Plaintiff S99/2016 and the Expansion of the Principle of Legality

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INTRODUCTION

In *Plaintiff S99/2016 v Minister for Immigration and Border Protection (Plaintiff S99)*, the Federal Court found that the Minister for Immigration and Border Protection (the Minister) owed a duty of care to a refugee under the law of negligence. In this highly publicised dispute, the plaintiff had arrived by boat in Australia and was detained in Nauru. Following her release into the Nauruan community and whilst awaiting resettlement, she was raped and became pregnant. The Court granted the plaintiff an injunction, precluding the Minister from procuring an abortion for her in Papua New Guinea, due to risks to her safety and the lawfulness of abortion there.

The Federal Court granted the plaintiff injunctive relief, despite the existence of a privative clause in the *Migration Act 1958* (Cth) (the Act). The Court applied the principle of legality – a common law interpretive principle – in support to find that words should be read into the privative clause so that it did not apply to actions in tort against the Minister.

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As Bromberg J’s judgment states, in this proceeding ‘[c]omplex issues are called up for determination’. However, this comment is focused on his Honour’s treatment of the principle of legality with respect to injunctions for tortious wrongs and certain maxims of equity. It does not seek to address other aspects of the Court’s judgment on the broader law of negligence.

**BACKGROUND**

**The facts**

The plaintiff is a young woman from an African country. She arrived at Christmas Island by boat in 2013 and was designated an ‘unlawful non-citizen’ under the Act. The plaintiff was detained by the Minister, taken from Australia and placed in the Republic of Nauru, being a ‘regional processing country’ under the Act. The plaintiff was detained in a detention centre in Nauru from October 2013 to November 2014. She was recognised as a refugee, released into the Nauruan community on a temporary settlement visa, and awaited resettlement. As the Court described, the plaintiff ‘has no independent means. She has been and remains dependent on the Minister for food, shelter, security and healthcare’.

On 31 January 2016, the plaintiff was raped whilst unconscious and suffering a seizure. At the time of the rape, she was living in accommodation in Nauru paid for by the Commonwealth government. She became pregnant and required an abortion. Expert medical evidence indicated that there were significant risks associated with an abortion because of her neurological condition, poor mental health, and physical and psychological complications. An abortion was unsafe and illegal in Nauru. The plaintiff sought an abortion in Australia. The Minister, who had legal capacity to bring the plaintiff to Australia for this purpose, refused to do so on the basis that exceptional circumstances were not involved. The Minister made an abortion available for her in Papua New Guinea, and she was taken to Port Moresby. However, the plaintiff claimed that an abortion there was also unsafe and not legal – there was an absence of

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3 [2016] FCA 483, [13].
4 Ibid [2].
5 Ibid [3]; see also [76]-[80].
6 Ibid [5]; see also [82]-[85].
7 Ibid [5]-[6]; see also [306].
8 Ibid [7].
9 Ibid [8].
medical resources in Papua New Guinea and an abortion would expose her to criminal liability.\textsuperscript{10}

Proceedings were brought by the plaintiff in the High Court, although the matter was ultimately referred to the Federal Court for determination. The plaintiff sought, amongst other things, a \textit{quia timet} injunction for apprehended breach of the Minister’s duty of care.\textsuperscript{11} The injunction proposed was for the Commonwealth to procure for her an abortion in Australia, or in the alternative, an abortion otherwise than in Nauru or Papua New Guinea.\textsuperscript{12} In response, the Minister relied upon (amongst other things) a privative clause in s 474 of the Act.

