THE IMPACT OF AMERICAN LAW ON ENGLISH AND COMMONWEALTH LAW

A Book of Essays

JEROME B. ELKIND

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Editor

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IN MEMORY OF

Lawrence L. Elkind
My Father

St. Clair A. Switzer
My Father-In-Law

Celia S. Elkind
My Mother

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Finally I would like to thank my good friend John Carbutt for his assistance in proof-reading the typescript and with graphics.

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FOREWORD

This is a book on a significant and important topic. Few lawyers in the Commonwealth, and elsewhere, can fail to encounter American law in the course of their professional lives, yet few perhaps recognize how important it has been in formulating the institutions and laws of their various jurisdictions. The principal reason for this must be that in Commonwealth countries American law is rarely applied directly by the judiciary. Certainly this is true of Britain; it is perhaps less true elsewhere. It would however be misleading to search for the importance of American law only in the law reports.

There was a time, at the turn of the century and before, when a knowledge of the works of the best of American institutional writers and judges was well-known throughout the English-speaking world. The common law was conceived of as a unity; solutions reached in America by jurists such as Storey and judges such as Holmes and Cardozo were appreciated according to their intellectual merit. Digests compiled English and American law. Yet, though many common traditions and similar institutions remained, this particular tradition faded. In part this was attributable to the consideration that common law was diverse. In part legislatures in all jurisdictions engaged in rather different social experiments and the relevance of the case law of one jurisdiction became less apparently obvious to jurists in other jurisdictions. Sheer bulk of materials inhibited comparative research. Yet common law cross-fertilization did not stop. It continues, and the search for better solutions to doctrinal problems increasingly induces comparative study. In this book that tradition is represented by discussions of restitution of products liability and of inequitable incorporation.

But a further area of inquiry has recently opened up. For, common or at any rate similar social problems have provoked a search for legislative models, and very often the model has been found in America where the problems have already arisen. As the editor notes, the structure of race relations law in this country owes a profound debt to American models. But that is by no means the sole example. Laws relating to securities regulation in Canada and proposals made recently to that end in Australia are rooted in American legislation and practice. Much the same might be said of measures dealing with pollution control, or condominiums in Ontario or oil conservation in Alberta.

One could hardly leave the topic without reference to constitutional law. Both Canada and Australia owe many of their constitutional arrangements to those of the United States, either by adoption

or rejection. The influence of American law may also be seen in India. These matters Mr. Williams has documented. Lord Haldane in *Attorney-General for Australia* v. *Colonial Sugar Refining Company* [1] warned against the slavish adoption of American precedents, but he noted nonetheless that the United States constitution served as a model for its Australian counterpart. The further manifestations of American influence can be seen in Mr. Williams' essay and in Professor P. H. Lane's magisterial *The Australian Federal System with United States Analogues* (1972). Canada in some ways rejected the American model. Doctrines such as that of the implied immunity of instrumentalities were rejected.[2] But propositions concerning aspects of trade and commerce, for instance of local regulation of contracts were borrowed from American sources.[3] And even where the Privy Council seemed most rejecting one finds a spectral evocation of American doctrine. When in *Attorney-General for Ontario* v. *Canada Temperance Federation* [4] Lord Simon declared that emergency does not give power over provincial matters to the Dominion he declared a proposition at least similar to that of Mr. Chief Justice Hughes in *Home Building and Loan Association* v. *Blaisdell*.[5] Of course the influence of the Bill of Rights in the United States constitution has been profound. Its structure has been adopted in India and it has been reproduced in a mediated form in Canada and in countries of the new Commonwealth. Even in Australia, which has resolutely eschewed such documents, at least two provisions similar to their American counterparts exist. The Bill of Rights has had its influence upon proposals elsewhere and notably the European Convention on Human Rights which may by a process of incorporation ultimately become part of British domestic law. All these are matters of which Americans and American lawyers can justly be proud.

