

**THE FRANCIS FORBES SOCIETY FOR AUSTRALIAN
LEGAL HISTORY**

ABN 55 099 158 620

Australian Legal History Essay Competition

***THE FOURTH ANNUAL (2010) COMPETITION:
A GENERAL OUTLINE***

1. **COMPETITION RULES:** The rules governing the Competition are published on the website of the Forbes Society (www.forbessociety.org.au) in a document entitled “Conditions of Entry and Guidelines”. There are three categories of prizes: One for Tertiary Students, Another for Senior (Secondary) School Students and a Third for Junior (Secondary) School Students. The deadline for submission of Essays is 15 November 2010.
2. **COMPETITION OBJECTS:** (a) To promote interest in, and an awareness of, Australian legal history by encouraging students to develop a facility for describing historical events and for recognising their place in broader themes; and (b) To provide opportunities for Educators and Students (at several levels) to encounter Australian legal history through development of story-telling skills and exposure to broad themes; concepts underlying the general law; and particular cases of interest.
3. **COMPETITION THEME:** An important function of the law in any society is to reconcile tensions between self interest and altruism and between personal responsibility and a need to be mindful of the welfare of the community.
4. **ESSAY TOPIC:** How moral imperatives of altruism (regard for others as a principle of action) and autonomy (personal freedom and self government) play out in the law, using as illustrations: (a) the concept of an actionable “wrong” (what lawyers call a “tort”) in the “law of negligence” applied in civil proceedings between litigants asserting rights as individuals; (b) the criminal law, when the State seeks redress in court proceeding brought against an individual in the name of the public; and (c) the provision of a public apology for a “collective wrong”

by a parliament speaking in the name of the State and as a representative of its citizens.

5. **ESSAY QUESTION:**

Can Australian history teach us anything about the role of altruism and personal responsibility in the law?

Discuss this question by reference to one or more of the following:

- a. **The Civil Law of Negligence:** the idea (found in the law of negligence as applied by courts exercising civil jurisdiction) that one person might owe to another person a “duty of care”, a breach of which entitles the other person to an award of damages (compensation) in proceedings that he or she might institute against the negligent party, contrasting:
 - i. the famous formula of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at 580 (“the Snail in the Ginger Beer Bottle case”), for determining whether a “duty of care” is owed by one person to another in the law of negligence; and
 - ii. the determination of the High Court of Australia (in *Cole v South Tweed Heads Rugby League Football Club Limited* [2004] HCA 29; 217 CLR 469 at [9]-[18] and [129]-[132] and *CAL No. 14 Pty Limited v Motor Accidents Insurance Board and Scott* [2009] HCA 47 at [49] and [52]-[57]) that publicans owe no general duty of care to patrons in relation to the amount of alcohol served and the consequences of its service, save in exceptional cases; and/or
- b. **The Criminal Law of Homicide:** the idea that, outside war, no person is entitled to save his or her own life by killing another, an issue debated in *The Queen v Dudley and Stephens* (1884) 14 QBD 273 (and 560) at 286-288, where a court held that “necessity is no defence to a charge of murder” and, accordingly, shipwrecked sailors bound for Australia were not entitled to cannibalise their cabin boy to survive; and/or

- c. Cases Involving “Collective Wrongs”: the plight of “the Stolen Generations” and “the Forgotten Generations” to whom Australia’s Parliament delivered formal apologies on 13 February 2008 and 16 November 2009 respectively.

6. **BACKGROUND NOTES ON “HISTORICAL CASES” FOR DISCUSSION:**

- a. *Donoghue v Stevenson* is, perhaps, the most famous case in the Common Law world. It was decided in the United Kingdom of Great Britain and Ireland (commonly known as the “United Kingdom” or the “UK” or “Britain”) by the House of Lords. Australians might, to the annoyance of some Britons, think of the House of Lords simply as an “English” institution. However, *Donoghue v Stevenson* provides a reminder that Britain has long had more than one legal system within its compass. The “law of England” (which became part of the “law of Australia” following colonisation of Australia by the British) is not necessarily the same as “the law of Scotland”. *Donoghue v Stevenson* was an appeal to the House of Lords from a Scottish Court. The reasoning adopted by the Lords in deciding the case was nevertheless considered equally applicable to England as to Scotland. And, because at that time (1932), Australian Courts generally followed decisions of the House of Lords, for all practical purposes the judgment of the House of Lords also determined Australian law.

