

The application of the common law and equity in countries of the South Pacific

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In all countries of the South Pacific that were under the control of Britain, or of the British colonies of Australia and New Zealand, the principles of common law and equity were introduced during their period of dependency, either by direct application by the controlling country or by adoption by the dependent country, and these principles have been continued in force since independence and self-government as part of the existing laws of the countries concerned.

The introduction of the common law and equity was effected by provisions of the Constitution or by legislation, and this written law expressly stated that the principles of common law and equity were subject to certain restrictions and limitations as to their application. The purpose of this article is to consider some issues that are raised by these provisions:

- Is it the common law and equity as applied in England that is introduced?
- Are the principles of common law and equity automatically in force in a country, or do they have to be specifically recognised in that country?
- Is there a cut-off date for the common law and equity that is introduced?
- How is the appropriateness of the common law and equity to the circumstances of the country to be determined?
- To whom do the principles of common law and equity apply?

Is it the common law and equity of England that has been introduced into countries of the South Pacific?

Nowadays the principles of common law and equity applied in some countries of the Commonwealth are not the same as those applied in England. This difference can arise because the written law that provided that the common law and equity are to apply in a country of the Commonwealth stated that they were to apply only to the extent that they were appropriate to the circumstances of that country. Relying on this provision, courts of a Commonwealth country can hold that a rule of common law or equity is not to be applied in their country, because it is inappropriate to the circumstances of that country.

For example, the High Court of Australia in *Uren v Fairfax* (1966) 117 CLR 118 declined to follow the decision of the House of Lords in *Rookes v Barnard* [1964] AC 1129, which had held that exemplary damages in civil proceedings can be awarded only in respect of unconstitutional or arbitrary acts of government officials or in respect of acts that were deliberately calculated to enable a profit to be made from the wrongdoing. The decision of the High Court was upheld by the Privy Council in *Australian Consolidated Press v Uren* [1969] 1 AC 118 on the grounds that there were circumstances in Australia that justified a different approach to exemplary damages. As a result the common law rules with regard to exemplary damages that are applied in Australia are different from those that are applied in England.

Again, the Court of Appeal of New Zealand in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 declined to follow the decision of the House of Lords in *Murphy v Brentwood District Council* [1991] 1 AC 398 in holding that a local authority was not liable in negligence for financial loss caused to the owner of a house by its failure to inspect the construction works adequately to ensure that the house was built in accordance with the plan approved by it. The decision of the Court of Appeal was upheld by the Privy Council in *Invercargill City Council v Hamlin* [1996] 2 WLR 367, on the ground that there were circumstances in New Zealand that justified such an approach. As a consequence, the common law rules with regard to the liability of local authorities for failure to inspect the construction of buildings that are applied in New Zealand are different from those that are applied in England.

In theory, therefore, there is nowadays room for an argument that when the terms ‘common law and equity’ are used, these words should be interpreted as not referring to the common law and equity as applied in England, but to the common law and equity as applied in other countries of the Commonwealth, or as determined by the courts of the host country.

This is an argument that could be, and was in fact, raised in Solomon Islands because paragraph 2(1) of Schedule 3 of the Constitution of Solomon Islands 1978 states that ‘the principles and rules of the common law and equity shall have effect as part of the law of the Solomon Islands’. There is here no express reference to England as the source of that common law and equity.

The Chief Justice of Solomon Islands held in *Official Administrator for Deceased Estates v Allardyce Lumber Company Ltd* [1980/81] SILR 66 that the term ‘common law and equity’ as used in paragraph 2 (1) of Schedule 3 was to be interpreted as not restricted to the common law and equity of England, and that the High Court of Solomon Islands was entitled to have regard to the decisions of courts of other countries of the Commonwealth to determine the common law and equity that was in force in Solomon Islands.

This interpretation of the terms of paragraph 2 (1) of Schedule 3 was, however, disapproved by the Court of Appeal of Solomon Islands in the later decision of *Cheung v Tanda* [1984] SILR 108. The Court of Appeal held that paragraph 2 (1) of Schedule 3, which adopts ‘the principles and rules of the common law and equity’, must be read in the light of the immediately following paragraph 2 (2), which reads as follows:

(2) The principles and rules of the common law and equity shall so have effect notwithstanding any revision of them by any Act of the Parliament of the United Kingdom which does not have effect as part of the law of the Solomon Islands.

As the Court of Appeal pointed out, this paragraph would have no relevance if it was the common law and equity of countries other than England that were in force in Solomon Islands, and so clearly indicates that it is only the common law and equity as applied in England that is in force in Solomon Islands by virtue of paragraph 2(1) of Schedule 3 of the Constitution, even though there is no express reference to England in that paragraph.

In the majority of other countries in the South Pacific there would seem to be no room for an argument that the common law and equity of any country other than England applies in those countries. This is because the written law that applies or adopts the common law and equity in those countries does explicitly state that it is the rules of common law and equity of England that are in force in the country:

- Cook Islands* Section 615 of the Cook Islands Act 1915 (NZ) provides that: ‘The law of England as existing on the fourteenth day of January in the year eighteen hundred and forty . . . shall be in force in the Cook Islands’.
- Fiji* Section 35 of the Supreme Court Ordinance 1875 provides that: ‘The Common Law, the Rules of Equity and the Statutes of general application which were in force in England . . . on the second day of January 1875 shall be in force within the Colony’.
- Kiribati* Section 6 (1) of the Kiribati Act 1989 states that: ‘Subject to this section, the common law of Kiribati comprises the rules comprised in the common law, including the doctrines of equity, of England’.
- Nauru* Section 4 of the Custom and Adopted Laws Act 1971 provides that: ‘(1) . . . the common law and the statutes of general application . . . which were in force in England on the thirty-first day of January 1968 are adopted as laws of Nauru.
- ‘(2) . . . the principles and rules of equity which were in force in England on the thirty first day of January 1968 are hereby adopted as the principles and rules of equity in Nauru’.
- Niue* Section 672 of the Niue Act 1966 (NZ) provided that: ‘The law of England existing on the fourteenth day of January in the year eighteen hundred and forty . . . shall be in force in Niue’.

- Papua New Guinea* Paragraph 2.2 (1) of Schedule 3 of the Constitution provides that: ‘Subject to this Part, the principles and rules that formed, immediately before Independence Day, the principles and rules of common law and equity in England are adopted’.
- Tokelau* Section 4A of the Tokelau Act 1948 (NZ) provides that: ‘The law of England existing on the fourteenth day of January in the year eighteen hundred and forty . . . shall be in force in Tokelau’.
- Tonga* Section 3 of the Civil Law Act 1966 provides that ‘Subject to the provisions of this Act, the Court shall apply the common law of England and the rules of equity, together with statutes of general application in force in England’.

