

Conversations with Professor Barbara Jane Stapleton

by
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This is the fourth interview for the Eminent Scholars Archive with an incumbent of the Arthur Goodhart Visiting Professor of Legal Science. Jane Stapleton is a professor in the Faculty of Law at the Australian National University, Canberra and also the Ernest E. Smith, Professor of Law at the University of Texas at Austin. She holds the Goodhart chair jointly with her husband Professor Peter Cane, the first time the position has been a joint appointment.

Interviewer: Lesley Dingle, **her questions and topics are in bold type**

Professor Stapleton's answers are in normal type.

Comments added by LD, *in italics*.

All footnotes added by LD.

1. Professor Stapleton, you are the fourth Goodhart Professor that I have had the pleasure of interviewing for the archive. We are making a tradition of hearing the views of the Goodhart incumbents at the start and end of their tenure. So I am extremely grateful to you for agreeing to add to the archive. Can I start by asking you what you hope to achieve in your time here?

Yes, I am hoping to map out a book about causation and consequences in common law and private law. I have done quite a bit of work on that over the last few years and I thought this was the time to draw it all together and provide the structure and start writing the book.

2. I notice that you are organising a series of Goodhart seminars on private and public law. As far as I know, this is a new innovation. Is this something that you just decided to do?

When we arrived it was very noticeable that in contrast to Oxford, where I teach every year a short course of lectures and where the faculty has instituted over the last five to ten years a very, very active programme of discussion groups, here there is not the same phenomenon. It was really a way so that we could discover what young scholars on the faculty were doing because there seemed to be no ongoing platform in which research papers could be delivered. So it was really just, in a way, a selfish way of being able to hear our colleagues give papers and there was a great demand from talking to young people. There was great enthusiasm for setting up something like this and indeed the series was oversubscribed within 24 hours.

So there was obviously a great interest and enthusiasm in the faculty to have an outlet like this. I think the international lawyers, of course, have their own set up for delivering papers so they are very active, but this was a way of providing a platform for public and private researchers to deliver their work.

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3. And they have been well attended?

Yes. Everyone was very engaged with the papers, so we are very pleased with how the programme is going.

4. I notice on the ANU website that there is a very impressive list of your expertise, which includes civil law and procedure, comparative law, philosophy of law and justice, legal theory, jurisprudence, commercial and contract law, tort law, and I wondered in which of these you are lecturing here at Cambridge?

I'll have to go and look at that website because some of those, I am sure, have been put there not by me. I wouldn't claim expertise in all those areas. Someone at the university would like me to have expertise that I do not claim, for example, I do not know really much about procedure.

What I will be doing here is giving some classes to the Aspects of Obligations class and that will be on causal theory and scope of responsibility for consequences of conduct. The sort of things that I was mentioning before in what I will be mapping out in my book. I have also already given some supervisions for students at St John's on a particular paper that I delivered to a discussion group here that was an ad hoc discussion group that was set up when I asked was there a way I could give a paper and that was back in Michaelmas term. In a way it was because it had to be set up ad hoc that I realised we could provide a formal set of seminars this term for others to give their papers.

5. Quite a few of the eminent scholars that I have had the privilege of interviewing started their academic life with tort as a specialist subject and I am thinking here of Professors Hepple and Jolowicz, but in later life, they seem to sort of change direction and it seemed it was partly because tort was somewhat incoherent and fragmented but clearly you've stayed with...

Well, I don't think because a field is diverse it necessarily is incoherent. In the law of torts there are a number of areas where the common law has responded to a particular context and the fact that the responses are different suggests to me not incoherence but just a richer nuance to response. So, it doesn't strike me as the law of torts is incoherent. That is only incoherent if you want to cram it into a pure theory and I am not interested in doing that. So I do not feel that the law of torts is unattractive because of these diverse norms, but my research interests tend to be about foundational ideas. So, for me, this is why I am interested in notions.

