal attitudes have increased the difficulty in recent decades. It follows that legal systems should tell the courts how to deal with novel and unforeseeable issues for which effective legal provision has not yet been made.

In 18th century Europe, when the codification movement was born,¹ change was much less rapid, so advocates of codification demanded that codes should contain unambiguous answers to every question which could possibly arise and that they should be the exclusive source of law, if not for everyone and everything, then at least for clearly circumscribed spheres of human existence. It was assumed that there was an absolute "general negative *Grundnorm*" to the effect that whatever is not regulated by the text of the code is regulated by its silence.² Codes were to have no gaps: a right asserted but not reflected in the Code was nonexistent!

¹ *Coing*, An Intellectual History of European Codification in the Eighteenth and Nineteenth Centuries: *Stoljar* (ed.), Problems of Codification (1977) 16–33.

² *Meier-Hayoz* (ed.), Berner Kommentar (1966) art. 1 n. 258.

I. Ambiguities, uncertainties and gaps in codified law

When the codification programme came to be translated into practice, even the most optimistic codifiers perceived discrepancies between theory and reality. Jeremy Bentham, the leading theoretician of codification and inventor of the term, thought that codes might need to be amended once every one hundred years. When the Prussian Code of 1794 was enacted, it was recognised that ambiguities might have crept in. An Interpretation Commission was established to provide authentic interpretations in such cases; courts were not trusted to perform such an important task.³ *Portalis* in France and *von Zeiller* in Austria, the fathers of the French and Austrian codes respectively, were men of experience who knew that even the most fertile human imagination cannot provide for all possible future cases, that the legislative *casus omissus* would always be a fact of life. Art. 4 of the French Code Civil offered the following Draconian solution:

“A judge who declines to give judgment on the ground that the law is silent, obscure or uncertain is to be prosecuted for denial of justice.”

This provision tells the judge to proceed to judgment but fails to tell him or her how to proceed. Wherever this kind of provision is adopted, one would expect the courts to read into it an overarching requirement that open questions be resolved as justice requires. That is precisely how the common law deals with novel issues.⁴

Other codes were more explicit than the French Code. The Austrian General Civil Code stated (§ 7):

“If a case cannot be decided by relying on the ordinary meaning of a law, similar cases to which related laws have provided definite solutions must be taken into consideration. Should the decision still be in doubt, it must be made according to the natural principles of law, considering all the circumstances, which must be carefully assessed and evaluated.”

Similar provisions, also enabling judges to deal with cases not provided for by legislation, are to be found in the Italian Civil Code (art. 1) and the Spanish Civil Code (art. 1–4).

The German Civil Code does not deal explicitly with the *casus omissus* but one of its provisions, § 242, has proved extremely useful in attending to the very same problem: “The debtor is bound to perform according to the requirements of good faith, ordinary usage being taken into consideration.” This provision has been treated as an overarching good faith requirement relevant far beyond the confines of the Code. It has enabled the German legal system to

³ *Hattenhauer*, Allgemeines Landrecht für die Preußischen Staaten von 1794 (1979) 36. One of the draftsmen of the Prussian Code, *E.F. Klein*, is said to have made it clear that there could be no such thing as a code without gaps (*ibidem*).

⁴ “What does justice require in a case such as this?” – *National Bank of Greece and Athens S.A. v. Metliss* [1958] AC 509 at 525, *per* Viscount Simonds.

deal successfully with many of the unprecedented challenges thrown up by the turbulent events which followed the coming into force of the Code in 1900.

The Principles of European Contract Law, drawn up by the Lando Commission,⁵ have followed the German example by providing that “in exercising rights and performing duties each party must act in accordance with good faith and fair dealing” (art. 1:106 (1)).

When courts adjudicate novel issues, it may not matter whether the code guiding them calls for good faith, reasonableness or equity, or whether the code is silent on the subject, in which case justice must be considered to be tacitly invoked. Good faith, reasonableness or equity seems to be no more concrete than a direct appeal to justice. They all seem capable of being articulated in much the same way. The opposition of many common lawyers to the introduction of a good faith principle into the common law may simply be based on the feeling that such a requirement would add nothing significant to the common law. Insisting on making subtle distinctions between differences at such a general level may encourage academic over-elaboration. The *Zürcher Kommentar* (art. 1 n. 298–350) distinguishes 22 different types of gap, presumably each requiring a different legal treatment.

Under the Dutch Civil Code, the most recent and most modern of the great European civil codes, the function of good faith, reasonableness or equity is not confined to the filling of gaps (a “supplementing” function in *Hartkamp’s* terminology⁶). In addition, there is a derogating function. Its art. 6:2 provides that a rule, binding by virtue of law, usage or legal act, does not apply to the extent that, under the circumstances, this would lead to a result unacceptable according to the standards of reasonableness and equity. *Hartkamp* has stated that:

“... it has a “derogating” or “restrictive” function, expressed in art. 6:248 para. 2, stating that a rule binding upon the parties does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity. So good faith may, in a given case, extinguish rules prevailing between the parties or exclude their application.”⁷

If a good faith requirement of this type were to be superimposed upon the common law, it would have the capacity to soften the operation of the rule of precedent and might facilitate judicial attempts to change rules and precedents which are too rigid and out of touch with the needs of the day. One doubts whether the Australian common law really needs this kind of incentive. During the last decade, even without the assistance of a good faith principle, the Australian High Court has modified quite dramatically many traditional common law rules.

