

Comparative Analysis in Judicial Decision-Making: The Australian Experience

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I. Introduction

In 1992 the then Chief Justice of the High Court of Australia, Sir Anthony Mason, spoke of the Court's use of materials from other jurisdictions. He said that although the Court looked primarily to decisions in other common law jurisdictions, it also looked to relevant comparative law principles and what other systems of law might have to say about a particular problem. Legal problems, because they reflect human problems, are not unique to any one system of law, he said¹.

Australian courts are not strangers to using foreign law in the process of judicial decision-making. As a relatively young ex-British colony, Australia

¹ *Anthony Mason, The Relationship Between International Law and National Law, and its Application in National Courts: Commonwealth Law Bulletin* 18 (1992) 750 at 753.

often looked to the law of England and other Commonwealth countries, such as Canada and New Zealand, in seeking to establish and develop a common law for Australia. The decisions of the United States Supreme Court on constitutional matters have had a particular relevance, because the Australian Constitution was drafted with parts of the United States Constitution in mind.

Much less use has been made by Australian courts of materials concerning civilian and European Community (EC) law. It is that use which is the focus of my discussion today.

When Sir Anthony Mason spoke it could not have been said that recourse was often had to such materials, nor by all judges of the Court. Nor can that be said today. But there has been an increased interest in the law of these jurisdictions in the last 20 years or so since he spoke. That interest, and a more outward looking approach, coincided with the assumption by the High Court of a greater role in the development of a uniquely Australian common law.

I commence this lecture by discussing the background to the High Court's role. I will refer to the areas in which civilian and EC law has been applied, where it has not and areas where it might be considered in the future. I shall then discuss some recent decisions of the High Court in the main area in which civilian law is referenced, tort law. In that process, I shall take up the central theme of this lecture, which is to identify the use made of civilian law materials in judicial reasoning. In my conclusion I shall briefly discuss factors which inhibit its wider use.

II. Background

1. The High Court's new role

I confine my discussion to the High Court of Australia because of its position in the court hierarchy in Australia. The High Court sits at the apex of the court system in the Australian federation and is both the constitutional court and the final court of appeal. The Court is responsible for the development of the common law, namely the non-statute law, for Australia, and is thus better placed than other courts to consider the perspectives of other legal systems. It has not, however, always had such a role.

At an early point in the history of Australia, the English common law and the rules of equity were received in the colonies to provide a basis for order and government². English judgments had an authoritative status in Austral-

² For a detailed discussion see *Crauford*, *Australian Law After Two Centuries*: Sydney L. Rev. 11 (1988) 444.

ian courts, derived, in large part, from the emphasis placed upon uniformity and harmony of law in the British Empire. The Privy Council, which remained the final appeal court for Australia for many years, upheld such uniformity as being “of the utmost importance”³. “Uniformity” meant conformity with the common law as declared in England. The decisions of the Privy Council were regarded as binding on all Australian courts. Decisions of the House of Lords were uniformly followed and applied, not only when there was no High Court decision on point, but also in cases of conflict between decisions of the High Court and the House of Lords⁴.

For some time the High Court also regarded Canadian and New Zealand courts as sister courts, in a single common law system, the judgments of which were highly regarded and often followed⁵. They were accorded a similar status to decisions of Australian State Supreme Courts. Their judgments were not “foreign” as such, but neither were they binding. The doctrine of a unified common law declined in importance when the former colonies became independent members of the Commonwealth of Nations and became more interested in the development of their own law.

An early step towards the break from the traditions concerning the application of English law in Australia was taken by the High Court in 1963⁶, when it departed from a decision of the House of Lords. In 1978 it declared that it no longer regarded itself as bound by the decisions of the Privy Council and that State courts might regard themselves as so bound only when there was no relevant High Court authority⁷. In 1986 the High Court reinforced that stance with statements that English precedents generally were not binding and were useful only to the extent of the persuasiveness of their reasoning⁸. The process was completed, by the final statutory abolition of appeals to the Privy Council, in the same year⁹. These events established what has been described as the precondition for an Australian jurisprudence¹⁰.

³ See *Trimble v. Hill*, [1879] 5 AC 342 at 345.

⁴ *Piro v. W Foster & Co Ltd* (1943), 68 CLR 313 at 320.

⁵ For example *Davison v. Vickery's Motors Ltd (In Liquidation)* (1925), 37 CLR 1 at 14 per Isaacs J.

⁶ *Parker v. The Queen* (1963), 111 CLR 610 at 632–633.

⁷ *Viro v. The Queen* (1978), 141 CLR 88.

