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# Searching for United States Tort Law in the Antipodes

Peter Cane\*

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## I. INTRODUCTION

I was delighted to be given the opportunity to contribute to the symposium organized by the *Pepperdine Law Review* in honor of Allen Linden on the provocative topic: “Does the World Still Need United States Tort Law? Or Did It Ever?” I was asked to provide an Antipodean perspective, which is particularly appropriate for several reasons. Allen Linden is, of course, one of the most distinguished Canadian tort lawyers. He has made major contributions to the subject as a teacher, writer, and judge. Within the common law world there is an important—if informal and somewhat blurred—distinction between the United States and what we might loosely call “the Commonwealth.” Canada and the two Antipodean jurisdictions of Australia<sup>1</sup> and New Zealand belong to this latter grouping, of which England is the mother jurisdiction.<sup>2</sup> Canada, Australia, and New

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1. Describing Australia (or Canada, for that matter) as a single jurisdiction is convenient but inaccurate. Australia, like Canada and the United States, is a federation. It has six states (New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia) and two mainland territories (the Australian Capital Territory and the Northern Territory). The federal entity is the Commonwealth of Australia. There are, therefore, nine jurisdictions within Australia. For convenience, in this paper I will use the term “the states” and the adjective “state” to refer to the states and territories collectively.

2. See *infra* pp. 274–75.

Zealand thus have a shared legal heritage. On the other hand, because of Canada's geographical proximity to the United States, we might speculate that its law has been influenced by U.S. law more than either Australian or New Zealand law.

Another reason why an Antipodean contribution to the symposium was especially appropriate is found in the person and work of the late Professor John Fleming. Fleming, German by birth, was sent to school in England in the 1930s and received his legal education at Oxford University.<sup>3</sup> After a short stint on the faculty at University College, London, in the late 1940s, he moved to Australia and for a decade taught law at Canberra University College—a predecessor of my own institution, the Australian National University.<sup>4</sup> Under the influence and sponsorship of William Prosser, Fleming migrated to the University of California at Berkeley (Boalt Hall), where he spent the rest of his career, becoming the Cecil Shannon Turner Professor of Law and working actively into his retirement.<sup>5</sup> Fleming was undoubtedly one of the greatest tort scholars in the English-speaking world in the latter half of the twentieth century. For many years he edited the *American Journal of Comparative Law*, but despite his stature as a tort lawyer, his work was relatively unknown in his adopted country. This is probably because Fleming's magnum opus, *The Law of Torts* (of which eight editions were published in his lifetime and a ninth in 1998, shortly after his death)—although a fine work of comparative scholarship—was firmly rooted in Australian law<sup>6</sup> and retained a strong Commonwealth orientation throughout its nine editions.<sup>7</sup> It was in Canada that *The Law of Torts* probably had the most influence.<sup>8</sup> Professor Stephen Sugarman quotes Allen Linden himself as saying that Fleming's book was "a bible for Canadian law students and judges for more than forty years."<sup>9</sup> I am confident that Allen will not object to my honoring him by invoking John's spirit as an inspiration for reflecting comparatively on the tort law of the United States, New Zealand, and Australia.

The basic arguments of this essay are that U.S. tort law has had surprisingly little influence in the Antipodes and that this can best be explained by structural and systemic differences between the various societies we are concerned with and their respective legal systems. I must begin by commenting on the meaning of the term "tort law," which I have

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3. Stephen D. Sugarman, *Presenting the Fleming Award to Justice Allen Linden at Pepperdine University School of Law*, 33 PEPP. L. REV. 925, 925 (2005–2006).

4. *Id.*

5. *Id.*

6. The first edition was written in Canberra.

7. For an assessment of the work, see Peter Cane, *Fleming on Torts: A Short Intellectual History*, 6 TORTS L.J. 216 (1998). A multi-authored tenth edition of Fleming's text is in preparation.

8. *Id.* at 216–17.

9. Stephen D. Sugarman, *An Appreciation of John G Fleming*, in PETER CANE & JANE STAPLETON, *THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMING* xxxii, xxxiii (1998).

elsewhere described as a “loose federation of causes of action.”<sup>10</sup> Unlike contract or property law, which may plausibly be portrayed as being informed by a single overarching concept, tort law lacks a convincing unifying theory, despite the best efforts of tort scholars from Oliver Wendell Holmes onwards, and including, most recently, those who variously argue that the cement of tort law (or, even more ambitiously, private law) is to be found in the concepts of “corrective justice,”<sup>11</sup> “rights,”<sup>12</sup> “wrongs,”<sup>13</sup> or “civil recourse.”<sup>14</sup> Because of the heterogeneity of the legal phenomena we call “torts,” I think it wise to confine this paper to one, albeit probably the most socially significant, aspect of the subject: tort liability for personal injury resulting from negligence.

Something should also be said about the concept of “U.S. tort law.” As in Australia, basic tort law in the United States is state law, not federal law. This is not to say that there is no federal tort law, but it is to say that there is no federal tort law in the way that there is federal constitutional law or federal administrative law, for instance. Nor is there a national common law of tort law in the United States. In Australia, by contrast, there is, according to the High Court, a single, national Australian common law.<sup>15</sup> In addition to being bound by decisions of the Australian High Court, appellate courts of the States are bound by decisions of appellate courts of other States unless convinced that such a decision is “plainly wrong.”<sup>16</sup> Unlike the U.S. Supreme Court, the Australian High Court is the final appellate court on matters of State law as well as matters of federal law. In Australia, there is no need or occasion for a “restatement” of the common law of torts because the High Court “states” tort law authoritatively for the whole country.<sup>17</sup>

10. PETER CANE, *TORT LAW AND ECONOMIC INTERESTS*, 447 (2d ed. 1996).

11. See ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

12. See, e.g., ROBERT STEVENS, *TORTS AND RIGHTS* (2007).

13. See John C. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917 (2010).

14. See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 *GEO. L. J.* 695 (2003).

15. Leslie Zines, *The Common Law in Australia: Its Nature and Constitutional Significance*, 32 *FED. L. REV.* 337, 344–51 (2004); see also L.J. Priestley, *A Federal Common Law in Australia?*, 6 *PUB. L. REV.* 221 (1995).

16. *Farah Constrs. Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 135 (Austl.); *CAL No. 14 Pty Ltd v Motor Accidents Ins. Bd.* (2009) 239 CLR 390, 448–51 (Austl.).

17. More deeply, I would speculate that the restatement phenomenon marks a subtle but significant difference between the way the common law is understood in the United States and Australia. Put crudely, I suggest that in the United States the process of making the common law is thought of as quasi-legislative, and the courts that make the common law are thought of as quasi-legislators. For instance, according to Melvin Eisenberg, courts have two social functions: resolution of disputes and “enrichment of the supply of legal rules.” MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 4 (1988). This quasi-statutory understanding of the common law is reflected in the collegiate way that the U.S. Supreme Court operates: The emphasis on the formation of pluralities tends to shift the focus from the reasons for decision to the decision itself. See also P.S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW*

Of course, as in the United States, statutory tort law varies from one Australian jurisdiction to another, but even in this context there is some momentum toward uniformity. This is illustrated by the history of Australian defamation law. Early in the twenty-first century, defamation law in Australia was a highly complex patchwork of state regimes that differed from each other in significant respects, including the extent to which the law had been embodied in statute. This heterogeneity was seen as problematic both for the media and for state courts hearing defamation claims arising out of publication across state borders. The solution, adopted by all states and territories in 2006, was to pass uniform legislation to the effect that liability for defamation would be regulated by the common law except to the extent that the uniform legislation provided otherwise.

So, while it makes some sense to talk about “Australian” tort law, the idea of “U.S.” tort law has much less resonance. Of course, with the exception of the law of Louisiana, the various state tort laws in the United States do share a common conceptual heritage in the English common law; the institutions of the “tort system”—legislatures, courts, juries, lawyers, insurers and so on—are more or less the same and function in similar ways throughout the United States. To the extent that the concept of “U.S. tort law” has meaningful reference, it is to what we might call its doctrinal and institutional “common core.”