In these countries, i.e. Cook Islands, Fiji, Kiribati, Nauru, Niue, Papua New Guinea, Tokelau and Tonga, the written law seems to make it very clear that it is the common law and equity of England, i.e. as applied in England, that was introduced into these countries.

In the remaining countries of the South Pacific, i.e. Tuvalu, Vanuatu and (Western) Samoa, a slightly different terminology was used. In these countries the written law that introduced common law and equity into those countries referred not to ‘the common law and equity of England’ but to ‘English common law’:

- Tuvalu* Section 6 of the Laws of Tuvalu Act 1987 provides that: ‘(1) Subject to this section, the common law of Tuvalu comprises the relevant rules as applied in the circumstances pertaining from time to time in Tuvalu . . . (5) In this section “the relevant rules” means the rules generally known as the English common law and the doctrines of equity’.
- Vanuatu* Section 15(1) of the Western Pacific (Courts) Order 1961 provided that: ‘the civil and criminal jurisdiction of the High Court [of the Western Pacific] shall, so far as circumstances admit, be exercised upon the

principles of and in conformity with: (a) the statutes of general application in force in England in the 1st day of January 1961, and (b) the substance of the English common law and doctrines of equity'. Although this subsection was revoked, section 11 of the New Hebrides Order 1975 provided that the High Court of the New Hebrides established by that order was to exercise its jurisdiction as if subsection 15 (1) had not been revoked, and this 1975 Order has been continued in force by s93(2) of the Constitution of Vanuatu in 1980, until revoked by Parliament.

Samoa

(formerly *Western Samoa*)

Section 111 (1) of the Constitution provides that: "law" includes the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa'.

The difference between 'the common law of England' and 'the English common law' might seem to many to be a difference only of phraseology, but not of substance, and so be taken to refer to the common law as applied in England. This, however, was not the view taken by the Supreme Court of Samoa in *Opeloge Olo v Police* m5092/80 (unreported) where St John CJ, said:

In my view the adjective English is descriptive of a system and body of law which originated in England and is not descriptive of the courts which declare such law. Many former British colonies, on gaining independence or some measure of it, have adapted the English common law, e.g. Australia and New Zealand. The superior courts of these countries have on occasion declared the common law differently to English courts . . . The English common law as applied to Samoa is as declared by its courts . . . But obviously where courts of high reputation agree on the common law to be applied in particular circumstances only a very bold judge would refuse to apply the same law in Western Samoa. In the case where inconsistent declarations have been made by courts of high reputation, it is for this court to determine which declaration is more sound as being consistent with established principle. (at 2)

Thus in Samoa there is authority for saying that the principles of common law and equity that are applicable in that country are not necessarily the same principles as are applied by the courts in England, but they may be principles of common law that are applied elsewhere in the Commonwealth. This decision must also be of some persuasive effect in Tuvalu and Vanuatu where the same term 'English common law and equity' is used.

Are the principles of common law and equity automatically in force in a country, or are they in force only if they have been adopted by the courts of that country?

In many countries of the South Pacific there is no doubt that the principles of common law and equity are automatically in force in these countries. This is made clear by the terms of the written law that provide for the application of the common law and equity in these countries:

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| <i>Cook Islands</i> | Section 615 of the Cook Islands Act 1915 (NZ) provides that: 'The law of England as existing on the fourteenth day of January in the year eighteen hundred forty . . . shall be in force in the Cook Islands'. |
| <i>Fiji</i> | Section 35 of the Supreme Court Ordinance 1875 provides that: 'The Common Law, the Rules of Equity and the Statutes of general application which were in force in England . . . on the second day of January 1875 shall be in force within the Colony'. |
| <i>Kiribati</i> | Section 649 of the Kiribati Act 1989 states: '(1) Subject to this section, the common law of Kiribati comprises the rules comprised in the common law, including the doctrines of equity, of England', and '(3) Subject to section 4 (1) the common law of Kiribati shall have effect as part of the law of Kiribati'. |
| <i>Nauru</i> | Section 4 of the Custom and Adopted Laws Act 1971 provides that: '(1) . . . the common law and the statutes of general application . . . which were |

in force in England on the thirty-first day of January 1968 are adopted as laws of Nauru.

‘(2) . . . the principles and rules of equity which were in force in England on the thirty first day of January 1968 are hereby adopted as the principles and rules of equity in Nauru.’

Niue

Section 672 of the Niue Act 1966 (NZ) provided that: ‘The Law of England existing on the fourteenth day of January I the year eighteen hundred and forty . . . shall be in force in Niue’.

Papua New Guinea

Paragraph 2.2 (1) of Schedule 3 of the Constitution provides that: ‘Subject to this Part, the principles and rules that formed, immediately before Independence Day, the principles and rules of common law and equity in England are adopted’.

Tokelau

Section 4A of the Tokelau Act 1948 (NZ) provides that: ‘The Law of England existing on the fourteenth day of January in the year eighteen hundred and forty . . . shall be in force in Tokelau’.

Samoa

Section 111 (1) of the Constitution provides that: “‘law” . . . includes the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa’.

In these countries, i.e. Cook Islands, Fiji, Nauru, Niue, Papua New Guinea, Tokelau and Samoa, it is very clear that the common law and equity are automatically in force in these countries.

In the remaining countries of the South Pacific, i.e. Tonga, Tuvalu and Vanuatu, however, it is not so clear whether the principles of common law and equity are automatically in force, or whether they are only in force if and to the extent that they have been applied by the High Court or Supreme Court.

This is because the written law that provides for the application of the principles of common law and equity in these three countries does not expressly state that these principles are in force, but provides instead that the High Court or the Supreme Court, and also the Magistrates Courts, of Tonga, Tuvalu and Vanuatu shall exercise their jurisdiction in accordance with these principles, but subject to such modifications as local circumstances render necessary:

Tonga The Civil Law Act 1966 provides by section 3 that: ‘Subject to the provisions of this Act, the Court shall apply the common law of England and the rules of equity, together with statutes of general application in force in England’. The Court is defined to mean ‘any Court of the Kingdom of competent jurisdiction’.

