COMMON LAW IN SOUTHERN AFRICA

Conflict of Laws and Torts Precedents

PETER B KUTNER

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PREFACE

The sole responsibility for the contents of this book is mine, but writing the book would have been neither feasible nor rewarding without the assistance and encouragement of numerous individuals and institutions.

My principal acknowledgement must be to the University of Cape Town Faculty of Law. I am very grateful not only for the Faculty's generosity in providing office, secretarial and library facilities to an overseas visitor for eleven months, but also for the assistance and friendship extended to me by the academic and non-academic staff. I valued the opportunity to be a *de facto* colleague of the able academics in the Faculty of Law and learned much from them. (Inevitably some passages in this book will show that there are things about Southern African law that I should have learned but did not. No one at U.C.T. is responsible for this.)

Also:

The University of Oklahoma College of Law, which granted the sabbatical during which much of the book was written.

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Denise Greyling, who while a student in the University of Cape Town Faculty of Law served ably as my research assistant and translated judgments published in Afrikaans.

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My colleagues at the University of Oklahoma, Mark Gillett, Mac Reynolds and Mickie Voges, whose advice and encouragement were much appreciated, and Michal Gray, whose commitment to this book was a *sine qua non* of its publication.

The secretarial staff of the University of Oklahoma College of Law and the University of Cape Town Faculty of Law, who prepared manuscripts of the book. Particular mention is due Debbie Case and Sheryl Waters of the University of Oklahoma and Maureen Fleming of the University of Cape Town. The index was first put into type by Jan Jay of Monash University.

This is a book on Southern African law, but it is written for use outside Southern Africa--by persons concerned with the law in countries whose legal systems are founded on English common law, *i.e.* the United States and most nations of the Commonwealth. For this reason, the text does not conform to some conventions of legal writing in Southern Africa, such as identifying the judge who delivered a judgment agreed to by the entire court. (Another convention not followed is referring to judgments "with respect". It should be assumed that all references to the judiciary are respectful, unless otherwise specified.) Furthermore, since the book's purpose is to identify and analyse judgments and statutes in light of their significance to common law jurisdictions, not to serve as a collection of edited judgments and statutes, there is less precision of quotation than generally found in Southern African legal writing and material in judgments that is not consistent with common law is mentioned only when necessary for explanation. Conversely, material consistent with common law is drawn upon even though Southern African lawyers would regard it as derived from principles of Roman-Dutch law. The cases, statutes, law reports and secondary sources cited in the book are listed in the bibliographic note, table of principal works cited and abbreviations, table of cases and table of statues.

Although aimed at a readership outside Southern Africa, I believe that lawyers within the region also can derive some benefit from the presentation of Southern African law and commentary found in this book. I hope they will be tolerant of what they may regard as undue liberties with the expressions of Southern African jurists or an excess of zeal in finding common law therein.

CONTENTS

INTRODUCTION

This book results from the author's studies of Conflict of Laws (Private International Law) and the law of Delict (Tort) in the countries of Southern Africa that adopted Roman-Dutch law as the basis of their substantive law. These comprise South Africa, Zimbabwe (formerly Southern Rhodesia and then Rhodesia), Botswana (Bechuanaland), Lesotho (Basutoland), Swaziland, South West Africa, and the states granted independence by South Africa: Transkei, Bophuthatswana, Venda and Ciskei.[1] With the exception of South West Africa (now also known as Namibia), a former German colony administered by South Africa since World War I, the entire region consisted of British colonies and protectorates prior to the establishment of the Union of South Africa in 1910. English law has had a great influence, direct and indirect, upon the development of law in Southern Africa.[2] Many judgments in Southern African courts

1 The terms "Southern Africa" and "Southern African" will be used to refer collectively to the African countries with Roman-Dutch legal systems. This excludes Angola and Moçambique, which received Portuguese law, and Malaŵi and Zambia, which received English law. For those countries whose names were changed upon independence, the pre-independence name will be used when referring to events that occurred and judgments that were delivered before independence.

2 See Schreiner, The Contribution of English Law to South African Law; and the Rule of Law in South Africa (1967); Beinart, *The English Legal Contribution in South Africa: the Interaction of Civil and Common Law*, 1981 Acta Juridica 7; Boberg, *Oak Tree or Acorn?--Conflicting Approaches to our Law of Delict*, (1966) 83 S.A.L.J. 150. The adoption of Roman-Dutch law stems from its retention in the Cape Colony after the Cape's occupation by

proceed along lines consistent with jurisprudence in common law jurisdictions, states whose law was derived from English common law.

These judgments have made substantial contributions to the body of common law, yet they are little-known in England and other common law countries. Common lawyers rarely survey them--for understandable reasons: the substantial differences between Roman-Dutch law and common law, an increasing language barrier,[3] and the immense volume of published judgments from common law jurisdictions, which discourages further research. In contrast, references to British and Commonwealth authorities (both cases and literature) are commonplace in Southern African courts, and American authorities appear to carry more weight in South Africa than in any other foreign country.