My aim in this paper is not to identify and explain similarities between the relevant rules and principles of U.S. tort law and Australian and New Zealand tort law. No doubt that would be an interesting and valuable project, and I am sure that it would disclose many similarities—but also some significant differences. However, as I read the question posed by the symposium’s title, it is concerned not so much with similarities and differences but primarily with whether any similarities can be explained in terms of the influence of U.S. ideas and institutions or, indeed, as borrowings from the United States. Our topic is, in short, the international flow of legal ideas, and the question, succinctly put, is whether United States personal injury tort law has been imported into Australia or New Zealand (or whether it is likely to be in the future). The short answer is no! The main aim of this paper is to explain why U.S. tort law has had so little influence on Antipodean tort law. I will first deal quite briefly with New Zealand and then say rather more about Australia.

Before doing that, however, it is worthwhile to mention two distinctive

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131–32 (1987) (more on plurality decisions). In this light, the project of restating the common law can be understood as a species of quasi-statutory codification or consolidation. By contrast, in Australia (and in the Commonwealth more generally) the common law is understood more as an ongoing discursive, dialogic process of practical reasoning and reason-giving rather than as a series of rule-making events. This conception is uncongenial to a propositional mode of restatement that largely suppresses reasons and reasoning; this may partly explain why the American Law Institute’s Restatements have had little impact outside the United States. The reason-based understanding also puts a premium on judicial individuality, which can generate its own pathologies: Peter Cane, *Taking Disagreement Seriously: Courts, Legislatures and the Reform of Tort Law*, 25 OXFORD J. LEGAL STUD. 393, 404 (2005).

features of U.S. tort law that one might expect would readily have found an export market: “strict” product liability and class actions. As for the first, the Australian common law of product liability is firmly rooted in the law of negligence, and legislative schemes of “strict” product liability in Australia have been based on the European model, not the U.S. model—although the former was partly influenced by U.S. experience.<sup>18</sup> Regarding class actions, there is no doubt that they are native to the United States and were introduced into Australia only in the 1990s as the result of a “slow and controversial” process of law reform.<sup>19</sup> Although involving no direct transplant,<sup>20</sup> according to Clark and Harris, the introduction of class actions into Australia “was opposed by the business community, which feared that it heralded the emergence of lawyer-driven, United States-style litigation in Australia,” and law reformers attempted to address these concerns by pointing to features of procedural law that would likely forestall such an outcome.<sup>21</sup> It is ironic, therefore, that the Australian system is, in certain respects, more plaintiff-friendly than that of the United States.<sup>22</sup> However, despite significant differences between the class action regimes in the two countries, Australian courts “have been receptive to” U.S. class action jurisprudence, and “there are numerous examples of cross-fertilization of ideas.”<sup>23</sup> That said, the striking fact is that “American-style class actions may only be brought in two Australian jurisdictions”—at the federal level and in the State of Victoria<sup>24</sup>—and “no Australian state government is currently [as of 2009] considering (or planning to consider) class action reform.”<sup>25</sup> Although there are no reliable statistics about the number and subject matter of class actions that have been instituted in Australia in the past twenty years, it appears that they are much less used in cases of personal injury than in cases of financial loss.<sup>26</sup>

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18. For an account of the development of the European model, see JANE STAPLETON, *PRODUCT LIABILITY* 37–65 (1994).

19. Stuart Clark & Christina Harris, *The Push to Reform Class Action Procedure in Australia: Evolution or Revolution?*, 32 MELB. U. L. REV. 775, 776 (2008).

20. See *id.* at 776. The Australian class action regime was modeled on Rule 23 of the United States’ Federal Rules of Civil Procedure but differs in significant respects from its U.S. counterpart.

21. *Id.* In the Australian regime, there is no certification stage and there are no jury trials. The costs rule is that the “loser pays”. Lawyers may not charge contingency fees, and commercial litigation funders play a major part. There is no common fund doctrine; nor are *cy-près* remedies available.

22. *Id.* at 777. For instance, the threshold criteria are much less onerous than in the United States, and personal injury class actions are easier to mount.

23. RACHEL MULHERON, *THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE* 16–17 (2004).

24. Vince Morabito, *Australia*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 320, 320 (2009).

25. *Id.* at 321.

26. As of 2008, only about 35 of 164 class actions that had been commenced in the federal jurisdiction involved product liability, and in only eighteen of these were damages claimed for

## II. NEW ZEALAND

So far as New Zealand is concerned, the lack of influence of U.S. personal injury tort law—at least in the last forty years—can be easily explained. Since 1972, the common law of tort has played only the most marginal role in providing compensation for personal injuries in New Zealand because of that country's no-fault accident compensation scheme.<sup>27</sup> The scheme, which is administered by a public corporation, is a hybrid of social insurance and social welfare, being funded partly by levies on risk-creating activities and partly by general taxation.<sup>28</sup> Three categories of personal injury fall within the scheme: injury by accident, injury resulting from "medical misadventure," and injury resulting from work-related illnesses and diseases.<sup>29</sup> Illnesses and diseases unrelated to work are not covered.<sup>30</sup> In cases that fall within the scheme, common law tort claims are barred.<sup>31</sup> In principle, this leaves significant room for the operation of the tort system. In practice, however, because of the "accident bias" of tort law,<sup>32</sup> personal injury tort claims in relation to illness and disease are of relatively minor significance. Victims of personal injuries that do not fall within the scheme may have access to the general social security and social welfare systems that sit alongside the accident compensation scheme.

One way in which the tort system supplements the accident compensation scheme is by providing an avenue for claiming punitive damages. Punitive damages play a somewhat more prominent role in U.S. tort law than in Commonwealth tort law, probably because personal injury tort law has a more regulatory flavor in the United States than in the major Commonwealth jurisdictions, where its predominant function is compensatory. In New Zealand, the compensation function is, of course, primarily performed by the accident compensation scheme. One therefore might have expected tort claims for punitive damages to acquire a distinctively and perhaps even strongly regulatory flavor, especially since it

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personal injuries. Jocelyn Kellam, S. Stuart Clark, & Christina Harris, *Representative Actions: A Review of 15 Years of Product Liability Class Action Litigation in Australia: Part I*, 16 *TRADE PRAC. L.J.* 166, 172 (2008). Other personal injury class actions have arisen out of single-event disasters. See generally S. Stuart Clark & Christina Harris, *The Past, Present and Future of Product Liability and Other Mass Tort Class Actions in Australia*, 32 *U. NEW S. WALES L.J.* 1022 (2009).

27. For a detailed account of the scheme, see STEPHEN TODD ET AL., *THE LAW OF TORTS IN NEW ZEALAND* 17–79 (4th ed. 2005). See also Symposium, *Looking Back at Accident Compensation: Finding Lessons for the Future*, 34 *VICTORIA U. WELLINGTON L. REV.* 189 (2003); Peter H. Schuck, *Tort Reform, Kiwi-Style*, 27 *YALE L. & POL'Y REV.* 187, 188 (2008). A no-fault compensation scheme can helpfully be distinguished from a strict liability regime such as workers' compensation. Both dispense with proof of fault, but under the latter, the injured claims against an individual responsible for the injury whereas under the former, the claim is made against a fund. The better analogy to no-fault is not strict liability but the disability component of the social security system.

28. Accident Compensation Act 2001, ss 167, 213, 227, 228 (N.Z.).

29. Rosemary Tobin & Elsabe Schoeman, *The New Zealand Accident Compensation Scheme: The Statutory Bar and the Conflict of Laws*, 53 *AM. J. COMP. L.* 493, 495–96 (2005).

30. *Id.*

31. *Id.* at 498.

32. See generally JANE STAPLETON, *DISEASE AND THE COMPENSATION DEBATE* (1986).

has often been argued that the abolition of tort has significantly reduced incentives for safe conduct.<sup>33</sup> However, this has not happened. The debate about punitive damages has taken place against the background of the traditional, restrictive English approach to punitive damages, namely that they are exceptional precisely because the main function of tort law is compensatory. Indeed, the New Zealand Supreme Court has recently held by a majority of four-to-one that punitive damages should only be available in cases where the defendant harmed the plaintiff intentionally or with subjective recklessness, and not where the harm was merely negligently inflicted.<sup>34</sup> The terms in which the debate about punitive damages has been conducted suggest a major reason why U.S. tort law has had so little influence in the Antipodes: both the Australian and the New Zealand legal systems have much stronger historical and cultural links with the English legal system than with the U.S. legal system. I will say more about this later with particular reference to Australia.