Tuvalu Section 15 of the Western Pacific (Courts) Order 1961 provided that ‘the civil and criminal jurisdiction of the High Court [of the Western Pacific] shall, so far as the circumstances admit, be exercised upon the principles of and in conformity with (a) the statutes of general application in force in England on the 1st day of January 1961, and (b) the substance of the English common law and doctrines of equity’. This section was revoked by the Tuvalu Order 1975, but s101(1) of that Order provided that the High Court of Tuvalu established by that Order should have the same jurisdiction as if the Order had not been revoked, and this was continued in effect by the Constitution of 1978 and 1986.

Vanuatu Section 15 of the Western Pacific (Courts) Order 1961 provided that: ‘the civil and criminal jurisdiction of the High Court [of the Western Pacific] shall, so far as circumstances admit, be exercised upon the principles of and in conformity with: (a) the statutes of general application in force in England on the 1st day of January 1961, and (b) the substance of the English common law and doctrines of equity’. This section was revoked by the New Hebrides Order 1975 but that Order provided that the

High Court of the New Hebrides established by that Order was to exercise jurisdiction as if it had not been revoked, and the Order was continued in force after independence by s93(2) of the Constitution. There is a similarly worded provision in the Magistrates Court Act of Vanuatu.

The High Court of Tuvalu has held that the effect of s15 of Western Pacific (Courts) Order 1961, which is still in force in Tuvalu and Vanuatu (but not in Kiribati where it was repealed by s14 Laws of Kiribati Act 1979), is that English statutes of general application are not in force in Tuvalu unless and until they have been adopted and adapted by the High Court of Tuvalu: *In re the Constitution of Tuvalu and the Laws of Tuvalu Act 1987* No. 4 /1989, Tuvalu.

In this case, the High Court of Tuvalu drew attention to the fact that not only does section 15 of the Western Pacific (Courts) Order 1961 not state that English statutes of general application are in force in Tuvalu, and only that the High Court shall exercise its jurisdiction in accordance with such statutes, but also that the section contains a proviso reading: ‘provided that the said common law, doctrines of equity and statutes of general application shall be in force so far only as the circumstances of any particular country and its inhabitants and the limits of Her Majesty’s jurisdiction permit and subject to such qualifications as local circumstances render necessary’. This proviso, the High Court held, strengthens the view that statutes of general application do not apply in a country until they have been adopted by the High Court to the local circumstances of the country. Donne CJ said:

Only after and not until an imperial enactment is adapted by the Court to meet these requirements is it ‘in force’ as the law of Tuvalu, that is the effect of the proviso . . .

The object of section 15(1) was, I consider, to receive the statutes of general application (the imperial enactments) in force in England on the 1st January 1961 but that such statutes were not to be applied as law until they were adapted in accordance with the requirements set forth in the provision.

This decision was given with regard to the application in Tuvalu of statutes of general application and not the common law and equity, but it would seem equally applicable to the principles of common law and equity

in that country, which are stated to be introduced into Tuvalu by the same words of the Western Pacific (Courts) Order 1961.

Since section 15 of the Western Pacific (Courts) Order 1961 is in force in Vanuatu, the decision must also be regarded as persuasive authority in that country, and since sections 3 and 4 of the Civil Law Act 1966 of Tonga are expressed in terms very similar to section 15 of the Western Pacific (Courts) Order 1961, the decision must be of some authority in that country as well.

Is there a 'cut-off date' for the application of the common law and equity?

There is no doubt that over the last 100 years, since the common law and equity was introduced into countries of the South Pacific, there have been some very significant changes in the principles of common law and equity as they have been applied in England, and also in other countries of the Commonwealth, and it therefore becomes important to know at what date the principles of common law and equity were introduced into the countries of the South Pacific.

At first sight, there are two obvious alternatives: either the principles of common law and equity were introduced as they existed at a particular specified date (often called the cut-off date) or the principles of common law and equity were introduced without reference to a specified date and so refer to the common law and equity as it currently exists from time to time. In practice, there is a third alternative: the written law was ambiguous and unclear as to whether it is to the common law and equity as at a particular date, or the common law and equity as existing currently, that is introduced into the country. In fact, there are examples of all three of these alternative possibilities in countries of the South Pacific, and we will now examine these:

a) Express reference to a particular date. In some countries of the South Pacific, the written law makes it clear that it is the principles of common law and equity as they existed at a particular date that are introduced into the country. This date is often referred to as 'the cut-off date'.

This is the position with regard to:

- Cook Islands* Section 615 of the Cook Islands Act 1915 (NZ) provides: ‘The law of England as existing on the fourteenth day of January in the year eighteen hundred and forty. . . shall be in force in the Cook Islands; save so far as inconsistent with this Act or inapplicable to the circumstance of these islands’.
- Nauru* Section 4 of the Custom and Adopted Laws Act 1971 (Nauru) provides: ‘(1) . . . the common law and the statutes of general application . . . which were in force in England on the thirty-first day of January 1968, are hereby adopted as laws of Nauru.
- ‘(2) The principles and rules of equity which were in force in England on the thirty-first day of January 1968 are hereby adopted as the principles and rules of equity in Nauru’.
- Niue* Section 672 of the Niue Act 1966 (NZ) provided: ‘The law of England as existing on the fourteenth day of January in the year eighteen hundred and forty . . . shall be in force in Niue, save so far as inconsistent with this Act or inapplicable to the circumstances of Niue’.
- Papua New Guinea* Paragraph 2 (1) of Schedule 2 of the Constitution of Papua New Guinea provides: ‘the principles and rules that formed, immediately before Independence Day, the principles and rules of common law and equity in England are adopted’.
- Tokelau* Section 4A of the Tokelau Act 1948 provides that: ‘The law of England as existing on the 14th day of January in the year 1840 . . . shall be in force in Tokelau’.

One advantage of an express statement as to the time at which the common law and equity is introduced is that it specifies very exactly the stage of development of the common law and equity that is introduced. Another advantage is that it allows the courts of the country a freedom to determine how the common law and equity are to be developed in that country after that date, without being bound to decisions of courts in England as to the common law and equity.

A disadvantage of an express cut-off date is the danger that those principles could be left by the courts of the country as they were at the date of introduction, without any regard to developments that may be made by courts in England, and other Commonwealth countries, so that the principles of common law and equity would be effectively ossified. The likelihood of this in fact occurring, however, seems remote, since there is now so much interaction between lawyers and judiciary of different countries of the Commonwealth, and so much awareness of the need to ensure that the common law and equity are appropriate to the needs of modern society, and produce a result that will be recognised and accepted as just.