It is too simplistic to regard this as a case of British Judges making law for Australia. In 1932 Australians generally regarded themselves as part of the British Empire. Lord Atkin, who delivered the House of Lords’ leading judgment, is an example of a life in that Empire. He was born in Queensland, of British parents, and moved to England in his youth.

The “facts” of the case have become familiar to generations of lawyers and law students trained (in Britain, Australia or elsewhere) in the “common law tradition”. A consumer alleged that she had suffered ill effects from drinking the contents of a bottle of ginger beer which contained the decomposed remains of a snail. She sued the

manufacturer of the ginger beer for damages. There was no contractual relationship between the parties: the consumer had not herself purchased the product from the manufacturer; it had been purchased by a friend from a retail outlet unrelated to the manufacturer and given to her.

Upon an assumption that the consumer's allegations of fact were correct (because there had not yet been a trial to determine the true facts), the House of Lords was required to rule upon the question whether, as the law then stood, the consumer had a "cause of action" (an entitlement to sue for damages) in negligence. The answer to that question turned on whether the manufacturer owed her a "duty of care" which, if it existed, had been "breached" and the breach of which "caused" damage to her.

In his Reasons for deciding in favour of the consumer Lord Atkin adapted a biblical parable (the New Testament story of the Good Samaritan in *Luke* Chapter 10 verses 25-37, itself an appeal to "law" found in the Old Testament's *Leviticus* Chapter 19 verse 18 and *Deuteronomy* Chapter 6 verse 5) in an endeavour to formulate a general statement of principle about when, and to whom, a "duty of care" is owed by one person to another for the purpose of the law of negligence applied in civil proceedings. His use of a literary allusion – an echo of scripture familiar to his audience – to expound the law demonstrates the power of shared experiences in the communication of ideas.

He said: *The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa", is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be –*

persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.
[Emphasis Added]

This reasoning comes close to a more general idea embodied in what is sometimes described as “The Golden Rule”, having universal application across cultures and religions and in every age: “Do unto others as you would have them do unto you”.

- b. **A Publican’s Duty of Care to a Patron:** In identifying his “legal principle” Lord Atkin attempted to state a general principle that would govern all allegations of negligent behaviour, and of which all particular cases would simply be an example. That high ambition has not proven possible for courts to attain. They have continued to struggle to explain why a “duty of care” should or should not be found to exist in particular cases. The problem of how to deal with excessive consumption of alcohol provides a sharp focus on the need to balance responsibility for “self” and responsibility for “others”.

In the CAL Case the majority judgment of Justices Gummow, Heydon and Crennan included the following passages: ... [Outside] exceptional cases, which this case is not, persons in the position of the Proprietor and the Licensee [of a Hotel], while bound by important statutory duties in relation to the service of alcohol and the conduct of the premises in which it is served, owe no general duty of care at common law to customers which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume. That conclusion is correct because the opposite view would create enormous difficulties ... relating to customer autonomy and coherence with legal norms. ... Then there are issues connected with individual autonomy and responsibility. ... The conclusion that, save in exceptional circumstances, publicans owe no duty of care to their customers in relation to how much alcohol is served and the consequences of serving it says nothing about whether publicans owe a duty to third parties who may be damaged by reason of the intoxication of those customers. Defendants owe duties of care not to the world, but to particular

plaintiffs. Some of the arguments against imposing a duty of care on publicans to their customers may have less application where the plaintiff is a third party injured by the customer. ...[Emphasis Added]

- c. **Necessity is No Defence to a Charge of Murder?** In *Cannibalism and the Common Law* (University of Chicago, 1984; Penguin Books, 1986) Professor AWB Simpson tells the story of the tragic last voyage of the *Mignonette*. In 1884 two respectable men (Tom Dudley and Edwin Stephens) were sentenced to death by an English Court (the Queen's Bench Division of the High Court of Justice) for killing their young shipmate (Richard Parker) in order to eat him as a means of their surviving a shipwreck. The case caused a sensation. Public sympathy was strongly in favour of the two men. But the legal authorities were determined to establish that necessity was not a defence to a charge of murder. Although the Court sentenced the Accused to death, as the Judges were required by law to do, the Crown (in effect, the Government on whose advice the Queen acted) later exercised its "prerogative of mercy" by commuting the death penalty to six months' imprisonment.

