

The intersection of the common law, statute law and notions of fairness

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Introduction

In 1732, what we would now describe as a custody dispute came before the Lord Chancellor presiding in the Court of Chancery in London. The Court of Chancery had been until then, and would remain for more than nearly a century to come, a one-judge court with jurisdiction to exercise the King's prerogative function of concerning himself with the welfare of his vulnerable subjects, as the nominal father of the nation. The case involved three sisters, the eldest of whom was aged 13. They had at an earlier age been taken in by their uncle. After the uncle's death, the girls' father exhibited a petition to the Lord Chancellor 'setting forth, that those three girls being his children, he consequently had a right to the guardianship of them, and praying, that they might be delivered to him' (*Ex parte Hopkins* (1732) 3 P Wms 152, 152).

The report of the case records:

'[H]is Lordship asked the eldest daughter then in court, whether she was under any force, and where she would rather be? who replied, she was not under any force; and that, though she had all imaginable duty for her father and mother, yet her uncle the testator having been so kind to her by his will, she thought herself under an obligation to continue where he intended she should, and that she thought it to be his intention she should continue in the house where he himself had placed her. Whereupon the Lord Chancellor dismissed the petition: but directed Mr Hopkins, who had the young ladies in his custody, to permit their father and mother, at all seasonable times, to have access to and see their children.' (*Ex parte Hopkins*, 155).

Looking back on the rather quaint case of *Ex parte Hopkins* after nearly three centuries, two things are remarkable. One is the uncomplicated nature of the process and the common sense of the outcome. The other is the implicit adoption by the Lord Chancellor in protean form of concepts which were not to be fully articulated in Australian family law until the last quarter of the twentieth century. Those concepts, which we would now recognise as species of procedural fairness and *Gillick* competence, can be seen to have informed an evaluative judgment, in which we can now recognise the welfare of the child to have been the paramount consideration.

To recall such an antique decision of the Court of Chancery in the course of introducing a contemporary discussion, in a family law context, of the intersection of the common law, statute law and notions of fairness, has utility. It reminds us that the central and most contentious subject-matter of modern family law – the resolution of disputes about the custody of children – was historically the province neither of the common law nor of statute law, and was historically informed by considerations of procedural and substantive fairness which were tailored to that very particular subject-matter.

The manner in which the Court of Chancery went about the exercise of its equitable jurisdiction was procedurally and substantively quite different from the manner in which the Court of King's Bench and other common law courts went about the exercise of their distinct common law jurisdictions. The Court of Chancery of the time was a court of conscience. It was comfortable with discretion. The equity it administered was still largely measured by the length of the Chancellor's foot and was just beginning to congeal into principles.

The common law of the time, in contrast, was a law of standardised writs, of hard-and-fast rules, and of set-piece remedies. It knew nothing of substantive discretion. It knew something, but not a great deal, of procedural fairness.

There is a tendency to romanticism, and even to mysticism, which has come to accompany contemporary discussions of that elusive legal concept which some of us have been brought up to think of as ‘natural justice’ and which others of us might think of as ‘due process’. We like to trace it back to Magna Carta and beyond. It is not uncommon in contemporary texts on administrative law to see quotations of a statement made by a judge of the Court of King’s Bench in 1723 to the effect that ‘even God himself did not pass sentence upon Adam, before he was called upon to make his defence’ (*R v The Chancellor, Masters and Scholars of the University of Cambridge (Dr Bentley’s Case)* (1723) 1 Str 557, 567).

The truth is that the common law process involved a stylised form of procedural fairness, but that the common law proceeded in practice on a very stunted understanding of what constituted a fair procedure. In a civil case, the common law always invariably required service of a writ and always afforded an opportunity to appear on the return of the writ before it would order a remedy against a defendant at the suit of a plaintiff. In a criminal case, the common law almost invariably required the presence of the accused before the court would proceed to the adjudication and punishment of criminal guilt. To be before the court entailed being given some opportunity to present evidence, to contest evidence presented and to make submissions. But the opportunity historically was quite limited. It was not until 1851, for example, that every party in a civil case was entitled to give evidence in that party’s own cause, and not until 1898 that every accused in a criminal trial was entitled to give evidence in his or her own defence.

