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## Why Diverge?

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The common law of obligations, once a unitary body of law, is now an interrelated set of laws operating in different jurisdictions which share a great deal in the way of substantive doctrine, methodology, taxonomy, approaches, philosophies, values, principles and policies. This book studies particular divergences that have occurred within the common law of obligations. These studies offer significant insights into the nature, effects, successes and failures of the deviations in question. Our particular concern in this introductory chapter is with the forces that produce major deviations, and especially the motivations underlying decisions by ultimate appellate courts to strike out on a divergent path.

Some of the most significant causes of divergence are considered in a related volume.<sup>1</sup> Divergence was made possible by the abandonment of the idea of a uniform common law, the establishment of local ultimate appellate courts and the abolition of appeals to the Privy Council in several major common law jurisdictions.<sup>2</sup> A wide range of factors have led, and continue to lead, courts to act on that possibility, including a concern to exercise independent judgement on difficult issues and a sense of responsibility for developing and perfecting the local common law.<sup>3</sup> Departures are also necessitated by the need to adapt the common law to local circumstances, by the direct and indirect effects of local statutes, by constitutional structures and by distinctive local or regional human rights regimes.<sup>4</sup> Divergence has also been driven by different understandings of the relationship between public and private law, different understandings of the nature and function of private law,<sup>5</sup> and perhaps even different understandings of the foundations of the authority of the common law.<sup>6</sup>

At the level of particular doctrines, one cause of deviation is a concern that existing rules or principles operate unjustly or fail to achieve relevant policy goals. This is exemplified by the Canadian recognition of fiduciary duties protecting non-economic interests, which

<sup>1</sup> A Robertson and M Tilbury (eds), *The Common Law of Obligations: Divergence and Unity* (Oxford, Hart Publishing, 2015).

<sup>2</sup> See A Roberson and M Tilbury (eds), 'Unity, Divergence and Convergence in the Common Law of Obligations', *ibid* ch 1.

<sup>3</sup> See esp J Goudkamp and J Murphy, 'Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories', *ibid* ch 13.

<sup>4</sup> See Goudkamp and Murphy, *ibid* and Goh Y, 'A Conscious Effort to Develop a "Different" Common Law of Obligations: A Possible Endeavour?', *ibid* ch 4.

<sup>5</sup> P Cane, 'The Tort Liability of Public Authorities', *ibid* ch 8 and N Connolly, 'We'll Meet Again: Convergence in the Private Law Treatment of Public Bodies', *ibid* ch 9.

<sup>6</sup> D Priel, 'The Philosophies of the Common Law and their Implications: Common Law Divergences, Public Authority Liability, and the Future of a Common Law World', *ibid* ch 11.

is explored by Erika Chamberlain in chapter 12.<sup>7</sup> The expansion of the scope of fiduciary duties to encompass other interests such as bodily safety and psychological well-being facilitates the granting of remedies with respect to wrongdoing that would not otherwise be redressed, and promotes deterrence in circumstances in which it is necessary to maintain high standards of behaviour. While that divergence involves a radical departure from the traditional fiduciary paradigm, Chamberlain argues that it can be justified by reference to the values underlying fiduciary law. She also suggests that the particular willingness of the Supreme Court of Canada to develop private law in order to address social problems may be explained by the fact that the Court is routinely involved in dealing with controversial social issues under the Charter of Rights and Freedoms.<sup>8</sup>

Perhaps the most widely known instance of divergence between common law systems is the recovery of compensation for pure economic loss in the case of negligently constructed buildings. Sarah Green and Paul Davies regard the real cause of divergence among common law jurisdictions in this area as attributable not so much to the values underlying a particular area of law, but to the more general prioritisation of values by particular legal systems.<sup>9</sup> Those values may reflect formal or substantive matters. In the context of defective building cases, for example, formal matters centre on the extent to which legislation should determine the law, while substantive issues relate to whether the issue is addressed on the basis of an exclusionary rule that pure economic loss is generally irrecoverable in negligence. The response of English law, while not consistent, is to adopt a pro-defendant exclusionary approach that leaves statute law to address any unfairness caused. In contrast, most other common law systems have opted for a more flexible approach: one that is more sympathetic to plaintiffs, allowing greater room for the judicial development of the law independently of statute. Green and Davies suggest that the English isolation on this issue is attributable to the desire of the English courts to maintain ‘doctrinal order’ and the ‘primacy of contract’, while other common law jurisdictions are more concerned with the ‘realities and merits’ of individual cases. This accords with the thesis that a major reason why Commonwealth jurisdictions wished to see an end to the role of the Privy Council in their respective jurisdictions was because the English version of the common law that the Privy Council espoused was, in the law of obligations, one that was based on traditional doctrines that resulted in injustice in individual cases and failed to reflect appropriate standards of conduct in dealings and relationships.<sup>10</sup>

