

**Address by the Rt. Hon Dame Sian Elias, GNZM,
Chief Justice of New Zealand
at the 18th Commonwealth Law Conference
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I am delighted and honoured to have been asked to participate in this session, designed to illustrate unity and diversity in the legal systems of the Commonwealth by reference to five interesting cases in different jurisdictions. As a Judge in one of the more recently-established final courts of appeal in the Commonwealth, I know how much my Court scans the case-law of Commonwealth jurisdictions for help in novel cases and would like to say how useful we have found the Law Reports of the Commonwealth for identifying cases of interest, especially those usually less accessible to us.

The New Zealand case I have been asked to address was one suggested by Professor Peter Slinn after discussion with one of my colleagues, *Couch v Attorney-General*.¹ I was more doubtful about their choice. While my colleague had written the principal judgment for the majority in that case, I had dissented, but I would like you to believe that was not the principal reason why I doubted whether *Couch* would travel well – those have more to do with the background to the case and the fact that, despite the sound, fury and indignation that peeps through in the reasons given by the judges, the practical effect of the decision may not be particularly significant (something I want to touch on).

I suggested to Professor Slinn that it might be more interesting to speak about another decision of the New Zealand Supreme Court, *Attorney-General v Chapman*, dealing with damages as a remedy for breach of our Bill of Rights Act where the state actor in breach is the judiciary.² I thought that might be of interest because Bill of Rights damages is a remedy fashioned by the New Zealand judiciary borrowing from Commonwealth precedents and because the case raised questions about whether Crown liability is limited to actions of the Executive, or whether it covers actions attributable to the State as a whole. (As the very interesting case of *Marin* from the Caribbean Court of Justice, which is to be discussed in this session, shows, the capacities in which governments can sue or be sued in the courts is a topic which exercises a number of jurisdictions).³

¹ *Couch v Attorney-General (No 2)* [2010] NZSC 27, [2010] 3 NZLR 149.

² *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

³ *Marin v Attorney General of Belize* [2011] CCJ 9 (AJ).

Professor Slinn's solution, in a sort of reverse judgment of Solomon, was to include both New Zealand cases. I have some embarrassment about that. Both are very long. And because in *Chapman* as well as *Couch* I dissented, they showcase divergence within the Supreme Court as much as divergence within the Commonwealth in substantive law.

In the time I have, I have decided to concentrate on *Couch*. What I think may be principally of interest to this audience is not so much its demonstration of diversity in result (as I said, I do not think that there is a huge amount of difference between the majority and minority provisions in practice). Rather, I think it is illustrative of unity in approach within the common law method. The principal points I want to make are to do with that method (which is familiar to most of us) and when it properly allows divergence in substance.

Couch decides that exemplary damages are available for claims in negligence only if the conduct which causes harm to the plaintiff is intentional or "subjectively reckless". Objectively reckless conduct, however outrageous, is not enough. In this determination, the Supreme Court declined to follow a recent decision of the Privy Council in a New Zealand case.⁴ The case is important for the substantive point of principle and also for the Supreme Court's indication that it does not consider itself bound by decisions of the Privy Council when the final court of appeal for New Zealand, and its discussion of when it will consider itself free to depart from such precedent.

The case itself was brought on a strike out application. As appears from the judgment, the pleadings were unsatisfactory and discovery had not yet been obtained.⁵ It was not clear to what extent the claims were brought against the Attorney-General on the basis that the Department of Corrections was directly or vicariously liable.

The plaintiff had been terribly injured in a robbery in which 3 other people had been killed. The principal offender was on parole and was working with the knowledge of his probation officer at the club at which the plaintiff and those killed had been employed, despite assessments indicating that was a risk when placed in positions where alcohol and money were available to him. It was frankly acknowledged by the Attorney-General that the probation officer had been overworked and out of her depth. Although the facts had not yet been established, it seemed likely that the plaintiff would succeed in showing that statutory obligations for the protection of the public had not been observed and that there were systemic deficiencies in the operations of the Probation Service as well as errors made by the individual probation officer.

⁴ *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721.

⁵ *Couch v Attorney-General (No 2)*, above n 1, at [6], [37], [40].

In an earlier round of the same litigation, the Attorney-General had been unsuccessful in seeking to strike out the claim in negligence on the basis that the statutory duties of the probation officer and the Probation Service gave rise to no duty of care.⁶ The latest case was concerned simply with whether exemplary damages were available for claims in negligence or whether it was necessary for the plaintiff to show intention to harm the plaintiff or reckless indifference to a risk of harm to her.

There are some matters of background I need to cover.