The notion that the common law has some general role to play in imposing a requirement of fairness in the exercise of a

statutory discretion can meaningfully be traced in the English case-law to the second half of the nineteenth century. But it can fairly be said to have taken root in most countries which are the inheritors of the common law tradition only in the twentieth century, and really only in the last quarter of the twentieth century. It has developed into a general principle of law in a period which is broadly contemporaneous with the specific development of modern family law.

I propose to outline the general development as it occurred in Australia and then to attempt to relate that general development to the specific subject-matter of custody disputes.

The general development

A very short history of Australia, sufficient for present purposes, goes something like this. The end of the eighteenth century saw the arrival of the first fleet at Sydney and the beginning of European settlement in Australia. The nineteenth century saw the establishment of what eventually became six Australian colonies, each with its own system of courts and each with its own Parliament. The beginning of the twentieth century saw the federation of those six colonies to form the Australian nation. The former Australian colonies became states within a single indissoluble Commonwealth of Australia.

The Australian Parliament was established as a national legislature, with capacity to exert legislative supremacy within designated fields of national legislative power. One of those fields of national legislative power was expressed to encompass laws with respect to marriage: a field sufficient to cover the dissolution of marriage, and the creation of rights and duties – and the resolution of disputes – as to the property and children of a marriage. Another of those fields of national legislative power was expressed to encompass laws with respect to external affairs: a field sufficient to cover the domestic implementation of Australia’s obligations under international law.

The Australian Parliament was given power to establish federal courts, which would

come eventually to include the Family Court of Australia and the Federal Circuit Court of Australia. The High Court of Australia was established as the national Supreme Court. The High Court was given original jurisdiction to prohibit or compel an exercise of jurisdiction by any federal court. And it was also given general appellate jurisdiction to hear appeals both from State Supreme Courts and from federal courts.

In 1958, the High Court described it as ‘a deep-rooted principle of the law that before [anyone] can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard’, adding that the application of that principle ‘to proceedings in the established courts is a matter of course’ (*The Commissioner of Police v Tanos* (1958) 98 CLR 383, 395–396). It was not until the 1970s and 1980s, however, that the High Court came to recognise the provision of an adequate opportunity to be heard as a presumptive limitation on the exercise of any statutory power which would have the potential to affect a legal right or legally recognised interest. One of the dozen or so cases in which that presumptive limitation took shape was a case in 1987 which concerned proceedings before a magistrate relating to the care of several children alleged to fall within the definition of ‘neglected child’ under state child welfare legislation. The parents of the children, it was held, had a right to be heard. ‘[S]ome qualification of the principles of natural justice may be necessary in order to ensure paramountcy to the welfare of the child’, it was said, ‘[b]ut a desire to promote the welfare of the child does not exclude application of the principles of natural justice except so far as is necessary to avoid frustration of the purpose for which the jurisdiction is conferred’ (*J v Lieschke* (1987) 162 CLR 447, 457).

The result was that by 1990, in the context of holding that family members of a deceased person had a right to make certain submissions at an inquest, a majority of the High Court was able to say that it could then be treated as settled that ‘when a

statute confers power upon a public official to destroy, defeat or prejudice a person’s rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment’ (*Annetts v McCann* (1990) 170 CLR 596, 598). The dissenting members of the court agreed in substance with the proposition, subject to one of them eschewing the reference to ‘legitimate expectation’. ‘An expectation that natural justice will be accorded,’ he said, ‘whatever the origin of the expectation may be, furnishes no criterion as to whether the exercise of the power is conditioned by the requirement to accord natural justice’ (*Annetts*, 606).

