

Chapter 33

Law and Contextual Change*

Many kinds of change affect the law, and many laws are designed to promote change. My present concern is with a particular kind of change, and its effect on the shape of the law. It might be described as contextual change. A case may be presented to a court as though it calls for a decision about a discrete issue: perhaps the interpretation of a statutory provision, or the operation of some aspect of the Constitution, or the application, and possible refinement or development, of a rule of common law. Yet the issue always exists in a wider legal context. Understanding context, and appreciating the effect of changes in context, is one of the challenges of judging.

The context in which the meaning of a provision in a statute is to be decided may include other provisions in the same Act; the general scheme of legislation of which the Act forms a part; the constitutional power pursuant to which the legislation was enacted; the provisions of cognate legislation; the history of the enactment, including the previous law, and legal problems the section was designed to remedy; the common law with which the legislation may intersect; and the rules of procedure and evidence that govern the practical application of the law.

The purpose of this paper is to reflect upon the importance of the wider legal and institutional environment in which particular rules of law exist and in which particular legal problems arise for decision. I will attempt to demonstrate the complexity and dynamism of that environment, beginning with fairly technical and uncontroversial examples and moving on to some examples which are of wider public interest.

People, and institutions, sometimes change in order to improve. Sometimes change takes the form of degeneration, and corruption. Nobody aged 70 believes that all change is progress. To suggest that all legal and institutional change is progressive would be absurd. Moral or political judgments are necessary for discrimination between change and progress, but such judgments are not relevant to my present purpose.

It is convenient to start with the idea of coherence, and its significance in the development of the common law. This may be illustrated by a commonplace problem of tort law. The law of negligence may require a court to decide whether, in some novel situation, (that is, a situation for which there is no existing judicial authority), a defendant owed a duty of care to a plaintiff. There have been few developments in the common law that could compare, in their impact, with that of the decision of the House of Lords in *Donoghue v Stevenson*.¹ Yet, at the time, it was a close-run thing. It was a decision of a 3-2 majority. I wonder how many modern barristers, or judges for that matter, have ever read the dissenting judgments. (They are interesting because they foretell

* The Investigator Lecture, Flinders University, Adelaide, 19 November 2008.

1 [1932] AC 562.

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