Fifth John Lehane Memorial Lecture

The Influence of European Law on the Common Law in English Courts

Lord Hoffmann
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1. John Lehane's insights and clarity of thinking are a lasting contribution to the administration of equity, both in this country and in England. Justice Gummow has drawn my attention to a very recent decision of the High Court which relies extensively upon his writings. Although I have of course read his work, both on and off the Bench, I did not have the privilege of knowing him personally. But I am assured by all who did that he was a most charming and delightful man, who was in no way responsible for the more insulting remarks about the English judiciary which appeared from time to time in *Meagher, Gummow and Lehane.*

2. The topic for this lecture was proposed to me by Chief Justice Spigelman, who said that the influence of European law upon decisions of the English courts appeared to Australian judges to diminish their value as guides to the true principles of common law. He thought it would be of interest to have the views of an English judge on this question. It is not for me to comment on the Australian view of the true common law and it may be that they will reach a similar position to that of John Henry Newman, who decided at an early stage in his career that it was the Church of England and not the Church of Rome which was the true holy catholic and apostolic church. That of course was before his conversion to Catholicism. There is however no doubt that

Europe has had a powerful influence on the development of English law in the past half century and it is this influence which I propose to examine.

3. In 1950 the United Kingdom acceded to the European Convention on Human Rights in the confident expectation that this would not have the least effect upon its law. True, there was to be a court in Strasbourg to decide whether a Member State was in breach of its obligations but there was to be no right of individual petition. And the British had played an important part of the drafting of the Convention, which was considered faithfully to reflect the rights enjoyed by the people of the United Kingdom at common law. So there could be no question of the United Kingdom being in breach. The purpose of the Convention was to declare the existence of these rights in the less fortunate Member States which had been under Nazi occupation and to put moral pressure on their governments not to revert, perhaps under Soviet influence, to totalitarianism. There was some concern in the Colonial Office about extending these rights to the African and other colonies, but the Convention provided that it should not apply to His Majesty's overseas territories unless the United Kingdom government declared it to do so.

4. There were no such illusions about the consequences of accession in 1973 to the Rome Treaty establishing European Economic Community. By then, the Court of Justice in Luxembourg had been functioning for 16 years and had built up a body of jurisprudence. The European Communities Act 1972 provided in unambiguous terms that if any past or future Act of Parliament was in conflict with the Treaty, or any legislation or decision made under the Treaty, as interpreted by the Court of Justice, European law was to prevail. Of course the 1972 Act is an Act like any other and if it

were to be repealed, the doctrine of the sovereignty of Parliament would prevent a British court from saying that the act of repeal was invalid. So there is some barren argument over whether the sovereignty of Parliament has really been compromised. In practice, European legislation always takes precedence. Immediately after accession, some French champagne producers, who were engaged in what until then had been an ordinary passing off action against a company selling Somerset cider as "champagne cider", amended their pleadings to rely upon European regulations protecting designations of the geographical origins of wine. Lord Denning said:[1]

"When we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back, Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute."

5. Thus the courts of the United Kingdom are directed by the 1972 Act to treat European law as an overlay, displacing both common law and statute. The interpretation of European law is ultimately a matter for the Court of Justice. The Treaty provides that if there is a question of interpretation of a provision of the Treaty or subordinate legislation which needs to be resolved, the national court may refer that question to the Court of Justice for a preliminary ruling. In the case of a court of final appeal such as the House of Lords or UK Supreme Court, there is a duty to refer. The result of this provision is that UK courts seldom decide questions of European law. They are bundled up and sent off to Luxembourg, with the proceedings adjourned until the answer is returned by the oracle a couple of years later.

6. There are, besides the delay, some unfortunate consequences of this system. One is that the Luxembourg court cannot decide the case as if it were hearing an

[1] *HP Bulmer Ltd v J Bollinger SA* [1974] Ch 401, 418.

appeal. It can only offer an interpretation, that is, a statement of the rule in different words, which the national court must then apply. And sometimes these interpretations are oracular and obscure. It is not unknown for both sides, on reading the Luxembourg judgment, to claim that they have won and for the national court to make a further reference inviting an interpretation of the previous interpretation. In a notorious case on the Trade Mark Directive, the dispute was not settled even by the second interpretation.