Earlier on in my career I was interested in the notion of duty. I am now interested in causation and consequences. In America I became interested in product liability and again at the theoretical or structural, I suppose, from the structural point of view, that is trying to understand what are the analytical categories that courts use, are they best expressed the way they are currently expressed or would there be a better way of doing that? Courts, practitioners, and academics were making the mistake of describing a particular phenomenon as strict liability when in fact, when one looks, one finds that it is not actually strict liability. So, I am interested in, not the vast sweep of tort law, I am not interested in knowing the details and doctrine across why there are dozens and dozens of torts that are out there, I am more interested in understanding the architecture by which courts reason through problems in the field.

6. And your expertise straddles the major common law jurisdictions. I am thinking here of Australia, United States and England and that is obviously one of your specialities, this comparative aspect and is this something that you highlight in your



teaching?

I think I am lucky that I can draw on different materials from those jurisdictions. There are major common law jurisdictions about which I know nothing. For example, India is a very large common law jurisdiction about which I know nothing, but I guess my major comparators would be the United States versus the Commonwealth and versus the UK. They tend to fall out into having somewhat different responses. America has structural features that are not present in any of those others. Tort law, for example, is a state matter so there is no unification under the US Supreme Court of tort, by and large, [although] some issues have been constitutionalised.

So you get a great diversity of jurisdictions' response to certain problems, and that in itself is an interesting phenomenon. Australia, for example, although it is a federal system, the Australian High Court attempts to co-ordinate and unify tort law in Australia and obviously in the UK we have the Supreme Court being the ultimate court of appeal from both Scotland and England and Wales, so it has a much more unified appearance.

So, what I think is useful for me is that when I am in the UK I can talk to students about how procedure makes the way the law looks in the United Kingdom is affected by procedural assumptions that students may not be aware of, and the same thing in America. It looks different in America because of the procedural assumptions that are in place there. So, for example, in tort law, probably the most famous case is *Donoghue v Stevenson*³. That went to the House of Lords on an interim matter, an interlocutory measure that wanted to know whether, on the facts, if proven, a duty of care would be owed. Now, in the United States that could not happen because they have a rule called the Final Judgment Rule so that you cannot go up to the appellant level until you have had a final determination by the court, either by the judge throwing the case out, or the jury finding a verdict. So, that makes a very big difference to the dynamics of the trial, but also the structure of appellant decisions. They tend to be addressed to how a judge behaved or how a jury behaved, rather than a straightforward decision about whether, for example, a duty was owed.

7. This is the first joint appointment to the Goodhart Chair, was there any special reason for this?

Well, Peter and I are married and I think the faculty kindly changed its rules so that we could both come. The fact that it was joint is nothing to do with us or indeed the university or the faculty, it has got to do with your Border Agency because the original plan was for one of us to have six months in the chair and then the other one to take over and this all went through. We signed our contracts with the university and everything was tickety boo and then we went to the border agency to get our visas and they said, "Well one of you can have a six months visa and the other one can have the following six months with a visa, but you couldn't both have visas for the twelve months". So, we had to go back to the university and say, "Sorry. We actually wanted to spend the time together." So the university, I think someone told me, that this might be the first time ever the University of Cambridge has a professorial job share. So, we had to re-do the contracts as 12 month contracts. But that's all about the Border Agency.

8. Well, it is very interesting to have that information on record.

In a talk that you gave to the Oxford Law Faculty in May last year, entitled *Defining and Refining Yourself as a Legal Scholar*. You said and I quote, "that you had had an idiosyncratic trajectory" and I realise that you were referring to your BSc and

³ *Donoghue (or McAlister) v Stevenson*, [1932] All ER Rep 1; [1932] AC 562; House of Lords



your PhD at New South Wales and Adelaide, respectively and then you also worked here in the Chemistry Department and finally you turned your attention to law. Could you elaborate on this very interesting pedigree?