**The privative clause**

Section 474 of the Act is contained in Division 1 of Part 8 of the Act. Section 474 relevantly provides:

\begin{quote}
474 Decisions under Act are final

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.
\end{quote}

The Minister submitted that an injunction could not be issued because it fell within the operation of s 474. According to the Minister, his decision not to bring the plaintiff to Australia for an abortion, but to take her to Papua New Guinea instead was, pursuant to s 474(1)(c), not subject to injunction in any court on any account.\textsuperscript{13} The Minister did not contend that he was immune from liability under s 474 for any tortious wrong. Said the Minister: ‘if there was a breach of a duty of care and the applicant suffered damage,
“she gets damages”.’ However, the Minister submitted, he could not be restrained from committing any tortious wrong due to the privative clause. If the Minister ‘engaged in tortious conduct, damages were available (having not been mentioned in s 474), but injunctive relief was not’.15

Justice Bromberg rejected the Minister’s argument. His Honour pointed to analogous case authorities on other provisions of the Act which placed time limitations on applications to the High Court, or limited the conferral of jurisdiction on the Federal Court, in relation to migration decisions. In those cases, the courts read such provisions as applying only to judicial review applications, and not actions in tort.16 Justice Bromberg also gave significant weight to the Explanatory Memorandum and Second Reading Speech for the relevant Bill.17 Justice Bromberg considered it ‘evident’ that s 474 was similarly targeted at judicial review processes.18

His Honour declined to follow a previous case authority to the contrary on s 474.19 Justice Bromberg found that s 474(1), properly construed, involved ‘reading in’ of the following words (in bold):

(1) A privative clause decision:

(a) is final and conclusive; and

(b) must not, in an application for judicial review, be challenged, appealed against, reviewed, quashed or called in question in any court; and

(c) is not, in an application for judicial review, subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.

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14 Ibid [454].
15 Ibid [454].
17 Migration Legislation Amendment (Judicial Review) Bill 1998 (Cth).
18 [2016] FCA 483, [430]; see also [432].
Justice Bromberg’s analysis on this issue could have ceased at this point. However, his Honour went further. Justice Bromberg relied on two other grounds to find that the Minister’s construction was incorrect. The first was the operation of the principle of legality. The second ‘and related’ reason was that the Minister’s interpretation would ‘yield draconian and absurd results’.

The principle of legality

It is necessary to set out some background to the principle of legality before proceeding further with Bromberg J’s judgment.

The principle of legality is a common law interpretive principle. It is a strangely named yet ‘unifying concept’ in Australia, said to encompass a broad range of common law principles of statutory interpretation. It has most commonly been associated with the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms and immunities except by clear and unambiguous language. However, it also extends to fundamental common law ‘principles’ and departures from the ‘general system of law’.

In the seminal High Court case of Potter v Minahan in 1908, O’Connor J quoted approvingly from Maxwell on Statutes, which said:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.

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20 It should also be noted that s 474 falls within Part 8 of the Act, which is headed ‘Judicial Review’. A heading to a Part forms part of an Act. Acts Interpretation Act 1901 (Cth), s 13(2)(d). This could have been another interpretive factor evidently in support of Bromberg J’s construction.
21 [2016] FCA 483, [448].
22 Ibid.
26 Ibid 343-4.
27 (1908) 7 CLR 277.
The principle of legality is directed at ascertaining Parliament’s actual legislative intention. In *Coco v The Queen*, the High Court said the principle of legality:

must be understood as a requirement for some manifestation or indication that the legislature has *not only directed its attention* to the question of the abrogation or curtailment [...]* but has also determined upon* abrogation or curtailment [...].

The above passages in *Potter* and *Coco* continue to attract support of the High Court. Nevertheless, despite its long standing nature and appearance of orthodoxy, the principle of legality is not without controversy. The principle’s rationale and operation is being increasingly scrutinised by commentators, and differences in approach to the principle are emerging amongst judges of the High Court. More relevantly though for present purposes, the scope of the principle of legality’s protection is unclear. There can be no authoritative statement of what is protected by the principle, since such recognition is ‘ultimately a matter of judicial choice’.

**THE PRINCIPLE OF LEGALITY APPLIED … AND EXPANDED**

Justice Bromberg began his analysis of the principle of legality by citing recent High Court authority which approved of the above passage from *Potter* and reaffirmed that departures from the general system of law are protected by the principle.