Deviations between the laws of common law jurisdictions may not be aimed at producing different outcomes, but may be motivated by a sense that a different mode of analysis of a particular type of legal problem is simpler, results in greater certainty, is less artificial, or more directly addresses underlying questions of justice or policy. Methodological divergence may also be motivated by a conviction that a mode of analysis followed elsewhere is flawed or inadequate. The divergence taken by Australian law in relation to duty of care analysis—which is explored in chapter 2 of this volume—arose primarily from dissatisfaction with proximity as a tool of analysis, and concern about the way in which that concept

<sup>7</sup> E Chamberlain, ‘Revisiting Canada’s Approach to Fiduciary Relationships’, ch 12 of this volume.

<sup>8</sup> Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>9</sup> S Green and P Davies, ‘“Pure Economic Loss” and Defective Buildings’, ch 4 of this volume.

<sup>10</sup> See P Finn, ‘Unity then Divergence, The Privy Council, the Common Laws of England and the Common Laws of Canada, Australia and New Zealand’ in Robertson and Tilbury, above n 1, ch 3.

had come to be understood and utilised by the Australian courts.<sup>11</sup> At the heart of the court's criticism of proximity is that it can be understood as a rule without content, and therefore as conferring a judicial discretion.<sup>12</sup> Interestingly, the abandonment of proximity and the rejection of the duty frameworks applied in other jurisdictions was not motivated by a conviction that a superior analytical device or a better method or framework had been found, but proceeded in spite of a candid acknowledgement that they had not.

Significantly less clear is the motivation for the Supreme Court of Canada's adoption of the civilian 'absence of juristic reason' approach to unjust enrichment claims, ostensibly in preference to the 'unjust factors' approach more widely followed in common law jurisdictions.<sup>13</sup> Like the Australian rejection of proximity, its roots seem to lie in a quest for greater guidance or constraint in judicial decision-making, or at least the appearance of greater certainty. It has been suggested that there is not much to be gained by speculating as to why, in his foundational statement of the elements of unjust enrichment, Dickson J stipulated an absence of juristic reason for the enrichment rather than the presence of a factor that made it unjust.<sup>14</sup> Lionel Smith has suggested that Dickson J may have been trying to bring the common law into alignment with the civil law of Quebec, but argued that it is more likely that he was seeking to alleviate concern that the application of the doctrine of unjust enrichment would involve excessive judicial discretion or appeals to individual conscience.<sup>15</sup> This explanation has since been endorsed by the Supreme Court,<sup>16</sup> though McLachlin J has noted that, in contrast with the traditional approach based on fact-specific categories, the unjust factors and absence of basis approaches both provide the flexibility needed to give effect to the equities of the particular case before the court.<sup>17</sup>

One of the most significant doctrinal and methodological divergences between common law jurisdictions that now presents itself is the decision of the High Court of Australia in *Andrews v Australia and New Zealand Banking Group Ltd*.<sup>18</sup> In that decision, which is analysed by Sirko Harder in this volume,<sup>19</sup> the High Court departed from what was then understood to be the law in Australia—and is still understood to be the law in other common law jurisdictions—that the penalty doctrine applies only in cases of breach of contract. Harvey McGregor has written that this is 'a straightforward, even self-evident, proposition.'<sup>20</sup> The High Court's disagreement with this stems from its understanding of the equitable jurisdiction in respect of penalties, which survived the judicature system, and which was not limited to breach cases, but could be engaged by, for example, the failure of a condition. The classic illustration, to which the Court appealed, was the penal bond with conditional defeasance, a popular method of contracting in early modern times. The Court's conclusion that there was nothing, in principle, to restrict the doctrine to breach cases has been

<sup>11</sup> A Robertson, 'Proximity: Divergence and Unity', ch 2 of this volume.

