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The 'very troubling case' of Owens v Owens
by Isobel Williams

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Part I: Commentaries and Reflections

THE SIGNIFICANCE OF COMPARATIVE LAW TO COMMON LAW JUDGES – AN AUSTRALIAN PERSPECTIVE

The Hon Chief Justice Susan Kiefel AC[*]

An enquiry as to the significance of comparative law to judges involves both a quantitative and qualitative question. The quantitative question may be seen to require the identification of the areas of the common law where references to comparative law materials more often occur, as well as consideration of whether this occurs very often. The qualitative question is directed to the purposes for which reference is made to comparative law materials and involves consideration of the benefits which judges might receive from that reference. This might in turn direct attention to aspects of judicial method.

I would not presume to speak for judges of all common law courts. My perspective is necessarily that of judges of the High Court of Australia. Before I enter upon these enquiries, it is necessary to explain a little more about the common law of Australia which is developed by the High Court and about the High Court itself. Indeed, the name of the Court may be somewhat confusing given that it is also used to describe courts lower in the judicial hierarchy in the UK than the UK Supreme Court and other final appellate courts. The High Court of Australia is the final appellate and constitutional court for Australia and is equivalent to the Supreme Court of other common law countries, including the UK Supreme Court.

It may be necessary also to dispel any idea that there is now one body of law called the common law. That was once the case, when the former colonies of the British Empire were required to conform to the law as declared in England, in order that the common law be uniform and harmonious.[1] But the demand for a unified common law lessened in importance when the

[*] Chief Justice of the High Court of Australia. An earlier version of this chapter was presented to the General Congress of the International Academy of Comparative Law in Fukuoka, Japan, on 23 July 2018.

[1] Justice Kenneth Hayne, 'The High Court of Australia and the UK Supreme Court: The Continued Evolution of Legal Relationships' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 4: 2012–2013* (Appellate Press 2018).

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former colonies became States in a federated sovereign nation.[2] Courts such as the High Court of Australia began departing from decisions of the House of Lords and gradually appeals from Australia and other common law countries to the Privy Council were abolished.[3]

For Australia, the process of separation was completed in 1986.[4] At this point, the development of the common law of Australia was, for the first time, placed in the hands of the High Court of Australia. It was observed by some judges of the Court at that time that decisions of other common law courts were now 'useful only to the degree of the persuasiveness of their reasoning.'[5]

Professor Birke Häcker makes the interesting observation that 'the picture of the common law world today *in some respects* resembles that of continental Europe round about the late 17th or early 18th century' and raises the question whether common law jurisdictions might learn lessons of coherence from the history of the Ius Commune.[6] This is a topic for another day.

It might be said, though, that given the analysis which is undertaken of decisions of other common law courts, the current approach of judges of the High Court of Australia is, to an extent, comparative. However, the subject of discussion in this chapter will be the comparative use of civil law materials, although some examples of correspondence between the High Court of Australia and the UK Supreme Court will be mentioned throughout where relevant. In this respect, the term 'civil law materials' refers to those materials which explain how European and the civil law are applied.

Because the High Court of Australia is autonomous, its judges may choose to consult European law and the civil law. When they do so, it would usually be through the medium of civil law texts. It must, however, be acknowledged that judges do not do so regularly, although they have done so more often in recent times, perhaps as a response to the new role of the judges in developing an Australian common law. There are a number of

2 See Daniel Clarry, 'Institutional Judicial Independence and the Judicial Committee of the Privy Council' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 4: 2012–2013* (Appellate Press 2018) 44, 46-52.

3 See Chief Justice French, 'Australia and the United Kingdom: A Bit Like Family, Much in Common But a Lot of Difference' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 7: 2015–2016* (Appellate Press 2018) 17, 18-26; Clarry (n 2) 46-52.

4 Hayne (n 1) 14.

5 *Cook v Cook* [1986] HCA 73, (1986) 162 CLR 376, 390 (Mason, Wilson, Deane and Dawson JJ).