Justice Bromberg went on to consider the Minister’s submission. His Honour was clearly perturbed by the notion that injunctive relief could not be granted for any

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29 Chen, above n 25, 334.
31 Ibid 437 (Mason CJ, Brennan, Gaudron and McHugh JJ) (citations omitted).
tortious conduct due to the operation of s 474. This, his Honour said, was ‘a very large submission’ which went ‘well beyond the tort of negligence’.

It would extend ‘to any tort committed or apprehended to be committed by the Minister, the Commonwealth, or an officer of the Commonwealth, using powers under the Act, but which is not, or is not yet, a jurisdictional error’. Justice Bromberg was also concerned about s 474’s operation across jurisdictions – the provision was not specific to the Federal Court; it would operate in this way across all courts in Australia. The plaintiff would be completely shut out from seeking injunctive relief.

His Honour then asked a series of searching questions. These were directed at ascertaining Parliament’s actual intention, consistently with the principle of legality’s rationale, particularly the likelihood of whether Parliament had intended for the outcome contended by the Minister:

Suppose an applicant was being falsely imprisoned. Could it really be that the legislature intended that the falsely-imprisoned applicant could seek damages from the court from time to time during the course of his or her imprisonment, or after that imprisonment ended, but could never have the benefit of injunctive relief prohibiting his or her continued unlawful detention? Suppose it was clear that the Minister’s gross negligence would very shortly cause the death of hundreds of detainees. Could it really be that the legislature intended that no injunction could issue preventing the negligence and that the detainees’ descendents would have to wait for the detainees’ death and then seek damages?

Suppose the Minister purported unlawfully to expropriate all detainees’ property. Would an injunction to restrain a conversion not issue? Suppose the Minister indicated he intended unlawfully to introduce corporal punishment in processing centres. Would an injunction restraining a common law battery not issue? Or, take the present case: suppose that the Minister’s duty to the applicant extends to procuring for her a safe and lawful abortion and suppose that the Minister told the applicant he had no intention of so procuring. Could it really be that the Parliament intended that the applicant’s choices were to take the risk of an unsafe or unlawful abortion, or to take the risk associated with having no abortion at all, and if she suffered damage in either case she would then have an entitlement to a remedy against the Minister?

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36 Ibid [455].
37 Ibid. His Honour gave the examples at [456]-[457].
39 [2016] FCA 483, [456]-[457].
There are, of course, matters encompassed by the principle of legality which touch on the subject areas explored above. At common law, there is a right to liberty of the individual. There is also a common law presumption that Parliament will not interfere with vested property rights or alienate property without compensation. Other common law presumptions include that Parliament does not intend to: ‘restrict access to the courts’, such that privative clauses purporting to oust judicial review should be interpreted restrictively; ‘authorize what would otherwise have been tortious conduct’; or ‘deprive a person of legal rights otherwise enjoyed against a statutory body’. There is general consensus that the above are protected by the principle of legality.

However, Plaintiff S99 breaks new ground. Justice Bromberg found that the courts’ power to issue injunctive relief for a tortious wrong can be protected by the principle of legality. His Honour considered that ‘[c]onsistently with the principle of legality, “irresistibly clear words” would be required before I would construe s 474 as precluding the issue of injunctive relief in the case of a tortious wrong. I do not think the words are sufficiently clear.’ This fortified his Honour’s conclusion that s 474 did not preclude injunctive relief except in judicial review proceedings.

Justice Bromberg found that the potential outcomes of the Minister’s construction were ‘irrational and draconian’ and ‘markedly depart[ed]’ from the general system of common law, ‘so far as it pertains to apprehended or continuing torts’. Moreover, his Honour categorised the following as ‘fundamental’ principles: ‘there is no wrong