⁵ <http://www.kcllc.or.jp/english/sympo/EUDialogue/lando.htm>.

⁶ Judicial Discretion under the New Civil Code of the Netherlands:
<http://www.cnr.it/CRDCS/hartkamp.htm>.

⁷ *Ibidem*.

II. The Swiss solution: articulating the rule

Art. 1 and 4 of the Swiss Civil Code of 1907 are widely regarded as particularly successful attempts to solve the problem of the novel legal issue or the *casus omissus*:⁸

Art. 1

1. This Law is to be applied to all legal questions for which it contains a provision according to wording or interpretation (*Wortlaut oder Auslegung*).

2. If a provision cannot be found in this Law, the court is to decide in accordance with customary law, or, failing that, with the rule which it would establish if it were the legislator.

3. In doing so, it follows time-tested teaching and tradition (*Lehre und Überlieferung*)."

Art. 4

"If the Law refers the court to judicial discretion or to an evaluation of the circumstances or to important reasons, it must make its decision in accordance with law and fairness (*Recht und Billigkeit*)."

These provisions apply not only to the law of persons, family law, inheritance and property law, *i.e.* to the subjects covered by the Civil Code, but also to the law of obligations even though that is contained in the formally separate Code of Obligations of 1881.⁹ They have been adopted *verbatim* by Liechtenstein. The Turkish Civil Code is a translated version of the Swiss Civil Code, so that art. 1 and 4 are also to be found there.

In the present context a general account of the scope and operation of these provisions is not required. Suffice it to highlight just one important aspect of art. 1 which is implicit in the words "in accordance with ... the rule which [the court] would establish if it were the legislator" (*supra*). The Berner Kommentar states:

"The judge must establish a rule, *i.e.* a general and abstract norm and then fit the individual and concrete facts under it by subsumption. This precludes casuistic [purely case-oriented¹⁰] solutions... The judge has to find out the constellation of interests, ... not of the immediate parties to the dispute but that which might be said to be typical in such situations."

It is a duty from which the Swiss judge cannot escape, for it is settled that art. 1 par. 2 also implies what is the chief concern of art. 4 of the French Civil Code *i.e.* that the judge is obliged to come to a decision.¹¹

⁸ Gauch/Schmid (ed.), Zürcher Kommentar (ed. 3, 1998) Vorbem. art. 1 and 4 n. 264 with supporting citations.

⁹ Berner Kommentar art. 1 n. 45.

¹⁰ The term "casuistic" is used here in the sense which it has in German. *Wahrig*, Deutsches Wörterbuch (Gütersloh/München 1986) defines "Kasuistik" as a "method of judging a case as an individual situation ... and of applying general legal principles not dogmatically but with appropriate modifications". Although the term is to be found in English dictionaries, it does not seem to have the same meaning in English.

¹¹ Zürcher Kommentar art. 1 n. 485.

It may well be that modern Swiss writers would no longer express the matter in quite this way, for it is recognised in Swiss jurisprudence that syllogistic subsumption is no longer considered the be-all and end-all of jurisprudence.¹² One wonders whether this has led to a really significant reorientation of the understanding of art. 1 par. 2. The recent Zürcher Kommentar (475) still confirms that the judge is obliged to formulate in the first place a general/abstract rule and stresses (citing decisions of the Federal Court) that such a rule should extend further than required by the concrete case and must be wide enough to fill the gap which has been found to exist in the code. This highlights two significant differences between the thinking of Swiss lawyers and that of common lawyers: (1) filling gaps in the law is not a significant preoccupation of common lawyers and (2) deciding cases “casuistically” is prohibited by Swiss law, but is one of the most characteristic style elements of the common law.

III. The common law: novel issues

The common law is no longer a wilderness of single instances. It is replete with rules formulated by judges when deciding actual cases. Common lawyers have not always rejected the idea that this system of rules and precedents has no gaps, an idea which is implicit in the so-called declaratory theory, once widely endorsed in the common law world. Blackstone held that the ancient customs and usages of England are the essence of the common law,¹³ and that judicial decisions are merely the best evidence of it.¹⁴ According to this theory, judges never make law but only declare it. In reality it was never more than a piece of more or less innocent mystification, perhaps designed to uphold the purity of the doctrine of the separation of powers. Such an unrealistic view need never have been adopted if only one had remembered that, even in a system governed by the rule of precedent, judicial “legislation” and parliamentary legislation are fundamentally different processes.¹⁵ The declaratory theory was abandoned by almost all common lawyers when, in an influential judicial utterance, Lord Reid

¹² Berner Kommentar art. 1 n. 33, having explained that the Civil Code is firmly based on a syllogistic subsumption view of the law, continues: “Recent trends in Continental theories of legal method ... stress, influenced by Anglo-Saxon legal thinking, that ... there is a merger of the norm with the process of its application, a merger of decision-making with the formation of rules ...”

¹³ Blackstone, *Commentaries on the Laws of England* (ed. 15, 1809) I, 66 *et seq.*

¹⁴ Blackstone described the common law as the “chief cornerstone of the laws of England, which is general immemorial custom ..., from time to time declared in the decisions of the courts of justice” – *ibidem* at 72.

¹⁵ Lücke, *The Common Law – Judicial Impartiality and Judge-made Law*: 98 *Law Quarterly Review* 29–93 (1982).

denounced it as a fiction.¹⁶ The theory has made way for the simple insight that, almost by definition, there cannot be any existing rule or precedent applicable directly to a truly novel issue.