6 Birke Häcker, 'Divergence and Convergence in the Common Law – Lessons from the Ius Commune' (2015) 131 LQR 424, 430, 445.

factors which inhibit the use of civil law materials. I will refer to them at the conclusion of my discussion.

There are not many areas of the Australian common law where resort is had to civil law materials. That there are limits to the areas in which the method of comparison is possible is evident from the content of civil law texts. That said, the areas in which it has been used in Australia are very limited. I do not intend to suggest that it could not be used more widely.

The principal areas in which judges of the High Court of Australia have made use of civil law materials in the last 25 years or so have been competition law and tort law. There are other areas of European law and of the civil law which other common law courts have adopted but which the Australian High Court has not, or in respect of which it has not yet had the opportunity to state the course it will take.

Despite the substantial debate in Europe and elsewhere concerning the requirement of good faith in contractual performance as an international standard, there has been much less debate about it in Australia and the issue has not reached the High Court of Australia for final determination. That is despite some intermediate appellate courts proceeding upon the basis that some form of that requirement applies in Australian law.

A principle of unjust or unjustified enrichment, well known to German law and adopted in part by courts of the UK,[7] has not found favour with the High Court of the Australia. It does not recognise it as a free-standing principle and prefers to see it as a concept which may explain why restitution is ordered in particular cases.[8]

The possibilities for consideration of European Union law and the civil law concerning intellectual property, particularly patent law, seem limited. Nevertheless, European laws have been referred to in copyright cases[9] and the perspective of some civil law courts has been noted in a patent case.[10]

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7 See eg Laurence Rabinowitz QC, 'Restitution and Unjust Enrichment' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 7: 2015–2016 Legal Year* (rev edn, Appellate Press 2018) 493, 493. For an analysis of recent cases before the UK Supreme Court in the recent 2017–2018 legal year that raised issues in the law of restitution and unjust enrichment, see Charles Mitchell, 'End of the Road for Overpaid Tax Litigation?' and also Laurence Rabinowitz QC and Niranjan Venkatesan, 'Restitution and Unjust Enrichment' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019).

8 *Bofinger v Kingsway Group Ltd* [2009] HCA 44, (2009) 239 CLR 269, [85]-[86] (Gummow, Hayne, Heydon, Kiefel and Bell JJ); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14, (2014) 253 CLR 560, [73] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

9 *IceTV Pty Ltd v Nine Network Australia Pty Ltd* [2009] HCA 14, (2009) 239 CLR 458, [135]-[139].

10 *Northern Territory v Collins* [2008] HCA 49, (2008) 235 CLR 619, [143].

It is well known that constitutional courts look to each other's statements of constitutional principle and to methods and standards of review respecting legislation. Some Australian constitutional cases concerning whether legislation contravenes the constitutionally guaranteed freedom of trade across borders utilised a test of reasonable necessity,[11] that aspect of proportionality analysis is often applied by the European Court of Justice. More recently, a majority of the High Court of Australia adapted and adopted the three tests of proportionality in cases involving legislation which restricts the freedom of communication about matters of politics and government, which is regarded as implied in the Australian Constitution.[12] They did so to test for the boundaries of legislative power but did not adopt it as a freestanding principle protective of rights. Previous judgments of the Court had traced the historical origins of proportionality analysis and its traditional method of operation through civil law materials.[13] In recent years, issues have arisen before the UK Supreme Court as to whether the principles of judicial review of the rationality of administrative decision-making in English public law are significantly different from those applied in a proportionality review of such a decision.[14]

I return now to the areas of the law in which the High Court and its judges do resort to civil law materials.

The High Court could hardly ignore decisions of European courts regarding European competition law, since the economic principles upon which the Treaty of Rome was based were used in drafting Australian competition legislation.[15] Consequently, decisions of the European Court of Justice have been utilised by the High Court of Australia in cases involving abuse

[11] *Cole v Whitfield* [1988] HCA 18, (1988) 165 CLR 360; *Betfair Pty Ltd v Western Australia* [2008] HCA 11, (2008) 234 CLR 418.