⁸ *Cook v. Cook* (1986), 162 CLR 376 at 390, 394.

⁹ *Australia Act 1986* (Cth), s. 11 (federal appeals had already been abolished) and the *Australia Act 1986* (UK).

¹⁰ *Crawford* (supra n. 2) at 450.

2. New interests in civilian and EC law

It is perhaps a quirk of history that as England was loosening its influence over Australian law, it faced the prospect of its own law being influenced by EC law and the civilian laws of continental Europe. Since Britain became a member of the EC, English judges, in their extra judicial writings, have looked to Europe¹¹, although a strong foundation had already been provided by *émigrés* who had taught civilian and comparative law in England post-war. Some credit for starting the debate about the use of European law has been given to Lord Scarman, who, in the Hamlyn Lecture in 1974, spoke of the New Dimension in English law¹². From the 1990s English judges were invoking foreign law in support of their objectives¹³.

When Sir Anthony Mason spoke of the High Court's interest in the law of non-common law jurisdictions, Australian judges would have been conscious of events unfolding in Britain and the debate concerning comparative perspectives. But the evident interest of Australian judges would not have been sparked by the pressures or influences which were relevant to English courts. Australian law would not be directly influenced by the law as determined by the European Court of Justice (ECJ), nor indirectly influenced by the civilian law which has shaped the jurisprudence of the ECJ. Australian law is not subject to the European Convention on Human Rights. The international human rights standards contained in that Convention have never been incorporated into Australian domestic law in a holistic way and that situation looks unlikely to change¹⁴. Rather the High Court was, for the first time, in a position to develop a common law for Australia¹⁵. And whilst its members sought to do so by taking account of local conditions, they considered it necessary to look outward to developments abroad and in Europe.

¹¹ *Markesinis/Fedtke*, The Judge as Comparatist: Tul. L. Rev. 80 (2005) 11 at 30–31 referring to Lords Scarman, Woolf, Bingham, Brown-Wilkinson, Hoffmann, Laws, Sedley, Schiemann and Irvine of Lairg.

¹² *Markesinis/Fedtke* (previous note) at 30 n. 54; see also Lord Diplock, The Common Market and the Common Law: The Law Teacher 6 (1972) 3 at 16.

¹³ *Markesinis/Fedtke* (supra n. 11) at 31; and see for example *Arthur J S Hall & Co v. Simons*, [2002] 1 AC 615; *A v. National Blood Authority*, [2001] 3 All ER 289; *Fairchild v. Glenhaven Funeral Services Ltd*, [2003] 1 AC 32.

¹⁴ Recent discussions in Australia about the adoption of a Charter of Rights were unproductive.

¹⁵ See *Anthony Mason*, Jurisdictional and Procedural Constraints on the Evolution of Australian Law: Sydney L. Rev. 10 (1984) 253 at 256; *id.*, The Use and Abuse of Precedent: Australian Bar Rev. 4 (1988) 93 at 107; *Toohy*, Towards an Australian Common Law: Australian Bar Rev. 6 (1990) 185 at 196–197.

III. Present and future use of European and civilian legal materials

The two principal areas in which the High Court has made use of European and civilian law materials in the last 20 years are competition law and tort law.

The Court could hardly ignore EC law, as it related to *competition law*, given that the economic principles upon which the Treaty of Rome were based were used in drafting the competition law statute in Australia¹⁶. Decisions of the ECJ have been considered by the Court in connection with that statute's provisions concerning abuse of market power¹⁷ and have continued to be referred to by lower courts which administer competition law.

But it is in the area of tort law that the courts in many jurisdictions have had to grapple with the same conceptual problems. It is therefore unsurprising that the subject of compensation for the wrongful infliction of injury has been given so much attention by comparatists. The number of recent cases involving negligent acts or omissions, where the High Court has looked to civilian law materials, indicates the strong potential for a continued use of a comparative perspective in this area. I shall shortly refer to some of those cases.

The areas where there has not been an interest shown in the use of European or civilian law materials, or where there appears to be only the possibility of some limited use, are as follows:

(1) *Restitution*. – The Australian common law concerning *restitution* is not aligned to the position now taken by English courts, which have accepted a principle of unjust or unjustified enrichment and developed it by reference to German law. The High Court does not recognise it as a free-standing principle, but prefers to see it as a concept which may explain why restitution is ordered in common law actions¹⁸. The relevance of civilian law in this area may therefore be limited.