<sup>12</sup> *San Sebastian Pty Ltd v Minister* (1986) 162 CLR 340, 368 (Brennan J). See also the oft-quoted statement of Gummow J in *Hill v Van Erp* (1997) 188 CLR 159, 238 that 'used as a legal norm, [proximity] has the uncertainties and perils of a category of indeterminate reference, used with shifting meanings to mask no more than policy preferences'.

<sup>13</sup> See Z Sinel, 'The Methods and Madness of Unjust Enrichment', ch 10 of this volume.

<sup>14</sup> *Rathwell v Rathwell* [1978] 2 SCR 436.

<sup>15</sup> L Smith, 'The Mystery of "Juristic Reason"' (2000) 12 *Supreme Court Law Review* (2d) 211.

<sup>16</sup> *Garland v Consumers' Gas Co* 2004 SCC 25, [2004] 1 SCR 629, [40] (Iacobucci J for the Court).

<sup>17</sup> *Peel (Regional Municipality) v Canada* [1992] 3 SCR 762, 785.

<sup>18</sup> *Andrews v Australia and New Zealand Banking Group Ltd* [2012] HCA 30, (2012) 247 CLR 205.

<sup>19</sup> S Harder, 'The Scope of the Rule against Contractual Penalties: A New Divergence', ch 8 of this volume.

<sup>20</sup> H McGregor, *McGregor on Damages*, 19th edn (London, Sweet & Maxwell, 2014) [15-009].

the subject of intense criticism especially for its failure to provide any justification (other than an historical one) for departing from an existing understanding of the law.<sup>21</sup> Harder too regards the decision as flawed in its methodology, and argues that it should not be followed in other common law jurisdictions since there are other doctrines of the common law and equity, as well as legislation, that provide means for dealing with unfair contracts. Viewed from the perspective of divergence, the approach in *Andrews* can be seen as requiring an approach to common law method that reflects a particular Australian (or at least New South Wales) view of equity—one that strives to preserve equity as a distinct and living body of law within the legal system in such a way that the historical continuity of the law is maintained.<sup>22</sup> Whether other common law systems will place such emphasis on historical coherence is open to question.

Where the common law is codified, then the reasons for any divergences in that codification are of course a matter for the legislature rather than the courts. Whether and how the legislature has intended divergence from the common law is, however, an extremely important question in the interpretation and application of the statute. An interesting issue considered by Alvin See in chapter 11 is whether a statutory provision expressed in broad terms may be interpreted in light of, and guided by, a common law framework developed elsewhere in the common law world after the statute has come into force.<sup>23</sup> See suggests that it can, and explains how the modern law of unjust enrichment can provide a guiding rationale and a structure for application of section 70 of the Indian Contract Act 1872, while accommodating the dictates of the particular statutory provision.

As noted earlier, the need to adapt the common law to suit local circumstances is an important motivation for divergence. Particular local circumstances may also provide a reason to retain traditional rules in one jurisdiction while the law is modernised in others. While the presumption of advancement and the presumption of a resulting trust are considered to be in decline in English law, those presumptions have recently been reaffirmed in Singaporean law. While the presumption of advancement as between parent and child has been placed on a gender-neutral footing in Singapore, the presumption of advancement between spouses has not. These developments, as well as their motivations and implications, are explored by Man Yip in chapter 13.<sup>24</sup> While Mindy Chen-Wishart has argued that Confucian family values may have played a role in the Singaporean divergence in the law of undue influence, Man Yip suggests that ‘Asian family values’ may be a means to an end in the law of resulting trusts, and policy may be the real driver of developments. The gender-specific operation of the presumption of advancement between spouses goes hand in hand with statutory spousal maintenance obligations, which require husbands to maintain wives but not vice versa. Both may be explained on the basis of a national policy of maintaining a gendered division of labour and encouraging childbirth, although the first of these is in some tension with the national policy of promoting women’s participation in the paid workforce and judicial recognition of the role of women as providers for their families.