And one could go on. But the thesis, of the importance of American law, is best traced through these essays which provide illustrations of a continuing development; both of the adoption of common law, and of the search for statutory responses to social problems. More could no doubt be written, more will no doubt be written on the topic. Dr. Elkind and his colleagues have taken a first, and a worthwhile, step.

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January, 1978.

1. [1914] A.C. 237.
2. Bank of Toronto v. Lombe (1887) 12 App.Cas. 575.
3. Citizens Insurance Co. v. Parsons (1881) 7 App.Cas. 96.
4. [1946] A.C. 193, 204.
5. 78 L.Ed. 413 (1934) at p. 422.

PREFACE

This book is devoted to a comparison of two legal systems. To that extent it may be regarded as a work in comparative law and may be placed alongside the multitude of volumes comparing English and American law. At the same time this book is a new departure in that we have endeavoured to reverse the way in which the two legal systems are normally looked at.

The debt which the American legal system owes to the English Common Law is drilled into American lawyers from the first day in law school. In torts we studied the *Polemis* case and *Rylands v. Fletcher*. In contracts *Hadley v. Baxendale* still concerns the American student. In criminal law, the rule in *M'Naghten's* case is still being discussed. English Common Law definitions of murder, burglary, theft, rape and the like are still considered before the American statutory departures.

The modern American practitioner still needs to be aware of English law. English cases are frequently cited to American Courts and they are considered to be persuasive authority on the common law.

In all but one State, either by legislation or by custom, the common law of England is made the rule of decision in the courts in the absence of local legislation. American law has been influenced by COKE'S INSTITUTES. BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND was the beginner's law book in the United States well into the Twentieth Century. In short English Common Law is still considered to be the basis of American jurisprudence.

By contrast English and Commonwealth students are seldom exposed to American case law unless they come into contact with American teachers. There are British and Commonwealth libraries which are woefully lacking in American research materials. And many English and Commonwealth judges strenuously resist using American law. When they do—and this book will demonstrate that there are times when it cannot be avoided—it is often with little real understanding. Consequently, practitioners tend to ignore American law and are unable to provide judges with much assistance when it is called for.

In the area of law reform, American statute law is being examined with increasing frequency. The chapters on Constitutional Law and Race Relations demonstrate the role that American statute law can and does play in law reform.

Where principles of American statute law do find their way into the statute books of Great Britain or a Commonwealth country, one would expect that American cases construing these statutes would

be considered persuasive in analysing English and Commonwealth legislation based upon them. American law was examined quite closely in connection with English Race Relations legislation. The essay on Race Relations law deals with its impact. But, as the essay will show, American case law has had virtually no impact on the construction of the legislation. At the same time there are interesting areas of judge-developed law in the United States that have not yet been canvassed by English or Commonwealth judges or lawyers. Some of these will be explored in the essays on Consumer Protection, Family Law and Company Law.

American law could also be useful in resolving problems about which English and/or Commonwealth law is silent. The United States is a big country. To date there are approximately four million reported cases in the United States.* This reservoir of authority should not be overlooked. Where English or Commonwealth law is silent on a particular point, there is often an American case in point. American law is not merely exotic foreign law as so many English and Commonwealth judges and lawyers seem to assume. It is a Common Law System. And it would seem beneficial for judge, practitioner and scholar alike to draw on the experience and consider the reasoning of judges in over fifty common law jurisdictions. The Restitution essay will underline this point.

The practice of looking to other jurisdictions for persuasive authority is, in itself, something that might well be learned from Americans. Because there are so many American jurisdictions, American lawyers are rather more accustomed to the practice of drawing on other jurisdictions for persuasive authority where their own law is silent and are fairly astute in assessing the value of such authority.

With the foregoing in mind, the contributors to this book were asked to take the following approach:

Each was to consider one or more topics in his or her particular field of interest in terms of:

> Whether American Case Law has actually been considered by the English and Commonwealth judiciary or whether American Statute Law was considered in the drafting of English or Commonwealth statutes and/or
>
> Whether there are areas of English and Commonwealth law in need of reform where the American law ought to be taken into account and, if so, whether the American approach is necessarily desirable.