(2) *Good faith in contractual performance*. – Despite the substantial debate in Europe and elsewhere about the adoption of good faith in the performance of contracts as an international standard, and the publications of bodies such as UNIDROIT, there has been little academic debate about it in Australia. The courts tend to address the issue only when a contract contains a good faith clause. The prospect of it as an overarching principle of contract law has not been dealt with by the High Court.

(3) *Intellectual property*. – The possibilities for consideration of EC and civilian laws concerning *intellectual property* are limited, particularly in patent law,

¹⁶ Australia, House of Representatives, Trade Practices Revision Bill 1986, Explanatory Memorandum at 13 [46].

¹⁷ *Queensland Wire Industries Pty Ltd v. Broken Hill Proprietary Co Ltd* (1989), 167 CLR 177 at 189.

¹⁸ See *Roxborough v. Rothmans of Pall Mall Australia Ltd* (2001), 208 CLR 516 at 504.

where our laws differ. Nevertheless, EC laws have been referred to in copyright cases¹⁹ and the perspectives of some civilian countries at least noted in a patent case²⁰.

(4) *Constitutional and administrative law.* – Little attention has been directed to civilian administrative and constitutional law in decisions of the High Court. Some would argue that the different distribution of power in civilian countries makes the importation of ideas in this area too difficult²¹.

However, two decisions of the Court involving the constitutional guarantee of freedom of trade, commerce and communication between the States raise the possibility of some future consideration of “proportionality” as it is understood in German and EC law. It is a term already used in Australian constitutional law, but does not yet extend to a test of strict proportionality. But in the cases mentioned, a test of “reasonable necessity” has been propounded, which goes some way toward the European model.

These cases also suggest the possibility that the Court may look more to ECJ decisions in the same area. The Treaty of Rome provisions are similar and the High Court has now arrived at a similar view to that expounded by the ECJ about the invalidity of legislation which interferes with these freedoms; namely, that it is to be assessed by reference to its anti-competitive effects²².

Now let me return to the area of torts to discuss some recent cases which have involved civilian law references.

IV. Recent cases – law of torts

1. Choice of law

In 2000 and 2002 the High Court decided two cases involving *choice of law in tort*. In the first of them²³ the appellant challenged the existing common law rule, which determined liability based on the law of the forum in which the action was brought²⁴. The rule had been subject to criticism and had been replaced in the United Kingdom, Canada and the United States. However, the argument put forward focussed upon the traditional prefer-

¹⁹ *IceTV Pty Ltd v. Nine Network Australia Pty Ltd* (2009), 239 CLR 458 at 653.

²⁰ *Northern Territory v. Collins* (2008), 235 CLR 619.

²¹ *Kahn-Freund*, On Uses and Misuses of Comparative Law: Mod. L. Rev. 37 (1974) 1 at 12.

²² *Cole v. Whitfield* (1988), 165 CLR 360; *Befair Pty Ltd v. Western Australia* (2008), 234 CLR 418.

²³ *John Pfeiffer Pty Ltd v. Rogerson* (2000), 203 CLR 503.

²⁴ Derived from *Phillips v. Eyre* (1870), 6 QB 1.

ence of civil law jurisdictions for the law of the place of the tort as governing delictual liability²⁵.

The majority judgment accepted that this was the appropriate basis for liability where an interstate element was present. But it did so by somewhat different reasoning. It considered the basis given by French commentators for that system's approach, one founded in notions of sovereignty over the place of the commission of the tort, but did not consider that basis to be strong enough to mandate a preference of one choice of law rule over another. This was especially so in a federal system like Australia, where "sovereignty" is shared between federal, State and Territory law areas²⁶. However, it reasoned that the fact that the same common law is applied throughout Australia weighed in favour of giving effect to the place of the tort²⁷, thus arriving at the same conclusion.

The choice of law rule was again raised in a case which involved injuries received by a person as a result of a motor vehicle accident which occurred in New Caledonia²⁸, the legal system of which is based on French civil law. The accident was caused by the negligent design and manufacture of a vehicle by a company whose place of business was France and which had no connection to Australia. The law of the place of the tort was also confirmed as appropriate to foreign torts and it was held that an Australian State court could apply that law. This was despite the defendant's argument that the Australian proceedings should be stayed to allow the foreign court to apply its own law. The test, the Court held, is whether the Australian court is "clearly inappropriate" to apply foreign law and this should not be assumed²⁹. It was necessary for the defendant to show that some prejudice or injustice would result, and it had not done so.