Certainly there has been nothing in the judgments of the principal courts of the above countries to indicate that the courts are rigidly retaining the principles of common law and equity in the exact state that they were at the date when they were introduced into these countries.

Another possible disadvantage of the cut-off date approach is that at that particular date the courts in England may have made a decision about a principle of common law or equity that is later held by a superior court in England to have been incorrect. Does this mean that the courts of a country where the cut-off date operates are obliged to apply a principle of common law or equity that has, after the cut-off date, been held to be incorrect in the country of its origin?

Clearly this would be very unsatisfactory, and a court should not be obliged to apply a principle of common law or equity that has later been held by the Court of Appeal or House of Lords in England to be incorrect.

This was the view of the Court of Solomon Islands in *Cheung v Tanda* [1984] SILR 108. In that case the Court of Appeal held that it was to be implied (see later) that 'the cut-off date for the common law and equity' was the date of independence, i.e. 7 July 1978. Nevertheless this was subject to an exception in the case of decisions of higher courts in England, that had

held that a principle of the common law and equity as stated by a lower English court at the time of the cut-off date was incorrect. This was justified by Kapi JA on a ground that he had adopted in Papua New Guinea. In *The State v Pokia* [1980] PNGLR 97, he held that 'the later decision of a competent court in England . . . will have a retrospective effect and all cases following the former principle would be regarded as wrongly decided'.

The effect of this exception to the application of the cut-off date for the principles of common law and equity was stated by Kapi JA in the following passage:

The principles and rules of common law and equity enunciated by courts in England before 7th July 1978 shall have effect as part of the law of Solomon Islands. After this point, decisions in England would not have any binding effect. The only exception to this general statement is where a competent court, such as the House of Lords, declares that a principle of law was wrongly decided by a lower court in England before independence [i.e. 7 July 1978].

Consequently in *Cheung v Tanda* (above) the Court of Appeal of Solomon Islands held that it should apply the principles of the common law of England not as they stand at the cut-off date on 7 July 1978 but as they had been corrected by later decisions of the courts in England after that date.

Whether this is the best method of ensuring that the courts of a country are not bound by principles of common law and equity that have been held to be incorrect in their country of origin is, with respect, open to some question. Another method of dealing with this difficulty would be to rely upon the express limitation in the written law that the common law and equity are to apply in a country only so far as appropriate to the circumstances of that country. Such an approach would have the advantage of not implying an exception, which seems to fly in the face of the express words of the written law, and of not holding that decisions have a retrospective effect, which seems to be quite contrary to basic principles of jurisprudence in common law systems.

(b) *Express provision that contains no cut-off date.* In one country of the South Pacific the written law that has introduced the common law and equity has expressly stated that there is no cut-off date for the application of the common law and equity and that it is to be applied as it exists from time to time:

Samoa Article 111(1) of the Constitution provides that the term “law” . . . includes the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa’.

At one time there was a similar provision in respect of :

Nauru Section 16 of the Laws Repeal and Adopting Ordinance, 1922–36 provided that: ‘The principles and rules of common law and equity that for the time being are in force in England shall so far as the same are applicable to the circumstances of the Island of Nauru, be likewise the principles and rules of common law and equity that shall for the time being be in force in the Island’.

As mentioned above, however, this provision has now been replaced by Section 4 of the Custom and Adopted Laws Act 1971, which provides expressly for a cut-off date.

The advantage of an express provision that there is no cut-off date for the introduction of the common law and equity is that it provides for the application of the principles of common law and equity as they are currently being developed and applied in England so that the principles of common law and equity applied in the host country are completely in conformity with the principles that are currently being applied in England.

A disadvantage of such a system is that it may be seen to tie the courts of the country concerned too closely to the courts in England, and may be perceived as promoting a colonial or dependency mentality on the part of the judiciary and lawyers of the country.

It is to be remembered, however, that the courts of a country do have the power to hold that a particular principle of common law or equity is not appropriate to the circumstances of the country, and so is not applicable. More will be said about this later.

(c) Ambiguous provisions as to time of application of principles of common law and equity. Unfortunately, in a number of countries the provision in the written law providing for the introduction of the principles of common law and equity is not precise but is ambiguous as to the time at which the principles are to apply.

It is therefore necessary to try to interpret the words of these provisions in their context, both textual and factual, and endeavour to determine whether they should be regarded as providing for a cut-off date for the principles of common law and equity, or a continuing application of these principles:

Fiji

Section 35 of the Supreme Court Ordinance 1876, contains what is described by Roberts-Wray in *Commonwealth and Colonial Law*, 545, as a ‘typically ambiguous phrase’: ‘The Common Law, the Rules of Equity and the Statutes of general application which were in force in England . . . on the second day of January 1875 shall be in force in the colony subject to the provisions of section 37 of this Ordinance’.

The cut-off date of 2 January 1875 clearly refers to the ‘Statutes of general application’ to which it directly relates, but it is not so clear whether the date specified refers only to the ‘Statutes of general application’, or whether the date refers also to ‘the Common Law and the Rules of Equity’, which are more removed from it in the section.

There seems to have been very little reported judicial discussion of this provision by the courts in Fiji, and in particular as to whether the date of 2 January 1875 relates to the common law and equity, as well as to the statutes of general application. There is a brief reference to the effect of this provision in the judgment of the Supreme Court of Fiji in *Suruji Kuar v Official Receiver* (1967) 13 FLR 5. After quoting the terms of s 35 (1), Hammett J said: ‘The law to be applied in this case is, therefore, the law in force in England on 2nd January 1875’. Unfortunately it is not clear from the terms of the judgment whether the judge was referring to the statute law or the common law and equity, or both, because he goes on to cite from the first edition of *Halsbury’s Laws of England*, 1910, statements that seemed to relate partly to the statute law, i.e. the Statute of Distributions 1670, and partly to the common law.

If this case is some authority for stating that the cut-off date of 2 January 1875 applies to the common law and equity as well as to English statutes of general application, then it is an authority that does not seem to have been followed in practice by the courts of Fiji, which seem to have applied without question the principles of common law and equity as they

have been developed and as they exist from time to time in England. There has been no suggestion that the courts are required to apply the principles of common law and equity as they existed in 1875.

Thus in *Ram Charan v Public Trustee of Fiji* (1973) 19 FLR 150 the Court of Appeal of Fiji stated that ‘the law as to vicarious responsibility, when a person other than the owner is driving a motor vehicle, was authoritatively laid down by the House of Lords in *Morgans v Launchbury & Ors* [1972] 2 All ER 606’. Obviously the common law in England in 1875 could have had no rules as to vicarious responsibility when a person other than the owner is driving a motor vehicle, since motor vehicles did not exist at that date. But this was a matter that the Court of Appeal did not allude to, and clearly considered of no significance at all.