First, the claim could be brought only for exemplary damages because, under New Zealand's system of accident compensation, no claim for compensatory damages (including aggravated damages) could be brought arising out of a personal injury. That is background that was used to suggest that in New Zealand conditions it was necessary to maintain a sharp distinction between compensatory and punitive damages. The Attorney-General argued that the provisions of the Accident Compensation legislation which prevent claims for compensation arising out of personal injury also excluded exemplary damages. The Supreme Court was unanimous in following earlier Court of Appeal authority (which had some subsequent statutory support) holding that exemplary damages were outside the compensatory scheme and not excluded by the language of the statute.⁷ As appears from the majority judgments, a significant factor in the reasoning was the risk that the availability of exemplary damages might cause plaintiffs to seek to top up accident compensation payments.⁸

Secondly, the Attorney-General had acknowledged vicarious liability of the Crown should the probation officer be liable for exemplary damages. That concession was awkward given that some members of the Supreme Court had held in an earlier Court of Appeal case that exemplary damages could not be available where liability is vicarious. Although all members of the Court acknowledged that the scope of vicarious liability was not directly before it, concern about the concession made by the Crown appears in some of the judgments and may be thought to amplify suspicion about exemplary damages.

Thirdly, New Zealand has since the 1980s declined to apply the restrictions on the availability of exemplary damages developed by the House of Lords in *Rookes v Barnard*.⁹ The case-law indicates an unwillingness to confine exemplary damages to categories of case or

⁶ *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.

⁷ At [7], [72], [86]–[89], [203] and [250].

⁸ At [66], [135] and [241].

⁹ *Rookes v Barnard* [1964] AC 1129 (HL).

types of behaviour and a preference for Lord Wilberforce's view in *Broome v Cassell*¹⁰ that the vindication of the law (Lord Devlin's words) which make it appropriate to award exemplary damages on the basis of the defendant's behaviour is not properly described as "anomalous".¹¹ These cases were, however, developed in respect of claims arising out of defamation, assaults, and other intentional torts. Only one first instance New Zealand case awarded exemplary damages on the basis of negligence.¹² That was the state of the law when *Bottrill* arose.

Bottrill is the fourth and most important matter of background. The New Zealand Court of Appeal there allowed an appeal by Dr Bottrill, a pathologist, against an order for new trial on the basis of fresh evidence following dismissal of a claim for exemplary damages against him by a patient for his negligence in misreading her tests and failing to diagnose her cancer.¹³ The Court, with one dissentient, held that exemplary damages was available for negligence but only if the defendant was subjectively aware of the risk of his conduct and acted deliberately, in reckless disregard of the risk.¹⁴ The new evidence, which showed that Dr Bottrill's misreading of the tests was much more extensive than had been appreciated at trial, was held to be immaterial on the ground that it did not address the question of knowledge. On appeal to the Privy Council, it was held by a majority (Lords Nicholls, Hope and Rodger) that the restriction of exemplary damages to cases of subjective recklessness was not warranted.¹⁵ The minority (Lords Hutton and Millett) would have confined exemplary damages to cases of subjective recklessness, although they would have allowed the appeal on the basis that the extent of the errors made by Dr Bottrill raised an issue as to whether he was put on notice, the basis on which the trial judge had granted a new trial.¹⁶ Two of the Judges who sat in the Supreme Court in *Couch* were members of the Court of Appeal which decided *Bottrill* and which was overturned by the Privy Council.

The final point to note in relation to *Couch* is the basis on which the New Zealand Supreme Court was set up to replace the Privy Council as our final court of appeal and which provided the occasion for the departure from the precedent set by the Privy Council in *Couch*. The New Zealand Supreme Court was set up in 2003. Under s3(a) of its Act the purpose with which it was set up is set out as being:¹⁷

¹⁰ *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL).

¹¹ *Rookes v Barnard*, above n 9, at 1227.

¹² *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424 (HC).

¹³ *Bottrill v A* [2001] 3 NZLR 622 (CA).

¹⁴ At [62].

¹⁵ *Bottrill v A* (PC), above n 4, at [26].

¹⁶ At [82] and [84].

¹⁷ Supreme Court Act 2003, s 3(a).

to establish within New Zealand a new court of final appeal comprising New Zealand judges:

- (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
- (ii) to enable important legal matters including matters relating to the Treaty of Waitangi to be resolved with an understanding of New Zealand conditions, history, and traditions; and
- (iii) to improve access to justice ...

It is clear that the majority judges in *Couch* considered that this was a case where knowledge of New Zealand conditions relating to the Accident Compensation legislation was important in the decision to depart from precedent.¹⁸ Indeed, some judgments indicate surprise that the Privy Council had not followed its practice in recent years in deferring to the assessment of the local courts in matters of policy.¹⁹ (The Privy Council majority in *Bottrill* had indicated that it was the error of principle it was correcting – the failure to treat the remedy of exemplary damages as one of general application. The majority in *Couch* considered that there was no error of principle because the Privy Council starting point that the remedy was generally applicable rather than anomalous was wrong).

Re-reading the judgments, it is hard I think to escape the impression that the difference here cannot really be dressed up by local conditions.