In the process of reasoning the joint judgment returned to the question, which had been adverted to in the earlier case, why Savigny and other 19th century scholars had considered delictual liability to be more strongly linked to the law of the forum. The answer, provided by Professor Kahn-Freund, lay in the past perception of the civil law of delict as intimately connected with the criminal law. The Court observed that the common law appears to have shared that view, given its treatment of the law of torts in terms of moral condemnation and not compensation. But, it said, developments in

²⁵ *John Pfeiffer Pty Ltd v. Rogerson* (supra n. 23) at 505.

²⁶ *John Pfeiffer Pty Ltd v. Rogerson* (supra n. 23) at 536 [74].

²⁷ *John Pfeiffer Pty Ltd v. Rogerson* (supra n. 23) at 540 [86].

²⁸ *Regie Nationale des Usines Renault SA v. Zhang* (2002), 210 CLR 491.

²⁹ *Regie Nationale des Usines Renault SA v Zhang* (previous note) at 504 [25], applying (or referring with approval to) *Voth v. Manildra Flour Mills Pty Ltd* (1990), 171 CLR 538 at 564–565.

technology have changed the nature of delictual liability³⁰. This was a view shared by both systems.

2. Breach of duty

In a case involving the obligation of police officers to “rescue” a person displaying suicidal tendencies, the bases for civilian laws creating a duty to render assistance were considered and compared with common law requirements.

A statutory power was given to police to apprehend a person if they believed the person was mentally ill and likely to commit suicide³¹. Two police officers came across the plaintiff’s husband in circumstances which strongly suggested he had been contemplating suicide. However, he appeared rational and assured them he had changed his mind. He took his life later that same day. His widow sued the police and the State for breach of duty. She claimed that a duty to apprehend and protect her husband arose both by reason of the statute and under the common law. The Court did not agree.

In the judgments, the difference between the approach of some civil law systems and the common law to this question was noted. Some civilian systems imposed a sanction for a failure to assist a person in these circumstances³², although it appeared that German law did not impose an absolute obligation to act in all cases. Historically, the common law has never imposed an obligation to rescue others. The reason for the fundamental difference between the legal systems was sought and found in the common law’s reluctance to interfere with the autonomy of the individual. In this regard, Professor Zimmermann, in his study of the law of obligations, had observed that the common law has more of an affinity with Roman law than does civilian law³³.

It was also observed in this case that the German courts appeared to give weight to the purpose of the protection afforded by the statutory rule. A purposive approach to the construction and application of statutes is conventional in Australian law and in this case it assumed some importance.

The purpose of the statutory provision was held not to be to prevent suicide; rather, it was to apprehend a mentally ill person who was at risk of harm because of their illness. The statutory power given to the police offic-

³⁰ *Regie Nationale des Usines Renault SA v. Zhang* (supra n. 28) at 510–511 [46]–[47] referring to *Kahn-Freund*, *Delictual Liability and the Conflict of Laws*: *Rec. des Cours* 124 (1968-II) 1 at 24.

³¹ *Stuart v. Kirkland-Veenstra* (2009), 237 CLR 215.

³² *Stuart v. Kirkland-Veenstra* (previous note) at 248 [88], 259 [218].

³³ *Zimmermann*, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) at 1044.

ers did not arise unless the police officers formed the opinion that the plaintiff's husband was mentally ill, and they had not thought that he was. It was said that one could not assume a person was mentally ill because they had contemplated suicide. No such assumption was implicit in the statute's provisions, which did not depart from the common law's view of autonomy.

Notions of individual responsibility were also reflected in a decision involving the *duty of care owed by a hotel licensee* to a customer who was affected by alcohol. The man left the hotel and was killed when his motorcycle ran off the road³⁴. The Court held that the licensee was not required to ensure that he got home safely, for example, by ringing the man's wife. The majority said that licensees have various statutory duties in relation to the service of alcohol, but the common law does not prescribe a general duty of care which requires them to monitor the consumption of alcohol or to protect customers from the consequences of the alcohol they choose to consume³⁵.

3. Loss of chance

This year (2010) the High Court rejected a claim for damages for the *loss of the chance of a better medical outcome*³⁶. This was the first time the Court had been presented with an opportunity to determine whether Australian common law could accommodate such a claim.

The plaintiff was a child who had presented at hospital with the effects of rubella, or chicken pox. Her symptoms included headaches and masked an underlying brain tumour. The surgeon was found to have been negligent in not ordering a scan when the plaintiff developed further symptoms which were indicative of a tumour. Had he done so, treatment would have been administered at an earlier time. However, the plaintiff could not prove that earlier treatment would have avoided, or even considerably reduced, the severe brain damage that she suffered. She could establish only that there was a chance that early intervention might have done so.