Judges occasionally speak of “gaps” in the common law,¹⁷ but this term is best avoided, for it reflects the false notion that the rules have not yet reached the ideal state where all gaps have been eliminated. It also suggests that a new rule or precedent formulated by a court must somehow “fit” into an existing body of law to create a harmonious whole. It is true that the existing law often provides the conceptual structure for debating new issues and may also yield many useful analogies and other clues. Nevertheless, moral and other non-legal material may prove just as important, or even more important, in generating new law. Some new precedents may be shaped by the pre-existing common law, but others may be such that the pre-existing law is shaped by them.

One way of lessening the expense of litigation is to make results dependent on a limited range of factual circumstances so that evidence and argument are circumscribed rather than limitless. This is best achieved by the adoption of clear rules from which the results may be unambiguously inferred by syllogistic reasoning. It makes the results of potential litigation predictable, facilitates the advising of clients and thus prevents litigation. Even when judges deal with unprecedented situations, it is still very desirable that they should formulate clear rules to assist with the decision of future cases.

Uncertainty as to the import of judgments, particularly in a system dominated by the rule of precedent, is the enemy of economy and efficiency. As McHugh J. stated in *Perre's* case (89):¹⁸

“The cost of [legal] services is substantially increased when lawyers cannot give advice to their clients without the need to read numerous and lengthy academic articles and judgments The cost of those services is also substantially increased when trial lawyers have to make lengthy and complex arguments about what appellate courts have ‘decided’ and what policies govern their cases.”

Despite these weighty considerations, the common law knows nothing of a judicial duty to formulate the relevant legal rule before a case raising novel issues is decided.

¹⁶ “There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the common law in all its splendour. ... But we do not believe in fairy tales any more.” – The Judge as Law Maker: 12 *Journal of the Society of Public Teachers of Law* (N.S.) 22 (1972).

¹⁷ See, for instance, Bingham L.J. in *Simaan General Contracting Co. v. Pilkington Glass Ltd.* (No. 2) [1988] QB 758 at 782.

¹⁸ The bracketed numbers are meant to indicate the paragraphs of the published version of the decision.

IV. The common law exemplified: *Perre's* case

A recent decision of the High Court of Australia, *Perre* (*supra*) may serve to illustrate the approach of the courts in common law countries to the treatment of novel issues.

The facts of the case were that the Perre family, who grew and processed¹⁹ potatoes in South Australia for sale in the lucrative Western Australian market, claimed damages for the loss of that market from Apand, a major producer of potato crisps. Apand's practice was to supply seed potatoes to a number of growers who then grew potatoes for them. Apand had supplied seed potatoes of the Saturna variety, which were infected with bacterial wilt, to the Sparnons, a family who grew potatoes on land adjacent to the Perre land. The disease affected the Sparnons' potatoes, but the potatoes grown by the Perres remained free from the disease. However, a Western Australian regulation prohibited for a period of five years the importation of potatoes grown within 20 km of land on which diseased potatoes had been grown or processed. The loss of the Western Australian market meant great financial loss to the Perres, for potatoes sold there brought more than twice the price obtainable in South Australia (\$ 670 instead of about \$ 300 per tonne). The issue was whether the Perres were able to claim damages from Apand for the loss they had suffered.

The Perres had suffered "pure" financial loss in the sense that their losses were not associated with bodily injury or damage to property. The Perres' damages claim was dismissed by the Federal Court and their appeal to the Full Court of the Federal Court failed, but their further appeal to the High Court of Australia was successful and the case was referred back to the Federal Court for an assessment of damages. We must focus attention on the way in which the judges of the High Court dealt with the issues for which, as they made clear, they lacked unambiguous precedential or statutory guidance.²⁰

¹⁹ The fact that some members of the Perre family owned and used facilities for processing potatoes led to some factual and legal complications. These have been ignored for they added little of significance to the subject of this study.

²⁰ For a selection of recent contributions to the debate about liability for carelessly caused pure financial loss, see *Katter*, Duty of Care in Australia (1999) 60–94; *Feldthusen*, Liability for Pure Economic Loss: Yes, But Why?: 28 University of Western Australia Law Review 84–120 (1999); *Katter*, Duty of Care in Australia – Is the Fog Lifting?: 72 Australian Law Journal 871–875 (1998); *Deutsch*, Compensation for Pure Economic Loss in German Law: *Banakas* (ed.), Civil Liability for Pure Economic Loss (1996) 73–87; *Feldthusen*, The Recovery of Pure Economic Loss in Canada – Proximity, Justice, Rationality, and Chaos: 24 *Manibota Law Journal* 1–22 (1996); *von Bar*, Liability for Information and Opinions Causing Pure Economic Loss to Third Parties: A Comparison of English and German Case Law: *Markesinis* (ed.), The Gradual Convergence: Foreign Ideas, Foreign Influences, and English Law on the Eve of the 21st Century (1994) 98–127; *Hogg*, Negligence and Economic Loss in England, Australia, Canada and New Zealand: 43 *International and Comparative Law Quarterly* 116–141 (1994); *Markesinis/Deakin*, The Random Element of Their Lordships' Infallible Judgment: An Economic and Comparative Analysis of the Tort of Negligence from *Anns* to *Murphy*: 55 *Modern Law Review* 619–646 (1992); *Stapleton*, Duty of Care and Economic Loss – A Wider

The Sparnons had also sustained losses, but these had been the result of damage to their land in the form of an infestation with bacterial wilt. A separate action brought by them succeeded in the Federal Court, *inter alia* on the ground of Apand's negligence in supplying diseased seed potatoes.