7. A second disadvantage of the present system is that the Court of Justice has no control over its work load. It is obliged to answer any reference which national courts in the European Union may make. The result is delay and sometimes poor quality work.

8. Thirdly, the obligation of final courts to make a reference means that they make little contribution to the development of European law. Until quite recently the practice in the House of Lords, when making a reference, was to send the question without expressing any opinion of its own. As a result, the Court of Justice tends to be inward-looking, seldom making any reference to the jurisprudence of national courts and producing judgments in the French style, that is to say, magisterial pronouncements unaccompanied by much in the way of reasoning. I think that this is a pity because the intellectual quality of the judges in the highest national courts tends to be better than those who are sent to Luxembourg and national decisions on questions of European law could make a serious contribution to the development of the subject. Having said that, I am bound to admit that when the House of Lords two years ago made a reference about the use of anti-suit injunctions in support of an

arbitration clause and, contrary to custom, I included my own views about how it should be decided, they were roundly rejected by the Advocate General and then by the Court.[2]

9. I think it would be better if the Court of Justice, instead of dealing with preliminary references, acted as a final court of appeal for Europe on questions of European law, as the United States Supreme Court is a final court of appeal on questions of federal law. That would enable the Court of Justice to control its own workload, granting leave to appeal only in those cases raising important points of European law, for example, where national courts had adopted inconsistent interpretations. Otherwise, the decisions could be left to the national courts, which would share in the development of European law.

10. Although the interpretation of European law is a matter for the Court of Justice, it is the national court to decide how European law and its own domestic system are to be reconciled with each other. The Court of Justice has said that national courts are obliged, so far as possible, to interpret their own law in a way which gives effect to European law, for example, to achieve the purpose required by a Directive. So far as a provision of domestic law is in conflict with European law and cannot be smoothed away by interpretation, it has to be disapplied, that is to say, treated as if repealed. These requirements sometimes produce fairly imaginative works of scissors and paste and rewritings of rules of statute law which are not easy to describe as interpretations, but there is no constitutional difficulty about them. The priority of European law is clear enough and the task of the courts is to give it effect without displacing provisions of national law more than is necessary to do so. It does not produce the

[2] *West Tankers Inc v Allianz SpA* [2009] 1 AC 1138.

same questions of parliamentary sovereignty and democracy which are raised by the rather similar interpretation requirements of the Human Rights Act, where the choice is between amending the provision under the guise of interpretation or making a declaration that it is incompatible with Convention rights, leaving Parliament to decide whether and if so how to amend it. The latter would appear to me to be the more democratic solution, but the former, sometimes involving judicial legislation by a remarkable extension of the concept of interpretation, has been favoured by the courts.

11. Apart from the problems of giving effect to the European overlay, I think it is hard to say that our membership of the European Union has affected the way in which English courts approach the interpretation of our common law or, for that matter, our statutes. Perhaps we have learned the vocabulary of European concepts like proportionality and legal certainty, but when they are applied by the Court of Justice, we are served up with the results and not required to apply them ourselves. Legal certainty, for example, is interpreted in Luxembourg as hostile to the concept of judicial discretion and to prohibit the use of the doctrine of forum non conveniens and anti-suit injunctions. We have to accept that, but do not take this view of judicial discretion in the rest of our domestic law. We continue to interpret and apply it as before.

12. Disputes over the extension of European concepts to areas presently occupied by the common law therefore take place at the political level rather than being a matter of judicial choice. It is, for example, at the level of negotiation with the institutions of the European Union that the United Kingdom is resisting the efforts of