For the next couple of decades a largely theoretical debate ensued within the High Court as to whether the source of the presumptive limitation on the exercise of statutory power was to be found in the common law or in statute. The intellectual accommodation that has now provisionally been reached might be thought of as a draw. The limitation is to be found in both. The limitation arises as a matter of statutory implication which results from the application of a common law principle of statutory interpretation. The particular common law principle of statutory interpretation has even come to be recognised as a manifestation of a broader common law principle of statutory interpretation, which has for some reason in Australia recently taken on the English label of the ‘principle of legality’, but which could equally be given the American label of the ‘clear statement rule’. In accordance with that principle, natural justice or procedural fairness is treated as encapsulating a common law value which is presumed to be respected by the legislature so as not to be excluded by statute in the absence of clear words of plain intendment.

Over much the same period, attention was from time to time focused on whether the presumptive limitation on the exercise of statutory power was entirely procedural. Was it confined to the provision of an adequate opportunity to be heard in relation

to the exercise of a statutory discretion, or did it impose some substantive limitation on how that discretion might be exercised? The position to which we have come in Australia is that it is the former and not the latter. We have not in Australia taken the step that has been taken in some other jurisdictions of recognising a duty to exercise a statutory discretion so as to produce an outcome which meets a criterion of substantive fairness that is exogenous to the particular statutory scheme. Substantive, as distinct from procedural, limitations on the exercise of a statutory discretion, we have tended to say, are to be found in the subject-matter, scope and purposes of the statute conferring the discretion rather than in the application of general principles of law. We say that against the background of an absence in Australia of any general constitutional or statutory enshrinement of human rights norms, and the absence of any standardised system of curial or administrative procedure.

The more difficult question with which we have grappled concerns the content of the presumptively implied general procedural duty to provide an adequate opportunity to be heard. What has proved elusive is the prescription of any generally applicable standard for determining in any particular context precisely who is to be heard, to what extent and by what means. The best we have been able to achieve at a level of generality has been to equate procedural fairness with the avoidance of practical injustice (*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 13–14 [37]–[38]). Beyond that, we have been forced to recognise that the content of procedural fairness is highly context-specific, and to accept that multiple, often countervailing, practical and legal considerations may frequently be in play.

Custody

Modern family law can conveniently be traced in Australia to a date slightly before the more general developments I have just described; specifically, to the enactment by the Australian Parliament in 1975 of the Family Law Act. The Parliament principally relied on its power to make laws with

respect to marriage to introduce, in Part VI of the Act, a national system of no-fault divorce premised on the single ground of irretrievable breakdown of marriage. The Act also established the Family Court of Australia. It was to be a new kind of court. It was to ‘act with a minimum of formality, coordinate the work of ancillary specialists attached to the court, encourage conciliation and apply, only as a last resort . . . the judicial powers of the court’ (Family Court of Australia, *Finding a Better Way: A Bold Departure from the Traditional Common Law Approach to the Conduct of Legal Proceedings* (2007), 3).

Revolutionary as the Family Law Act was in 1975, it had little to say about the capacities and rights of children to participate in family law disputes that affected them. By s 64(1)(a) of the Act, the Family Court was directed that in proceedings with respect to the custody of a child of a marriage, it was to ‘regard the welfare of the child as the paramount consideration’. The Family Court was also specifically directed, by s 64(1)(b) of the Act, that where the child of a marriage had attained the age of 14 years, the court was not to make an order for custody ‘contrary to the wishes of the child unless the [C]ourt [was] satisfied that, by reason of special circumstances, it [was] necessary to do so’. Section 65 of the Act empowered the Family Court to make orders that a child be separately represented where it appeared to the court that the child ought to be so represented.

That the Family Law Act as originally enacted was somewhat spartan, and somewhat arbitrary, in its approach to considering the capacities and rights of children affected by family law disputes, is hardly surprising given that it was enacted some 15 years before the entry into force of the United Nations Convention on the Rights of the Child. In line with what would eventually become the mandate of Art 12(1) of that Convention – that a child ‘who is capable of forming his or her own views’ have ‘the right to express those views freely in all matters affecting the child’, and that those views be ‘given due weight in accordance with the age and maturity of the

child' – the Act was not very long afterwards amended to enable the wishes of a child of any age to be taken into account, and given the appropriate weight, in custody proceedings (Family Law Amendment Act 1983 (Cth), s 29(b)).