Again in *Suruj Lal v Chand and Suva City Council* (1983) 29 FLR 71, the Court of Appeal of Fiji accepted without question recent developments of the law made in the latter part of the twentieth century by courts in England as to the liability of local authorities for negligent supervision of building construction:

It is now settled law that where a local authority is negligent in exercising control over construction which the law vests in it, it is liable to future owners if they suffer injury or damage as a result. (See *Dutton v Bognor Regis UDC* [1972] 1 QB 373; *Johnson v Mount Albert Borough* [1977] 2 NZLR 530; *Anns v Merton London Borough Council* [1978] AC 728).

It seems therefore that although there may be some legal basis for stating that only the principles of common law and equity existing in England on 2 January 1875 are binding in Fiji, in practice the courts of Fiji seem to have assumed that the principles of common law and equity currently existing in England are binding in that country.

Kiribati Section 6 (1) of the Laws of Kiribati Act 1989 provides as follows: ‘Subject to this section, the common law of Kiribati comprises the rules comprised in the common law, including the doctrines of equity, (in this section referred to as “the inherited rules”) as applied in the circumstances pertaining from time to time in Kiribati’.

The words of section 6 (1) by themselves, whilst indicating that the common law and equity are to be applied from time to time in Kiribati, do not make it clear whether it is the common law and equity that currently exists from time to time in England that is to be applied, or only the principles of common law and equity that existed at the time of coming in to force of the Laws of Kiribati Act 1989, or at some earlier date.

Prior to the enactment of the Laws of Kiribati Act 1989 the application of the common law and equity by the High Court of Kiribati had been regulated by section 15 of the Western Pacific (Courts) Order 1961, which provided that the jurisdiction of the High Court of the Western Pacific:

shall be exercised upon the principles of and in conformity with

(a) the statutes of general application in force in England on the 1st day of January 1961, and

(b) the substance of the English common law and doctrines of equity . . . subject to such qualifications as local circumstances render necessary.

There was a provision in the same terms in respect of magistrates courts in the Magistrates Court Ordinance 1977.

These provisions draw a sharp distinction between the statutes of general application, which are subject to a cut-off date of 1 of January 1961 (the date of the commencement of operation of the High Court of the Western Pacific), and the English common law and equity, which are subject to no cut-off date. The clear implication is that it is the principles of common law and equity as they exist from time to time in England that were to be applied by the High Court of the Western Pacific to Kiribati and by the Magistrates Courts of Kiribati prior to 1989.

It is a well established principle of statutory interpretation that a fundamental change in the existing law is not to be interpreted as having been provided by a statute unless this is clearly indicated by the statute. A fundamental change is not to be regarded as being provided by a side-wind, or by the back-door, as it were. This principle has the high authority of the House of Lords in *Nairn v University of St Andrews* [1909] AC 147, and in *Viscountess Rhonda's Claim* [1922] 2 AC 339, and was applied by the Court of Appeal of Western Samoa in *Attorney-General v Olomalu* [1980–

93] WSLR 41. This principle of interpretation indicates that section 6 (1) of the Laws of Kiribati Act 1989 should be interpreted so as to make no drastic change to the application of the common law and equity in Kiribati as it existed before 1989. This means that Section 6 (1) of the Laws of Kiribati Act 1989 should be interpreted as providing that the common law and equity of England is to be applied in Kiribati as it exists from time to time in England, so that the courts in Kiribati are bound to apply decisions of English courts from time to time as to the common law and equity.

Solomon Islands Paragraph 2 (1) of Schedule 3 of the Constitution of the Solomon Islands provides that: ‘subject to this paragraph, the principles and rules of common law and equity shall have effect as part of the law of Solomon Islands’.

As these words stand, it is not clear whether it is the principles of common law and equity as they exist from time to time in England, or as they existed at the date that the Constitution came into force, or at some other particular date, which are to have effect as part of the law of Solomon Islands.

The High Court of Solomon Islands in *Official Administrator for Unrepresented Estates v Allardyce Lumber Co Ltd* [1980–81] SILR 66 adopted the former view, and held ‘that there is no date fixed for the receipt of the common law and therefore decisions of any date must be given consideration’. The same view was reiterated by the Chief Justice in *Tanda v Cheung* [1983] SILR 193 when he said 205: ‘Thus this court applies the common law as it exists at this date’.

When the latter case reached the Court of Appeal, in *Cheung v Tanda* [1984] SILR 108, that Court took a different view and held that there was a cut-off date for the reception of the common law and equity in Solomon Islands, i.e. 7 July 1978. The Court of Appeal reached this conclusion on the basis of paragraph 4 (1) of Schedule 3, which reads as follows:

No court of Solomon Islands shall be bound by any decision of a foreign court given on or after 7th July 1978 [i.e. the date when Solomon Islands became independent].

Reading paragraph 2 (1) together with paragraph 4 (1), Kapi JA, with the concurrence of Jones JA, held, as discussed earlier, that decisions of English and other foreign courts as to the principles of common law and

equity were not binding after 7 July 1978, except decisions made by the English courts after 7 July 1978 showing that English decisions made before that date were incorrect.

Tonga Section 3 of the Civil Law Act 1966 Tonga provides that courts in Tonga ‘shall apply the common law and the rules of equity, together with the statutes of general application in force in England’.

There is no express indication here as to whether it is the common law and equity as it existed in England at a particular date, a cut-off date, or whether it is the common law and equity as they continue to exist from time to time, that are in force in Tonga. Nor is there any indication elsewhere in the text of the Act. However, the factual context of section 3 of the Civil Law Act 1966 seems to supply an answer. Prior to 1983 section 3 of the Civil Law Act 1966 contained at the end of the section the words ‘at the date on which this Act shall come into force’. These words were removed and a full stop was inserted after the word ‘England’, by the Civil Law (Amendment) Act 1983. By removing the express reference to a cut-off date, and not replacing it by any other, the legislature of Tonga would seem to be indicating that the statutes of general application and also the common law and equity shall be in force as they continue to exist from time to time in England.

Tuvalu Section 6 (1) of the Laws of Tuvalu Act 1987 provides that: ‘the common law of Tuvalu comprises the relevant rules, as applied in the circumstances pertaining from time to time in Tuvalu’; and section 6 (5) states that: ‘In this section, “the relevant rules” means the rules generally known as the English common law and equity’.