<sup>21</sup> See esp JW Carter, W Courtney, E Peden, A Stewart and G Tolhurst, ‘Contractual Penalties: Resurrecting the Equitable Jurisdiction’ (2013) 30 *Journal of Contract Law* 99.

<sup>22</sup> See JD Heydon, MJ Leeming and PG Turner, *Meagher, Gummow and Lehane’s Equity Doctrine and Remedies*, 5th edn (Chatswood, LexisNexis Butterworths, 2015) xxi–xxiii.

<sup>23</sup> A W-L See, ‘Recovery of Non-Gratuitously Conferred Benefit under Section 70 of the Indian Contract Act 1872’, ch 11 of this volume.

<sup>24</sup> M Yip, ‘The Presumptions of Resulting Trust and Advancement under Singapore Law: Localisation, Nationalism and Beyond’, ch 13 of this volume.

Just as jurisdictions may diverge, so they may converge. Louise Bélanger-Hardy provides an apt illustration in her contribution to this volume,<sup>25</sup> addressing what is a seemingly stark divergence between the common law jurisdictions in Canada on the one hand and the civil law of Quebec on the other. It concerns personal injury claims where the plaintiff's injury consists of mental harm standing alone, that is, where the mental harm is not ancillary to physical harm. In common law Canada, in order to succeed in such a claim in negligence or under the principle in *Wilkinson v Downton*,<sup>26</sup> plaintiffs must establish that their mental harm amounts to a recognisable psychiatric injury. In contrast, defendants in Quebec are liable for any 'bodily, moral or material' injury caused by their fault, and it is clear that this does not require plaintiffs to establish a recognisable psychiatric injury as an ingredient of their claim. Nevertheless, dicta in the leading common law decision of the Supreme Court of Canada, *Mustapha v Culligan of Canada Inc*,<sup>27</sup> have appealed to Quebec courts as setting the minimum standard for actionable mental harm in Quebec. The interpretation put on *Mustapha* by the Quebec courts has led, in turn, to suggestions that the requirement of a recognisable psychiatric injury now no longer applies in the common law in Canada. Whatever the strength of the arguments, this is indicative of the way in which the interpretation of a major case can lead away from overt divergence between laws towards their convergence.

Moves towards convergence are also apparent between common law jurisdictions, particularly in new or developing areas of law, where it is necessary for the law to adapt to novel situations. That adaptation may require the courts to mould existing principles using traditional common law methodologies. The underlying unity of the common law, both in terms of values and method, may be strong enough to ensure that convergence, or at least substantial convergence, is achieved between the laws of independent jurisdictions. This is illustrated by the application of the law of defamation in the context of Internet publication. Are Internet intermediaries (such as those who host discussion forums or blogs) to be held liable for whatever is published on them? The answer depends on identifying the publisher of the material and on whether the defence of innocent dissemination is available to the publisher so identified. As Justice Ribeiro points out in his contribution to this volume,<sup>28</sup> the Hong Kong and English courts have agreed that Internet intermediaries are not liable as primary publishers and so are able to avail themselves of the innocent dissemination defence before they become aware of the defamatory material. However, the English and Hong Kong courts differ in their approaches to the law after Internet intermediaries become aware of the defamatory material. The English courts have applied the 'noticeboard cases' to make intermediaries who know about and adopt the publication liable as primary publishers, while the Hong Kong courts focus on the reasonableness of the intermediaries' conduct for the purposes of applying the innocent dissemination defence. In most cases, this difference of approach will, no doubt, still lead to substantial convergence in outcome.

A similar story is evident in the law relating to non-delegable duties of care, which has assumed significance in an era of 'outsourcing', in determining whether schools or

<sup>25</sup> L. Bélanger-Hardy, 'Canada's Common Law, Quebec's Civil Law and the Threshold of Actionable Mental Harm following Tortious Conduct', ch 3 of this volume.

<sup>26</sup> *Wilkinson v Downton* [1897] 2 QB 57.

<sup>27</sup> *Mustapha v Culligan of Canada Inc* 2008 SCC 27, [2008] 2 SCR 114.