1. Pure financial loss: possible solutions

Had the case arisen a hundred years earlier, the judges would have been able to apply an "exclusionary rule": there was no liability for carelessly inflicting pure financial loss on others. This rule was traced to Blackburn J.'s judgment in *Cattle v. Stockton Waterworks Co.* (1875) LR 10 QB 453. It broke down when the House of Lords allowed recovery for pure economic loss which had been inflicted by careless misrepresentation in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465.

In *Caltex Oil (Australia) Pty. Ltd. v. The Dredge "Willemstad"* (1976) 136 CLR 529, the High Court of Australia extended this type of liability to cases other than those involving careless misrepresentation.²¹ One possible result might have been for the law to have affirmed a general duty to take care not to cause reasonably foreseeable financial harm to others, thus equating pure financial loss with financial loss which is consequential upon physical injury. Gummow J. made the perhaps doubtful suggestion (187, 188) that the law of France had taken this course.²² In *Caltex Oil* Gibbs J. made it clear just how calamitous such a course would be (at 545):

"... a law which imposed a general duty to take care to avoid causing foreseeable pecuniary loss to others would ... interfere greatly with the ordinary affairs of life. There are sound reasons of policy why economic loss should not be treated in exactly the same way as material loss."

The Australian courts have found it difficult to find a middle course between these two extremes, to draw a line between meritorious and non-meritorious

Agenda: 107 Law Quarterly Review 249–297 (1991); *Feldthusen*, Economic Loss in the Supreme Court of Canada – Yesterday and Tomorrow: (1991) 17 Canadian Business Law Journal 356–379.

²¹ In *Perre* Callinan J. summed up the effect of *Caltex Oil* as follows (at 387): "... this Court held that, although as a general rule damages are not recoverable for foreseeable economic loss which is not consequential on injury to person or property, damages may be, and were there recoverable in a case in which the defendant had knowledge, or the means of knowledge that a particular plaintiff would be likely to suffer economic loss as a consequence of the defendant's negligence."

²² See *Deschamps*, La réparation du préjudice économique pur en droit français: *Banakas* (ed.), Civil Liability for Pure Economic Loss (1996) 89–101.

claims of this kind.²³ *Perre* is the most recent attempt by the High Court to come to grips with the problem.

2. Pure financial loss: the significance of existing negligence rules and precedents

The judges in *Perre* lacked the guidance of precedent or statute: the decision could not be reached by simple interpretation and application of existing legal precepts. This is not to deny that the established conceptual structure of the law of negligence (foreseeability, proximity, duty) or related precedents, particularly *Caltex Oil*, played important roles in the decision. Indeed, they provided the crucial framework within which the judicial debate took place.

3. Attempts to formulate rules

Of the seven judges who heard and decided the appeal, only Gaudron J. and Kirby J. formulated rules intended to account for the result.²⁴ Gaudron J. stated (42):

“In my view, where a person knows or ought to know that his or her acts or omissions may cause the loss or impairment of legal rights possessed, enjoyed or exercised by another, whether as an individual or as a member of a class, and that that latter person is in no position to protect his or her own interests, there is a relationship such that the law should impose a duty of care on the former to take reasonable steps to avoid a foreseeable risk of economic loss resulting from the loss or impairment of those rights.”

This found no followers in the Court, for, as McHugh J. pointed out (85), the cornerstone of this approach, the concept of legal rights, was applied to the Perres’ “right” to engage in trade which is not a right in a “proprietary, equitable and contractual” sense, but in the sense that “anything which is not prohibited is permitted”. With respect, a simple example will show that these objections are well justified. Assume that A runs a cafe next to B’s cinema, and A derives a substantial portion of trade from cinema patrons. B decides to close the cinema on three days each week causing A to suffer substantial trading losses. On Gaudron J.’s formula, B would have to pay compensation. This seems wrong – if B has no duty to open a cinema there in the first place, there can hardly be a duty to keep it open. Was McHugh J. not correct when he

²³ See the decision in *Caltex Oil*, which the Privy Council in *Candlewood Navigation Corporation Ltd. v. Mitsui OSK Lines Ltd.* [1986] AC 1 decided not to follow and criticised on the ground that it lacked a clear *ratio decidendi*.

²⁴ McHugh J. formulated (133) a five-fold test rather than a rule. He favoured the incremental approach.

suggested (85) that the formula would extend the liability of defendants, “perhaps massively”?

Kirby J. considered that the rule appropriate to the case should be cast in the form of the following three-fold approach (259):

- “1. Was it reasonably foreseeable to the alleged wrongdoer that particular conduct or an omission on its part would be likely to cause harm to persons who have suffered damage or a person in the same position?
2. Does there exist between the alleged wrongdoer and such person a relationship characterised by the law as one of ‘proximity’ or ‘neighbourhood’?
3. If so, is it fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrongdoer for the benefit of such a person?”

This formula, particularly its third part, also failed to persuade the other members of the Court. The objections to it were spelt out most clearly by Hayne J. (331–333):²⁵

“... the problem of identifying when a duty of care to prevent economic loss should be found to exist cannot be solved by discarding references to proximity and substituting a test that is (or includes) whether the imposition of a duty would be ‘fair, just and reasonable’. The adoption of a test cast in those terms does no more than invite attention to what it is that may properly be taken into account in deciding what is fair, just and reasonable ...”