On behalf of his Court, the Lord Chief Justice of England, Lord Coleridge, delivered a judgment that included the following: ... [Except] for the purpose of testing how far the conservation of a man's own life is in all cases and under all circumstances, an absolute, unqualified, and paramount duty, we exclude from our consideration all the incidents of war. We are dealing with a case of private homicide, not one imposed upon men in the service of their Sovereign and in the defence of their country. Now it is admitted [by the Accused] that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called "necessity". But the temptation to the act which existed here [that is, the cannibalistic killing of the cabin boy] was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of

instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, and of the crew to the passengers, of soldiers to women and children ...; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is hoped, in England, will men ever shrink, as indeed, they have not shrunk. It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life. ... It is not needful to point out the awful danger of admitting the principle which has been contented for [by the Accused]. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "no". ... It is not suggested that in this particular case [the killing was] "devilish", but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. ... It must not be supposed that in refusing to admit temptation to be an excuse for crime it is forgotten how terrible the temptation was; how awful the suffering; how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. ... [Emphasis Added]

At the time judgment was delivered in *Dudley and Stephens* (1884) the courts of the Australian Colonies (which did not federate, as the "Commonwealth of Australia", until 1901) generally followed judgments of the English High Court. It was not until the enactment of the *Australia Acts* 1986, by the Parliaments of the United Kingdom and (with the consent of all Australian State Parliaments) Australia, that the Australian legal system became fully independent of that of the United Kingdom. For all practical purposes, Lord Coleridge's statement of the law of England was a statement of the law applicable in Australia.

- d. **Is an Apology for a “Lost Childhood” Necessary, Appropriate and Sufficient?** Cases like *Donoghue v Stevenson*, *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* and *Scott and The Queen v Dudley and Stephens*, in different ways, demonstrate the inter-play between law and morality. Each case, in its own way, invites reflection on how the law can, must or should deal – in a principled way – with fundamental questions affecting the lives of ordinary people.

Sometimes, however, some questions seem too big to be left simply to courts determining particular disputes between particular people as they are required to do. In two recent areas the Australian Parliament has addressed such questions by delivering public apologies to “The Stolen Generations” and “The Forgotten Generations”. Was it right to do so? Does time heal all wounds? Can a collective apology really be made by one generation to another? Can an apology really be made by people who were not personally complicit in “wrongs” done to other people long gone? What purpose does such an apology serve? If an apology is, in fact, necessary and appropriate, is it enough simply to say “sorry” without offering compensation? If those to whom an apology is owed or given have passed away, can or should their descendants receive an apology, or compensation, in their place? Would it be “right” to withhold an apology morally due simply because to say “sorry” might be construed by a lawyer as an admission of liability to pay compensation? If compensation is to be paid who must, or should, pay it? When all things are considered, is a public, parliamentary “apology” the same as one person’s apology to another? Is there a risk that it might be little more than an excuse for future inaction? How important is it? Does it – can it – change anything about how we live in society with one another?

Are there any parallels, or overlaps, between the principles identified in cases such as *Donoghue v Stevenson*, *CAL* and *Dudley and Stephens* dealing with “individual wrong-doing” and cases of “collective wrongs” such as those addressed by Parliament’s apologies? How far does the

Golden Rule extend in cases of this type? Do courts and parliaments have different roles to play in dealing with such cases?

7. **AVAILABILITY OF LAW REPORTS:** Marked up, scanned copies of *Donoghue v Stevenson* [1932] AC 562 and *The Queen v Dudley and Stephens* (1884) 14 QBD 273 (and 560) can be found on the website of the Forbes Society (www.forbessociety.org.au). Copies of the judgments of the High Court of Australia in *Cole v South Tweed Heads Rugby League Football Club Ltd* [2004] HCA 29; 217 CLR 469 and *CAL No. 14 Pty Ltd v Motor Accidents Insurance Board and Scott* [2009] HCA 47 are available via the website of the Court (www.hcourt.gov.au) or the website of the Australasian Legal Information Institute (www.austlii.edu.au).

Date: 22 December 2009