It is worth noting, finally, that a significant number of U.S. jurisdictions have statutory, no-fault auto accident compensation schemes that interact with the common law of tort in various ways.<sup>35</sup> However, such schemes have had no impact in New Zealand. There are two main reasons, I think. The most obvious is that, both temporally and politically, New Zealand was a world leader in this area (as in so many other social developments of the past century and more). Of all the no-fault personal injury compensation schemes around the world, New Zealand's is still, by far, the most wide-ranging, and it has significantly influenced thinking about personal injury compensation in many places. Pertinently, its architect, Sir Owen Woodhouse, was invited to Australia in the 1970s to develop a proposal for an even more comprehensive accident and illness compensation scheme which, as events turned out, was killed off by the combination of a constitutional crisis and lack of political will.<sup>36</sup> Nevertheless, to the extent that no-fault compensation is debated in Australia these days, it is the New Zealand scheme that provides the point of departure. By contrast, according to Richard Gaskins, "[e]xcept for occasional experts who travelled to New Zealand, Americans never closely inspected the Woodhouse strategy during this period [i.e. the 1960s and 1970s], and they did not know enough about it to reject it."<sup>37</sup>

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33. PETER CANE, *ATYIAH'S ACCIDENTS, COMPENSATION AND THE LAW* 482–83 (7th ed. 2006).

34. *Couch v Attorney-General* [2010] 3 NZLR 149 (SC).

35. See Gary T. Schwartz, *Auto No-Fault and First Party Insurance: Advantages and Problems*, 73 S. CAL. L. REV. 611 (2000).

36. Harold Luntz, *Looking Back at Accident Compensation: An Australian Perspective*, 34 VICTORIA U. WELLINGTON L. REV. 279, 288 (2003).

37. Richard Gaskins, *The Fate of "No-Fault" in America*, 34 VICTORIA U. WELLINGTON L. REV. 213, 223 (2003); see also Schuck, *supra* note 27, at 187–88.



Another less obvious reason why experience with no-fault compensation in the United States is of little relevance to New Zealand (and vice-versa) is that New Zealand is a much more highly developed welfare state than the United States. The New Zealand scheme was conceived and designed, and it now operates, against very different social and economic backgrounds than are found in the United States. Although it was, in many of its details, modeled on the tort system, its core principle of community responsibility represented a decisive and radical break from the ideology of individual responsibility that underpins tort law. New Zealand accident compensation is best understood as a form of social security, whereas in the United States, no-fault schemes are a species of private insurance. Outside the United States, probably the best-known American work on alternatives to tort is that of Jeffrey O'Connell. His various no-fault plans sit firmly within a framework of contract law and individual initiative.<sup>38</sup> The major shift they represent is not from tort to public social provision, but from tort and third-party liability insurance to contract and private first-party loss insurance.<sup>39</sup> Similarly, Stephen Sugarman describes his preferred approach as a "pre-accident market in legal rights to bodily security."<sup>40</sup> No-fault compensation has a quite different resonance in the United States than it does in New Zealand and Australia, more in tune with market individualism than with values of social solidarity and community welfare.<sup>41</sup>

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38. See, e.g., ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965). This is particularly true of "elective" versions of no-fault. See, e.g., Jeffrey O'Connell & Robert H. Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61 (1986).

39. See, e.g., Jeffrey O'Connell & Janet Beck, *Overcoming Legal Barriers to the Transfer of Third-Party Tort Claims as a Means of Financing First-Party No-Fault Insurance*, 58 WASH. U. L. Q. 55 (1980).

40. STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 201 (1989).

41. Robert Rabin has argued in private correspondence with me that the U.S. workers' compensation system provides a counter-example to this statement. He points out that entitlement to workers' compensation bars a tort claim and that the workers' compensation system dispenses with the tort principle of full compensation. A short answer to this argument is that the statement in the text does not refer to workers' compensation, which I do not include in the definition of a "no-fault" scheme. See *supra* note 27. But a longer and better reply would be that the appearance of workers' compensation is affected by the background against which it is viewed. In an expansive welfare state such as New Zealand (or Australia), workers' compensation looks like an analogue of tort because it involves making a claim against a responsible party, and it is funded by liability insurance. It can be contrasted with the United Kingdom's industrial injuries scheme, which replaced workers' compensation and is a component of the social security system. In this respect, it is worth noting that the process that culminated in the introduction of the New Zealand accident compensation scheme began as an inquiry into the workers' compensation system—which was, of course, superseded by the no-fault scheme. By contrast, in a more market-oriented society such as the United States, workers' compensation may look more like an analogue of social security. However, there are (as far as I am aware) no proposals in the United States to replace employers' strict liability to compensate workers with a no-fault scheme funded by levies on employers, which would be more analogous to a social security disability scheme. This is probably because the practical operation of the workers' compensation system is very similar to that of a social security system. Nevertheless, there remains an important difference of principle between a compensation system based on an idea of community responsibility to meet the needs of the injured and one based on a concept of individual responsibility to repair harm.

## III. AUSTRALIA

## A. Tort Reform and Alternatives to Tort

As in the United States, there are various alternatives to the common law of tort operating in Australia.<sup>42</sup> All jurisdictions have workers' compensation schemes that differ from tort in two main ways: (1) the injured worker does not have to prove that the injury was caused by negligence, and (2) the assessment of compensation is less individualized. However, in contrast to the position in the United States, entitlement to workers' compensation does not bar a common law tort claim against the employer. As a result, employers' liability in tort is an important feature of the Australian system mainly because tort compensation may be more generous than equivalent payments under the applicable workers' compensation scheme. Both workers' compensation and employers' tort liability are funded by compulsory third-party liability insurance.

In all state jurisdictions there is a statutory criminal injuries compensation scheme. Such schemes are funded by general taxation. Entitlement depends on establishing (on the balance of probabilities, not beyond reasonable doubt) that the injury was the result of a crime (which will typically also be a tort); but it is not necessary that the criminal be successfully prosecuted or even identified. Once again, New Zealand was the leader in this field, introducing its scheme in 1963.<sup>43</sup> The rationale for such arrangements has been much debated,<sup>44</sup> but they are now so deeply entrenched that their continuance is beyond question, even if their cost is a cause of regular hand-wringing.

In a few states (the Northern Territory, Tasmania, and Victoria) there is a no-fault, transport accident compensation scheme. Entitlement under the Northern Territory scheme bars a tort claim, but the other two schemes operate alongside the tort system. In practice, the Victorian scheme deals with a very significant proportion of road accident personal injury claims; tort claims are allowed only in serious cases. In both Victoria and Tasmania, awards under the no-fault scheme are set off against any tort damages received by the injured person, and in Tasmania, no claim can be made under the road accident scheme if there is a right to claim workers' compensation benefits.

Most of these various alternatives to tort are products of the 1970s and early 1980s, and as I noted above, an abortive proposal was made in the

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42. Briefly described in ROSALIE P. BALKIN & JIM L. R. DAVIS, *LAW OF TORTS* 393–410 (4th ed. 2009).

43. The scheme has since been superseded by the accident compensation scheme discussed above. See *supra* note 27 and accompanying text.