The principal purpose of this book is to identify and describe judgments in Southern African courts[4] that are significant for their treatment of conflicts and tort issues and can serve as authorities or models in common law jurisdictions. They can so serve because their selection of legal principles or approach to the case is the same as or similar to that which might be found in a common law court. The most important legislative reforms in related subjects are also described. The text thus will provide lawyers in common law countries with access to the Southern African cases and statutes most pertinent to questions of Conflict of Laws and Torts that arise in common law jurisdictions.

The judgments surveyed are those published in the South African Law Reports, which commenced in 1947, and the official law

the British early in the nineteenth century.

3 A growing proportion of the judgments in the South African Law Reports is published in Afrikaans. English translations of Afrikaans material in the law reports ceased after the 1980 volume. Prior to the commencement of the translations in 1969, most judgments were published in English.

4 References to the "Appellate Division" are to the Appellate Division of the Supreme Court of South Africa. The name of the country is included in references to other appellate divisions, such as that of the High Court of Rhodesia. The Federal Supreme Court is the Supreme Court of the former Federation of Rhodesia and Nyasaland. Lower courts are identified only in the citation to the report of the court's judgment. Every judgment is attributed to the court, rather than to the judge who delivered it, unless the judgment represents the view of less than a majority of the court.

reports of other Southern African countries from 1947 to the present.[5] All the material is thus of fairly recent vintage. There are extensive quotations from some cases, but the intention is to give the gist or import rather than the *ipsissima verba* of the judgments. The implications as well as the expressions of the judgments are drawn upon. Helpful English-language commentaries on cases and statutes discussed in the text are cited in the notes.

This book does not purport to describe the Southern African law of Delict or Conflict of Laws as a whole. It encompasses only modern judgments which should be regarded as within the body of common law, as well as Roman-Dutch law, and legislation that should be of interest to common law countries.[6] The statutes can serve as models (to be followed, modified or shunned) in those countries as well as in Southern Africa. In order to avoid presenting a work of undue length, I have not undertaken systematic criticism of all the cases and statutes or comparison of common law precedents with decisions of Southern African courts. I have noted criticisms published in Southern African literature and added my own comments when warranted. The comments on cases are intended to indicate whether the decision should be followed in common law jurisdictions rather than whether the court's exposition of the law of South Africa or another Southern African nation was accurate.

In evaluating the authority which a Southern African case should carry in common law countries, one must of course keep in mind the extent to which the decision may have depended upon principles of Roman-Dutch law that are distinctly different from principles of common law. The influence of Roman-Dutch authorities may be present but unexpressed. A court's application of Roman-Dutch law does not necessarily mean that its judgment does not form part of the

5 The volumes covered are 1947-1986 South African Law Reports (S.A.), 1947-1955 Southern Rhodesia Law Reports (S.R.), 1947-1955 Rhodesia and Nyasaland Court of Appeal Decisions (R. & N.C.A.), 1956-1964 Rhodesia and Nyasaland Law Reports (R. & N.), 1964-1979 Rhodesian Law Reports (R.L.R.), 1980-1983 Zimbabwe Law Reports (Z.L.R.), 1947-1966 High Commission Territories Law Reports (H.C.T.L.R.), 1964-1982 Botswana Law Reports (B.L.R.), 1967-1977 and 1980-1981 Lesotho Law Reports (L.L.R.), 1963-1981 Swaziland Law Reports (S.L.R.), and 1977-1981 Bophuthatswana Law Reports (B.S.C.). There is several years' delay in the publication of reports other than the South African Law Reports.

6 Comprehensive treatments of Southern African law are found in South African texts. The principal work in English on Private International Law is Forsyth. For Delict (Tort), see the works by Boberg, McKerron and van der Walt.

common law. That depends upon whether the court's approach to the case and its application of legal principles are consistent with common law doctrine and tradition.

Southern African case law is substantial in many areas of Conflict of Laws, including jurisdiction, recognition of foreign judgments, choice of law in contract, validity of marriage and child custody. No treatment of domicile or matrimonial property matters from a common law perspective could be complete without reference to Southern African decisions on those subjects. Outside the field of jurisdiction, the law reflected in modern Southern African cases is largely similar to the law in common law countries other than the United States. When different rules are applied--as for the essential validity of a marriage--this is readily discernible. The similarity may be explained not only by the influence of English law in Southern Africa but also by the influence of Roman-Dutch writers upon the development of English and American Private International Law.[7]

A lawyer familiar with the place of tort choice of law in common law countries, especially the United States, would expect it to be prominent in litigation elsewhere, but in Southern Africa there is a total absence of definitive decisions on the subject. There are only two cases on the actionability of foreign delicts.[8] Neither established any choice of law principles. A leading Conflicts text introduces its discussion of delictual choice of law with the question, "Is there South African law on choice of law in delict?"[9] If such law exists, it is contained in texts, journals and foreign judicial decisions, not in Southern African law reports.[10] Judicial pronouncements on choice of law concerning property and succession are not as rare, but outside cases involving matrimonial property, there is little of precedential value to be found in the judgments of the last four

7 See Cheshire & North, 22-23, 32-33; Forsyth, 30-36, 46; Scoles & Hay, 8-13.

8 Mackay v. Philip, (1830) 1 Menzies 455; Rogaly v. General Imports (Pty.) Ltd., 1948 (1) S.A. 1216 (C), discussed in Pollak, *Conflict of Laws*, 1948 Ann. Surv. S. Afr. L. 203, 209-10. In Guggenheim v. Rosenbaum (2), 1961 (4) S.A. 21 (W), discussed pp. 75-77, *infra*, the court awarded delictual damages for breach of promise of marriage but did not consider application of delictual choice of law principles. It applied the "proper law" of the "contract" (the agreement to marry).