For the purposes of my discussion, the case may be said to have three distinctive features. In the first place, it involved a topic upon which opinion was divided in both common law and civil law jurisdictions. Some United States courts had allowed such claims, the Supreme Court of Canada had not and the House of Lords also had not, although there were strong dissents in the decision of the House of Lords³⁷. Secondly, the topic had generated a deal of academic debate, some of which was written from a comparative

³⁴ *CAL No 14 Pty Ltd v. Motor Accidents Insurance Board* (2009), 239 CLR 390.

³⁵ *CAL No 14 Pty Ltd v. Motor Accidents Insurance Board* (previous note) at 413 [52], 417 [64].

³⁶ *Tabet v. Gett* (2010), 240 CLR 537, 84 Australian Law Journal Reports (ALJR) 292.

³⁷ *Gregg v. Scott*, [2005] 2 AC 176.

perspective, and the plaintiff's lawyers put these materials before the Court. Thirdly, as the extent of that debate suggested, the case involved a challenge to the requirements of the common law cause of action in negligence. Such fundamental questions of theory and policy inevitably encourage comparison with the approaches of other jurisdictions.

The first major issue was the concept of a loss of chance as itself being damage, as that notion is understood by the common law. Here, different theories of what constitute damage could be observed in different systems and this variety of approaches was a factor to be considered in determining whether such a loss was recognised as actionable at common law. In the principal judgment it was observed that while French courts recognised claims based on loss of a chance, French law appeared to have a much wider view of damage. On the other hand, countries such as Germany, which did not, seemed to require damage itself to have a value. This was closer to the Australian position.

The plaintiff also argued that the loss of a chance might be viewed as independent of the physical injury. This might favour the idea of it as a separate head of damage. But here the judgment drew upon both Canadian and German commentators³⁸, who had pointed out that to view it in this way might require compensation even if no actual injury was suffered.

The other key issue identified was the standard of proof required by Australian law. For the plaintiff's case to succeed, the standard needed to be lowered to accommodate only the *possibility*, as opposed to the *probability*, that she would not have suffered brain damage, or as much damage as she did, had the surgeon not acted negligently. It was observed that the Australian standard was already relatively low, not requiring something approaching certainty, in contrast to some civilian countries. It had been suggested that the strictness with which French courts approach proof may have led them to resort to loss of chance as a solution³⁹. And it was observed that other countries, like Germany, tempered a high standard of proof with a partial reversal of onus in cases of medical "gross negligence". The House of Lords had likewise shown a preparedness to override evidentiary requirements in an asbestosis case⁴⁰. But in this case, the High Court was not asked to consider such an approach and the question whether it would do so was not decided.

³⁸ *Tabet v. Gett* (supra n. 36) at 583–584 [130], referring to *Khoury*, Causation and Risk in the Highest Courts of Canada, England, and France: L. Q. Rev. 124 (2008) 103 at 126; Digest of European Tort Law I: Essential Cases on Natural Causation, ed. by *Winiger et al.* (2007) at 591.

³⁹ *Tabet v. Gett* (supra n. 36) at 588 [146], referring to *Khoury*, Uncertain Causation in Medical Liability (2006) at 137.

⁴⁰ *Fairchild v. Glenhaven Funeral Services Ltd* (supra n. 13).

In the result, the changes necessary to the requirements of the cause of action in negligence, to accommodate a claim for loss of chance, were considered too great. Policy considerations were not regarded as sufficiently strong to warrant such fundamental changes to underlying concepts of the common law.

4. Causation; unsuccessful sterilisation; nervous shock

Problems of causation and the standard of proof were raised in a case involving the death of a man from lung cancer. This case did not involve explicit reference to civil law materials, but it dealt with an area that has been grappled with in most jurisdictions. He had been exposed to respirable asbestos fibres in the course of his employment⁴¹. The claim was complicated by the fact that he had been a smoker. The evidence did not establish that asbestos exposure was probably a cause of the cancer. The fact that asbestos exposure *might* have been a cause did not satisfy the requirement of an affirmative answer as to whether it was more probable than not. That also denied the prospect that asbestos exposure had been a materially contributing factor, which may suffice for liability. It was said that knowing that inhaling asbestos *can* cause cancer did not entail, in this case, that it probably *did*. The evidence did, however, suggest that smoking was a probable cause.

Medical negligence cases have also provided the opportunity for the Court to consider the approaches in other jurisdictions to a “wrongful life” claim⁴² and a claim for damages by the parents of a child born after an *unsuccessful sterilisation*.