the Commission to produce a European code of the law of contract. This project has for some time been proceeding in sheep's clothing as an academic exercise. In December 2008 an academic group sponsored and paid by the Commission produced what was called a draft Common Frame of Reference, containing statements of principle, definitions and model rules which could form the basis of a contract code. The Commission at present insists that it has no intention of imposing such a code on the Member States but, given the amount of effort and resources being put into the project, it is hard to believe that is not the ultimate objective. The opposition of the Government of the United Kingdom is put down to the self-interest of London lawyers who benefit from the fact that huge numbers of international contracts, having no connection with the United Kingdom, are expressed to be governed by English law. In my view this opposition is entirely rational in the interests not only of the international legal services provided by London but in the wider interests of the international commercial community. Whatever may be superior merits of a contract code based on civilian principles, the very act of codification will throw the law into a state of uncertainty damaging to commerce. The reason why foreign commercial bodies, not necessarily English speaking, choose English law rather than, say, French law, is because it is easier to find the answer to any given question in English commercial law than any other. The many volumes of Lloyd's List Reports are a resource built up over more than a century which it would be foolish to throw away.

13. The central role of the Luxembourg court means that United Kingdom courts are not concerned with trying to ensure that our interpretation of the Treaty does not get out of line with its interpretation in other Member States. That is the business of

the Court of Justice. It is different when one comes to European instruments which are not part of community law, such as the European Patent Convention. It is a remarkable feature of this Convention that, despite nearly 40 years of effort, the Member States have not been able to agree on a central court to resolve conflicts of interpretation and that occasionally the same patent is held to be valid in one member state and invalid in another. That is obviously a highly undesirable state of affairs and courts of the member states with the most patent business, Germany, the Netherlands and the United Kingdom, keep a close watch on each other's decisions and try to avoid differences of interpretation. It is therefore quite common for cases decided in those other jurisdictions, as well as the decisions of the Boards of Appeal of the European Patent Office in Munich to be cited in English courts.

14. That brings me to the question of human rights. The common law dualist doctrine of international treaties meant that the European Convention did not form part of the domestic law of the United Kingdom and that, until the Human Rights Act came into force in 2000, there were no corresponding statutory rights in our domestic law. On the other hand, a right of individual petition to Strasbourg was granted by the United Kingdom government in 1966 and an initial trickle built up into a flood of cases complaining of breaches of the Convention by the United Kingdom. From about 1970 the British courts, which had not been troubled by the Convention over the previous 20 years, began to cast about for ways of interpreting both common law and statutes to avoid results which would bring them to Strasbourg.

15. The rights enumerated in the Convention are rights of individuals against the State and their infringement will take the form of the acts or omissions of public

authorities in relation to the individuals concerned. So far as these acts or omissions were expressly authorised or required by primary legislation, the doctrine of the sovereignty of Parliament meant that there was little the courts could do. They could, and did, try to interpret statutes in a way which would avoid infringements of human rights. They were assisted by two general and perhaps overlapping principles of statutory interpretation; first, that the courts will if possible interpret legislation in a way which avoids putting the United Kingdom in breach of its international obligations, and secondly that they will not construe general words in a way which produces an unreasonable result, such as infringing generally accepted human rights. This latter canon of construction is nowadays called the principle of legality, a term borrowed from European law, although it can be found in a case decided in the time of the first Queen Elizabeth.[3]

16. For the most part, however, the problem could not be solved by statutory construction. More often, the alleged infringement would involve the exercise of a discretion which was within the terms of a statutory or common law power unless it could be held unlawful in accordance with principles of administrative law. However, when the question of compliance with the Convention began to assume importance in the 1980s, administrative law was inadequate to the task. It was inadequate because, if one takes Lord Diplock's list of grounds for judicial review – illegality, procedural impropriety and irrationality – illegality was ex hypothesi unavailable and infringement of Convention rights did not necessarily involve any procedural impropriety or irrational conduct. This last point emerged very clearly from a

[3] *Stradling v Morgan* (1560) 1 Plow 199.

decision of the House of Lords dealing with a challenge to the ruling that interviews with members of the IRA could not be broadcast on television, although it was permissible to have actors saying their lines.[4] I have little doubt that this ludicrous directive would have infringed the broadcasters' freedom of speech as being inappropriate and ineffective to achieve any justifiable ground for restriction, but the House of Lords said, perhaps correctly, that it was not irrational. More fundamentally, administrative law seemed inadequate to the task because it was concerned with the decision-making process rather than whether the decision infringed an individual's substantive rights. Even *Wednesbury* unreasonableness is justified on the ground that the irrationality of the decision shows that the decision-maker could not have applied his mind to relevant considerations as he ought to have done. Human rights, on the other hand, have either been infringed or they have not, irrespective of whether the decision-making process was good or bad.