Schedule 3 to the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) effected a major reform to the Family Law Act, applicable specifically to the conduct of child-related proceedings, that moved those proceedings even further away from the common law model of adversarial litigation, and moved them designedly instead towards models of family law litigation in Continental Europe. The principles for conducting child-related proceedings, inserted as s 69ZN of the Act, required and continue to require a court actively to consider 'the needs of the child concerned and the impact that the conduct of the proceedings may have on the child in determining the conduct of the proceedings'; to 'direct, control and manage the conduct of the proceedings'; and to conduct the proceedings 'without undue delay and with as little formality . . . as possible'. The principles are supported by a legislative regime which confirms the court's substantial case management powers, including as regards the reception of evidence in proceedings.

That new legislative focus on what was labelled the 'Less Adversarial Trial', the Family Court was quick to hold, did not impinge upon or diminish the fundamental rights of all parties to family law litigation to procedural fairness (*Truman v Truman* [2008] 38 Fam LR 614, 659–660 [163]; *Crestin v Crestin* (2008) 39 Fam LR 420, 428 [31]). Nor did it change the media through which children's views and wishes were represented: 'the voice of the child [was to be] represented through the same participants as in a traditional trial' – through evidence and reports prepared by a family consultant; through options such as the appointment of an independent children's lawyer; through the provision of evidence by expert witnesses; and, if a judge thought it appropriate, through judicial interviewing (Family Court of Australia,

Less Adversarial Trial Handbook (2009), available from www.familycourt.gov.au). The principal innovation as regards the views and wishes of affected children was to ensure that their voices were 'represented earlier' in proceedings, with the accompanying advantages of 'allowing the judge to use information about the child's wishes to determine future evidentiary requirements and to help define the issues' (*Less Adversarial Trial Handbook*, p 23).

Whether – and if so, to what extent – procedural fairness may require that a child be represented or be heard, or otherwise participate as a party to a proceeding in which his or her custody is at stake, arose for consideration in an application brought in the original jurisdiction of the High Court in 2012. The case concerned four sisters, all under the age of 16, who were taken by their mother from their habitual place of residence, Italy, to Australia, and who were the subjects of a return order made by the Family Court under the Hague Convention. The maternal aunt of the children sought in the High Court to prohibit the execution of the return order on the basis that the Family Court had, amongst other things, 'failed . . . to afford the . . . children an opportunity to have separate and independent representation' in the form of an independent children's lawyer, and that this had constituted a denial of procedural fairness (*RCB v The Honourable Justice Forrest* (2012) 247 CLR 304, 310). I was involved in the hearing before the High Court as intervening counsel, rather than as a judge.

The High Court dismissed the application. It accepted that the decision to be made was required as a matter of general principle to be procedurally fair to the children, as well as to the parents. But it held that the need for the Family Court to be sufficiently and fairly apprised of the views of the children could be, and in that case was, sufficiently met by the Family Court's appointment of a family consultant. The family consultant, characterised by the High Court as 'an officer of the Family Court', had, in that case, reported the views of the children to the Family Court and to the parties. There

was, in the circumstances of the case, ‘no suggestion of any practical unfairness resulting to the children from their non-intervention as parties in the proceeding’ or from the manner in which their interests were in fact represented. The plaintiff’s ‘central submission’ that ‘resolution of questions about a child’s objection to return . . . in every case require[s] that the child or children concerned be separately represented by a lawyer’ was wrong, said the High Court, to the extent that it was based on the unfounded assumption ‘that only a lawyer

could sufficiently and fairly determine the child’s views and transmit that opinion to the court’ (RCB, 322).

Conclusion

The case of the Italian children in numerous ways represents a neat consolidation of my theme. It shows that the common law has something to say about procedural fairness in circumstances where statutory procedures specifically protect the provision, and the taking into account, of the views and wishes of children affected by family law proceedings. But not very much.