[12] *McCloy v New South Wales* [2015] HCA 34, (2015) 257 CLR 178; see also *Brown v Tasmania* [2017] HCA 43, (2017) 349 ALR 398.

[13] See eg *Rowe v Electoral Commissioner* [2010] HCA 46, (2010) 243 CLR 1, 139-142, [456]-[466] (Kiefel J).

[14] See eg See eg *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, [20], [74] (Lord Sumption and Lord Reed); *Kennedy v Charity Commission* [2014] UKSC 20, [2015] AC 455, [51]-[55] (Lord Mance (with whom Lord Neuberger, Lord Clark and Lord Sumption agreed)); *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591, [60] (Lord Carnwath (with whom Lord Neuberger, Lady Hale and Lord Wilson agreed)), [107]-[110] (Lord Sumption (with whom Lord Neuberger, Lady Hale and Lord Wilson agreed)), [115]-[117] (Lord Reed); *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 [131]-[134] (Lord Neuberger (with whom Lord Hughes agreed)), [271]-[278] (Lord Kerr). See also Lord Reed, 'Comparative Law in the UK Supreme Court' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019).

[15] Explanatory Memorandum to the Trade Practices Revision Bill 1986, Australia, House of Representatives, 13.

of market power[16] and are used by lower courts which more regularly administer competition law.

The principal use made of civil law materials by some judges of the High Court of Australia is in the area of tort law or delict. This is understandable. As Professor Wagner has said, that branch of the law is 'particularly amenable to comparativist endeavour as the patterns of cases are almost identical across different societies'.[17] Further, it is in the area of tort law that novel questions seem more often to arise.[18] Moreover, the degree of difficulty which attends these cases and the divergence of opinion which sometimes emerges as between common law courts may suggest to a judge that she or he should extend the areas of her or his usual researches.

The UK Supreme Court has been confronted in recent years with the development of the principles of negligence to the conduct of police officers in the performance of their duties. In *Michael v Chief Constable of South Wales Police,*[19] the question arose as to the liability of police in delaying to render assistance in response to an emergency from Ms Michael, who had dialled the emergency number '999' to report that her ex-boyfriend had turned up at her house, found her with another man and threatened to kill her. Following a subsequent call to the police, Ms Michael was found dead in her home having been brutally attacked and stabbed by her ex-boyfriend, who was sentenced to life imprisonment. In *Robinson v Chief Constable of West Yorkshire Police,*[20] a question arose to whether two police officers owed Mrs Robinson a duty of care and, if so, whether they were in breach of that duty. Mrs Robinson was a 76-year-old lady who had been knocked over and injured by the police officers, two sturdily built men, in the course of an attempted arrest of a suspected drug dealer on a street in a town centre.

In both cases, questions arose as to the nature of the duty of care in tort law and its application to public authorities, such as police officers, in the performance of their duties. In developing the principles of negligence in both cases, the UK Supreme Court referred to Australian High Court case of *Sutherland Shire Council v Heyman* ('*Heyman*') in which Brennan J observed a preference that 'the law should develop novel categories of negligence incrementally and by analogy with established categories, rather

[16] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* [1989] HCA 6, (1989) 167 CLR 177, 189.

[17] Gerhard Wagner, 'Comparative Tort Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 1003, 1004.

[18] See eg *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736; see also Donal Nolan, 'The Duty of Care After *Robinson v Chief Constable of West Yorkshire Police*' in Daniel Clarry (ed), *The UK Supreme Court Yearbook, Volume 9: 2017–2018 Legal Year* (Appellate Press 2019).

[19] *Michael v Chief Constable of South Wales* [2015] UKSC 2, [2015] AC 1732.