17. Nevertheless, during the 1990s and in the absence of any other mechanism, the principles of judicial review were pressed into service for the protection of human rights. Executive decisions which touched upon Convention rights were made subject to what was called "anxious scrutiny" which was not applied to decisions involving only the general public good. This approach accorded with Ronald Dworkin's well known distinction between questions of principle which are decided by judges and questions of policy which are decided by the democratic process – by the legislature or by persons responsible to the legislature. An executive decision which affected human rights had to be justified in a way which decisions involving general public

[4] *Regina v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696.

policy, such as planning or the distribution of public resources, did not. As the object of the exercise was to use administrative law for the protection of human rights and to avoid criticism from Strasbourg, it is not surprising that matters which would be taken into account in the Strasbourg jurisprudence, such as the proportionality of the justification in relation to the invasion of individual rights, began to play a role in the new and stricter scrutiny of the decision-making process. But complete convergence was not possible. Just before the Human Rights Act came into force, an administrative law challenge to the exclusion of homosexuals in the armed forces failed in the Court of Appeal. The Court, which included Lord Bingham, found itself unable to go so far as to say that the policy was irrational.[5] But it succeeded in Strasbourg on the ground that it was a disproportionate interference with private life, contrary to article 8 of the Convention.[6] The Strasbourg Court pointedly remarked that administrative law principles were inadequate to ensure that interferences with Convention rights would be justified and proportionate.

18. All this changed when the Human Rights Act came into force. Now, public authorities had a statutory duty not to act in a way which infringed substantive Convention rights.[7] It was no longer necessary to rely upon administrative law remedies and their use was positively discouraged. For example, when school authorities would not allow a girl to come to school in a black robe and headdress instead of school uniform, the Court of Appeal set aside the decision on the ground that the authorities had not given proper consideration to whether this might infringe

[5] *R v Ministry of Defence, ex parte Smith* [1996] QB 517.
[6] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493.
[7] Section 6(1).

the girl's right to manifest her religious beliefs.[8] The House of Lords said that the court should not concern itself with the decision-making process. It should simply decide whether her rights had been infringed. In the opinion of the House they had not. Likewise, the Court of Appeal in Northern Ireland judicially reviewed a decision of the Belfast City Council to refuse to grant a sex shop licence, saying that it had not taken into consideration the Convention right to freedom of the press, including the sale of pornography.[9] Again the House of Lords said it did not matter what they had taken into consideration. They either had a human right to sell pornography or they did not. The House thought they did not.

19. I am not sure where this leaves English administrative law, now that the need to use it for the protection of human rights appears to have gone. One hears less nowadays of anxious scrutiny, although there may still be room for it in those cases which affect the individual without involving Convention rights, such immigrants liable to deportation. There seems to me no doubt that in the last years of the last century, English administrative law was powerfully affected by the need to try, so far as the courts were able, to shadow the Strasbourg human rights jurisprudence. It was never an altogether suitable instrument for doing so and Australian judges may prefer to regard the expedients we adopted as an aberration attributable to the special circumstances in which we found ourselves, trying indirectly to give effect to a human rights treaty which was not part of our domestic law. On the other hand, even if there had been no European Convention and no Human Rights Act, leaving the protection of human rights to nothing but the common law, I think that for the reasons given by

[8] *Regina (SB) v Governors of Denbigh High School* [2007] 1 AC 100.
[9] *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420.

Ronald Dworkin, administrative law is likely to have developed standards of scrutiny for decisions affecting individual rights which were more exacting than those for decisions of a general utilitarian character.