Yes. Well, I remember I was working in the chemical laboratories on Lensfield Road as a postdoc and watching the clock and waiting for it to be time for me to go home and I thought this was a bad idea. So, indeed, I changed my life in the chem labs at Lensfield Road. I started out as a scientist because I was not brave enough when I left school to follow my interests and decided, with my father's advice, to stick with science because I found that was very straightforward and I was good at science, but even then I didn't really have a passion for science. I just was competent at science and it took me eight years to build up the courage to go into fields that I found more interesting. I am a very slow learner at knowing what I want to do.

9. Having looked at your publications list, I saw that many contained subjects related to cancers and various diseases, with asbestos frequently mentioned - seven mentions since 2003. How did you get drawn to this particular subject area. Presumably, your science background was key here?

I am not sure it was key. I think my science background is helpful to me because I am not frightened of numbers or scientific concepts, so it is really a confidence thing. That's how it helps me. Even when I was a scientist, I was interested in basic ideas, building blocks rather than detail because I have a very, very bad memory. So, to cope with my bad memory, I tend to go down deeper into a few things rather than spread my vision broadly.

Now, when it came to finishing my... I did my law degree as a mature age student at the Australian National University and then I came to Oxford to do my DPhil in Law and I thought about what I was interested in. I was interested in new technology in the workplace to start with but when I actually sat down, I thought the only bits of that I was really interested in were the bits to do with the impact on health of new technology and so I became interested. This often happens, you don't plan things, you just get interested and I got interested in the impact of new technology in the workplace. And the form that the impact was having on people was not traumatic and so I became interested in non-traumatic injuries and this was not a field that much work had been done on here. I remember when I had my first couple of sessions with my supervisor, Patrick Atiyah⁴, he thought that everything had been done about compensation for injury and I kept trying to point out, no, it actually hadn't been done for non-traumatic injuries and non-traumatic injuries raise very significant issues for the legal system that traumatic injuries do not do.

If I break your leg, we tend to know who broke it and we tend to know where and when it happened. So things like limitation periods are not a problem, but if you are injured non-traumatically, then it might be very difficult to find out who it was that injured you, where they injured you and when they injured you. So, it raised, as I say, these deep fundamental issues that I became interested in and so I did my thesis on compensation for non-traumatic injuries and through that I, of course, became interested in things like cancers and obviously the huge elephant in the room of every legal system at the moment is asbestos diseases.

10. Similarly, your interest in drug induced injury and here I am thinking of your

⁴ Atiyah, Patrick S. (b. 1931-) QC FBA. Professor of English Law, University of Oxford (1977-88), University of Warwick (1973-1977), Australian National University (1970-73).



seminar to the British Institute of International and Comparative Law with the involvement of the Medicine and Healthcare Products Regulatory Agency that was in May 2006.

Yes, I talked to the British Institute because I am very interested in talking to audiences of the Bench and the Bar. In fact, I would say I actually write for the Bench and the Bar rather than other academics. So for me it is very helpful to present my work to them because they often have such insightful comments, the conversations with groups like those are very useful. So, yes, I am interested in pharmaceuticals again for the same reasons that pharmaceutical injuries tend to be the ones where it is problematic proving a causal connection. It may be you cannot remember exactly which maker of that particular pharmaceutical was the one you took. There are insurance problems. There is the whole constellation of issues which are similar to the sort of issues that are raised by other non-traumatic agents, such as asbestos.

11. With the explosion of the numbers of modern drugs, presumably this is an area of great activity and I wondered how the regulatory authorities stand in the crossfire between the patients and say, commercial companies?

Well, I am not a great expert on regulation but I think one of the phenomena that you see is the difference, getting back to the comparative law, that there is a huge difference between how tort law operates in the United States in relation to pharmaceutical injuries, and here. To my knowledge, there has not been one successful judgment of damages against a pharmaceutical company in the United Kingdom, which is extraordinary given how many cases are brought, and successfully brought, in the United States. So, you might say that that reflects well on the regulatory regime in the United Kingdom. Alternatively, it could be simply a reflection of how high the barriers to access to justice are in the United Kingdom. It is a very bold person who will take a claim, especially against a pharmaceutical company, where the costs of preparing your case are going to be so huge, that it would deter anyone but someone who either had a lot of money or until recently, was able to get backing from Legal Aid.