[20] *Robinson* (n 18).

than by a massive extension of a prima facie duty of care restrained only by indefinable [considerations that circumscribe or negative the operation or scope of the duty].'[21] The Australian approach in *Heyman* not only influenced the test formulated earlier by the House of Lords in *Caparo Industries plc v Dickman*,[22] which the UK Supreme Court revisited in *Michael* and *Robinson*, but resurfaced in considering the novel questions before the Court in both cases.[23]

In turn, the High Court of Australia develops foundational principles of the common law by reference to English law, especially recent decisions of the UK Supreme Court. Whether or not those decisions are followed, the decisions themselves are carefully considered and regarded as highly persuasive albeit not, of course, binding as a matter of precedent.[24] My predecessor on the High Court of Australia, Robert French, has given various examples of the correspondence between the High Court of Australia and the UK Supreme Court, as well as convergence and divergence in judicial development of basic principles of the common law in both systems, in an earlier volume of this yearbook.[25] However, the use by some judges of the Australian High Court of the civil law in developing the law of negligence is best explained by a few examples of cases dealt with in recent times. These examples may serve to show how civil law materials are used by the judges and inform the larger question of why they do so.

The first case was concerned with whether police officers were under an obligation to 'rescue' a person who had been observed in circumstances which might suggest he was contemplating taking his own life.[26] The person appeared rational and assured the police officers that he had changed his mind. He took his life later the same day and his wife sued the State for breach of duty. The Court did not allow the claim. Although the ultimate decision turned largely upon whether the statute under which the police were acting created a duty, the differences of approach of some civil law systems and the common law to this question were observed and compared.[27] Historically, the common law had never imposed an obligation

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[21] *Sutherland Shire Council v Heyman* (1985) 60 ALR 1, 43-44.

[22] *Caparo Industries plc v Dickman* [1990] 2 AC 605 (HL), 618 (Lord Bridge).

[23] *Michael* (n 19) [106] (Lord Toulson (with whom Lord Neuberger, Lord Mance, Lord Reed and Lord Hodge agreed)), [146] (Lord Kerr); *Robinson* (n 18) [25] (Lord Reed (with whom Lady Hale and Lord Hodge agreed)); see also Nolan (n 18) X. See also *Darnley v Croydon Health Services* [2018] UKSC 50, [2018] 3 WLR 1153, [15] (Lord Lloyd-Jones (with whom Lady Hale, Lord Reed, Lord Kerr and Lord Hodge agreed)).

[24] See eg *Paciocco v Australian and New Zealand Banking Group Ltd* [2016] HCA 28, (2016) 90 ALJR 835, [10] (French CJ).

[25] French CJ (n 3) 21-26.

[26] *Stuart v Kirkland-Veenstra* [2009] HCA 15, (2009) 237 CLR 215.

[27] ibid [88] (Gummow, Hayne and Heydon JJ), [127]-[128] (Crennan and Kiefel JJ).

to rescue others. The reason for this difference was sought and found in the common law's reluctance to interfere with the autonomy of the individual.

In the second case,[28] the Court rejected a claim for damages for the loss of a chance of a better medical outcome. The plaintiff had presented at a hospital with symptoms which masked an underlying brain tumour. The surgeon was found negligent in not ordering further investigations when the plaintiff developed further symptoms. Had he done so, treatment could have been administered at an earlier time. However, the plaintiff could not establish that earlier treatment would have avoided or mitigated the severe brain damage that she eventually suffered. She could show only that there was a *chance* that it might have done so.

This was the first time that such a claim had been raised in the Australian High Court. Opinion as to whether the loss of a chance of this kind is compensable was divided in both common law and civil law jurisdictions. The case raised a number of discrete issues. The first was whether loss of a chance of this kind could itself be regarded as damage. The claimant relied upon French law, but it was considered that French law had a wider and different view of what constituted damage than the Australian common law.[29] The law of Germany and certain other countries, which seemed to require damage to have a value, most closely accorded with the Australian position.[30] The plaintiff also argued that the loss of a chance might be viewed as independent of the physical injury and therefore a separate head of damage. The judgment here drew upon both Canadian and German commentators who suggested that to view it in this way would require compensation even if no actual injury was suffered.[31]