His Honour considered that this kind of “rule” ran the risk of stating “no principle, [but] only a qualitative description of the intended result of any and every application of law”. The principal use of a rule must surely be that it enables courts to decide cases on the basis of a limited range of circumstances rather than by weighing all the facts of the case. This is where Kirby J.’s formula shows its weakness, for, as Hayne J. pointed out (331), it “does not suggest any limit to the range of relevant considerations”.

4. The “incremental” approach

An “incremental” approach was favoured by Gleeson C.J. (9), McHugh J. (94–99),²⁶ Gummow J. (196–202), Hayne J. (333) and Callinan J. (405). These judges favoured an approach which, in Switzerland, would presumably run

²⁵ His Honour adopted the dictum of Lord Bridge of Harwich in *Caparo Industries P.l.c. v. Dickman* [1990] 2 AC 605 who had said of concepts such as proximity and fairness (at 618) that they “are not susceptible of any such precise definition as would be necessary to give them utility as practical tests, but amount in effect to little more than convenient labels to attach to the features of different specific situations which, on a detailed examination of all the circumstances, the law recognises pragmatically as giving rise to a duty of care of a given scope”.

²⁶ His Honour invoked a striking metaphor first used by Lord Wright, comparing the common law judges and their approach of proceeding from case to case with “the ancient Mediterranean mariners, hugging the coast from point to point, and avoiding the dangers of the open sea of system or science” – *The Study of Law*: 54 *Law Quarterly Review* 185 at 186 (1938).

counter to the law: the case was to be decided without formulating any unifying principle. McHugh J. (93) explained the futility of insisting on formulating such a principle:

"It is not an approach that appeals to grand theorists who prefer to decide cases by general principles applicable to all cases. But in an area of law such as awarding damages for negligently inflicted economic loss ... there is no alternative to a cautious development of the law on a case by case basis. Perhaps another unifying principle may emerge and gain widespread acceptance. Past experience suggests that, if it does, its fall from favour will not be long in coming. Until a unifying principle again emerges, however, the best solution is to proceed incrementally from the established cases and principles."

It is not uncommon for courts to decide a case without articulating any kind of major premise simply "on its own facts". The adversarial procedure of the common law is often criticised for being unduly time-consuming and expensive for litigants, but it does have the advantage of presenting the courts with a very full picture of the facts, some of which may be relevant *de lege ferenda*, thus encouraging the further development of the law. By contrast, the principle *jura novit curia* prevalent in continental countries seems designed to admit, in the interest of economy, only facts of relevance according to the *lex lata*.

In the common law a decision "on the facts" may still have the effect of a binding precedent. As *Cross* has said:

"... a court bound by a judgment as distinct from a *ratio decidendi* is bound to make a similar order to that made in a previous case when all the material facts are similar".²⁷

Cross points out that sometimes precedents have to be applied without the medium of generalised rules when the facts of the two cases are "on all fours" or "indistinguishable".

However meticulous it might be, the examination without more of all the factual features of the case is no substitute for a missing legal rule or principle. The factual features which justify the decision in favour of one or the other party have to be identified. Hayne J. not only pleaded for the incremental approach but also insisted (333) on the "recognition of the factors that are considered important in deciding whether there is a duty to take care to avoid pure economic loss". Gummow J., with whom Gleeson C.J. agreed (12), preferred the approach which isolated a number of "salient features" of the case (201). Callinan J. expressed (387) the view that the cases required "a careful marshalling of all the relevant facts and circumstances, and as has on occasions been frankly acknowledged, ... the weighing of relevant policy considerations."²⁸ McHugh J. suggested (95) that, once such salient features, or "rea-

²⁷ *Cross*, *Precedent in English Law* (ed. 4, 1991) at 61.

²⁸ For this last proposition the learned judge referred to *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424 at 498 *per* Deane J.; to *Hill v. Van Erp* (1997) 188 CLR 159 at 179 *per* Dawson J. and to *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465 at 536-537.

sons", as he called them, had been identified, they should be applied as principles, if only ones of limited scope.

5. "Salient features"; "facts" and their deeper significance

Facts alone are deaf and dumb. They cannot yield any meaningful arguments for a judicial decision. They can play such a role only if some legal or extra-legal principle or policy consideration lies behind them. In his examination of the precedential system of the common law *Bodenheimer* has stated this fundamental truth as follows:

"...without a norm considered to be of general validity, which is based upon social, ethical or similar considerations, and which is applicable to both the precedent and the case to be decided, a court would not be in a position to decide whether it should follow the precedent."²⁹

This observation is applicable not only to the operation of precedent but also, *mutatis mutandis*, to the process of deciding cases not already governed by established law. As *Perre* shows, novel issues may be judged upon the basis of social, ethical or similar policy considerations.³⁰

6. Callinan J.'s enumeration

Callinan J.'s judgment lends itself particularly well to a demonstration of the correctness of *Bodenheimer*'s observation. The learned judge stated (406):

"I turn now to a consideration of the factors which in combination I think relevant in this case and which establish ... special circumstances justifying the compensation of the appellants for their losses."

The factors which Callinan J. considered relevant have been rearranged to some extent in the following account and an attempt has been made to spell out the policy considerations which lie behind them.

a) Moral considerations

Fact 1. Apand encouraged the Sparnons to grow the Saturna potatoes because they wanted to conduct an experiment (415).