20. Administrative law is not the only area of English law which was affected by Strasbourg decisions, although its role in other areas has been somewhat more controversial. In the notorious case of *Osman*, the Court appeared to invent a human right to bring an action in tort, declaring that a litigant whose claim had been struck out as disclosing no cause of action had been denied the right to a court to hear his claim, contrary to article 6. This ridiculous decision was reversed a few years later on rather unsatisfactory grounds which leave room for more trouble in the future. Meanwhile, however, it had caused consternation in England, no one quite knowing what it meant or how far it went, and during that period did some damage to the English law of torts in making the courts reluctant to say that there could not be a cause of action. For example, the House of Lords, contrary to previous authority, refused to strike out a claim against an education authority which alleged that it had been negligent in failing to diagnose dyslexia and provide appropriate teaching.[10] This has led to a flood of litigation which does not appear to have done good for anyone except the lawyers and expert witnesses involved. More recently, I think that this trend has been put into reverse, but that is a topic for another occasion.

21. The relationship between the House of Lords and the Court in Strasbourg has, I should say, not been an altogether easy one, partly on account of the poor quality of the way in which the reasoning in many judgments is expressed and partly on account of the court's inability to resist the temptation to micromanage the legal systems of its

[10] *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619.

member states. The rights and freedoms in the Convention are expressed at a high level of abstraction and there are of course when it comes to detail, there are many ways in which a legal system may give those concepts concrete form. There are, for example, widely differing forms of criminal procedure, none of which could be said to be inconsistent with the right to a fair trial. However, the Strasbourg court sometimes has rigid views about what is required for a fair trial and last year it decided that an accused who had been convicted on the basis of hearsay evidence, admitted under a recent and carefully limited statute, had not had a fair trial.[11] Last December the Supreme Court of the United Kingdom declined to follow this decision,[12] on the ground, if I may summarise Lord Phillips's carefully nuanced decision, that it was *Wednesbury* unreasonable and showed that the Court could not have understood English criminal procedure. The Strasbourg court has been invited to consider the matter again.

22. Perhaps the most interesting development stemming from the European Convention before the Human Rights Act was the development of a right to prevent unauthorised dissemination of personal information, based on the right to private life in article 8. In 2003 the House of Lords said that before the Human Rights Act there was no general right to privacy in English common law. Privacy was protected by the existence of a number of particular torts, like the law of trespass, which prevented people from invading your premises, whether to read your letters or take photographs, but it was not protected as such. So when relatives of a man charged with murder who appeared to be carrying on his trade as a drug dealer from the prison went to visit him,

[11] *Al-Khawaja and Tahery v United Kingdom* (2009) 49 EHRR 1.
[12] *R v Horncastle* [2009] UKSC 14.

they were required to undergo a strip search. They complained that this was an invasion of their privacy but the House said that there was no such cause of action.[13] Since then the Strasbourg court has said that their rights under article 8 had been infringed and so, if the events had occurred when the Human Rights Act was in force, they may have been able to complain of a breach of the statutory duty of a public authority not to infringe human rights.

23. A different and more specific question, however, was whether the unauthorised publication of personal information gave rise to a cause of action at common law. Until the end of the 20th century, it was accepted without question that it did not. But in Naomi Campbell's case in 2004 it was decided that it did.[14] What is interesting is the part which the European Convention played in this revolution.

24. The starting point in the journey was the equitable action for breach of confidence. This was originally based on the existence of a confidential relationship such as that which existed between Prince Albert and the printer to whom he entrusted the family etchings. But the duty of confidence bound anyone who obtained information with notice that it was confidential and in the English *Spycatcher* case[15] Lord Goff said that it would be illogical if a person who obtained obviously confidential information were not subject to any duty of confidence because he did not know the circumstances in which it had originally been imparted, such as when it found its way into his hands by accident. This reasoning meant that emphasis shifted from the circumstances in which the information had been communicated, which had on the whole confined its scope to commercial secrets, to whether it was by its nature

[13] *Wainwright v Home Office* [2004] 2 AC 406.
[14] *Campbell v MGN Ltd* [2004] 2 AC 457.
[15] *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109.

of a confidential nature. It was at this point that the European Convention exerted its influence. The right to privacy contained in article 8 indicated the importance attached to the ability to control one's personal information, as an aspect of individual dignity and autonomy. It would therefore be inconsistent for the law to deny protection for such information but to protect information which was, for example, obviously a commercial secret. And so on these grounds the old equitable action for breach of confidence mutated into a right to the protection of personal information.