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40 Re Bolton; Ex parte Beane (1987) 162 CLR 514, 520, 523, 532.
41 Clissold v Perry (1904) 1 CLR 363, 373.
42 Commonwealth v Haseldell Ltd (1918) 25 CLR 552, 563.
43 Spigelman, above n 24, 775; Perry Herzfeld, Thomas Prince, and Stephen Tully, Interpretation and Use of Legal Sources: The Laws of Australia (Thomson Reuters, 2013) 226 [25.1.1950].
44 Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, which was also in respect of the operation of s 474, albeit in the judicial review context; Bare v IBAC (2015) 326 ALR 198, 226 [100]-[102] (Warren CJ) (in obiter, dissenting); 290-2 [330]-[336] (Tate JA), 362 [590] (Santamaria JA).
46 Puntoriero v Water Corporation (2000) 199 CLR 575, 594 [59] (Kirby J) (dissenting); see also 588 [34] (McHugh J), 613 [113] (Callinan J); and Board of Fire Commissioners (NSW) v Ardouin (1961) 109 CLR 105, 116; Australian National Airlines Commission v Newman (1987) 162 CLR 466, 471.
48 [2016] FCA 483, [459].
49 Ibid [458].
50 Ibid.
without a remedy’ (*ubi jus ibi remedium*);51 ‘equity suffers not a right without a remedy’;52 and ‘it is better to restrain in time than to seek a remedy after the injury has been inflicted’.53

Significantly, Bromberg J’s decision on s 474 opens up the prospect of injunctive relief against the Minister for apprehended or continuing tortious wrongs in migration decisions. However, the decision raises further questions. Will this finding rear its head beyond s 474 and migration decisions? The Court appeared to be spurred on by a number of case-specific factors in *Plaintiff S99*: a privative clause which referred to injunctions, but not damages; the Minister’s peculiar submission that remedy in the form of damages was available, but not injunctive relief; the unpalatable consequences of such a construction; and the all-encompassing operation of the privative clause across Australia’s courts.

So does *Plaintiff S99* stand for authority, more broadly, of a presumption that Parliament does not intend to preclude the issuing of injunctive relief for a tortious wrong, without clear and unambiguous language? It may be that a statute makes changes to equitable remedies, by ‘modifying, expanding or narrowing (or even both at the same time), or (perhaps less usually) abolishing’ them.54 In light of *Plaintiff S99*, are such statutory provisions now to be read strictly so as not to preclude injunctive relief for a tortious wrong where it is otherwise available, except where there is clear and unambiguous language to the contrary? In addition, the ‘fundamental’ principles recognised by Bromberg J (ie. there is no wrong without a remedy etc.) are maxims of equity. Although the lines between common law and equity are blurred, it is fair to say that *Plaintiff S99* takes the principle of legality further into the law of equity55 (see below).

51 *The Western Counties Manure Company v Lawes Chemical Manure Company* (1873-74) LR 9 Ex 218, 222 (Pollock B).
52 *Annuity and Rent Charge* (1744) 1 Eq Ca Abr 31; 21 ER 851.
55 Although ‘[s]ome lawyers would regard maintaining the continuing distinction between common law and equity […] as a sterile antiquated endeavour’, ‘it still makes sense to compare, contrast and analyse separate bodies of law called “common law” and “equity”’: Mark Leeming, ‘Common Law, Equity and Statute: Limitations and Analogies (Speech delivered at the Private Law Seminar, University of Technology, Sydney, 14 November 2014) 1, 2.
The principle of legality is not well known for its protection of maxims of equity. Surprisingly though, that proposition is not without support. In *Minister for Lands and Forests v McPherson*, the New South Wales Court of Appeal (Kirby P, Meagher JA agreeing) considered whether the test for (what is nowadays known as) the principle of legality could be applied:

> in relation to basic principles of equity, where those principles have been developed over the centuries to safeguard the achievement of justice in particular cases where the assertion of legal rights, according to their letter, would be unconscionable?

The Court of Appeal was of the view that ‘[i]n principle, there would seem to be no reason why a similar approach should not be taken to basic rules of equity’. Extra curially, Leeming JA of the Court of Appeal and leading commentator on the law of equity has subsequently remarked that ‘[f]ew would quarrel with that reasoning’.