9 Forsyth, 279.

10 See *ibid.*, 278-86, and literature cited therein, for discussion of choice of law principles that a Southern African court might apply.

decades.

There is more Southern African case law on Delict than on Conflict of Laws, but it diverges more from its common law counterpart, Tort. In size, Southern Africa's greatest contribution to tort law has been to the law of negligence. In relative terms, the greatest contribution has been to the law of defamation.[11] Southern African developments in economic torts and apportionment of damages are particularly noteworthy. The cases on assessment of damages merit attention in common law jurisdictions, and Southern African cases on vicarious liability form a significant part of the common law on the subject. Largely absent from this book are cases concerned with dignitary wrongs, ownership and possession of property, interference with family relations and doctrines of strict liability, in which there are marked differences between common law and the law of Southern Africa.

Of the cases discussed in the book, the great majority are from South Africa. (All but a few of the others are from Southern Rhodesia/Zimbabwe.) Most of the cases are of a type that could have arisen as easily in one of the "First World" common law countries as in Southern Africa. Some, however, are distinctly South African. Major issues of South African politics underly a number of the defamation cases.[12] Racial politics are reflected in several of these cases,[13] but none directly presented issues of race or the effects of race laws. The few cases that did present such issues are *Radebe v. Hough*,[14] *Ex parte Cathrall*,[15] *Winters v. Winters*[16] and *Amod v.*

11 Defamation cases constitute an unusually high proportion of the reported decisions on the law of Delict--forty per cent in the period prior to Union (1910). See Boberg, *Oak Tree or Acorn?--Conflicting Approaches to our Law of Delict*, (1966) 83 S.A.L.J. 150, 158-59.

12 See especially de Klerk v. Union Government (pp. 314, 338-39) and the cases cited in note 13, *infra*.

13 See Golding v. Torch Printing & Publishing Co. (Pty.), Ltd. (p. 317); Vermaas v. Pelser (pp. 322-23); Pienaar v. Argus Printing and Publishing Co. Ltd. (pp. 325-26); and the ostensibly non-political cases Gayre v. S.A. Associated Newspapers Ltd. (pp. 314-16) and South Africa Associated Newspapers Ltd. v. Estate Pelser (pp. 323-25).

14 Pp. 229-31.

15 Pp. 113, 128-29.

16 Pp. 116-17, 129.

Andrews Bakery (Pty.) Ltd.[17]

In the *Radebe* case, the Appellate Division emphatically rejected race as a factor in the assessment of damages for pain and suffering. In *Cathrall*, a South African court found itself obliged to hold an interracial marriage void if it fell under the provisions of the Prohibition of Mixed Marriages Act.[18] In *Winters*, however, a Swaziland court treated such a marriage as valid and thereby offered a party to it the satisfaction of a divorce instead of an annulment. *Amod* holds that a person illegally residing in an area reserved for whites cannot maintain an action for nuisance. This reflects judicial unwillingness to afford legal remedies to persons engaged in illegal activities, which is also found in the cases on injuries causing loss of illegally-derived income.[19] Valid criticisms can be made of decisions in these and other private law cases in which race was an element, but it should be accepted that the South African higher judiciary generally has given such cases a "straight" treatment and delivered judgments that can be cited outside South Africa without embarrassment. It might also be observed that on the sensitive subject of police assaults and unlawful arrests, every Appellate Division decision discussed in the text favours the victim.[20]

South Africa's position on the Rhodesian unilateral declaration of independence ("U.D.I.") is addressed in *Ocean Commodities Inc. v. Standard Bank of S.A. Ltd.*,[21] in which it is laid down in *dictum* that the courts do not recognise the laws of an unrecognised state. Whether the enactments of unilaterally-independent Rhodesia constituted "laws", whether the judgments of Rhodesian courts bound the parties and whether Rhodesian judgments were "precedents" have become academic questions. (The laws and judgments were validated by Britain in its arrangements for the establishment of Zimbabwe in 1980.) However, similar questions exist concerning South West Africa/Namibia and the "national states" granted independence by

17 P. 252.

18 No. 55 of 1949, repealed, Immorality and Prohibition of Mixed Marriages Amendment Act, No. 72 of 1985, s. 7 (S. Afr.).

19 Pp. 240-44.

20 See pp. 161-62, 213-16, 220-26.

21 Pp. 87-92.