44. CANE, *supra* note 33, at 304–09.

1970s for a comprehensive Australian no-fault personal injury compensation scheme. Proposals for a no-fault road accident scheme made by the New South Wales Law Reform Commission in 1984 proved fruitless, and the no-fault movement finally ran out of steam in the late 1980s. However, the defects of the tort system that were addressed by no-fault proposals remained, and (as in the United States, according to Gaskins)<sup>45</sup> gave rise to new policy initiatives aimed at reducing the amount of resources devoted to the tort system. Two main strategies were pursued: caps on damages, especially damages for loss of earnings and general damages, and procedural reform, particularly experiments with alternative dispute resolution. By the late 1990s, the attack on tort was being supported by claims of increasing litigiousness and changes in tort law indicative of a “blame (or ‘compensation’) culture.”<sup>46</sup> From one point of view, this new rhetoric represented a continuation of the anti-tort battle by different means: if tort cannot be abolished it should, at least, be cut down to size. In fact, however, it signaled an ideological *volte-face*. Whereas the main concern of advocates of no-fault was to compensate more injured people more efficiently, the major thrust of the new “reform” movement was to reduce the tort rights of the injured even if, in practice, this would have meant making more people dependent on social security and social welfare.<sup>47</sup> So strong was the backlash against the communitarian ideology of no-fault that in a highly influential “tort reform” manifesto published in 2002, the Chief Justice of New South Wales felt able to describe personal injury negligence law as “the last outpost of the welfare state.”<sup>48</sup>

In Australia, matters came to a head in 2002 with the occurrence of its first full-blown “insurance crisis.”<sup>49</sup> Undoubtedly, the causes of the crisis were varied, but they are not fully understood. The immediate catalysts were the collapse of a commercial insurer that held more than twenty percent of the public liability insurance market in Australia and the temporary insolvency of the country’s largest mutual provider of medical indemnity. Premiums for these two lines of cover rose suddenly and sharply. Relevant stakeholder groups—especially local government authorities, not-for-profits, and medical practitioners—had considerable political muscle. Despite the lack of supporting evidence,<sup>50</sup> significant responsibility for the crisis was laid at the door of the tort system. It was

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45. Gaskins, *supra* note 37, at 226.

46. A central text was P.S. ATIYAH, *THE DAMAGES LOTTERY* (1997).

47. Atiyah, however, still favored abolition. But, whereas in the 1970s he proposed its replacement by a social insurance/social welfare scheme, in the 1990s he was promoting a U.S.-style contractual solution—albeit against the background of a reasonably adequate social security and social welfare system. *See generally* ATIYAH, *supra* note 46.

48. J.J. Spigelman, *Negligence: The Last Outpost of the Welfare State*, 76 *AUSTRALIAN L. J.* 432, 432 (2002).

49. Peter Cane, *Reforming Tort Law in Australia: A Personal Perspective*, 27 *MELB. UNIV. L. REV.* 649, 653 (2003).

50. Indeed, it appears that the evidence supported the contrary conclusion. *See* E.W. Wright, *National Trends in Personal Injury Litigation: Before and After “Ipp,”* 14 *TORTS L.J.* 233 (2006).

argued that increases in the number of personal injury tort claims and aggregate tort damages coupled with a pro-plaintiff bias in the lower judiciary had made a significant, if not the most significant, contribution to increases in insurance premiums. As in the context of class actions,<sup>51</sup> here we see can a negative influence of U.S. tort law on Australian debates about tort law and, indirectly, on tort law itself. Especially by people who know little about the U.S. tort system, and whose understanding of the Australian tort system is limited, the former is often held up as a terrible warning of what its Australian counterpart might become if steps are not taken to curb “adversarial legalism”<sup>52</sup> and the development of a full-blown compensation and blame culture. However, the most important government-commissioned report about the crisis did not link increases in premiums directly to the number of tort claims and the aggregate amount of tort compensation.<sup>53</sup> Rather, it suggested more vaguely that tort doctrine had become too pro-plaintiff and that the tort system was costing too much.<sup>54</sup>

In response to the crisis and its alleged association with the tort system, the nine Australian governments (six states, two mainland territories and the Commonwealth) jointly appointed a “panel of eminent persons” to review the law of negligence as a system of compensation for personal injury. The chair of the panel was a judge of the New South Wales Court of Appeal (Justice David Ipp, by whose name the panel’s report is popularly known—the Ipp Report). Its other members were the mayor of a New South Wales country town, a clinical professor of surgery, and this writer. The panel’s terms of reference were based on two main ideas: that too large a proportion of society’s resources was devoted to the tort system, and that tort law set the balance between the interests of injurers and the injured too heavily in favor of the injured. The panel was instructed to make recommendations for changes to the law of negligence that would reduce the overall cost of the personal injury tort system and allocate more of the responsibility for avoiding, and meeting the costs of accidents to the injured. The panel was not invited to explore the alleged link between negligence law and the insurance crisis but was, in effect, instructed to assume such a link despite the lack of supporting empirical evidence.

The Ipp Report<sup>55</sup> contained sixty-one recommendations, many of which were soon embodied in legislation in all Australian jurisdictions now generically referred to as “the Civil Liability Acts.” Some of the changes would be familiar to U.S. tort reform experts—notably caps on pecuniary

51. See *supra* note 19 and accompanying text.

52. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

53. Cane, *supra* note 49, at 657–58.

54. *Id.*

55. COMMONWEALTH OF AUSTRALIA, *REVIEW OF THE LAW OF NEGLIGENCE: FINAL REPORT* (2002), available at [http://revofneg.treasury.gov.au/content/Report2/PDF/Law\\_Neg\\_Final.pdf](http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf).

and non-pecuniary damages. Others, however, have not been tried in the United States—such as reformulation of rules about standard of care and causation designed to discourage courts from too readily imposing liability for negligence.<sup>56</sup> At the same time, the panel recommended against change, such as has commonly been adopted in the United States, to the rule of joint and several liability.<sup>57</sup>

There is empirical evidence that the various changes to tort law that resulted from the Ipp Report—especially, perhaps, those imposing damages thresholds—have had the intended effect of reducing the aggregate number of tort claims,<sup>58</sup> and intuitively, it seems likely that the caps on damages have reduced the size of the relatively small proportion of large awards. However, the review of negligence law was not the only, or probably the most important, step taken to deal with the insurance crisis. Particular mention might be made of the suite of measures adopted to deal with the issue of medical indemnity because these illustrate well some of the differences between the U.S. and Australian landscapes in which tort law operates.<sup>59</sup>

The medical indemnity crisis had its major effect only on certain high-risk procedural specialties—notably obstetrics, gynecology, and neurosurgery. In Australia, such procedures are available both in the public health system and privately. Many doctors in such specialties work within both systems. Insurance for work undertaken in the public system is provided as part of the remuneration package by the public health authorities for which the doctors work.<sup>60</sup> It is only in respect of their private practice that doctors need to buy their own cover.<sup>61</sup> Nevertheless, sharp and sudden premium increases in 2001 and 2002 gave these groups of procedural specialists very considerable political clout because of the need to ensure the continued availability of their services especially outside big cities. The private component of the work of specialists who practice in remote, rural areas tends to be relatively smaller than that of their city counterparts, and the increases in premiums tended to represent a greater proportion of the private incomes of rural practitioners than of their metropolitan cousins. The fear was that this would cause specialists to leave rural areas, depriving their inhabitants of convenient access to specialist medical services. To address this risk, the Commonwealth government enacted various publicly-funded measures including a premium subsidy of 80% for premiums of more than 7.5% of the doctor's gross private income; payment of half of damages

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56. *Id.* ¶ 7.1–51.

57. *Id.* ¶¶ 12.1–26.

58. Wright, *supra* note 50.

59. For an excellent discussion of the United States situation, see KENNETH S. ABRAHAM, *THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11* 104–38 (2008).

60. See Fiona Tito Wheatland, *Medical Indemnity Reform in Australia: "First Do No Harm,"* 33 *J. L. MED & ETHICS* 429, 430 (2005).

61. *See id.*

awards totaling more than \$300,000 and of all claims over \$20 million; and an injection of capital of \$480 million into the insolvent medical indemnity insurer.<sup>62</sup> Even assuming that the various reforms of negligence law enacted in the wake of the Ipp Report have exerted significant downward pressure on medical negligence claims and awards (which, anyway, represent a miniscule proportion of personal injury litigation in Australia), the immediate solution to the crisis involved very significant public spending designed to prevent socially-oriented healthcare policy being undermined by the vagaries of the insurance market. As far as I am aware, in none of this did knowledge of experience in the United States play any part.