The Court of Appeal went on to say that the law of equity is ‘part of the legal order with which statute law must harmoniously operate’. It recognised that while equitable remedies are discretionary, that is a reason for ‘confining the operation of the equitable principle, not for denying its co-existence, so far as compatible, with the provisions of the statute’. In the context of the dispute in that proceeding, the Court of Appeal found that the power of the New South Wales Supreme Court to provide equitable relief against forfeiture had not been revoked by statute.

Although Bromberg J in *Plaintiff S99* did not cite *McPherson* in support, his designation of specific maxims of equity as ‘fundamental’ is consistent with *McPherson*. Alternatively, the law of equity arguably sits in the category of ‘the general system of law’ referred to in *Maxwell on Statutes*. However, the proposition that the principle of legality covers maxims of equity is yet to find support in the High Court. Moreover, some commentators have treated maxims of equity as not

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57 Ibid 700.
58 Ibid.
59 Mark Leeming, ‘Equity: Ageless in the “Age of Statutes”’ (2015) 9(2) *Journal of Equity* 108, 125. However, see fn 66.
60 (1991) 22 NSWLR 687, 700.
61 Ibid.
62 Ibid 702 (Kirby P, Meagher JA agreeing), 715 (Mahoney JA).
encompassed by the principle of legality, but by a weaker principle of statutory interpretation – the presumption against altering common law doctrines. The distinction is between ordinary common law doctrines and those which are fundamental. So what are the implications of the maxims of equity drawing force from the principle of legality? It should be noted that the law of equity has been the subject of extensive statutory incursions, and equity and statute share a complex interrelationship.

FUTURE DIRECTIONS OF THE PRINCIPLE OF LEGALITY

As Gageler J has said about the principle of legality, ‘[o]utside its application to established categories of protected common law rights and immunities, that principle must be approached with caution’. In Plaintiff S99, the Federal Court applied the principle of legality to the equitable remedy of injunctive relief for tortious wrong, recognised particular maxims of equity as fundamental, and characterised apprehended or continuing torts as a general system of law.

This expansion of the principle draws attention to how courts determine what the principle of legality should protect. What is a ‘fundamental’ right, freedom, immunity or principle? What is a departure from the ‘general system of law’? The courts have not offered particularly insightful guidance in this respect. And if it extends further, where do the boundaries lie?

63 Herzfeld, Prince and Tully, above n 43, 233 [25.1.1980]; but cf Pearce and Geddes, above n 47, 238-9 [5.29].
64 Chen, above n 25, 358-9.
66 See Leeming, above n 59, where his Honour was critical of the principle of legality for encouraging ‘a simplified legal analysis: that there is a homogenous class of statutes, which, when they are in conflict with “common law”, calls for a particular response’: 109. According to his Honour, ‘almost inevitably statutes pick up the language of common law and equity, and in such cases it will be commonly be necessary to determine whether the language translates to the general law concept, or whether a new statutory creature with incidents resembling those at general law is denoted’. If the latter, ‘the question is not merely the contestable issue whether an equitable doctrine is “basic” or “fundamental” so as to engage’ the principle of legality. ‘Instead, the nature of equity is that much of its doctrines and remedies are susceptible to statute […] much of equity is supplemental to an existing body of law’: 125-6. In respect of injunctions specifically, see I C F Spry, The Principles of Equitable Remedies (Lawbook Co, 8th ed, 2010) 365-8. See also J D Heydon, M J Leeming and P G Turner, Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies (LexisNexis Butterworths, 5th ed, 2015) 132ff [4-215]ff; and Dietrich and Middleton, above n 54.
67 Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd (2015) 317 ALR 279, 296 [67] (Gageler J).
*Plaintiff S99* clearly illustrates that the principle of legality is not static or fixed in nature. The principle is evolving. Other areas of law in which the principle has been extended, or tentatively extended, include statutory rights, human rights and constitutional rights.69 *Plaintiff S99* is but one recent example of the growing expansion of the scope of the principle. What subject matter the principle of legality protects belies confident prediction.

69 Ibid 331 and the references therein.