Hal Wootten L

lives. This is reflected in what he said about his "little nudge" philosophy, the subject of today's Lecture.

This philosophy was introduced in 2008, when Hal Wootten himself delivered a lecture as part of this series. He said that every person has opportunities to give the world a "little nudge" in the right direction.[2] Hal Wootten explained:

> "In 1944, when I was still at an impressionable age, Lord Wavell published an anthology of verses entitled “Other Men’s Flowers”. I too have gained much comfort, insight and help in expressing my thoughts by appropriating other men’s flowers. For me one unwitting florist was Lord Diplock, who remarked that a judge seldom has the opportunity to say, like Lord Mansfield, ‘The air of England is too free for any slave to breathe, let the [slave] go free’, but every now and then there is the opportunity to give a little nudge that sends the law along the direction it ought to go." [3]

He further expanded on this philosophy in 2012, when he remarked:

> "Each of us has countless opportunities every day to give the world little nudges in the right direction, and the cumulative effect of our little nudges, and those of all the other little nudgers, is a major effect on the direction the world takes." [4]

My talk today focuses on two landmark decisions: Donoghue v Stevenson[5] and Mabo v Queensland (No 2)[6]. These were undoubtedly significant decisions in the develo (f)0.6 (i)1.2 (cf)0.6 (i)0o0.002cer

Lord Atkin's speech famously states the "neighbour principle". The person to whom the duty is owed is a person who is "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 that are called in question".[9]

Prior to Donoghue v Stevenson, there was a general rule that the manufacturer owed no duty of care to third parties. But there were limited exceptions to that rule. The first was the case of fraud, where the vendor knowingly sold a defective item that was dangerous, such as a lamp that exploded on being lit.[10] The second was where the article sold was dangerous per se, such as poison, and the vendor did not warn of its inherently dangerous nature.[11] The third and more relevant exception was the rule in George v Skivington, [12] but it was controversial.

George v Skivington was an 1869 decision of the Court of Exchequer concerning hair wash. Mrs George used a hair wash, which her husband had purchased from Mr Skivington, who was also its manufacturer, and was injured. Mr and Mrs George sued (Mrs George could not as a married woman sue in her own name). The Court unanimously held that the Georges had a cause of action. There was a "duty to use ordinary care in compounding the wash for the hair".[13] That is to say the case was distinguished from earlier cases because Mr Skivington was sued in his capacity as a chemist and manufacturer rather than as a vendor. In the words of one member of the Court, "[t]he action [was], in effect, against a tradesman for negligence and unskilfulness in his business".[14]

Although the decision was the subject of unfavourable commentary in subsequent cases,[15] there were some judges who took another view. In Heaven v Pender,[16] in an 1883 decision of the Queen's Bench, a worker at a

plaintiff was injured when one of the wheels of the car he was driving collapsed due to a defect in the wheel which could have been discovered by inspection. The plaintiff sued Buick as the manufacturer of the vehicle. It denied liability on the basis that the plaintiff had purchased the car from a dealer and therefore it owed no duty to the plaintiff. The position was similar to that prevailing in England.

Cardozo J, writing for the majority, held the defendant had a duty of care to the plaintiff and in doing so expressly approved Lord Esher's dictum in Heaven v Pender.[24] His Honour said that if a thing is made negligently, is likely to place life and limb in peril, and will be used without further test or inspection, then the manufacturer of it is under a duty to make it carefully.[25]

The two other Law Lords in the majority in Donoghue v Stevenson – Lords Thankerton and Macmillan – were also influenced by a previous judgment. It may be recalled that, in the 1929 decision of Mullen v AG Barr & Co Ltd, [26] the Court held, on materially the same facts as Donoghue v Stevenson, that there was no duty owed to the plaintiffs. In that case, Lord Hunter dissented and referred to Lord Esher's dictum in Heaven v Pender as forming a "useful guide".[27] Both Lords Thankerton and Macmillan referred to Lord Hunter's dissent with approval and expressly overruled the majority in Mullen.[28]

The express references by Lord Atkin and the others in the majority in Donoghue v Stevenson invited the inference that the earlier decisions provided more than a "little nudge" in the direction of a statement of a duty of care. But they did not clearly articulate to whom the duty was owed and Lord Atkin realised that, left unanswered, it would bedevil the common law.

It is also well known that the doctrine of terra nullius was derived from the principles summarised by Blackstone as to the reception of the common law in a colony and the acquisition of sovereignty.[29] It turned on the distinction between a settled colony and a conquered colony. According to Blackstone, if a country is uninhabited and settled all English laws come into force.[30] But in conquered or ceded countries, which have laws of their own, those laws remain until the King changes them. Whether the inhabitants of a country had their own laws was therefore important to any property rights which they might assert. Australia was for a long time after settlement regarded as uninhabited and therefore terra nullius .