12. I am also very interested in your wide ranging geographical legal expertise. You currently hold the position of Ernest E Smith, Professor of Law at the University of Texas at Austin. How did this connection develop?

It is very interesting and I often tell the students about this because when I was Patrick Atiyah's student, a PhD student, he gave me wonderful advice about career and various things and one of the first things he said to me, unlike the first person I started out with. The first person I started out with in Oxford who was more of an expert in workplace relations had said, "Well if you are going to go and look at compensation and tort law, just don't go near America, it is a quagmire. Don't go near America" and when I decided I really just wanted to do torts and I moved to Patrick, the first thing he said to me was, "If you are going to do a torts thesis, you must engage with American material", so this was diametrically opposite. So I said, "Well how do you do that because it is so vast?" and he said, "What you do is you find out a couple of people whose work you admire and you read all their work and then if those few people keep referring to another scholar, then you branch out and read that person's work and so on" and this enables you to build out from quality without getting bogged down in the endless number of articles published.

One of the people I then early on identified as someone whose work I really admired



was a man called Bill Powers⁵ and he wrote, not a lot, but he wrote on product liability in the States. When I finished my doctorate I decided I would write a book on product liability and I read his work and I became an expert in American products liability because the law that had just been adopted in the UK was modelled on the American system. So, when I had to assess what I thought of the American system, I came to conclusions which were fairly unusual, most Americans were not saying these things but one of the few people who were saying things like this was Bill. Another thing Patrick had said to me was that if you admire someone, you should send them your work. I thought this was very bold and he said this was standard practice, for example, in the United States, which it is, so I was bold enough to send my book to Bill who then wrote back enthusiastically that he and I agreed on things and so, fast forward a few years, he kept saying, “You must come to Texas” and I said, “No, I have small children and I am teaching at Oxford” but when I moved back to Australia to do research, he said, “Well now, your children are older, you’re not burdened by teaching so come and visit” and when I got there, he basically said “Well I think I’m going to become Dean, I’d like you to take over my courses in products liability” and so it was really a meeting of minds that enabled me to make the entry into American tort law. It was really that idiosyncratic a career move.

13. When you say your book, which you presented to him, was this your book on product liability⁶?

Yes, yes. I mean that book was initiated because the European Union, as it now is, passed a directive in 1987 on products liability and I decided I would write just a little commentary on that, but I had just had my second child and it took, instead of a couple of years, it took six years to write that book and the reason for that was that again, I was more interested, when I looked at it, in the fundamental reasons why this rule had been created. So that took me into American materials and the American materials were not only vast in terms of case law but it had become the field on which theorists practised their new theories, so it has a lot of theory in it as well as a lot of American law and that is why it took me so long.

14. And the EC directive⁷ which you mentioned was, of course, implemented here by the very far reaching Consumer Protection Act⁸ and you said on page 4 in this book that in 1994 tort lawyers were “bewildered agnostics about the direction and fate of tort law”. Do you feel that this is still the case 18 years on?

I think what had happened was that there had been a move following... I suppose it reached its most impressive moment when New Zealand abolished tort law for personal injury by accident and set up a compensation scheme⁹. There were moves in this country, very vocal commentators, urging the same move here. So, there was this moment where it

⁵ Powers, William (Bill) Charles Jr. (b. 1946-). 28th president of The University of Texas at Austin (2006-). Dean of The University of Texas School of Law (2000-06). Chevalier de la Légion d'honneur (2008).

⁶ 1994, *Products Liability*, Butterworths, 384pp.

⁷ Product Liability Directive, formally Council Directive 85/374/EEC of 25 July 1985, Directive 1999/34/EC amended the 1985 Product Liability Directive.