One of the main concerns of those who are dissatisfied with the tort system is that in terms of the basic common law principle of full compensation, it tends to under-compensate the most seriously injured and disabled. The 2002 reforms may have exacerbated this effect. On the other hand, tort compensation payable to a seriously injured person may be considerably more generous than counterpart social security benefits, which partly explains why personal injury litigation is often described as a “lottery.” The relative generosity of tort compared with social security can provide a positive argument for damages caps. At least since the 1960s in the United States, deterrence has been the prime function attributed to tort law. One of the basic assumptions underlying “tort reform” in the United States is that tort law and the tort system give socially undesirable incentives to risk-takers. By contrast, personal injury tort law in Australia is primarily viewed as a compensatory mechanism.<sup>63</sup> Since the late 1960s, outside the United States, the main plank of the case for abolition of the tort system as a means of dealing with personal injuries and its replacement by some form of no-fault arrangement has been tort’s inefficiency as a compensatory mechanism, especially by comparison with social systems of support for the disabled. Once tort is viewed as one component of a larger set of compensation mechanisms it becomes harder to justify its generosity relative to other members of the set and easier to contemplate making tort less generous.

Placing the tort system within the wider context of provision for the disabled also demonstrates how relatively insignificant tort law is in the wider scheme of things. The biggest cause of disability is aging, and in younger people, congenital defects and mental illness are highly significant.<sup>64</sup> The Australian Productivity Commission has recently

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62. *Id.* at 437.

63. For a brief discussion of this point in relation to class actions, see Clark & Harris, *supra* note 19, at 802–03.

64. For Australia, see AUSTL. GOV’T PRODUCTIVITY COMM’N, ISSUES PAPER, DISABILITY CARE AND SUPPORT 6–7 (2010) [hereinafter DISABILITY CARE AND SUPPORT], [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0007/98026/issues.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0007/98026/issues.pdf).

estimated that less than one percent of disability results from “accidents.”<sup>65</sup> Probably only a proportion of “accidents” would, even in theory, fall within the tort system, and we know that only a proportion of injuries that could in theory attract tort compensation actually do.<sup>66</sup> This explains why, since 2002 in Australia, proposals for change in the area of provision for the disabled have not focused on the tort system, but on developing better support, both public and private, for the disabled generally and, more particularly, the severely disabled, whatever the cause of their disability.<sup>67</sup> Whereas tort reform in the United States is an ongoing project of high political visibility, in Australia the tort reform exercise, precipitated by the insurance crisis of 2002, was very unusual in its scope, intensity, and political salience. Although abolition of tort is certainly not on the political agenda in Australia (except, perhaps, as a mechanism for supporting the very seriously disabled, and then only as part of a wider reform of the disability support system), tort law does not carry the double ideological freight of individual rights and health and safety regulation that it bears in the United States. When Australians reject the New Zealand accident compensation scheme as a model for their country, they do so not primarily because of its ideological underpinnings, but either out of self or partisan interest, or because of its supposed defects and inefficiencies.

#### *B. Structural and Institutional Differences Between Australia and the United States*

As in the United States, personal injury tort law is a firmly entrenched feature of Australian law and society. However, there are various plausible structural and cultural explanations of why U.S. tort law and the U.S. “way of doing tort law” provide little more than cautionary tales in Australia. One is implicit in the story told in the last section—Australia has very different health and social security systems than those in the United States. In particular, because of the system of universal health care (financed by a mix of public and private funding), the tort regime is a relatively less important source of support for the injured in Australia than in the United States. Despite significant changes of government policy and practice associated with the rise of economic liberalism since 1980, Australia is still best described as a welfare state. This is not because—or, at least, not only because—governments in Australia redistribute more resources from the rich to the poor and from the healthy to the sick than governments in the United States.<sup>68</sup> More deeply, I think, it shows that Australians are less

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65. *Id.* at 9. But the Commission does not define “accident.”

66. See CANE, *supra* note 33, at 207–14.

67. DISABILITY CARE AND SUPPORT, *supra* note 64, at 9 (“Currently, the overarching goal of Australian governments’ disability policies is to enhance the quality of life . . . of people with disabilities . . . . That goal is reflected in a range of . . . measures by governments. These include [among others] . . . the provision of care and support for people with disabilities and their families.”).

68. IRWIN GARFINKEL, LEE RAINWATER & TIMOTHY SMEEDING, WEALTH & WELFARE STATES:

suspicious of government and government provision than Americans, and that Australia is a less individualistic society than the United States.

A second explanation of why U.S. experience does not resonate in Australia is that Australia has more robust legislative institutions than the United States. This is related to the fact that in parliamentary systems of government, the legislature and the executive are integrated, whereas in presidential systems of the U.S. variety they are separated.<sup>69</sup> In the former, members of the political executive must be members of the legislature. Australian governments will normally control at least the lower house of the legislature and an administration will not be able to continue in office if it loses control of that chamber. This arrangement has several significant features. One is that party discipline is strong and the prime loyalty of the typical member of Parliament is to their political party, not to their constituency. Another is that the government has considerable control over the legislative agenda and over the proceedings of Parliament. This enables governments to achieve quite radical and far-reaching policy objectives through legislation, and to do so relatively quickly, and without having to make large, unpalatable concessions to opponents.<sup>70</sup> Although the legislative responses in the various states and territories (and at the federal level) to the 2002 insurance crisis were not uniform, their speed and scale illustrate the capacity of Australian governments to act quickly and in concert in a way that would be hard to imagine in the United States, especially when one notes that although the governments of all the states and territories at that time were controlled by the Labor (left-wing) Party, the federal government (which, because of its responsibilities for insurance and its large financial stake in the healthcare system, took the lead in the tort reform process) was controlled by the Liberal (conservative) Party.

The dynamics of the legislative process affect (the perception of) the role of courts. In the United States, courts are (seen as) political actors and agents of social change to a greater extent than in Australia. One relatively minor but pertinent illustration is found in the fact that in all Australian jurisdictions, apportionment for contributory negligence (“comparative negligence”) was introduced by legislation, whereas in a number of U.S. jurisdictions, it was the result of judicial action.<sup>71</sup> Despite the enactment of apportionment legislation in the United Kingdom in 1945, the High Court of Australia continued to elaborate the exceptions to the common law rule of

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IS AMERICA A LAGGARD OR LEADER? 68–71 (2010) (providing some data on income redistribution in various countries).

69. For brief discussion, see NARELLE MIRAGLIOTTA, WAYNE ERRINGTON, & NICHOLAS BARRY, *THE AUSTRALIAN POLITICAL SYSTEM IN ACTION* 73–74 (2010).

70. By the same token, however, it also enables an incoming government with different policy objectives to undo its predecessor’s achievements with relative ease.

71. See *RESTATEMENT (THIRD) OF TORTS* § 7 cmt. a (2000).



no recovery<sup>72</sup> and found, in that development in the “mother jurisdiction,” no inspiration to change the Australian common law to allow apportionment. Michael Green argues that the willingness of juries in the United States to award negligent plaintiffs reduced damages, despite the formal rule of no recovery, may have delayed the introduction of apportionment.<sup>73</sup> This suggestion has less force in relation to Australia where, by the mid-twentieth century, the role of the civil jury was greatly diminished. For the same reason, the contrary argument that “the willingness of juries to reach a compromise verdict in cases of contributory negligence” was a catalyst for the shift to comparative negligence<sup>74</sup> seems implausible in relation to Australia. The best explanation for the longevity in Australia of the common law rule of no recovery (albeit subject to a raft of qualifications) is that courts would have considered apportionment too radical a change to be achieved by judicial action and to be a proper subject only for the legislature. It is not clear why it took some Australian legislatures until the 1960s to introduce apportionment. Here, the best explanation may simply be lack of political pressure.

More significant than the story of comparative negligence is the fact that courts in the United States (especially at the federal level) are seen as playing a central role in setting and maintaining a balance of political power between the legislature and the executive. For instance, by exercising their judicial review functions, especially in relation to agency rule-making, U.S. courts have become active participants in the regulatory system in a way, and to an extent, that Australian courts have not and could not. It is a reasonable speculation that the status of U.S. courts as political actors, especially in the regulatory arena, has indirectly contributed to the development of personal injury tort law as a tool of regulation and to the idea that tort claims can make a significant contribution to the promotion of health and safety. Of course, it must be true in the United States, as it is in Australia, that the practical significance of the ordinary run-of-the-mill personal injury tort claim is primarily compensatory, not regulatory. However, at the systemic level with which we are concerned here, it is also true that common law tort claiming and the tort system are understood to have greater regulatory significance and potential in the United States than in Australia.