My discussion of the Court’s decision in a “wrongful life” case is postponed for the purpose of a workshop to be held later this week⁴³. For present purposes, I will simply record that the case did involve references to the outcomes of earlier German⁴⁴ and English⁴⁵ cases.

The surgeon who negligently carried out a sterilisation procedure, which proved ineffective, was held liable to the parents of the child for the cost of raising and maintaining the child⁴⁶. In the course of the judgments, reference was made to the different approaches taken by the courts in England, France and Germany to recovery in such cases.

⁴¹ *Amaca Pty Ltd v. Ellis* (2010), 240 CLR 111.

⁴² *Harriton v. Stephens* (2006), 226 CLR 52.

⁴³ This article was delivered as a lecture to the Max Planck Institute, Hamburg, on 12 July 2010.

⁴⁴ Bundesgerichtshof 18. 1. 1983, JZ 1983, at 450, referred to in *Stolker*, Wrongful life, The Limits of Liability and Beyond: Int. Comp. L. Q. 43 (1994) 521 at 521.

⁴⁵ *McKay v. Essex Area Health Authority*, [1982] 2 QB 1166.

⁴⁶ *Cattanach v. Melchior* (2003), 215 CLR 1.

The last case which I shall mention concerned a claim for psychiatric injury, of the nature of “nervous shock”. The test of liability for such an injury was held to be whether it was reasonably foreseeable that a person in the plaintiff’s position might suffer psychiatric injury as a result of the alleged negligent act⁴⁷. This did not require the plaintiff to show that a person of “normal fortitude” might sustain such an injury in the circumstances.

It was observed, in one judgment, that both common law and civil law systems had grappled with the difficulties posed by these claims, of determining the boundaries of liability. The approach of German courts, in applying relevant provisions of the BGB⁴⁸, was considered of interest in a number of respects. The limitation upon liability which German courts placed upon recovery, by reference to something like the normal fortitude test, was not adopted. But the extension of liability provided by German courts to persons suffering psychiatric injury, but who had not been at the scene of the accident, was implicitly approved⁴⁹. And some common ground was found in the identification by German courts of problems of causation in such claims, whilst at the same time recognising, as did the common law, that questions of policy were involved⁵⁰.

V. The use made of civilian law materials – some observations

The use of materials about the laws of any foreign jurisdiction is a matter of choice for judges of the High Court. The fact that they have been used in these cases therefore raises questions as to when and for what purpose they are used.

It makes sense to look to how other jurisdictions have dealt with a novel problem, and the Court has done so, as may be seen by the wrongful life, the failed sterilisation and the loss of chance cases. But novel cases do not represent the only occasions on which consideration has been given to civilian law. And when resort has been had to civilian law, it is not always obviously for the purpose of seeking a solution.

The more minimal use of civilian law in the cases, usually by reference to texts, is by way of a simple reference to what that law concludes on a topic, without further analysis. The sterilisation case provides an example of this form of use. It may be open to the criticism that it conveys only that the judgment writer is aware of the approach of other jurisdictions and no more.

⁴⁷ *Tame v. New South Wales* (2002), 211 CLR 317.

⁴⁸ Bürgerliches Gesetzbuch.

⁴⁹ *Tame v. New South Wales* (supra n. 47) at 403 [251].

⁵⁰ *Tame v. New South Wales* (supra n. 47) at 403 [251], 404 [254].

It is true that a mere reference to a civilian law standard or outcome does not convey that it has assumed any real relevance for the reasoning in the judgment. But that is the point. Such references are intended to convey that the judge has looked at the materials about that civilian law, noted what is usually a difference of approach, and determined that it does not assist in the process of reasoning. Because of the discipline usually demanded in concise judgment writing, it will not usually be possible to ascertain the extent to which the civilian law was considered by the judge. Even so, the fact that a judge has an eye to other jurisdictions cannot be a bad thing.

Any process of comparison will either identify apparent similarities or differences in approach. Both can be useful: the former to support legal conclusions that are reached and the latter to provide a springboard for analysis of one's own law. But what is the purpose of recognising sameness? This brings to mind the exhortation of Professor Kahn-Freund to his comparative law students – not to be lured by homonyms and not to be afraid of (hidden) synonyms⁵¹. But what is of most importance is to understand why the approaches of other jurisdictions are the way they are, and to use that understanding to form a more holistic view of one's own law and the direction that it should take. That understanding is critical to a body such as the High Court which is faced, on a daily basis, with novel and complex legal problems that invite consideration of the conceptual framework and underlying purpose of the law.