The other issue was the standard of proof required by Australian common law. For the plaintiff's case to succeed it needed to be lowered to a possibility as distinct from a probability that she would not have suffered brain damage, or not as severely as she did. The common law usually requires proof on the balance of probabilities. Consideration was given to how the Australian standard of proof was already low compared with what is applied by some civil law courts where it is used as a method of controlling or limiting claims.[32]

A comparative approach to pure economic loss in tort law has been undertaken on two occasions by Australian High Court judges.[33] It was

[28] *Tabet v Gett* [2010] HCA 12, (2010) 240 CLR 537.
[29] ibid [125]-[126] (Kiefel J).
[30] ibid.
[31] ibid [127]-[131].
[32] ibid [143]-[151].
[33] *Perre v Apand Pty Ltd* [1999] HCA 36, (1999) 198 CLR 180, [187]-[188] (Gummow J); *Barclay v Penberthy* [2012] HCA 40, (2012) 246 CLR 258, [165]-[171].

observed in the first case that in this area German law displays an 'ideological affinity' with the common law.[34] In Germany, it is said that the rule against recovery of economic loss is a guarantee of freedom in the market and that a similar imperative, that of encouraging competitive conduct, underlies the policy of the law. In the second case, the other avenues for relief which German law allows were noted.[35] It was observed that the duty owed to a third party under German contract law might bear some similarity to how duty of care is approached at common law.[36]

Two further decisions may also be mentioned. In one, a surgeon negligently failed to warn of the continued risk of conception after carrying out a sterilisation procedure and was held liable to the parents for the cost of raising and maintaining a child born after the procedure.[37] In the course of the judgment, reference was made to the different approaches to recovery in such cases taken by the courts in England, France and Germany. Regard was had to the different arguments which had been raised in other jurisdictions[38] and to themes which might be seen to run through many of the judgments,[39] including moral judgments. But in the end result, the majority decided that the benefits gained from the birth of a child by the parents are not legally relevant to the question of damage. In this context, it is of note that in a recent judgment on the failure of a doctor to warn a patient of medical risks associated with vaginal child birth for diabetic women, the UK Supreme Court featured a section on 'Comparative law' in which the Court records having been referred to 'case law from a number of other major common law jurisdictions' and, having quoted from the leading Australian case of *Rogers v Whitaker,* held that a passage of the majority judgment in that case, was 'undoubtedly right' – that is, "the doctor's duty of care takes its precise content from the needs, concerns and circumstances of the individual patient, to the extent that they are or ought to be known to the doctor."[40]

The other Australian case I wish to mention in this context involved a claim by a child born with congenital defects because the child's mother

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[34] *Perre* (n 33) [188] (Gummow J), citing Basil Markesinis, *A Comparative Introduction to the German Law of Torts* (3rd edn, Clarendon Press 1994) 43.

[35] *Barclay* (n 33) [163]-[171] (Kiefel J).

[36] ibid [169] (Kiefel J).

[37] *Cattanach v Melchior* [2003] HCA 38, (2003) 215 CLR 1.

[38] ibid 21-22 (Gleeson CJ), 32-33, 36, 39 (McHugh and Gummow JJ), 46-51 (Kirby J), 70 (Hayne J), 101-103 (Callinan J), 113-114 (Heydon J).

[39] ibid 52, 101.

[40] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] 1 AC 1430, [70]-[73] (Lord Kerr and Lord Reed (with whom Lord Neuberger, Lord Clarke, Lord Wilson and Lord Hodge agreed)), citing *Rogers v Whitaker* [1992] HCA 58, (1992) 172 CLR 479, 490 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

had been exposed to the rubella virus during her pregnancy.[41] Her treating doctor had not identified the symptoms and as a result, it was argued, the mother did not have the pregnancy terminated, which she would have done. The Court turned to the decisions of three common law courts where the difficulties in attributing loss to a disabled child on the basis that the child had been born were analysed and the claim disallowed.[42] It noted also that the German Supreme Court had rejected such a claim.[43] It was observed that the Supreme Court of Israel had upheld such a claim, but in doing so had to employ the legal fiction of a 'life as a healthy child'.[44] Although French law allowed a claim of this kind, it was thought that this was on the basis of a claim being in contract rather than in tort.[45]

Having surveyed these decisions, consideration may be given to what might be seen as the purpose for these comparative law references.