This is reflected in the importance of the U.S. doctrine of preemption. This doctrine, which is a function of federalism, is concerned with the question (in the words of Robert Rabin) of “whether Congress intended to displace tort law,” where “Congress” stands for federal regulation and “tort

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72. *Alford v Magee* (1952) 85 CLR 437 (Austl.).

73. See Michael D. Green, *The Impact of the Civil Jury on American Tort Law*, 38 PEPP. L. REV. 337, 343 (2011).

74. Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 427 (1999); see also JOHN G. FLEMING, *THE AMERICAN TORT PROCESS* 121–22 (1988).

law” refers to common law tort claims in state courts.<sup>75</sup> Preemption must be distinguished from the “regulatory compliance defense” to a tort claim according to which compliance with a statutory standard (whether contained in federal or state legislation) may, but will not necessarily, satisfy negligence law’s standard of reasonable care. The regulatory compliance defense operates similarly in Australian and U.S. tort law and in functional terms is concerned, as Rabin puts it, with whether the statutory regulator or the court is “better constituted to impose optimal standards of industry conduct.”<sup>76</sup> By contrast, although in principle the Australian Parliament could, within the boundaries of its legislative competence, either expressly or impliedly bar common law tort claims in state courts with respect to allegedly negligent breaches of federal statutory health and safety standards, “regulatory containment of the tort system”<sup>77</sup> is not an issue in Australia.

There are several possible explanations for this striking difference. I have already adverted to the first: in Australia, tort law is not understood as being in competition with statutory regulation to the extent that it seems to be in the United States. Adopting Rabin’s words again, in Australia, tort is not seen or commonly used as a means “to revisit and supersede the regulatory approval process.”<sup>78</sup> A second possible explanation relates to the respective ways the regulatory process is viewed in the two countries. It seems to me that the U.S. regulatory system puts greater emphasis on technological expertise and less emphasis on politics and value judgment than the Australian system. Put slightly differently, in Australia, regulation is more firmly located within the political process than it is in the United States, and because courts in Australia are not viewed as political actors, they are not considered to be a generally appropriate forum for engaging in or with regulatory decision-making. The thrust of Rabin’s proposal provides a useful counterpoint. He argues that in cases where Congress has not expressly barred tort claims, legislation should not be interpreted as doing so impliedly in cases where the regulatory process labored under some information deficit that the tort system can redress.<sup>79</sup> This proposal is motivated, he says, by a desire to “forge a path that recognizes the distinct benefits that both regulation and tort have to offer” to the project of promoting health and safety.<sup>80</sup>

A third possible explanation lies in differences between U.S. and

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75. Robert L. Rabin, *Territorial Claims in the Domain of Accidental Harm: Conflicting Conceptions of Tort Preemption*, 74 *Brook. L. Rev.* 987, 990 (2009) (emphasis omitted).

76. *Id.*

77. *Id.*

78. *Id.* at 1002.

79. *Id.*

80. *Id.* at 1009.

Australian federalism to which some reference has already been made.<sup>81</sup> The most important difference is found in the respective roles of the U.S. Supreme Court and the Australian High Court. The Australian High Court, unlike the U.S. Supreme Court, is the ultimate court of appeal on matters of state as well as federal law. As a result, the fact that in Australia (as in the United States) tort law is primarily a state legislative responsibility does not generate the degree of tension between federal statutory regulation and the state common law of torts as it appears to do in the United States because there is a national common law in Australia. Australia is a single common law jurisdiction in a way the United States certainly is not. This helps to explain why Australian tort law addresses the relationship between the common law of negligence and statutory standards through its equivalent of the regulatory compliance defense, but has not developed a doctrine analogous to preemption to address the relationship between federal regulation and state tort claims. In other words, in Australia, the relationship between tort law and regulation lacks the federal dimension it has in the United States.

### *C. Why Australian Courts Rarely Cite U.S. Tort Decisions*

The lack of influence of U.S. tort law in Australia is reflected in the fact that citation of U.S. tort decisions by Australian courts is relatively rare compared with citation of decisions from other major common law jurisdictions. This is certainly not because Australian courts are uninterested in what goes on elsewhere. Although the Australian land mass (at approximately 7.7 million square kilometers), rivals in size that of the United States (at approximately 9.6 million square kilometers), Australia is a small nation of only about twenty-one million people. Despite a significant indigenous population and increasing immigration from Asia to Australia, Australian culture is predominantly Anglophone and European. That fact, coupled with Australia's location on "the other side of the world," has produced a *zeitgeist* that is outward-looking and constantly conscious of its links with, and dependence on, the rest of the world. Put bluntly, the most obvious reason why Australian courts do not look to the United States for inspiration and guidance is that Australia was once part of the British Empire but has never been part of the American empire.

This is not to say that U.S. law has had no influence in Australia. Indeed, the U.S. Constitution was a major source of inspiration for the founders of the Commonwealth of Australia in the latter half of the nineteenth century. In particular, the first three chapters of the Australian Constitution mirror the first three Articles of the U.S. Constitution in establishing a separation of powers between the legislature, the executive, and the judiciary. As a result, U.S. constitutionalism continues to exert influence in Australia. However, even in this area the influence is limited.

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81. See *supra* pp. 259–60.

Australia has no constitutional bill of rights. One of the states and one of the territories have enacted statutory bills of rights, but these establish a weak form of judicial review rather than the strong form operative in the United States.<sup>82</sup> Human rights thinking in Australia is based much more on European and international models than on U.S. experience. Moreover, separation of powers is understood very differently in Australia than it is in the United States. The Australian governmental system is parliamentary rather than presidential. The result is twofold: first, in Australia, unlike the United States, the legislature and the executive are integrated rather than separated; and, second, partly for this reason, judicial power is more strictly separated from executive power in Australia than in the United States.<sup>83</sup> However, the public law of the Australian states is significantly different from the public law of the Commonwealth of Australia. None of the constitutions of the Australian states embodies formal separation of powers, and although federal public law affects state public law in various ways, there was no reception of principles of U.S. constitutionalism at the state level. Even more than the federal system, the governmental systems of the states are firmly rooted in English soil.

Important to understanding the orientation of Australian law is the fact that as a nation, Australia emerged as a result of evolution rather than revolution. When the British settled Australia in 1788, they brought both common law and statutory law with them. The legal system of the indigenous inhabitants was unknown or ignored. The official date of reception of statutes of the Westminster Parliament into the colony of New South Wales was July 25, 1828: all statutes in force at that date were automatically applied in the colony.<sup>84</sup> Although the Commonwealth of Australia came into being at an identifiable moment in 1901 as the result of a deliberate process of building a nation and drafting a constitution, this event only marked the beginning of the process of creating an autonomous legal system. The constitutions of the various colonies that became the States of the new federation continued in force. These constitutions reflected the development of responsible government (i.e., the integration of legislature and executive) in the nineteenth century in both the United Kingdom and the Australian colonies. For most of the twentieth century, the ultimate court of appeal in the Australian legal system was the U.K. Privy Council. Senior judges from Commonwealth countries often sat as members

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82. See *Victorian Charter of Rights and Responsibilities Act 2006* (Vic) (Austl.); *Human Rights Act 2004* (ACT) (Austl.).

83. PETER CANE, *ADMINISTRATIVE TRIBUNALS AND ADJUDICATION* 82–86 (2009).

84. BRUCE KERCHER, *AN UNRULY CHILD: A HISTORY OF LAW IN AUSTRALIA* 74–75 (1995). Until as recently as 1985 the law of limitation of actions in the Australian Capital Territory was based on a 1623 statute of the English Parliament. F.A. TRINDADE & PETER CANE, *THE LAW OF TORTS IN AUSTRALIA* 632 (1985).

of the Privy Council, but most of its judges were members of the U.K. House of Lords, the final appellate court for England and the other U.K. jurisdictions (until its replacement by the U.K. Supreme Court in 2009). This coincidence of membership enhanced the influence of the English common law in Commonwealth jurisdictions; especially in matters of private law, decisions of the House of Lords (and the English Court of Appeal) were treated with the greatest respect by Australian courts even though they were not technically binding. This was partly because—at least until the middle of the twentieth century—Australia needed more law (especially common law) than it could produce locally. For obvious reasons, it looked mainly to the United Kingdom to supply that need.