There is in these words no express statement as to whether it is the English common law and equity as they continue to exist from time to time, or whether it is the English common law and equity as they existed at the time of the commencement of the Act, or at some other date.

However, as with Kiribati, prior to 1987 the written law of Tuvalu had contained provisions that made it reasonably clear that it was the principles of common law and equity as they exist from time to time in England that

were to be applied by the courts in Tuvalu. Section 15 (1) Western Pacific (Courts) Order 1961 provided that the jurisdiction of the High Court of the Western Pacific and later the High Court of Tuvalu:

shall, so far as the circumstances admit, be exercised upon the principles of and in conformity with:

(a) the statutes of general application in force in England on the 1st day of January 1961;

(b) the substance of the English common law and doctrines of equity . . . subject to such qualifications as local circumstances render necessary.

There was a similarly worded provision in section 16 (1) of the Islands Courts Ordinance 1965, requiring that island courts exercise their jurisdiction on a similar basis.

Although not expressly stated, it seems tolerably clear from the sharp distinction that was drawn in these provisions between a cut-off date for the statutes of general application and no cut-off date for the English common law and equity, that these provisions were intended to ensure that the English common law and equity as they existed from time to time in England were to be applied by Tuvalu courts prior to 1987. As with Kiribati, in accordance with established principles of statutory interpretation, the Laws of Tuvalu Act 1987 should be interpreted as making no drastic change from this position. Accordingly it would seem that it is the principles of common law and equity as they exist from time to time in England that are to be regarded as being in force in Tuvalu, so that the courts in Tuvalu are bound to follow the courts in England in their development of the common law and equity, unless they are considered to be inappropriate to the circumstances of the country.

Vanuatu The Constitution of Vanuatu provides by Article 93 (2) that: ‘Until otherwise provided by Parliament, the British and French laws in force or applied in the New Hebrides immediately before the day of Independence shall on and after that day continue to apply to the extent that they are not expressly revoked, or incompatible with the independent status of Vanuatu, and whenever possible taking due account of custom’.

Although this provision does not expressly so state, the implication from these words would seem clearly to be, on the basis of the *inclusio unius exclusio alterius* principle of interpretation, that British laws, including the common law and equity, made after the day of independence are not in force in Vanuatu. This would indicate that there is a cut-off date for the introduction of English common law and equity at the day of Independence, i.e. 30 July 1980.

To sum up then, of the six countries in which the written law is ambiguous as to whether there is a cut-off date for the introduction of the common law and equity, i.e. Fiji, Kiribati, Solomon Islands, Tonga, Tuvalu and Vanuatu, it would seem that in three of these countries, i.e. Fiji, Solomon Islands and Vanuatu, a cut-off date should be implied, although in two, Fiji and Vanuatu, this has not been acknowledged by the courts, and in the other, Solomon Islands, it has been made subject to an exception that seems, with respect, rather dubious. In the other three countries, i.e. Kiribati, Tonga and Tuvalu, it seems that the established principles of statutory interpretation indicate that the ambiguity should be resolved by interpreting the written law as allowing for the introduction of the common law and equity as they exist from time to time in England, without a cut-off date.

How is the appropriateness of common law and equity to the circumstances of the country to be determined?

In all countries of the South Pacific in which the principles of common law and equity have been applied or adopted by the Constitution or legislation, it is always expressly stated that those principles are to apply only so far as not inappropriate to the circumstances of the country. Nothing is said, however, as to how the courts are to determine whether the principles of common law and equity are inappropriate to the circumstances of the country.

Basically two questions would seem to be involved. First, is the appropriateness of the common law and equity a matter of law that can be decided by judges on the basis of judicial notice without the production of evidence, or is it a matter of fact that must be proved by evidence produced to the court? Secondly, should courts apply the normal rules as to burden and standard of proof, or should they require that a stronger, or a weaker, case be made before being satisfied that a rule of common law or equity is

inappropriate to the circumstances of a country? Put another way, should there be a presumption that the principles of common law and equity do apply, or a presumption that they do not apply, and if so, how strong should that presumption be?

Unfortunately none of these related questions has been very adequately considered by courts in the South Pacific, as the following discussion will make apparent.

(a) Is the appropriateness of the common law and equity to be determined as a matter of law on the basis of judicial notice or as a matter of fact on the basis of evidence? There have been several occasions when the Privy Council has considered whether a rule of common law was appropriate to the countries of a British dependency: i.e. *Cooper v Stuart* (1889) 14 App Cas 286 (rule against perpetuities); *Leong v Chye* [1955] AC 468 (rule against conditions subsequent on personality). But on no occasion did the Privy Council consider directly whether their decision was to be made on the basis of evidence or judicial notice.

Likewise also this question was not directly addressed by the Fiji Supreme Court in *Nukhai v Attorney-General* (1942) 3 FLR 376 when it held, following *Cooper v Stuart* (above), that the common law rule against perpetuities was not appropriate to the circumstances of Fiji.

The question was directly considered by the National Court of Papua New Guinea in *Vian Guatal v PNG* [1981] PNG LR 230. In that case Miles J held that a rule of the common law that enabled the administrator of the estate of a deceased person whose death had been caused by the negligence of a defendant to claim for the loss of prospective earnings for the whole of the period that the deceased might have been expected to live was inappropriate to the circumstance of Papua New Guinea. Miles J firmly held that the appropriateness of a rule of common law was a question of law to be decided by the judge, and not a question of fact to be decided on the basis of evidence produced to the court:

I would add here that Ms Cox foreshadowed in her final address an application to call evidence to support a submission that the rule in *Oliver v Ashman* [1961] 3 ALL ER 323 when applied to survival actions was inappropriate to the circumstances of Papua New Guinea for the purposes of sect. 2.2 of the Constitution. I indicated that such evidence

would be inadmissible because the appropriateness of the English common law to the circumstances of Papua New Guinea was a matter of law and not of fact to be determined by evidence. (at 248)

Miles J went on to hold as a matter of law that the rule of common law in issue in that case, i.e. that the representative of the estate of a deceased person could bring proceedings for damages for loss of earnings by the deceased person, was inappropriate to the circumstances of Papua New Guinea for several reasons: first, that it was illogical that a claim should be able to be brought for the prospective earnings of a person who has died, since that person was no longer able to enjoy these damages; secondly, that the assessment of the prospective earnings of a man who has died is very difficult; and thirdly, that it was socially undesirable that large amounts of money should be able to be claimed and enjoyed by relatives when the real victim and sufferer was no longer able to do so.