In Mabo (No 2) , Brennan J described terra nullius as a fiction dependent on a discriminatory policy justification. He said that "[t]he theory that the indigenous inhabitants of a 'settled' colony had no proprietary interest in the land ... depended on a discriminatory denigration of indigenous inhabitants, their social organization and customs".[31] The reference to customs extends to laws. He described the basis of the theory as "false in fact and unacceptable in our society".[32] As a result, there was a choice of legal principle for the Court to make. Brennan J explained:

> "This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher 'in the scale of social organization' than the Australian Aborigines whose claims were 'utterly disregarded' by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were terra nullius and those which were not." [33]

His Honour directed, in effect, that what he called "the preferable rule" draws no distinction between the indigenous inhabitants of a settled colony with the indigenous inhabitants of a conquered colony in respect of their rights and interests in land.[34] A "mere change in sovereignty" does not extinguish native title to land.[35]

The underpinnings of terra nullius did not go unremarked in early decisions of colonial courts. In R v Murrell ,[36] in 1836, it was argued that the colony of New South Wales did not fall into either of Blackstone's categories because the Aboriginal people in question had recognisable laws and customs.[37] The Court rejected the argument holding, in effect, that although strictly speaking Australia was not uninhabited at settlement, the social systems and governance of Indigenous people were not recognised by British law. This was sufficient to bring it within terra nullius.

In 1841, in R v Bonjon, [38] a very different approach was taken. Willis J, of the Supreme Court of New South Wales sitting in Melbourne, did not agree with Murrell and did not regard himself as bound by it. He undertook an extensive historical and legal examination of other jurisdictions such as New Zealand and the United States. Willis J rejected the proposition that either of Blackstone's categories applied to Australia for it was neither unoccupied nor was gained by conquest or ceded under treaty.[39] He found that Aboriginal peoples had "laws and usages of their own"[40] and quoted with approval from the 1837 Aborigines Report of the British Select Committee relating to the various British colonies which recognised that native inhabitants have an "incontrovertible right to their own soil".[41] He compare Td[(not)0.o0.0.6 (he var)9.nee2(peop)9.2 (l)1.2 (es t)0.6 (hab0 T B"i)1.3 (

observe in Mabo (No 2) , the comments in these cases did not go to the heart of the issues in Mabo (No 2) and were mere obiter dicta.

Whilst the plaintiffs in the

Land (Northern Territory) Bill 1975 (Cth), introduced by the Whitlam Government, largely adopted the recommendations of the Commission including those concerning the making of claims to land and the regulation of mining rights. But when the Whitlam Government was dismissed, the Bill lapsed.

The Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) was passed in 1976 with bipartisan support after being introduced by the Fraser Government. It provided for a process of determination as to the traditional Aboriginal owners of an area of land. By April 1998, 51 claims had been the subject of completed inquiries.[59]

went as far as he could in nudging the issue towards a different legal outcome. Changes in socio-political viewpoints by the 1970s were sufficient that legislation allowing for claims by the traditional owners of Aboriginal land was passed by the Commonwealth. These pointed the way to native title, but the old common law view of terra nullius continued to stand in the way and was not squarely raised and dealt with until Mabo (No 2). Identifying the influences on the majority in the House of Lords in Donoghue v Stevenson is more straight forward. Clearly they benefitted from earlier decisions.

But regardless of the clarity and extent of the influence, I think it may be said that the law or the course that the law might take had been nudged in the right direction. Hal Wootten's philosophy was that judicial decisions can be the culmination of many "little nudges" along the way. This is how the common law is to be understood to sometimes move forward.

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[1] My thanks to Jonathan Tjandra and Rebecca Lucas, the former and current Legal Research Officers at the High Court of Australia, for their assistance.

[2] Wootten, "Living in the Law" (Hal Wootten Lecture, University of New South Wales, 2008).

[3] Wootten, "Living in the Law" (Hal Wootten Lecture, University of New South Wales, 2008).

[4] Wootten, "Response to Lecture delivered by Sir Gerard Brennan" (Hal Wootten Lecture, University of New South Wales, 2012).

[5] [1932] AC 562.

[6] (1992) 175 CLR 1.

[7] [1929] SC 461.

[8] Donoghue v Stevenson [1932] AC 562 at 599 per Lord Atkin. See also 603 per Lord Thankerton and 620 per Lord Macmillan.

[9] Donoghue v Stevenson [1932] AC 562 at 580.

[10] See, for example, Langridge v Levy (1837) 2 M & W 519; 150 ER 863; Levy v Langridge (1838) M & W 337; 150 ER 1458.

[11] See, for example, Thomas v Winchester (1852) 6 NY 397; Dominion Natural Gas Co Ltd v Collins [1909] AC 640.

[12] George v Skivington (1869) LR 5 Ex 1.

[13] George v Skivington (1869) LR 5 Ex 1 at 3.

[14] George v Skivington (1869) LR 5 Ex 1 at 4 per Baron Pigott.

[15] Mullen v AG