Most rights of appeal from the High Court of Australia to the Privy Council were abolished by the mid-1970s, but appeals from state courts remained possible. The jurisdiction of the Privy Council in Australia was not finally and completely removed until 1986, when two pieces of legislation called the Australia Acts, enacted in parallel by the Westminster and Australian Parliaments, abolished most of the remaining links between the Australian and U.K. legal systems.<sup>85</sup> This event has profoundly influenced the development of Australian law, including tort law. It cleared the ground for the development of an Australian national common law (as already discussed). Subsequent developments in the United Kingdom—particularly the enactment of the Human Rights Act 1998 and the consequent impact of the European Convention on Human Rights on English private law<sup>86</sup>—together with a new sense of legal independence and nationalism in Australia and growth of local production of statute and common law (including tort law), have generated increasingly significant divergences between English and Australian tort law. However, U.S. tort law has played no discernible part in this process, and there has been no wholesale, or even retail, importation of U.S. tort law into Australia since 1986.

A final factor that may help to explain the near-invisibility of U.S. tort law in Australia (and to which brief reference has already been made) is the continued use of civil juries in the United States to a much greater extent than in Australia. Except in the state of Victoria, it has been many years since juries have played a significant role in tort litigation in Australia.<sup>87</sup> The abolition of the jury has had subtle but profound effects on tort doctrine. It has, for instance, led to much greater judicial elaboration of damages-assessment principles<sup>88</sup> and the standard of care (i.e., the “breach” question)

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85. GERARD CARNEY, *THE CONSTITUTIONAL SYSTEMS OF THE AUSTRALIAN STATES AND TERRITORIES* 66–74 (2006). Note, however, that the British Monarch is also the Monarch of Australia.

86. See, e.g., JANE WRIGHT, *TORT LAW AND HUMAN RIGHTS* (2d ed. 2001).

87. Jane Stapleton, *Controlling the Future of the Common Law by Restatement*, in *EXPLORING TORT LAW* 262, 265 (M. Stuart Madden ed., 2005).

88. See FLEMING, *supra* note 74, at 123 (“By far the widest scope for jury discretion is its power to assess damages . . . . [T]he American law of . . . tort damages for personal injuries, is surprisingly

in negligence. Regarding damages, the result—in the United Kingdom to a greater extent than in Australia—has been an approach to the assessment of general damages based on a semi-authoritative “tariff” of injuries and awards designed to achieve predictability and uniformity.<sup>89</sup>

Concerning the standard of care, the demise of the jury has inevitably affected judicial understandings of the relationship between the duty question and the breach question in negligence cases. Mark Gergen argues that the U.S. system uses the duty/breach distinction to strike a balance between the predictability and “expertise” of judicial decision-making on the one hand, and the “popular” and flexible character of jury decision-making on the other, at least with regard to “normative” or “moral” issues such as reasonable care.<sup>90</sup> Jane Stapleton explains how general “no-duty” rules, which nevertheless allow for fact-specific exceptions, enable judges to keep the issue of reasonable care from the jury and simultaneously achieve what are considered to be fair results in individual cases.<sup>91</sup>

In a system without juries, the duty/breach distinction can operate to allocate decision-making power—not as between judge and jury, but as between appellate and trial court. The more closely an appellate court tailors its findings of duty to the facts of particular cases, the less leeway it leaves trial judges in future cases to deal differently with factually similar claims. This technique can be seen at work in the deployment of distinctions between the existence of a duty of care on the one hand and its “scope” or “content” on the other,<sup>92</sup> and between the scope or content of duty on the one hand and standard of care on the other. Appellate courts that wish to control trial judges may use the language of “scope” or “content” to narrow a general duty in such a way as to restrict the freedom that trial judges would have if the facts of the case were treated as going to standard of care rather than duty. This is because decisions on issues of duty can create precedents, whereas decisions on standard of care cannot. For example, in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*,<sup>93</sup> the question was whether the owner of a shopping centre could be held liable to an employee of a tenant of the centre who was mugged in the centre’s car park late at night after work. It is firmly established that an occupier of land (such as the owner) owes a (general) duty of care to lawful visitors (such as the employee). One way of addressing the issue that arose in *Modbury* would be to ask whether

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unformulated.”).

89. For the United Kingdom, see JUDICIAL STUDIES BD., GUIDELINES FOR THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES (9th ed. 2008).

90. Gergen, *supra* note 74, at 431–38.

91. See Stapleton, *supra* note 87, at 262.

92. See, e.g., *Cole v S. Tweed Heads Rugby Football Club Ltd* (2004) 217 CLR 469, ¶ 1 (Gleeson, C.J.) (Austl.).

93. (2000) 205 CLR 254 (Austl.).

the owner's (general) duty to this employee extended to protecting her from criminal acts of third parties. Another approach would be to ask whether, in all circumstances of the case, the owner had been negligent in not taking steps that would probably have prevented the attack. The former technique gives trial judges less scope for taking account of the detailed facts of particular cases than the latter.

On the other hand, we also find appellate courts discouraging trial courts—which, unlike juries, typically give reasons for their decisions—from framing standards of care at high levels of generality in such a way as effectively to embed them in the law as statements of duty.<sup>94</sup> This approach may be understood as the converse of that analyzed in the previous paragraph: appellate courts that want to control trial judges by making fact-specific findings of duty will also likely want to prevent trial judges from transforming fact-specific findings of breach into legal holdings of fact-specific duty. The High Court of Australia has an incentive to take both approaches because in recent years it has been keen to establish itself as the ultimate authority on the Australian common law, including the common law of torts. Around the time of the 2002 insurance crisis, it was frequently said that trial judges as a group had become too pro-plaintiff. Harold Luntz has documented a pro-defendant shift by the High Court starting in the late 1990s,<sup>95</sup> one argument used against certain aspects of the statutory tort reforms introduced to address the crisis was that they were unnecessary because the High Court had already “reined in” tort law. Be that as it may, it seems that the High Court sees one of its functions as being to regulate decision-making by trial courts, and the duty/breach distinction can be used to that end.

Over the past decade and more, the High Court has also devoted considerable attention to the relationships between itself as the ultimate appellate court, (intermediate) state courts of appeal, and trial courts. It has given leave to appeal in a significant number of cases in which the basic issue is whether the intermediate court should have interfered with the trial court's fact-specific decision-making on the issue of reasonable care. This approach may, once again, be interpreted as witnessing a concern of the High Court to establish itself (and not intermediate appellate courts) as the prime regulator of the application of fact-sensitive standards by trial courts.

Having said all this, however, I think that the abolition of juries has actually diverted attention away from the power-allocation function of the duty concept. Although manipulation of the distinctions between the existence and content of duties and between content of duty and standard of care may affect the allocation of decision-making power, it is by no means clear that this has been its purpose. For instance, the aim of discouraging

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94. FRANCIS TRINDADE, PETER CANE & MARK LUNNEY, *THE LAW OF TORTS IN AUSTRALIA* 451–52 (4th ed. 2007).

95. Harold Luntz, *Torts Turnaround Downunder*, 1 OXFORD U. COMMONWEALTH L.J. 95, 96 (2001).

trial judges from enunciating general standards of conduct may also be to strike an appropriate balance between the citizen-oriented values of predictability and flexibility. In Australian law, the duty concept is primarily understood as a technique not for regulating the allocation of rule-making power, but for specifying the scope of legal liability. This would explain why Australian law contains an eclectic collection of bright-line no-duty rules (unrelated to concepts such as foreseeability and reasonableness) and much more fact-sensitive principles. Bright-line principles include the rules that advocates do not owe their clients a duty of care for either in-court or out-of-court conduct relating to the case<sup>96</sup> and that a child cannot sue a doctor for wrongful birth.<sup>97</sup> By contrast, the principles governing the scope of liability for mental harm<sup>98</sup> and economic loss<sup>99</sup> are very fact-sensitive. Indeed, the general approach currently approved by the Australian High Court for determining whether a duty of care exists involves taking account of “salient features” of the individual cases.<sup>100</sup> Lists of salient features can be extracted from the case law, but such lists are necessarily provisional and open-ended. The choice between bright-line rules and fact-sensitive principles seems to depend not on considerations of institutional design but rather on the desirability of establishing boundaries of tort liability that appropriately take account of the interests of both potential doers and potential sufferers of harm. In short, in Australian law, duty is first and foremost a device for controlling liability, not for allocating the power to make decisions about liability.