Two years later, however, the Chief Justice of Solomon Islands took quite a different view from that adopted by Miles J in *Vian Guatal v PNG* (above). In *Tanda v Cheung* [1983] SILR 193 Daly CJ, in considering whether the same rule of common law that was under consideration in *Vian Guatal v PNG* (above) was appropriate to the circumstances of the Solomon Islands said:

In this Court I would want a case made out with the utmost clarity on substantial evidence before I would conclude on such general basis that a rule of the common law was 'inapplicable or inappropriate in the circumstances of Solomon Islands'.

The result of the above decisions is that there is still confusion and doubt as to whether a decision about the appropriateness of a principle of common law or equity to the circumstances of a country is a matter of law to be determined by the courts on the basis of judicial notice, or a matter of fact to be determined on the basis of evidence produced to the court.

(b) Do the normal rules as to burden of proof and weight of evidence apply? Should there be any presumptions made either in favour of, or against, the appropriateness of a principle of common law and equity to the circumstances of a country? There appears to be a similar degree of uncertainty on both of these questions.

In *Cooper v Stuart* (1889) 14 App Cas 286, the Privy Council was required to consider whether the common law rule against perpetuities was appropriate to the circumstances of the British colony of New South Wales. The Privy Council held that the rule was not appropriate to the circumstances of that country, without indicating that there was any special presumption or rule about burden or onus of proof to be applied.

On the other hand, in more recent times in *Leong v Chye* [1955] AC 468 the Privy Council stated that a principle of English common law or equity should not be held to be inappropriate to the circumstances of a British dependency unless there was 'solid ground' for so holding. The common law principle in question in that case was the principle that a condition subsequent upon a bequest of personality, such as a condition that a widow must not remarry, is not binding unless there is an explicit gift of the legacy to another person in the event of a breach of the condition. It was argued that this common law principle was not appropriate to the colony of Penang in Malaya, but the Privy Council responded to this argument thus:

Their Lordships are far from denying that there is force in an argument on these lines. It is very natural to see something anomalous in the introduction into Malaya of a special rule of English law of this kind. But English law itself has been introduced into Penang, as part of the Straits Settlements, 'so far as it is applicable to the circumstances of the place' (*Yeap Cheah Neo v Ong Cheng Neo* (1875) LR PC 381, 39); and, while so much of that law as can be said to relate to matters and exigencies peculiar to the local conditions of England and to be inapplicable to the conditions of the overseas territory is not to be treated as so imported, their Lordships are of opinion that the process of selection cannot rest on anything less than some solid ground that establishes the inconsistency. And it is any solid ground of that sort that is lacking in this case. (at 665)

There would seem to be a difference of approach in these two decisions of the Privy Council: in the earlier decision no special standard of proof was considered necessary, but in the later decision, some 'solid ground' was required to be shown.

Turning to decisions closer to the South Pacific, one finds a similar uncertainty about whether or not the courts should adopt any special rules when considering whether a rule of English common law or equity is appropriate to the circumstances of a country.

In *Nukhai v Attorney-General* (above) the Supreme Court of Fiji did not address this question at all when holding that the common law rule against perpetuities was not appropriate to the circumstances of Fiji.

In *Vian Guatal v PNG* (above) Miles J held that the principle of common law in issue in that case was not appropriate to the circumstances of Papua New Guinea, but he did not indicate that any strong case, or to use the expression of the Privy Council, 'solid ground' had to be established for this.

On the other hand in *Tanda v Cheung* (above) Daly CJ clearly considered that a strong case must be shown to satisfy him that a rule of English common law was not appropriate to the circumstances of Solomon Islands:

. . . it seems to me that to neglect a well established part of the common law on considerations of economics and policy is not an act lightly to be undertaken by a court of law . . . In this Court I would want a case made out with the utmost clarity on substantial evidence before I could conclude on such general bases that a rule of the common law was 'inapplicable or inappropriate in the circumstances of the Solomon Islands'.

In this passage the learned Chief Justice is clearly indicating that a decision as to the appropriateness of a rule of common law or equity should not be made lightly, but must be established with 'the utmost clarity'. In this respect, Daly CJ differed from the approach of Miles J in *Vian Guatal v PNG* (above).

In *Tanda v Cheung* (above) Daly CJ added a further restriction upon holding a rule of common law to be inappropriate. The learned Chief Justice stated that it was only factors peculiar to Solomon Islands that could be taken into account in considering whether a rule of common law was inappropriate to the circumstances of that country:

It seems to me that the main thrust of the judgment in *Guatal's Case* was that lost years claim would be inappropriate or inapplicable in the circumstances of Papua New Guinea. It would, of course, be possible for this court to make a similar finding under paragraph 2 (1) (b) of Schedule 3 of the Constitution. I leave aside the strictures of Miles J upon the logical bases for the award itself. As those strictures would equally apply to the operation of the rule throughout the world they cannot, in my judgment, support an argument which must relate to 'circumstances of Solomon Islands'. Other reasons are set out on page 249 of the judgment.

First the difficulty of assessing economic worth of a person's life; second, that the claim might result in 'windfall' cases and third that in Papua New Guinea a flat rate amount is payable by statute to the customary kinship group of a person killed in a motor accident. The former reasons are, again, not related to the circumstances of Papua New Guinea but are general objections. The third clearly is a circumstance of Papua New Guinea. In Solomon Islands we have no such statute.

With respect, it seems that the learned Chief Justice was going too far in these comments. Whilst there can be no doubt that a court can only hold that a rule of common law is inappropriate in the circumstances of a country if it considers that the rule of common law is indeed inappropriate in the circumstances of that country, the fact that some factors cause a rule of common law to be inappropriate in other countries surely does not mean that they might not also operate in the country in question and cause the rule to be inappropriate in that country. Schedule 3 of the Constitution of Solomon Islands does not require that a rule is inappropriate in Solomon Islands alone, but only that it is inappropriate in Solomon Islands. The rule of common law or equity may well be inappropriate in other countries as well.

The above decisions of the Privy Council and of courts in the South Pacific seem to provide no clear answer to the question as to whether the normal rules of burden and weight of proof apply to the making of a decision or as to whether or not a principle of common law or equity is appropriate to the circumstances of a country. Clearly this is a question that will need to be debated and discussed further in courts of the region.

To whom do the principles of common law and equity apply?

