A History of Australian Tort Law 1901–1945: England's Obedient Servant? By Mark Lunney. [Cambridge University Press, 2018. xxiv + 287 pp. Hardback: £85.00. ISBN: 978-11-08423-31-1.]

Anyone who has visited Australia in summer, particularly the dry, rural landscapes found in many of the states across the continent, will find no trouble imagining the extreme danger to life and livelihood posed by fire. In the early part of last century, the special dangers created by a harsh natural environment in Australia were well-known to judges, one writing: "If in a country like England the lighting of a fire is considered dangerous, such an action in a climate like ours must be still more dangerous": *Craig v Parker*, unreported, 1905 (affirmed by the Full Court of the Supreme Court of Western Australia in *Craig v Parker* [1906] W.A.R. 161).

It is little wonder then that for a time South Australian law recognised a rule of strict liability for the spread of fire deliberately lit. However, the need for stringent rules around the use of fire had to be balanced by the necessity of its use in growing the Australian economy. This led Griffith C.J., of the High Court of Australia, to comment in 1914 in *Whinfield v Lands Purchase and Management Board of Victoria* (1914) 18 C.L.R. 606, at 616:

> It would be a shocking thing to lay down as a rule of law that in a country like Australia, where probably hundreds, if not thousands, of men travelling on foot in sparsely settled districts ask every day for permission to camp for the night on private property, the owner by granting such poor hospitality becomes responsible for the lighting of a fire by the wayfarer to boil his "billy" or keep himself warm.

Australian courts were, in instances like these, analysing and adapting common law principles to respond appropriately to the distinct, perhaps unique, context in which they were working.

The story of liability for fires is just one of those told in Mark Lunney's work *A History of Australian Tort Law 1901–1945*, which seeks to examine a "heretofore unexplored area of Australian legal history": the Australian contribution to the law of tort in the early twentieth century. Though he notes a dearth of scholarship on the history of private law in Australia, and particularly for this period, Lunney tells us that it has generally been assumed that Australian law mirrored the English common law. Due to binding precedent, as well as a more informal deference, it has been thought that Australian courts "simply followed what was dictated in the mother country". There is also the possibility that judges were vulnerable to the "cultural cringe", a phenomenon whereby Australian intellectuals, out of feelings of inferiority or fear of marginalisation, sought to distance themselves from local views and practices in order to align themselves more closely with "the cultivated Englishman" (see Phillips, *The Cultural Cringe* (2006)).

However, Lunney puts forward another story: one of "Australian legal creativity" and innovation. This is not to say that he argues that the understanding of uniformity is altogether incorrect. Instead, he takes a more nuanced approach. He seeks to show that for the most part, Australian courts of the time would have found appalling any suggestion of conflict or the creation of a distinct "Australian" common law (not to mention ill-advised, as recourse to the Privy Council existed for disgruntled parties). The prevailing perception was of one legal community. Nevertheless, at the same time they sought to ensure that the common law, in theory and application, was appropriate for a country very different to England. Significant differences existed between colony and colonial power, including the continuing use of juries in Australia during this period (unlike in England), as well as more obvious factors

such as the natural environment, climate and make-up of society. Lunney argues against the binary view taken by earlier commentators of an era of subservience followed by an era of independence. He suggests that "Australian legal innovation may have much greater continuity than previously recognised".

This study starts in 1901, the year of Australian federation. Choosing 1901 as a starting point makes sense; the creation of a separate nation from several colonies under common control is an event which would naturally pose questions and prompt debate about the present and future relationship with the coloniser. The end date is, as Lunney acknowledges, less obvious: historians continue to argue over when there was a clear shift in the relationship between Australia and Britain. Setting 1945 as the end date allows Lunney to consider developments in the same general context. After the Second World War, significant changes in Australian society and politics would make it more difficult to tease out the extent to which Anglo-Australian relations were an influence.

Following introductory material in the first two chapters, the third and fourth chapters consider the law of defamation. Lunney provides readers with good examples of independent Australian thinking and the prioritisation of Australian interests. We are shown, in the context of actions for defamation, documented instances of criticism of English courts by Australian judges and newspapers. For example, in response to the Privy Council's overturning of a High Court decision (*Macintosh v Dun* (1906) 3 C.L.R. 1134) as to the privileged status of trade protection agency reports regarding creditworthiness, the *Sydney Morning Herald* wrote: "for once [the Privy Council] proved unable to adapt the principle of the common law to the changing needs of commerce . . .. We have already given it as our opinion that such a decision cannot be final, and that the law will have to be altered to meet the situation just created."