Callinan J. seems to have had in mind a general rule of experience that experiments very often involve risks. The potato experiment was particularly risky as appeared from the fact, stressed by the learned judge, that Apand's

²⁹ Jurisprudence. The Philosophy and Method of the Law (ed. 2, 1974) 390 *et seq.*

³⁰ There was a time when common law judges considered it inappropriate to admit to being guided by policy. In *Perre* the term "policy" is used 86 times.

officers had themselves spoken of an experiment and had pointed out in written communications the dangers involved in it. As a matter of ethics and social responsibility if not law, one might conclude that those who conduct such experiments have a responsibility to assess the seriousness of the risk and take appropriate precautions to avoid harming others.

Fact 2: Apand was in effective control of the events which led to the Perres' financial loss, *i.e.* the selection of the particular Saturna seed and the invitation to the Sparsons (who were Apand's contract growers and thus in no position to reject Apand's suggestions) to use it (408).

This factor seems to have weighed upon the learned judge's mind, because of a broad principle that if someone (X) exercises control over an operation, those whose position is placed at risk depend for their protection on X's cooperation in the prevention of injury and prejudice; X should provide that cooperation by taking due care.

Fact 3. Apand occupied a commanding position in the market (407).

Callinan J. seems to be suggesting that those who occupy a powerful position in any sphere of life should accept a special moral and social responsibility for those over whom they exercise dominance. Admittedly, the Perres were not contract growers for Apand, but, as Kirby J. pointed out (293), there had been discussions between representatives of both sides about this possibility.

Fact 4. The Perres had no way of averting the prejudice which they suffered (416).

This consideration weighed quite heavily with some of the other judges as well.³¹ To regard it as important surely means that one considers defenceless people to be morally more deserving of special consideration and extra care than those with a real chance to protect themselves.

Fact 5. Apand had "an especially heightened awareness" of the risk that potato wilt in the vicinity would close the Western Australian market to growers. Apand must have known that the Perres would be directly affected by their actions. Apand and the Perres were involved in the same industry of potato growing. Apand knew that being excluded from the Western Australian market would be "devastating" to the Perres, effectively putting them out of business. (409–412, 422).

To natural contemplation, a person who in fact foresees more or less exactly (one of Apand's internal memoranda showed that Apand had actually had this foresight) the detrimental consequences (financially devastating ones in this case) which one's conduct may cause and who goes ahead regardless is surely

³¹ See for instance Gleeson C.J. (10, 11), McHugh J. (50, 123–130, 149–151) and Kirby J. (296–299).

more blameworthy than one who engages in the same conduct with the same consequences but lacks such foresight. Thus, the case for compensation can only be strengthened by this factor.

Fact 6. It would not have been particularly inconvenient for Apand to have persisted with the certification programme run by the Victorian Government (a voluntary programme – Apand had withdrawn the Saturna potatoes from it) and supplied to the Sparnons seed potatoes certified safe; this would have safeguarded the Perres' position (413).

The reason why Callinan J. considered this important seems self-evident. When effective safeguards are readily available and can be adopted with little inconvenience, they ought not to be neglected.

b) Public policy

Fact 7. The risk created by Apand affected the interstate commodity market, a market which is of great national importance and is also very easily disrupted, e.g. by contamination of a commodity (414).

Callinan J. was influenced not only by moral considerations but also by considerations of public policy, which require that the law extend its protection to important parts of the national economy.

Fact 8. The evidence shows that there were relatively few growers of potatoes within 20 kilometres of the Sparnons' property. Furthermore, only 26 growers in the whole country were asked to plant this seed.

The learned judge gave a good deal of attention to this factor and concluded that "the appellants were members of a determinate class". The significance of this factor is not self-evident (for detailed treatment, see *infra*).

c) Legal policy

Fact 9. The diminution of the profitability of the Perres land (which was caused by Apand's carelessness) almost amounted to physical damage, for the amenity of a property is very much akin to a physical attribute (423).

The High Court, including Callinan J., rejected the argument that the Perres' land had been injured in some way (if accepted, this would have resolved the problem in favour of the Perres). Nevertheless, Callinan J. saw the impairment of the land which had been caused by Apand as a factor which was very similar to physical injury. This invoked the notion that close analogy to a well-established category of liability (physical damage to land caused by carelessness) should be given some weight as an argument for liability.

Fact 10. There was no statutory or regulatory regime to govern Apand's conduct (417).

The learned judge seems to be expressing the view that, when some form of legal regulation is called for and none is provided by statute or regulation, it is desirable for the common law to fill the gap.

Fact 11. Allowing the claim to succeed would not undermine any existing principle of law (424) and would be no departure from previous case law (425).

Callinan J. here expresses his fidelity to the existing law, a value in itself, but finds no inconsistency with it in the course he is pursuing.

In Callinan J.'s view, the combined weight of these circumstances was sufficient to justify a finding in favour of the Perres.

V. The conversion of non-legal considerations to legal rules

Callinan J. also stated at least two facts which are related to existing legal principles as follows:

"The geographical propinquity of the property to which the respondent caused the Saturna seed to be introduced (the Sparnons' property) to the [Perres'] property is relevant.

So too, the commercial propinquity, that is to say the facts that [the Perres] and the [Apand] were both involved in the same industry in the same year and had been so involved for some time, is relevant. Both this and the preceding matter to which I have referred bespeak, in a real sense, proximity."