<sup>28</sup> R. Ribeiro, 'Defamation on the Internet', ch 6 of this volume.

hospitals, among others, are liable for the negligence of independent contractors to whom they have contracted out the performance of some of their functions. Formidable doctrinal issues arise in determining when a 'principal' is under a 'personal' or 'non-delegable' duty and whether the conduct in issue is within that 'personal' duty.<sup>29</sup> In chapter 7, Neil Foster compares the responses of the Australian and English courts to these issues.<sup>30</sup> His study indicates that, notwithstanding doctrinal difficulties, the overwhelming trend is towards convergence of Australian and English law, especially in the light of the decision of the UK Supreme Court in *Woodland v Essex County Council*.<sup>31</sup> Divergences remain, but at least two of these are justifiable or explicable. The first, namely the inapplicability in England of the law of non-delegable duties between occupiers and their visitors, is a result of statute.<sup>32</sup> Another is that in Australia a road authority does not owe a non-delegable duty to road users, a result that may be linked to the abolition of the so-called 'highway immunity' rule,<sup>33</sup> but (as Foster points out) is more convincingly explained by Australian conditions (such as the long stretches of road that need to be maintained by local councils with limited resources). A third is not easily defensible: it is the reluctance of the Australian authorities to apply the law of non-delegable duties where the conduct of the independent contractor is deliberate rather than negligent.<sup>34</sup> Here the hope is that, just as the UK Supreme Court referred to the Australian authorities as a basis for the development of the law in *Woodland v Essex County Council*, so the Australian courts will now refer to the English restatement in that case, as well as to other relevant Commonwealth authority, in now developing the law in Australia on a principled basis.

Robyn Honey's study of the English and Australian approaches to undue influence in chapter 14 reminds us that divergence sometimes occurs as much within a particular jurisdiction as it does between jurisdictions.<sup>35</sup> One can sometimes identify commonalities in strands of thinking across jurisdictions, where proponents of or adherents to a particular view of law may find more support outside their own jurisdiction than within it. Honey argues that there are three fundamental concerns underlying the law of undue influence which pull the doctrine in different directions, and which are not all adequately captured in either the Australian or English models of undue influence. That deficiency creates instability in the application of the doctrine in both jurisdictions, producing divergences within each as well as points of alignment.

The examples of divergence or convergence provided by comparative common law provide a rich database on which analysis of contemporary problems in the common law can draw. Thus, Robert Stevens' argument<sup>36</sup> that the decision of the High Court of Australia

<sup>29</sup> See RP Balkin and JLR Davis, *Law of Torts*, 5th edn (Chatswood, LexisNexis Butterworths, 2013) [26.24]–[26.36].

<sup>30</sup> N Foster, 'Convergence and Divergence: the Law of Non-delegable Duties in Australia and the United Kingdom', ch 7 of this volume.

<sup>31</sup> *Woodland v Essex County Council* [2013] UKSC 66, [2014] AC 537.

<sup>32</sup> Occupiers Liability Act 1957 (UK) s 2(4)(b). For the position in Australia, see Balkin and Davis, above n 29, [26.34].

<sup>33</sup> *Brodie v Singleton Shire Council* [2001] HCA 29, (2001) 206 CLR 512.

<sup>34</sup> *Esp New South Wales v Lepore* (2003) 212 CLR 511, which is probably not the last word on this issue, nor on vicarious liability in these situations (where the topic has also been considered by the final courts of appeal in Canada, England and New Zealand: see Balkin and Davis, above n 29, [26.54]–[26.55]).

<sup>35</sup> R Honey, 'Divergence in the Australian and English Law of Undue Influence: Vacillation or Variance?', ch 14 of this volume.

<sup>36</sup> R Stevens, 'Rights Restricting Remedies', ch 9 of this volume.

in *Andrews*, which has been mentioned above,<sup>37</sup> should not be followed in other common law jurisdictions is grounded in the premise that the scope of the penalty doctrine can only be delimited by identifying its rationale. In his view, that rationale requires a recognition that the obligation to pay damages is a ‘monetised form of the primary obligation of performance’ that cannot be inconsistent with the primary obligation.<sup>38</sup> A clause imposing liability on breach of contract for an amount that is excessive in comparison to the value of the primary obligation at least runs the risk of being inconsistent in this sense. In contrast, a sum of money payable on the occurrence of a condition is not capable of being inconsistent in this way: the situation simply cannot be analysed in terms of primary and secondary obligations.