In 1992, when the former Chief Justice spoke about the High Court looking to non-common law jurisdictions, the terms “globalisation” and “harmonisation” had much currency. Courts might have then been encouraged to a perspective which saw these ideals as possible and therefore to search for sameness. Indeed, this may have influenced what Sir Anthony said on that occasion.

However, the cases reviewed do not suggest an identification of sameness on that account. Ideals such as harmonisation and globalisation are likely to have less relevance for a court than they may for those involved in wider law reform. A judge of the High Court, whilst attempting to see the present and future shape of the law, is concerned with its incremental development and at the same time finding the solution to the case at hand.

Perhaps the use made of comparative law by English judges in the 1990s, which I have referred to, is more to the point; namely, that similar approaches of foreign jurisdictions can be used to confirm the common law judge's decision as correct. In the cases to which I have referred, such a use of comparative law is evident in the reference in the rescue case – to the common approach of other jurisdictions to statutory interpretation; and in

⁵¹ *Kahn-Freund*, Comparative Law as an Academic Subject: L.Q. Rev. 82 (1966) 40 at 52 (cited: Comparative Law).

the nervous shock case – to the mutual recognition of the part policy plays in determining the bounds of liability.

The identification of differences in approach may be useful, at a number of levels, to judicial thinking. At a basic level a difference between the common law and civil law may convey to the judge that there is no one right answer. And this will be confirmed where there is further division of opinion within those systems, as occurred in the rescue and the loss of chance cases.

At the next level, analysis may be involved. The common law judge asks why the approaches of the legal systems are different. The rescue case furnishes an example of such an inquiry and one where the answer concluded the process of comparison. The Court was led to the inquiry because of criticisms of the common law rule and the need to find an explanation as to why civilian systems required more of their citizens than the common law did. The answer lay in the social values which informed these legal rules: the common law was more individualistic, civilian law more socially impregnated⁵². In the result, the legal approaches were not truly comparable. The assistance which was gained by the reference to civilian law was an understanding as to why that was so.

The examination of differences can also facilitate an analysis, at a deeper level, of one's own legal structures. The loss of chance case highlights the possibilities for a critical appraisal of the requirements of a cause of action in common law negligence by reference to the different requirements of civilian systems.

The analysis, it will be recalled, occurred in relation to damage, causation and proof. In relation to each of these issues the understanding reached about civilian law illuminated the common law requirement, the reason for it and how it was linked with the other requirements. The recognition of what the Australian common law required for something to amount to "damage" was aided by comparison. The stricter civilian standard of proof accounted for the initial acceptance of claims of loss of chance; whereas the common law's standard was seen, by contrast, as already accommodating some certainty of proof. This suggested that very strong reasons were required to effect a fundamental shift in the common law and coherence was ultimately preferred. Nevertheless, it may be said that civilian law was used to better examine and explicate Australian law.

I said at the outset of this part of my discussion that the cases reviewed did not reflect any assumption that a solution was to be found in other jurisdictions. That is not to say that the Court has not been open to ideas. In the nervous shock case the prospect that the duty could be extended to persons

⁵² *Stuart v. Kirkland-Veenstra* (supra n. 31) at 248 [88], referring to *Markesinis/Unberath*, *The German Law of Torts: A Comparative Treatise*⁴ (2002) at 90.

not present at the scene was implicitly approved, although it must be conceded there may be two reasons for that. It may have involved taking up the German approach; or the Court may have been using that approach to justify a conclusion already reached. In the first choice of law case whilst the basis for the civil law's preference was not applied, it led the Court to reason about how it translated to the Australian context, a process which led to the same conclusion. The possibility of taking up more ideas or solutions remains for the future in the area of torts.

VI. Factors which inhibit the use of foreign materials

In the second choice of law case the Court expressed some confidence in Australian trial courts being able to apply foreign law. But in such cases the courts are assisted by expert evidence. No such assistance is provided on the rare occasions when material about a civilian law is put before the Court by way of argument, as occurred in the loss of chance case.

That case was unusual in that the lawyers for one party took the step of including a large amount of writing on the subject as an adjunct to the written outline of argument. In most cases, the possible use of a comparative perspective would not occur to most lawyers. But having invited that perspective, the plaintiff's lawyers were only able to identify the systems which supported the conclusion for which they argued. They did not identify how the material was to be used to answer the various questions raised in the case, and in the plaintiff's favour. The other party did not really respond to the material.