If, under the traditional law of negligence, a duty of care is to be established, a finding must be made that the parties stood in a position of "proximity" or "neighbourhood" when the duty is said to have arisen. The requirement has become controversial in Australia but is still treated by most judges as crucial. Because this aspect of the judgment like "foreseeability" deals with a phase of the case concerned with legal rather than extra-legal considerations, it has been neglected in this study.

Of much greater interest for our purposes is Fact 8 (*supra*). With the possible exception of that, the other policy considerations listed were derived from dimensions other than the legal one. As Lord Lowry stated in *Spring v. Guardian Assurance Plc* [1995] 2 AC 296 at 326: "To assess the validity of the argument [that public policy should be allowed to determine the result of the case before the Court] entails ... a balancing of moral and practical arguments." Drawing on such extra-legal material is admissible not only in the context of public policy but also when the courts have to resolve issues not yet settled by statute or precedent. That follows as an inescapable conclusion from the practice of the courts of declaring facts as material and giving them precedential effect even when rules have not been stated. The policy considerations

behind such facts are thereby admitted, either alone or in combination with others, to the status of legal rules. Thus, the common law draws its strength and its substance from the broadest possible range of non-legal norms which are identified as relevant by the experience and good sense of the judges. *Perre* enables us to witness this process of conversion in actual operation.

As already explained, cases involving pure economic loss used to be governed by the exclusionary rule (*supra* IV 1.). Much the same rule had been adopted in the United States and in *Ultramares Corporation v. Touche* 174 N.E. 441 (1931) Benjamin Cardozo, then Chief Justice of New York, stated (at 444), as a reason for the rule that its reversal would lead to liability “in an indeterminate amount for an indeterminate time to an indeterminate class”. Like other striking phrases coined by that great judge, this one has made an impact far beyond the borders of the United States. The spectre of the kind of legal chaos Cordozo foresaw has haunted the courts and has acted as a break on the expansion of the tort of negligence into the area of pure economic loss.³² Even after the rule itself had been abandoned in Australia, Cardozo’s dictum remained persuasive. As Gleeson C.J. stated in *Perre* (8), “the considerations underlying the [exclusionary] rule remain cogent, even if they are no longer seen as absolutely compelling”.

It is one thing to voice anxiety about indeterminate liability, it is another to know just what the phrase means. Examples will best convey its meaning. Kirby J. stated (298):

“... the concern to avoid imposing legal liability upon an indeterminate class for indeterminate amounts ... is a legitimate concern and ... would, for example, allow the law to draw a rational line which would deny recovery to the local store in the Perres’ town whose income had dropped because of the loss to the Perre interests (and hence to the income of its principals and employees) following the loss of the export trade to Western Australia ... [or] to a trucking firm which, before the blight, carried the potatoes to Western Australia. It would exclude consumers in that State, forced to purchase potatoes, or the crisps manufactured from them, from other more distant and expensive suppliers.”³³

When used by Cardozo, the statement was not meant to serve as a legal rule, but rather as the reason for an exclusionary rule. Having referred to Cardozo’s dictum, Gaudron J. stated (32):

“It is important to remember that that is a policy consideration, not a rule of law. Thus, it is not necessarily fatal to the recognition of a duty of care that the duty is owed to a class whose members cannot be identified with complete accuracy.”

³² See observations by Mason C.J., Deane and Gaudron JJ. in *Bryan v. Maloney* (1995) 182 CLR 609 at 618. See also *Caltex Oil* (*supra* IV a) at 568 *per* Stephen J., 591 *per* Mason J.; *Sutherland Shire Council v. Heyman* (1985) 157 CLR 424 at 465 *per* Mason J.; *San Sebastian Pty. Ltd. v. The Minister* (1986) 162 CLR 340 at 353–354 *per* Gibbs C.J., Mason, Wilson and Dawson JJ., 367 *per* Brennan J.; *Hill v. Van Erp* (1997) 188 CLR 159 at 171 *per* Brennan C.J., 179 *per* Dawson J., 192 *per* Gaudron J., 216 *per* McHugh J., 235 *per* Gummow J.

³³ For further helpful examples, see *Caltex Oil* (*supra* IV. 1.) at 545 *et seq.* *per* Gibbs J.

Apand had supplied the Saturna seed to a number of growers throughout the country (26 according to Callinan J. (409)) and the Full Court of the Federal Court had thought that to hold Apand liable would potentially be too crippling a burden for Apand. To Mc Hugh (50, 106–113) and Hayne JJ. (336–340) “indeterminate liability” implied a group of potential claimants which is not readily ascertainable. That their number is large they did not consider to be an impediment to liability as the Full Court of the Federal Court had thought. By seeking to define the exact meaning of “indeterminate liability”, their Honours treated the concept as a legal one, thus converting a non-legal policy consideration to a rule of law. McHugh J. made this quite clear (102):

“If the policy of the law is that indeterminacy of liability ... should not give rise to a duty of care, that policy should be translated into [a] form which can be applied as [a] rule of law. I see no reason why that step should not be taken.”³⁴

The significant legal shift which took place in these two judgments is the metamorphosis of Cardozo’s dictum from a mere non-legal reason for the abandoned broad exclusionary rule to another more limited exclusionary rule which does not exclude cases in which recovery would be justified. The other judges also considered that Cardozo’s policy statement did not apply to the facts of the case.³⁵ Although they gave no indication that they regarded it as a rule of law, they did not question the legitimacy of the course taken and articulated by McHugh J.