Generally speaking, judges of the High Court of Australia would not apply the civil law directly in tort law. It would not be expected that it would furnish a solution, in whole or in part, which would cohere with Australian tort law and precedent. It will be observed from the cases mentioned that it is either the conclusion reached by civil law courts which is of interest to Australian judges or it is a discrete aspect or aspects of the civil law which is the focus of comparison.

In the sterilisation case and the wrongful life case,[46] the Australian judges were interested to see whether other courts had refused or allowed claims of those kinds. It might be expected that the judges would survey other courts more widely not the least because there were moral overtones to the cases. A survey of the preponderance of opinion of judges elsewhere might also serve to confirm the provisional view of a judge. It was observed in the sterilisation case that the fact that so many judges in different jurisdictions had rejected a claim of that kind, albeit they had expressed their reasons in different terms, was not a matter lightly to be disregarded.[47] In a case of a novel kind such a survey might promote confidence in the outcome, not only in the judge but also the parties and readers of the judgment.

Where a judge is inclined to depart from what other courts have concluded,

[41] *Harriton v Stephens* [2006] HCA 15, (2006) 226 CLR 52.
[42] ibid 119-121.
[43] ibid 122.
[44] ibid 121.
[45] ibid 122.
[46] *Cattanach* (n 37); *Harriton* (n 41).
[47] *Cattanach* (n 37) [82]-[83] (McHugh and Gummow JJ), citing *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530, [2002] QB 266, 290 (Hale LJ), and [297] (Callinan J).

further analysis will usually be necessary. In the wrongful life case,[48] the reasons why some courts allowed the claim were examined. The reasons were either unacceptable or inconsistent with the approach of the common law. Likewise, in the loss of chance case,[49] the claimant's reliance on French law was considered to be misguided because that law took a different view of damage which could not be adapted to the common law. The fact that other legal systems required that damage be capable of being valued offered some support for the approach taken by Australian law.

The loss of chance case provides a good example of discrete aspects of the civil law being compared with each other and with the common law: whether loss of a chance can qualify as damage; whether it can be viewed as separate damage; and how standards of proof appear to be used in different jurisdictions.[50] The principal purpose of the comparisons made was to identify differences which explained why the allowance of claims by some civil courts was not relevant to the Australian common law.

It is the approach taken in the rescue case which I think serves best to identify a more fundamental reason why Australian judges might look not only to the conclusions reached by other courts but also attempt to compare key aspects of the reasoning it must undertake towards its solution.[51] The reason is that the process of comparison, and the analysis of differences necessary to it, brings one's own law more sharply into focus.

In the rescue case,[52] the rule of our common law, that there was no duty of care, was challenged. That necessitated a consideration of why some civil law systems considered that there was such a duty, albeit to differing degrees. The reason was found in social values which informed a policy of the law or a legal rule: the common law was more individualistic, civil law more socially impregnated.[53] The process of comparison resulted in the identification of the basis for the common law rule. Likewise, in the pure economic loss cases,[54] a policy of competition was seen as informing both German law and the common law.

It has been said that there is no such thing as comparative law, only a method or methods useful in particular to look more closely at one's own law.[55] From a judge's perspective, the process of comparison, the recognition of

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[48] *Harriton* (n 41).

[49] *Tabet* (n 28).

[50] ibid [125]-[131], [143]-[151] (Kiefel J).

[51] *Stuart* (n 26).

[52] ibid.

[53] *Stuart* (n 26) [88], referring to Basil Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (4th edn, Hart Publishing 2002) 90.

[54] *Perre* (n 33); *Barclay* (n 33).