All of this of course indicates that Australian litigation lawyers do not have a background in comparative method. And of course it must be said that Australian judges are the product of the same system of learning, although they may be expected to have a more developed understanding of, and interest in, other legal systems because they need to view a problem in a wider perspective. The lack of background is easily explained. It follows from a lack of teaching and a lack of academic discourse in foreign jurisdictions and in comparative method.

A comprehensive comparative law course was first offered in Australia in 1948⁵³. Despite this promising start, the teaching of comparative law remains largely in a developmental stage. A study in 1996 showed that less than half of the law schools in Australia offered any comparative law subjects⁵⁴. This has substantially improved, but very few of those do make it a

⁵³ At the University of Melbourne: see *Friedmann*, *A Comparative Law Course at Melbourne University*: *Journal of the Society of Public Teachers of Law* 1 (1949) 274 at 274.

⁵⁴ *Blay*, *The Function of International and Comparative Law in Australian Legal Education*: *Australian Int. L.J.* 1996, 80 at 85.

compulsory subject in the Bachelor of Laws degree. However, one law school conducts a Masters of Comparative Law programme in conjunction with the University of Mannheim⁵⁵. The courses which are available vary enormously in their content. Not all involve the teaching of traditional methods of comparative law. The number of students undertaking the courses is small.

The reasons why Law Schools have not encouraged the study of comparative law may be many. They may consider that it requires high level second or even third languages, which is not common amongst students in Australia. They may well have found difficulty in finding teachers, although that is an obvious outcome if a subject is not widely taught. Many of the lecturers in the subject have come from overseas. One cannot help but wonder whether the subject has been viewed by the Law Schools as of academic interest rather than of practical benefit. Law Schools have tended to become training grounds for practising lawyers. Even so, one would think that the process of analysis of, and understanding of, one's own system that it provides might be viewed as adding to the intellectual armoury of a litigation lawyer.

The reality is therefore that it will be judges who undertake research into civilian law themselves. Of course they can require the parties' lawyers to address argument to a particular area of law, which might include a comparative perspective, but they are conscious of adding to the costs of litigation. They would not always be sufficiently confident that the use to which European civilian law materials may be put warrants requiring the parties to conduct research, not the least because it may not offer a solution. Its utility may lie in analysis and the parties to an appeal may not appreciate that this is important.

It must then be said that the task of researching civilian law materials is not an easy one for Australian judges. The principal difficulties will be obvious, but I offer these observations.

The principal resource material about civilian jurisdictions is comparative law texts. Regardless of their quality and how informative they are on their topic, they cannot always explain the intricacies of the interaction of civilian code provisions. In this regard it must be recalled that judges at a high appellate level are dealing with complex issues.

Texts also tend to state the law by reference to how a code is intended to operate. Common law judges prefer to observe how a law is actually applied by other courts, in order to better understand it. Even making allowances for the possibility that civilian codes might reduce the opportunity for individual activity on the part of the courts, common law judges would find it

⁵⁵ The University of Adelaide.

difficult to accept that civilian judges make no law at all and have no inventive function in dealing with the shortcomings of statutory rules⁵⁶.

When faced with the decisions of civilian courts, most common law judges would need the assistance of a summary. Without a comprehensive knowledge of a legal system it is difficult to truly understand the critical issues and reasoning upon which a decision of a civilian court turns. By contrast, the decisions of the ECJ are rendered more intelligible because the opinion of the Advocate General on the case is also published.

VII. Conclusion

It has been said that there is no such thing as comparative law, only methods or a variety of methods useful in particular to look at one's own law⁵⁷. Despite the difficulties which attend the use of foreign materials, there is undoubted benefit to be gained from the perspective it provides. Moreover, one should not assume that ideas and even solutions from other jurisdictions will not present themselves in the future.

Australia is often described as a young country. It was obliged, for much of its early history, to depend upon the decisions of English courts for guidance. In recent times the High Court has been engaged in developing a uniquely Australian common law. In doing so, it has shown a greater willingness to consider the jurisprudence of courts outside of the traditional common law family. And while it is often the case that decisions of the ECJ and European civil law are referred to simply to bolster a decision already reached, the civil law is being increasingly involved to deepen the existing understanding of our law and the future direction it should take. Comparative law has been lifted from a purely academic context and now forms part of the judicial method.

⁵⁶ A point made by *Kahn-Freund*, *Comparative Law* (supra n. 51) 40 at 50–51.

⁵⁷ *Kahn-Freund*, *Comparative Law* (supra n. 51) at 41; see also *Jolowicz*, *Comparative Law in Twentieth-Century England*, in: *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, ed. by *Beatson/Zimmermann* (2004) 345 at 346.