There are a number of examples in New Zealand of areas of law where local conditions set up divergence from other jurisdictions. Divergence sometimes follows local statutory policies or New Zealand history, such as under the Treaty of Waitangi. An important difference between New Zealand on the one hand and the United Kingdom and Australia on the other has been in relation to claims for economic loss in relation to local authorities in respect of their approval and supervision of building work. The Privy Council explicitly recognised this divergence as legitimate in *Hamlin v Invercargill City Council*²⁰ (a decision the Supreme Court has declined to depart from recently).²¹ Similarly, in relation to qualified privilege for the press in cases of public interest, the Privy Council

¹⁸ See, for example, *Couch v Attorney-General (No 2)*, above n 1, at [106], [108] and [212].

¹⁹ At [53] per Blanchard J.

²⁰ *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

²¹ *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289.

accepted that New Zealand law could diverge from British law in *Lange v Atkinson*.²²

In the *Couch* case however there is no indication that the Privy Council did not understand that compensatory damages were not available for personal injury cases and all the arguments that prevailed in *Couch* were weighed in *Bottrill*. *Bottrill* was consistent with earlier New Zealand Court of Appeal authority declining to adopt a categorical approach to the availability of exemplary damages and declining to treat such awards as anomalous in principle, while acknowledging them to be exceptional.²³ Instead, I think it is clear that the majority simply regarded the failure of the Privy Council to require subjective recklessness as a pre-condition of the award of exemplary damages for negligence as wrong when assessed against the purpose of punishment which confines the jurisdiction. That was undoubtedly a course available to them, as it is to any final court.

It has to be acknowledged (and is a point made explicitly by McGrath J²⁴) that the difference in approach is not likely to lead to very different outcomes in practice. The Privy Council thought the better policy was "never say never" but clearly thought that exemplary damages (always exceptional) would be highly unlikely except in cases of advertent recklessness.²⁵ It seems to me that there are two significant implications of the decision. First, it couples the mental element of advertence to risk with the element of foreseeability of harm to the plaintiff for the tort of negligence (rather than in allowing it might be advertent behaviour accompanying the tort). Secondly, it indicates a preference for a more categorical approach than has been the pattern in New Zealand case law (as the reliance on *Rookes v Barnard* indicates) and which may have implications for future directions in the work of the Court if maintained. But this is speculation.

Such speculation aside, what the decision is interesting for is the indication of when precedent (and uniformity) should not prevail. *Couch* is illustration of the obligation, recognised in 1966 by the House of Lords, that departure from precedent is necessary when it is right to depart.²⁶ Although there have been attempts from time to time to identify a check list of when such departure is warranted, I do not think the test of rightness can be further refined. Certainty and predictability are always important considerations. Context in this, as in all law, is everything.

²² *Lange v Atkinson* [2000] 1 NZLR 257 (PC).

²³ *Taylor v Beere* [1982] 1 NZLR 81 (CA) at 85 per Cooke J; at 90 per Richardson J; and at 95 per Somers J.

²⁴ *Bottrill v A* (CA), above n 13, at [230].

²⁵ *Bottrill v A* (PC), above n 4, at [26].

²⁶ Practice Statement [1966] 3 All ER 77.

Benjamin Cardozo saw the method of the common law as one of change. The propositions of law we adopt are "working hypotheses".²⁷ One of the principal prods for reassessment is the work of courts in other jurisdictions. In hard cases, such as come before final courts, we need all the help we can get. Of course we look to the reasons that have convinced other courts. *Couch* is an example. The surveys (and explanations) of the cases in other jurisdictions is a significant part of the reasoning. Of course, since those courts are themselves operating on working hypotheses, such reliance may prove unreliable over time and require reassessment. Common law method tends to convergence over time, except where there are significant differences in local traditions (in respect of which much divergence was tolerated even in colonial times). Lord Goff described judging as "an educated reflex to facts".²⁸ Sharing much, it is not surprising that the different jurisdictions of the Commonwealth produce similar reflexes in judging. As the Privy Council said in *Lange v Atkinson*:²⁹

Even on issues of local public policy, every jurisdiction can benefit from examination of an issue undertaken by others. Interaction between the jurisdictions can help to clarify and refine the issues and the available options, without prejudicing national autonomy.

The excellence of and ease of accessing law reporting and the speed with which new cases pass around the world mean that all of us are exposed to the reasoning of others. Convergence is also prompted by the international derivation of so much of our enacted law.

Often divergence will be a result of lag which will be corrected over time. Where we go different ways, it will be because there are reasons to differ. In such cases, the expressions of difference are themselves critical to the continuing vitality of the law. I doubt that *Couch* is a case which provides justification for local divergence. It is another hypothesis which is unlikely to survive reassessment if it proves out of step with other jurisdictions.

²⁷ Benjamin Cardozo *The Growth of the Law* (Yale University Press, New Haven, 1924) at 73.

²⁸ Lord Goff of Chievely "The Future of the Common Law" (1997) 46 *International Comparative and Law Quarterly* 745 at 754. See also, *Smith v Littlewoods Ltd* [1987] 1 AC 241 at 280 (HL).

²⁹ *Lange v Atkinson*, above n 22, at 263.