⁸ 1987

⁹ 1972 Accident Compensation Act, and the 1973 Amendments. The Act was later replaced by the Injury Prevention, Rehabilitation and Compensation Act 2001. Renamed the Accident Compensation Act 2001 in 2010. Administered by Accident Compensation Corporation.



looked like tort law was going in that direction that it was going to be replaced by a compensation scheme. By the early 90s, that moment had gone. There had been the Thatcher years and Patrick Atiyah who, for example, had been a champion of the Woodhouse¹⁰ scheme in New Zealand, had changed in line with what he felt was realistic politically and so in the early 90s, people were I think, not knowing where the future of tort law would go. I think now everyone has accepted that it is not going to be replaced by any sort of compensation scheme, except maybe a few areas where people are still interested, such as medical negligence or pharmaceutical injuries. So, I think now it has resolved itself back to the old regime and it will tick on being a Rolls Royce regime from which people get rich. Behind that, in the shadow of what would go on in court, people still settled accident claims on the road, at work, and so on. So it is still as it was when I went to law school in the late 70s.

15. You conclude in your book that the Directive, and I quote “disrupts and inhibits the development of civil liability along broad rational principles while threatening to have an unfair and an haphazard impact on certain market sectors”. I found that very interesting.

I think what the Americans found too is that they thought, in their rule, which was created in the late 50s and early 60s, they were going to get what is called strict liability for products. But when the law was restated in the 1990s, it was revealed that after 40 years what had really happened was it had taken the courts that long to appreciate that they were not willing to impose genuine strict liability on manufacturers for the design or warning condition on their products, and it has taken a lot of time to appreciate that that was really what was going to happen. So, you’ve got this odd situation where there’s one set of injuries that has this special set of rules, that is when you are injured by a product, and there is no rational reason why product injuries deserved a particular response rather than, say, medical negligence injuries. So it is an anomaly within the broad sweep of normal principles that in private law would apply, regardless of the particular type of agent that has broken your leg, whether it is a product or a doctor or some other agent. “Why are products special?” is still a question that has not been answered satisfactorily, so I still would agree with what I wrote then, that it has introduced an anomalous distinction between those who have been injured in society.

16. Coming to your earlier book, *Disease and the Compensation Debate* 1986 OUP. You identify a general failure in tort to compensate for insidious disabilities in contrast to traumatic disabilities and you alluded to this at the beginning of our interview and you ask, “Why should the system favour accident over disease?”. What is the state of play today?

Well it is, as I said before, it is only a sort of inevitable result of the difficulties of proof that it is very hard to identify it. Often in these cases, and we are finding this with asbestos, it is very hard to identify whose fibres, in that case, were the ones that triggered your cancer. We know very little about how cancer is caused to begin with and then when it is possible that one of the many different sources of fibre had been involved, it presents people with great difficulties. Then if the legal system wants to respond, as it did in

¹⁰ 1967, a Royal Commission ('The Woodhouse Report') recommended that compensation should be extended to all injuries on a no-fault basis.



mesothelioma in the case of *Fairchild*¹¹, you then have a very significant exception to the normal proof rules which puts pressure on other areas because people say, “Well, if they are getting a special proof rule for mesothelioma, what about me? What about my particular context?” “I have got lung cancer. I have never smoked and I have been exposed to Radon in my house and I have got lung cancer, can I have a claim? Can I have a special rule of proof?”

So, I think it is not so much that there is a deity in the sky saying we are going to be cruel and more demanding of victims of non-traumatic injury, it is just the nature of how orthodox proof rules operate, that it makes it very, very difficult for these people, within a private law system, to secure compensation.

17. Well, Professor Stapleton, I am extremely grateful to you for a very interesting account. Thank you so much - it was a really great privilege to be able to interview you.

Thanks very much.

¹¹ *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. The House of Lords approved the test of "materially increasing risk" of harm, as a deviation in some circumstances from the ordinary "balance of probabilities" test under the "but for" standard.

