Chapter 21

How far can Trial Courts and Intermediate Appellate Courts Develop the Law?*

Introduction

Mr Justice Walsh's career in the High Court of Australia illustrates one aspect of the present problem. He served there from 1969 until his early death from multiple myeloma in 1973—the shortest tenure in the history of the court. He had been a judge of the Supreme Court of New South Wales from 1954, first as a trial judge, then as a member of the Court of Appeal. He may be best known as the trial judge in *The Wagon Mound (No 2)*.[1] In his era, a trial judge in New South Wales was bound by the intermediate appellate court in New South Wales, by the High Court of Australia and by the Privy Council. More surprisingly, perhaps, the High Court had repeatedly made it plain that, even if not strictly bound,[2] Australian trial and appellate courts—including the High Court—should as a general rule follow decisions of the English Court of Appeal[3] and the House of Lords.[4] That was so even though appeals did not lie from New South Wales courts to those courts.

This world was only just beginning to fade when Mr Justice Walsh came to the High Court.[5] If ever there was a man imbued with a tragic vision of life, it was him. The qualities of both his character and his mental powers were deeply respected by his contemporaries. His judgments took the form to be expected from a pessimistic, cautious and analytically powerful mind, totally loyal to authority, which had spent its

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1 *Miller Steamship Co Pty Ltd v Overseas Tankship (UK) Ltd* [1963] 1 Lloyd's Rep 402, discussed in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty Ltd* [1967] 1 AC 617.

2 RA Wright, "Precedents" (1942) 8 *Cambridge Law Journal* 118 at 135.

3 *Waghorn v Waghorn* (1942) 65 CLR 289 at 292 ("pay the highest respect") and 297. In that case it did so in preference to one of its own decisions, which it overruled. However, on occasion it refused to follow English Court of Appeal decisions (eg *Hurst v Picture Theatres Ltd* [1915] 1 KB 1 in *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605).

4 *Piro v W Foster & Co Ltd* (1943) 68 CLR 313 at 320. Similarly in Canada: PB Mignault, "The Authority of Decided Cases" (1925) 3 *Canadian Bar Review* 1 at 9.

5 Privy Council appeals were abolished in three stages from the 1960s to the 1980s. Only then did the High Court say in *Cook v Cook* (1986) 162 CLR 376 at 390 that non-Australian precedents "are not binding and are useful only to the degree of the persuasiveness of their reasoning".