The Privy Council's decision was seen as incompatible with local commercial conditions, the Judicial Committee failing to recognise the importance of such communications to Australia's economy. The situation also sparked comment from judges – Leo Cussen described the Privy Council's negative treatment of American authorities as being "like kicking away a ladder and then attempting to scale a wall with the meagre help of one's fingers and toes" – and legislative change in New South Wales. Lunney also presents readers with Australian legislative alterations which were then applied faithfully by Australian courts, including a rejection of the proposition that statutory interpretation should seek to align Australian laws with English law.

Lunney takes his readers through many different areas of the law of tort. From the memorable *Lothian v Rickards* (1911) 12 C.L.R. 165 litigation concerning damage caused by blocked and overflowing lavatory basins to the thorny issue of "nervous shock", the compelling tale of confidence and innovation in Australian courts continues. In *Victoria Railway Commissioners v Coultas* (1888) 13 App. Cas. 222, the Privy Council refused to award damages for "nervous or mental shock" unaccompanied by physical injury, creating a hurdle for legal development. Australian courts began, only a few years after it was handed down, to distinguish this decision. While not necessarily the lone jurisdiction in the Empire doing so, it demonstrates Australian judicial creativity and that a more complex relationship existed between the legal systems than we might perhaps expect. At one point, in a case concerning a mother's nervous condition arising out of burns suffered by her newborn child in hospital, the production of tears was considered a sufficient "physical consequence" to avoid the effect of *Coultas.*

It is clear that Australian courts were aware that they were making decisions in a unique context, presenting distinctive challenges and considerations. Even laws

surrounding things as apparently familiar as roads and railways required special treatment. Much infrastructure in Australia at this time was built and financed by government bodies, while in England this was more frequently done by private entities. The roads and railways also existed and operated in a substantially different climate and environment to those in England. This led English authorities to be treated as of little use to Australian courts. For example, Griffith C.J. said in *Miller v McKeon* (1905) 3 C.L.R. 50, at 58: "Reference was made during argument to a great number of cases dealing with the law relating to highways in England and the doctrines that were to be applied to them. There is certainly an identity in name between highways in England and highways in this country, but the similarity is to a great extent in name only."

Other chapters consider challenges arising from extreme fire danger, national defence concerns and that great Australian pastime, sport. Lunney makes a good case for the existence of Australian courts' sensitivity to social and economic contexts and their willingness to engage in independent and, at times, novel analysis.

This book has three principal strengths. First, it is illuminating: discussion is detailed (at times, perhaps overwhelmingly so) and thoroughly researched, and principally based on primary material. Analysis centres mainly around judicial decisions, but Lunney also includes evidence from sources such as newspapers, court documents and judges' extra-judicial writings. The archival material brings the cases to life, helping the reader to understand the core problem in each dispute. Second, the breadth of topics covered in such detail means that it goes a long way to remedying the shortage of research in this area. Third, Lunney makes private law accessible and, at times, entertaining – which is no easy task. This book is very readable; the prose is crisp and sometimes animated.

The book, in substance and style, is persuasive in advancing the author's central thesis. Lunney is convincing in demonstrating the confidence of Australian courts in proceeding to make law in circumstances where there was no applicable English precedent or acting with independence to limit the practical effect of undesirable authority.

This is a book not just for every tort lawyer's shelf in Australia but also for those in the UK: it provides compelling examples of the breadth, malleability and need for context-sensitivity in the law of tort.

The reader is left wishing Lunney would continue the tale. This is not a criticism; the end date of Lunney's study is well-defended. It is a hope that we might have a further instalment of this important story, dealing with the changing milieu in which a transition to a clearly independent Australian tort law was possible.

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A Victorian Tragedy: The Extraordinary Case of Banks v Goodfellow. By Martyn Frost. [London: Wildy, Simmonds & Hill Publishing, 2018. xii + 262 pp. Hardback £19.99. ISBN 978-08-54902-53-8.]

At the time of writing, the basic test for determining whether a testator has sufficient capacity to make a valid will derives from *Banks v Goodfellow* (1870) L.R. 5 Q.B. 549. Cockburn C.J. held it essential that a competent testator "shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he