Comparative Law in the House of Lords and Supreme Court

Aim

To consider the use of comparative law materials in tort cases in the House of Lords and Supreme Court between 1990 and 2013.

In particular:

- To determine whether such use is increasing as a result of senior appeal courts having an increasingly international outlook.
- To consider whether approaches such as that of Lord Bingham in *Fairchild v Glenhaven Funeral Services Ltd* are exceptional or represent a significant change.

The research has covered both common law and civil law sources. 110 tort cases have been surveyed.

Uses of comparative law

The uses vary greatly. Common law cases are often treated simply as part of the applicable body of law. More positive uses include: using such cases to identify the principles, ethical considerations or policies relevant to the case under consideration and to identify trends in the development of law. Comparative law can, of course, assist in filling gaps in domestic law. Such material can operate to validate a development in domestic law.

In what areas of tort has use of comparative law had the greatest impact?

- *Williams v Natural Life* (1998) - personal tortious liability of a person acting on behalf of a company
- *Three Rivers* (2001) - constituents of misfeasance in public office
- *Chester v Afshar* (2004) - causation in relation to doctor's non disclosure of risks

**Common Law**

Use of materials from Australia, Canada, New Zealand and the United States has been a familiar part of the picture in this period. Over half of the cases surveyed use such. There appears to be little change in the frequency of use. There is little use of materials from other common law jurisdictions.

![Fig 1: Percentage of cases using common law materials](image1)

**Civil Law**

Use of civil law materials is at a much lower level than common law. German law is the most commonly cited. There is sporadic use made of civil law materials between 1994 and 2005. There is only one example of such use since 2005.

![Fig 2: Percentage of cases using civil law materials](image2)

**ECHR**

The ECHR provides a route for overseas jurisdictions to influence domestic law. Inevitably there has been a significant increase in reference to ECHR materials since 2000. All of these references were to decisions of the European Court of Human Rights. In no case was reference made to decisions of courts interpreting the Convention in other jurisdictions.

**Individuals**

There is considerable evidence that use of civil law materials has been driven by the enthusiasm of particular judges; in particular, Lords Bingham, Goff and Steyn. Such use has fallen significantly since their retirements.

**Supreme Court**

There is no evidence that the pattern of use of comparative law materials has changed with the advent of the Supreme Court. Six of the eight Supreme Court cases surveyed refer to comparative materials (and the two others refer to ECHR). There is only one reference in these cases (in *Flood v Times Newspapers*) to civilian materials.

**Conclusion**

Common law principles remain an important factor in the development of the law of tort in spite of the impact of the EU and ECHR. Enthusiasm for the use of civilian law has waned in the last decade. The law of tort is now more isolated from civilian influence than it was 10 years ago.

**Publication**

The full research will be published shortly in Volume 42 (2013) Issue 3 of the Common Law World Review.

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