VI. Conclusion

Callinan J. stated (419, 421):

“What happened to the [Perres] here was not the result of merely legitimate, competitive, commercial activity. The imposition of liability upon [Apand] would not impose an impediment in the way of ordinary commercial activity in the potato industry.”

This was not a statement of fact but the learned Judge’s answer to the most crucial issue of the case. McHugh J. favoured embodying these considerations in yet another exclusionary rule (102):

“If the policy of the law is that ... conduct legitimately protecting or pursuing a person’s social or business interests should not give rise to a duty of care, that policy should be translated into [a] form which can be applied as [a] rule of law. I see no reason why that step should not be taken.”

Most of the judges voiced some anxiety lest their judgments might impose undue restrictions upon commercial activity which, even if it harms others, is

³⁴ The learned judge referred for support of his approach to Mason J.’s statement in *Caltex Oil (Australia) Pty. Ltd. v. The Dredge “Willemstad”* 136 CLR 529 at 592–593 (1976).

³⁵ Gleeson C.J. (15), Gummow J. (210), Kirby J. (285 and 296–298) and Hayne J. (336).

quite normal and legitimate in our kind of economy. As Gummow J. stated (181): "... the common law values competitive conduct."

The supply of the seed potatoes to the Sparnons was not an act of competition, at least not directly. But what applies to competition also applies to other ways of protecting or advancing the interests of a business. It should not be subjected to undue restrictions. One example has been given (the cinema example – *supra* IV. 3.). One might have expected a number of similar clarifying examples in the judgments, but there are none. The reason may be that, in the particular circumstances, the issue was not unduly difficult. Apand was already under a duty to the Sparnons (*supra* IV. Introd. *in fine*), which called for care in the selection and supply of potatoes, and the extension of the duty to the Perres did not restrict their freedom of action any further.³⁶ This "casuistic" consideration did little more than solve the problem in just that one case. Finding a more general formula encapsulating the extent to which it is legitimate to restrict the freedom of business people in the interest of the finances of third parties proved elusive. As McHugh J. stated (76): "... the differing views of the members of this Court in the present case suggest that the search for a unifying element may be a long one."

There is no need to pursue this issue further, seeking to solve a problem for which the judges in *Perre* failed to find a unifying formula. The main object of this study has, I believe, been achieved. It has been demonstrated that the common law, as exemplified by *Perre*, draws very freely on non-legal considerations and turns these into legal rules if appropriate. Over the centuries this process has contributed to the success of the common law as a generator of rules which are well-adapted to society's purposes.³⁷

It would be naive to suggest that the Swiss or other civil law courts will not take non-legal considerations into account when filling gaps or deciding novel issues. In commenting on art. 1, the Zürcher Kommentar states (n. 265):

"Those methodic elements which are concerned specifically with the written law, in particular the linguistic and systematic elements, will play a predominant role when, according to par. 1, 'application of the law' is in question. Methodic elements unrelated to the written *lex*, like the realist element or that concerned with ethical values will be in the foreground in the context of par. 2."

³⁶ See observations by McHugh J. (50, 147).

³⁷ Some of the greatest legal minds in the common law and the civil law world have testified to this quality of the common law. In 1972 Lord Reid stated: "If you think in decades, prefer orderly growth and believe in the old proverb more haste less speed, then stick to the common law." – The Judge as Law Maker: 12 Journal of the Society of Public Teachers of Law (N.S.) 22 at 28 (1972). Ernst Rabel has said: "The hesitant creation of law by judges, cautiously proceeding from case to case until legal rules and principles slowly emerge, is still, it seems to me, proving its worth extremely well in many spheres of the private law." – Deutsches und Amerikanisches Recht: 16 Rabels Zeitschrift 340 at 344 (1951) (translated).

As *Gauch* has pointed out, the Swiss Federal Court in a recent decision professed to have been influenced by the *Zeitgeist*,³⁸ a clear indication that the values prevalent in a society are bound to be reflected in the decisions of the courts. Differences between Swiss decisions and those of common law courts are more likely to be ones of degree and emphasis rather of principle. Nevertheless, it seems that such considerations flow less directly into Swiss law. *Gauch* has explained that Swiss judges will be guided in the difficult task they face when carrying out the mandate of art. 1 par. 2 by the *Methodenlehre* (the teachings of legal method) and that the most important tool it makes available is analogy.³⁹ This is indicative of the concern of courts in a civil law code system with the symmetry of the code and the integrity of the values embodied in it. This concern is bound to be reinforced by the fact that the courts are told to seek their inspiration in “time-tested teaching and tradition”, a reference to the writings of legal scholars who are rarely close to the impact of the facts of actual cases and the need to decide them.

Whether a Swiss court in such a case as *Perre* would have ignored the difficulties the High Court saw and stated a rule (in the language of the High Court a “unifying principle, test or element”) as required by art. 1 par. 2, is difficult to say. It might have found guidance in “time-tested teaching and tradition” as required by art. 1 par. 3. The risk of getting it wrong might have been no less in Switzerland than it proved to be in Australia. Admittedly, adoption of a misguided rule by the final appeal court would be more detrimental to a legal system governed by the rule of precedent than to one like that of Switzerland, which regards judicial pronouncements as law only when they have hardened into a kind of customary court practice. That may help to explain why art. 1 par. 2 of the Swiss Code in demanding general formulas shows no sign of the caution which is such a traditional feature of the common law process.

³⁸ 18 recht (2000) 87 at 95.

³⁹ *Ibidem* at 94.