[55] Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82 LQR 40, 41.

differences and why they exist serves to illuminate our common law and to assist in identifying the basal reasons for its rules. It may be inferred from many of the references to civil law materials in the cases discussed that the judges were seeking to do just this. So understood, it forms part of the judicial method, the purpose of which is to deepen one's understanding of our laws in order to answer novel and difficult questions.

If reference to civil law materials is useful to decision-making, at least in some novel cases, what inhibits Australian judges from resorting to them more often; or in the case of some judges, at all?

There are a number of factors which affect the extent to which European and civil law materials are used in Australian courts. Principal amongst them is that, generally speaking, Australian lawyers do not have a background in comparative law and its methods. This is largely because of their education. Whilst the first comparative law course was offered in Australia in 1948,[56] a comprehensive course such as that initially taught is rarely now offered. The subjects that are offered tend to be of a much narrower focus and are not compulsory. The reasons why Australian law schools do not encourage the study of comparative law may be many. They may include the fact that those teaching are largely the result of the same system and that it is regarded as a subject of academic interest rather than of practical benefit. Thus, to the extent that Australian lawyers have regard to foreign sources of law and legal materials, the focus is generally on other jurisdictions within the common law tradition – principally, although not exclusively, Canada, England and Wales, and New Zealand. To that extent, Australian lawyers are adept at using comparative materials... within their own legal tradition.

A judge's legal researcher will, therefore, not be trained in comparative legal methodologies and will not be familiar with available civil law texts. Except in choice of law cases, foreign law will almost never be referred to by the parties' lawyers, let alone proved as foreign law by experts. Unless a judge is convinced of the value of the research, she or he is not likely to put the parties in the litigation to the expense of undertaking it. The result for judges is that in novel cases, where civil law materials might be useful, the judge will have to undertake this research herself or himself. Research of this kind is time-consuming and judges do not have a lot of spare time.

Another factor is that some judges feel that they must have a complete grasp of the law of another country before they can comment on any aspect of it. There is a fear, understandable to an extent, of error. These concerns may be unjustified and based upon a misconception of the respective roles of

[56] Wolfgang Friedmann, 'A Comparative Law course at Melbourne University' (1947-51) 1 Journal of the Society of Public Law Teachers 274.

judges and of comparative lawyers. Common law appellate judges regularly familiarise themselves with areas of law with which they are unfamiliar. In that process they learn to discern pre-eminent scholars. They appreciate the need to cross-reference between commentators to ensure that an opinion is generally accepted. The use of civil law materials for the purposes I have outlined above does not require a judge to write an opinion on how a civil law court is likely to apply the civil law in a hypothetical, undetermined case. Rather, access will be had to discrete aspects of the civil law as explained by comparative law scholars by reference to such decisions or how the civil law may be understood to approach such questions.

Comparative lawyers could assist in encouraging its use. With this in mind, some years ago I arranged for a professor of comparative law to speak to the Australian High Court Justices over lunch. Predictably, one of my colleagues who is not disposed to the use of foreign law materials, asked the Professor: was he not concerned about not fully understanding the system he was looking at when making any observation about its operation? The professor answered simply, 'yes'. Perhaps he might more helpfully have explained that: 'that is because I need to have that breadth of knowledge to write what I do: from a judge's perspective you can avail yourself of good comparative law texts. The research has been done for you by people like me.'

Which brings me to comparative law texts. It must be acknowledged that, understandably, they are not always written with judges in mind. Common law judges are likely to prefer to gain an understanding from them about how European and civil law courts have dealt or may be expected to deal with the issue in question, in a concrete way, rather than reading opinions, which might be contestable, about how a Code should work in theory.

In conclusion, the answer to the question whether a comparative law method is significant to Australian judges is: to some judges, occasionally, and mostly in novel cases. When applied, it can be useful to confirm an opinion as one held by many courts. But its real benefit lies in illuminating our own law.

My interest in comparative law may explain why I have on occasions in the past been guilty of making aspirational statements about its future use in Australia. I continue to have hope. Much will depend upon legal education and, of course, upon professors of comparative law offering more encouragement about its use.