#### *D. U.S. and Australian Tort Scholarship*

Finally, we may deepen our understanding of the relationship between U.S. and Australian tort law by paying some attention to differences between tort scholarship in the two countries. This is not because such differences explain that relationship, but because they reflect intellectual factors and features of legal culture that help to explain the near-invisibility of U.S. tort law in Australia. At some risk of over-generalization and over-simplification of complex realities, I think it is fair to say that Antipodean tort scholars are, as a group, more formalist and doctrinal in approach than their typical U.S. counterparts. The effects of realism and instrumentalism have been less and have come later in Australia than in the United States. Nor has the economic and regulatory approach to tort law taken hold in

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96. TRINDADE, CANE & LUNNEY, *supra* note 94, at 531–33.

97. *Id.* at 536–38.

98. *Id.* at 479–84.

99. *Id.* at 492–513.

100. *Id.* at 467–68.



Australia in the way it has in the United States. In the Antipodes, the centre of gravity of academic analysis and thought about private law lies much closer to notions of corrective justice. Of course, such ideas have also had some influence in the United States. After all, one of the leading proponents of corrective justice accounts of tort law in particular and private law more generally—Jules Coleman—is American. Moreover, two of the most influential and prolific U.S. tort scholars of a younger generation—John Goldberg and Benjamin Zipursky—propound a version of corrective justice theory.<sup>101</sup>

On the other hand, it is significant that modern corrective justice approaches were developed (starting in the 1970s in North America) in reaction and as an alternative to instrumentalist, economic, and regulatory accounts of tort and other areas of law, which gained no secure purchase outside the United States. Scholars in the United Kingdom and Australia, for instance, have embraced corrective justice and wrong-based or right-based accounts of private law not because they offer an attractive alternative to instrumentalist accounts but because they seem to fit well with common pre-theoretical understandings and interpretations of the law. Whereas U.S. corrective justice theorists may seem to be swimming against the tide of widespread regulatory and functionalist thinking about tort law, their counterparts outside the United States are more likely to see themselves as merely articulating an implicit but fundamental feature of legal thought.

An illuminating, if impressionistic, contrast with the position in Australia and other Commonwealth jurisdictions is provided by the situation in Israel as depicted by Haim Sandberg in a recent article in which he describes U.S. influence on legal education and scholarship in Israel in terms of colonization.<sup>102</sup> Increasingly, Israeli legal scholars will have done graduate legal work in the United States. By contrast, with the possible exception of public law scholars, Australians who acquire graduate qualifications abroad are still more likely to do so in the United Kingdom than in the United States. No university in the United States can claim a reputation in Australia as a centre for sophisticated private law scholarship to rival that of Oxford or Cambridge. My impression is that Australian private law scholars who take study leave abroad are more likely to do so in the United Kingdom (or Canada) than in the United States. This orientation toward the United Kingdom is reflected in the success of the biennial *Obligations* conference series, which was initiated at the University of Melbourne in 2002 and has “become a leading forum for discussions of

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101. Goldberg & Zipursky, *supra* note 13, at 925.

102. Haim Sandberg, *Legal Colonialism—Americanization of Legal Education in Israel*, 10 GLOBAL JURIST Article 6 (2010), <http://www.bepress.com/gj/vol10/iss2/art6>. In personal correspondence, Stephen Sugarman said:

[F]rom here I see how U.S. scholarship is influencing not just Israel, but Latin America, some parts of Germany, younger scholars in Japan, etc. I think that over time legal scholarship will become more connected to social sciences and more empirically based everywhere, including Australia.

private law in the common law world.”<sup>103</sup> Participants in *Obligations I* were predominantly from the major Commonwealth jurisdictions, including Australia and the United Kingdom. Eight years later, *Obligations V* attracted U.S. scholars who are increasingly interested in and willing to engage with ideas about private law generated outside the United States.

Sandberg suggests that the Americanization of legal education and research in Israel has had various effects on the legal system. One effect is that Israeli scholars have become less inclined to address an audience that includes Israeli judges and legal practitioners; they are now more interested in communicating with the U.S. scholarly community. Another is that U.S.-educated scholars increasingly “distance” themselves from Israeli law with the aim of “getting closer to global law, in general, and American law in particular.”<sup>104</sup> By contrast, most Australian (and U.K.) scholars of tort law in particular and scholars of the law of obligations more generally show relatively little interest in U.S. law. This is, perhaps, partly the result of the complexity of the U.S. legal system and the difficulty of penetrating and navigating the huge and immensely dense forest of primary and secondary U.S. legal materials.<sup>105</sup> But it may also be that the prime intended audience for the best U.S. legal scholarship consists of scholars. By contrast, much of the best Commonwealth scholarship (apart from that with a primarily pedagogical purpose) is still directed, at least in part, to those involved in the practical administration of the law, including judges, lawyers, and policy-makers. Commonwealth scholars, to a greater extent than many of the most influential U.S. scholars, see themselves as part of what Sandberg calls “the broader population of jurists.”<sup>106</sup> By contrast, at least to the outsider, many scholars in the elite U.S. law schools seem to identify more with, and be more oriented towards, the broader academy, especially philosophers, historians, and social and political scientists. Such differences are, of course, only differences of degree, but they are nevertheless real and significant.

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103. *Obligations V: Rights and Private Law*, UNIV. OF OXFORD & UNIV. OF MELBOURNE, <http://www.law.ox.ac.uk/obligations/> (last visited Oct. 21, 2010).

104. See Sandberg, *supra* note 102, at 10.

105. The American Law Institute’s restatements of the law, which might provide a useful insight into U.S. law for the foreign scholar, are relatively unknown and unused outside the United States. Fleming’s text was the first substantial treatise to focus on Australian law. See *supra* notes 6–7 and accompanying text. Before its publication, Australian students and lawyers relied on English texts. U.S. tort treatises have never been used much in Australia. One result of lack of interest in U.S. law is that few Australian scholars publish in U.S. law journals (especially earlier in their careers). To the outsider, the typical student-edited U.S. law journal appears unwelcoming to articles that are significantly concerned with foreign law or that engage in serious comparative analysis. Australian scholars who aspire to publish abroad—especially those who work in private law—generally prefer the leading U.K. journals.

106. See Sandberg, *supra* note 102, at 9.

#### IV. CONCLUSION

Sandberg fears that the Americanization of Israeli legal scholarship will affect the way law is taught in Israeli universities and, in the longer term, lead to an Americanization of the Israeli legal system to the detriment of Israeli society.<sup>107</sup> In other words, he posits the sort of causal connection between legal education and scholarship on the one hand, and law and the legal system on the other, that I avoided at the beginning of the previous section. Even if Sandberg is right in positing such a link, I think we can safely speculate that the future for U.S. law in the Antipodes is bleak. There is no sign that the Australian legal academy and legal education will be significantly Americanized any time soon. A legal transplant is likely to be successful only if it is needed and is compatible with the system into which it is being transplanted. There was certainly a time when Australia, for instance, needed more law than it could produce locally. But for the various reasons I have explained, the United States was not the place it looked to supply that need. I have also suggested cultural and systemic differences between Australia and the United States that might lead us to expect that any attempt to graft U.S. tort law onto the Australian root-stock would have ended in rejection or at least serious weakening of the host. Law is, to a significant extent, historically and culturally specific—or “path-dependent,” as the theorists might say. The Australian historical and cultural experiences are sufficiently different from their American counterparts to explain why Australia has not needed U.S. tort law in the past and is very unlikely to need it in the future.

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107. *See id.* at 10.