A similar approach is evident in Jason Neyers’ study of the nature of the tort of public nuisance in Canadian and English law.<sup>39</sup> Conceptualising the tort as limited to the enforcement of private rights (akin to easements or profits) associated with passage on the highway and with fishing, Neyers confronts two of the difficult issues that have plagued the development of the tort: the meaning of the requirement of ‘special damage’ and the question of the availability in the tort of personal injury damages. Analysing the sometimes divergent approaches of the courts in England and Canada, Neyers argues that the rights-based analysis of public nuisance that he offers gives coherence to the tort by requiring that the special damage requirement is best understood as ‘actual damage’, which sometimes encompasses the recovery of personal injury damages.

Divergent uses of the concept of unconscionability,<sup>40</sup> both within and between particular jurisdictions, are analysed by Graham Virgo in his contribution to this volume. Unconscionability is used to justify equitable intervention in a variety of different contexts and in relation to a variety of different kinds of behaviour. Virgo proposes a taxonomy of unconscionability which distinguishes between its different meanings, and explains why each is used when it is, in order to promote more precise, consistent and comprehensible usage. Virgo proposes a threefold classification, which distinguishes between references to the defendant’s state of mind, the defendant’s behaviour (assessed in light of his or her awareness of relevant circumstances) and the conscience of the court, which involves the exercise of discretion in accordance with established principles. Of particular interest in the present context is the High Court of Australia’s embrace of unconscionability as the foundation, and basis for determination, of restitutionary claims such as the action to recover money paid under a mistake of fact. Like the Australian divergence in the law of penalties, this deviation from the common law mainstream is grounded in history. Like the Canadian divergence in the law of unjust enrichment, it also seems to be grounded in a fear of an excessive flexibility or discretion in unjust enrichment analysis. As Virgo indicates, however, it is difficult to see an unelaborated standard of unconscionability as the path to greater certainty and consistency in the determination of restitutionary claims.

One of the best-known divergences between the United States and Commonwealth jurisdictions in the field of private law is in the extent to which the common law and equity are

<sup>37</sup> Above n 18.

<sup>38</sup> Stevens, above n 36, also analyses *Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)* [2008] UKHL 48, [2009] 1 AC 61 in terms of a wider theory that primary obligations determine the form of the (secondary) duty of next-best compliance.

<sup>39</sup> J Neyers, ‘Divergence and Convergence in the Tort of Public Nuisance’, ch 5 of this volume.

<sup>40</sup> G Virgo, ‘Whose Conscience? Unconscionability in the Common Law of Obligations’, ch 15 of this volume.

understood to have been merged to form a single body of law. Whether the two bodies of law remain separate, and ought to remain separate, remain contentious questions in Commonwealth jurisdictions. Differing views about the distinctiveness of equity provide fertile ground for particular doctrinal divergences between common law jurisdictions. In the final chapter of this volume, Stephen Smith asks whether there is anything distinctively equitable about awards of specific relief, other than their origins in the Court of Chancery.<sup>41</sup> We are accustomed to describing these remedies as 'equitable', and to assuming that because they are discretionary and subject to special bars and defences they can only properly be understood by reference to their origin. In fact, Smith argues, what is distinctive about awards of specific relief is neither their origin nor their special equitable nature, but that they concern matters that are within the more or less exclusive control of the defendant. They must therefore be enforced by way of an incentive, namely the threat of punishment, rather than execution by court officials. The crucial distinction is therefore between executable and non-executable rulings, which does not require any reference to the distinction between the common law and equity. Executable rulings can be carried out by court officials without the participation of the defendant, whereas non-executable rulings concern matters that are within the more or less exclusive control of the defendant and must therefore be enforced by the threat of punishment. The distinction arose in a dual system, in part because of it, but reflects a natural distinction between impersonal directives to do things that can be done without the defendant's participation and personal directives to do things that cannot.

<sup>41</sup> S Smith, 'Form and Substance in Equitable Remedies', ch 16 of this volume.