25. Finally, I want to say something about the influence of European private law not through the courts of Luxembourg or Strasbourg but simply as a source of persuasive authority, as one might use cases from the United States or indeed Australia. English commercial law has been taking ideas from civilian systems since the time of Lord Mansfield, when the works of Pothier and Domat represented far more systematic and intelligible expositions of legal principle than anything which was available in England. But with greater maturity, the reliance of English courts on foreign authorities became increasingly rare. There was a notable attempt by Lord Goff in *White v Jones*[16] to interest his colleagues in the German doctrine of *Schadensverlagerung*, or transferred loss, by which a disappointed beneficiary can take the benefit of the professional duties owed to the testator by his lawyer in drawing up his will, but no one took the fly. On the whole, the attitude of the English courts to comparative law remains as it was described by Lord Wilberforce in conversation with Lord Bingham[17]:

> "Our approach to overseas authorities is very straightforward. If the foreign judge says what we are ourselves inclined to think, then we pay tribute to his

[16] [1995] 2 AC 207, 263-264.

[17] See Lord Bingham in *Centenary Essays for the High Court of Australia*, p.85.

> erudition and adopt what he says, observing that we could not have hoped to express the point as well as he has done. If, on the other hand, the judge's thinking does not coincide with our own, we point out that it was a decision given against a different statutory background in a place where different social conditions obtain, and that we are in the circumstances unlikely to obtain any substantial assistance from it."

26. In such cases, a reference to foreign law in a judgment is more in the nature of a rhetorical flourish than an essential step in the reasoning. For example, in deciding that a victim of mesothelioma can sue all persons who exposed him to asbestos, even though he cannot prove whose asbestos caused his disease, Lord Rodger referred to the view of the great second century Roman jurist Salvius Julianus that if a slave was wounded by a number of people so that it was impossible to tell which wound had caused his death, all were liable for killing.[18] Lord Rodger is learned in Roman law and the citation is an ornament to his speech, but it is hardly evidence of the influence of ancient Roman law on the modern English law of torts. This kind of thing is significant only to comparative lawyers who, like train spotters in anoraks, count of number of references to foreign authorities and write articles in which they award prizes to the judges who achieve the highest score. The case was decided in the way it was because, rightly or wrongly, the House of Lords took the view that justice required a person in that position to have a remedy. Likewise Lord Woolf's comprehensive analysis of English authorities on legitimate expectations, leading to the conclusion that the failure of a public authority to keep its promise can be a ground for judicial review, contained a throw-away remark that review on this ground would present no problems to a European lawyer.[19] The Australian High Court has rejected the principle stated by Lord Woolf, saying that it was "an attempted assimilation into

[18] *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, 113.
[19] *Regina v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213, 243.

the English common law of doctrines derived from European civilian systems" and pointing out that the principles of European administrative law differed fundamentally from those of the common law.[20] I would not regard this as a serious description of Lord Woolf's judgment, but it is a perfectly legitimate way of applying Lord Wilberforce's technique for dealing with foreign authorities of which you disapprove. Likewise in the High Court of Australia has said that the decision of the House of Lords rejecting the immunity of advocates from being sued by their clients[21] was "significantly affected by European considerations".[22] The only traces of European influence that I can find in the speeches is an undeveloped reference to article 6 of the Convention in the speech of Lord Millett and an observation by Lord Steyn that in many countries, including some in Europe, such immunity was denied without apparently causing any failure of justice. The High Court is of course perfectly entitled to disagree with the decision but I think, speaking as a member of the court who made not the slightest mention of any European considerations, that this reason is another illustration of the Wilberforce doctrine.

27. I would sum up by saying that there have been cases, particularly on administrative law before the Human Rights Act, in which the development of the common law in England was influenced by the need to comply with the European Convention on Human Rights. For the most part, however, the ground for even those decisions which refer to European law was that the Court thought they were right; only fair and just but consistent with the previous development of the common law.

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[20] *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at para 73.
[21] *Arthur J Hall & Co v Simons* [2002] 1 AC 615.
[22] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at para 60.

You need have no fear that English judges have decided to abandon common law principles, throw in our lot with continental Europe and subscribe to the Code Napoleon.