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* In 1962, Price & Bittner in EFFECTIVE LEGAL RESEARCH (Little, Brown & Co., student edition revised) p. 181, estimated that there were between three and three and one-half million reported cases with over 30,000 being added each year. The third edition 1969 did not revise this estimate. Assuming that the volume of cases has accelerated, it would be safe to say that there are around 4 million reported cases in 1977.

We do not mean to tout the American approach as the best one in all cases. In fact, the essay on Restitution, after considering the American approach, concludes that the American approach could only be adopted by statute and would probably have a very unsettling effect on English law if not approached with considerable caution.

The premise of the book is that American law has developed from English common law. It has carried forth, with certain modifications, the basic values and the method of legal reasoning of the English common law. As parents learn from their offspring, so too should English law learn from its American offspring.

It must be stressed that this is a book of essays. It is not an exhaustive treatise. We have not, for instance, discussed the impact of American "no-fault" insurance on the Accident Compensation Legislation of New Zealand and Australia. Nor have we discussed the impact of the Maryland law of liens on the laws of New Zealand and the Australian State of Queensland. It could be that a thorough search of the cases would reveal that the impact is far more widespread than even we imagine. But any such search or treatise must attend upon the interest and enthusiasm that this book kindles for such a project.

Many of the contributors to this book have the benefit of exposure to both English/Commonwealth and American legal education. The editor's legal education is primarily American. Others have been educated entirely in English and/or Commonwealth Universities.

Since this is a Comparative Law effort, it seems that each contribution can best be understood in terms of the point of view imparted by the contributor's legal education. Thus we have adopted the device of setting out each contributor's credentials at the beginning of each chapter. We call the reader's attention to this device as an aid to understanding each chapter on its own terms.

We have tried not to confine our inquiry to "White Commonwealth" countries settled by Europeans. And there are sections dealing with "Third World" countries particularly in the essays on Race Relations and Constitutional Law since American Constitutional Law is of considerable value to lawyers in those countries with written "entrenched" constitutions. But other essays, particularly those on Restitution, Company Law, and even Consumer Protection, should also be of interest in Third World countries where the English common law is followed. The areas dealt with are: Race Relations, Constitutional Law, Consumer Protection, Restitution, Company Law and Family Law. The last essay is a jurisprudential one tying the whole thing together and making some observations on the future impact of American law.

Since this book is aimed primarily at the English and Commonwealth reader (although it should also be of considerable interest to the American reader) we felt that an appendix on the use of American Research Materials might be of some value.

Finally, for the sake of consistency, we have used the symbol "§" to designate a section in citations rather than "S.". Also I have used the terms "American Law" and "U.S. Law" interchangeably although I realise that neither is strictly accurate. Canadian Law is also strictly speaking "American Law" and there is no such thing as "U.S." law per se, but rather Federal Law and State Law.

JEROME B. ELKIND

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By

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The author has a B.A. and LL.B. from Victoria University of Wellington. He has a B.C.L. from Oxford where he was a Rhodes Scholar. He is a Barrister and Solicitor of the Supreme Court of New Zealand and was formerly a Lecturer in Law at the University of Dar es Salaam, Tanzania. He is at present Lecturer in Law at the University of Auckland, New Zealand.

"No man is an Iland, intire of it selfe."

John Donne.[1]

"Ideas have wings. No legal system of significance has been able to claim freedom from foreign inspiration."

H. R. Hahlo and Ellison Kahn.[2]

1. John Donne, Devotions Upon Emergent Occasions XVII, cited from Hayward, John Donne—Complete Poetry and Selected Prose, p. 538 (The Nonesuch Press, 1962).

2. Hahlo and Kahn, The South African Legal System and Its Background, p. 484 (Juta & Co., Ltd. 1968).