In most countries of the South Pacific there is no doubt that the principles of common law and equity apply to all persons subject to the jurisdiction of the courts. No exception or limitation is made by the written law as to the persons to whom the common law and equity is to apply.

In one country, Vanuatu, however, there is some room for doubt. Under the Protocol entered into between Britain and France in 1914 and ratified in 1922, the two metropolitan countries were authorised to apply their own laws only to their own respective citizens and optants (i.e. those citizens of other countries who opted or chose to come under the jurisdiction of one of the two metropolitan countries). During the condominium, the British laws (including the common law and equity) applied only to British citizens and optants and the French laws applied only to the French citizens and optants. There was no provision for the British laws to apply to French citizens and optants or to New Hebrideans. Likewise there was no provision for the French laws to apply to British citizens and optants or to New Hebrideans.

After independence the Constitution provides by Article 95 (2) that 'the British laws and the French laws in force at the time of the commencement of the Constitution shall continue in force'. But what the Constitution does not provide is: to whom do the British and French laws apply? To the citizens and optants of Britain and France respectively as before? Or to all inhabitants of Vanuatu, regardless of whether or not they were British citizens or optants or French citizens and optants, or are now British citizens or French citizens, the status of optant having disappeared with the revocation of the Protocol at the time of independence?

This question was considered at considerable length by the Senior Magistrates Court and the Supreme Court of Vanuatu in *Banga v Waiwo* App Case No 1/1966. In that case a wife had petitioned for a decree of divorce from her husband on the ground of adultery and had claimed VT100.000 in damages against the co-respondent. She relied upon the provisions of the Matrimonial Causes Act Cap 192, enacted by the Vanuatu Parliament in 1986. Section 17 of this Act provides for the court to award damages against the co-respondent, but does not specify how the damages are to be assessed, and a question arose in this case as to whether the

damages should include exemplary or punitive damages (i.e. damages to punish or provide a deterrence for wrongdoing) as well as purely compensatory damages.

The Senior Magistrates Court adverted to the fact that in England the Matrimonial Causes Act 1965 had been interpreted to provide only for compensatory damages, and to the fact that the Matrimonial Causes Act 1986 Vanuatu had been modelled on this English Act, which had been in force in Vanuatu for British subjects and optants prior to 1986. It had been argued by counsel for the wife that since the Vanuatu Act was modelled on the British Act it should be interpreted as having a similar meaning and therefore not providing for exemplary damages. However, the Senior Magistrate held that since the parties were ni-Vanuatu they would not have been subject to the English Matrimonial Causes Act, before independence, so that the interpretation adopted in England did not apply to ni-Vanuatu. The Senior Magistrate, as he then was, now the Acting Chief Justice, referred to Article 45 (1), which provides: 'If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom'. On the basis of this provision the Senior Magistrate held that custom should be applied, and since custom recognised the imposition of fines as a deterrent or punishment for adultery, the damages for adultery should include exemplary damages.

The co-respondent appealed to the Supreme Court, and that Court took quite a different view. It held that Article 95 (2) in the Constitution, which provides that the British and French laws are to continue to apply after independence, is to be interpreted as applying these laws to all the inhabitants of Vanuatu, no matter what their current or past nationality. The Chief Justice, Vaudin d'Imecourt, said:

It is clear that under Article 95 of the Constitution, the French and English Laws that applied on the day before the Day of Independence applied to everyone in Vanuatu, irrespective of nationality, and irrespective of whether they were indigenous ni-Vanuatu or not. They were no longer French or English laws but they had become the law of Vanuatu. All these English and French laws that still now apply in Vanuatu . . . form part of the law of Vanuatu and apply to everyone in Vanuatu, irrespective of creed, colour or nationality. (at 8-9)

The reason the Chief Justice adopted this interpretation of the Constitution was that he considered that if this interpretation was not adopted there would be large gaps in the laws, and also discrepancies between the application of laws as between people of different nationalities. These should be avoided, the Chief Justice considered, by holding that Article 95 (2), which states that ‘the British and French laws in force or applied in the New Hebrides immediately before the day of Independence shall continue to apply’, should be interpreted as if the words ‘to everybody’ were included.

One can understand the Chief Justice’s concern that the great majority of the population of ni-Vanuatu might be not subject to British or French laws, but, with respect, the interpretation adopted by his Lordship seems to give inadequate weight to the Article 45 (1) of the Constitution relied upon by the Senior Magistrate, which provides that ‘If there is no rule of law applicable to a matter before it, a court shall determine the matter according to substantial justice and whenever possible in conformity with custom’. This provision was surely inserted for the very purpose of dealing with the kind of issue that was concerning the Chief Justice, i.e. a lack of law applicable to a person, and therefore should have enabled the court to proceed on the basis of substantial justice and if possible in conformity with custom. The makers of the Constitution obviously foresaw that English and French laws would apply only to the respective nationals and optants of Britain and France, and wished to provide the courts with a mechanism for dealing with such situations.

Accordingly, it seems to the writer that the British laws including the common law and equity continue to apply only to British citizens in Vanuatu, but may be applied to other persons in Vanuatu to the extent that this is in accordance with substantial justice, and where possible, custom.

Conclusion

To summarise the main points made in this paper it seems to the writer that:

- In all Commonwealth countries of the South Pacific, except Samoa, and perhaps also Tuvalu and Vanuatu, it is the principles of common law and equity as applied by the courts in England that have been introduced.
 - In all Commonwealth countries of the South Pacific, except Tuvalu and possibly also Tonga and Vanuatu, the principles of common law and equity are automatically in force and do not require a judicial decision to apply them.
 - In the Cook Islands, Nauru, Niue, Papua New Guinea and Tokelau, and also in Solomon Islands, it is the common law and equity that existed in England at a date specified in the written law, i.e. the cut-off date, that is in force, except, perhaps, to the extent that it has been subsequently corrected by the English courts after the cut-off date. On the other hand in Fiji, Kiribati, Tonga and Tuvalu it would seem that the principles of common law and equity that exist in England from time to time are applied in these countries.
 - There is a difference of judicial view at present as to whether a principle of common law or equity is to be held inappropriate to the circumstances of a country only on the basis of evidence or whether it may be the subject of judicial notice, and also as to whether there is any presumption that such a principle is, or is not, appropriate to the circumstances of a country.
 - In most Commonwealth countries of the South Pacific the principles of common law and equity apply to all persons, but in Vanuatu it seems that they directly apply only to British citizens, but may be applied to others if this is in accordance with substantial justice and, where appropriate, custom.
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