

**Index to compilation of speeches delivered by
the Hon. Justice D Ipp AO**

Date speech delivered	Description	Page number reference within pdf compilation
13 November 2009	Farewell Ceremony for the Honourable Justice Ipp AO	Page 2 of 142
21 November 2008	Maintaining the Tradition of Judicial Impartiality	Page 24 of 142
1 November 2007	Paper delivered at the launch of "Principles of Planning Law" by Mr Les Stein	Page 39 of 142
17 May 2007	The Politics, Purpose and Reform of the Law of Negligence: Paper given at the Conference of the Australian Insurance Law Association at Noosa	Page 43 of 142
30 March 2007	The Metamorphosis of Slip and Fall: Paper given at the New South Wales State Conference of the Australian Lawyers Alliance at the Hunter Valley Gardens	Page 52 of 142
16 March 2007	Themes in the Law of Torts: Paper given at the Judges' Review Conference 2007: Past, Present and Future Perspectives on the Law at the Westin Hotel	Page 60 of 142
2 September 2006	Problems with Fact-finding	Page 68 of 142
13 and 19 October 2004	The Trial Judge's Duties from an Appellate Point of View: Edited Version of a Paper given at a Conference in Beijing organised by the National Judicial College, Beijing, 13 October 2004 and to the Shanghai Judicial College, Shanghai, 19 October 2004	Page 75 of 142
12 and 19 October 2004	Ethical Problems with Judicial Activism: Edited Version of a Paper given at a Conference in Beijing organised by the National Judicial College, Beijing, 12 October 2004 and to the Shanghai Judicial College, Shanghai, 19 October 2004	Page 84 of 142
11 and 19 October 2004	Judicial Bias: Edited Version of a Paper given at a Conference in Beijing organised by the National Judicial College, Beijing, 11 October 2004 and to the Shanghai Judicial College, Shanghai, 19 October 2004	Page 93 of 142
1 May 2004	Personal Responsibility in Australian Society and Law: Striving for Balance - Edited version of Oration delivered at Annual Scientific Meeting, Australian and New Zealand College of Anaesthetists, Perth, WA on 1 May 2004	Page 102 of 142
15 September 2003	Policy and the Swing of the Negligence Pendulum	Page 106 of 142
8 May 2003	Judges and Judging - President's Lecture to Annual Scientific Congress of Royal Australian College of Surgeons.	Page 121 of 142
January 2003	Negligence - Where Lies the Future?	Page 130 of 142
May 2001	Enduring Values and Change	Page 139 of 142

**IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT**

Friday 13 November 2009

**FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE IPP AO
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES**

JUDGMENT

- 1 We assemble in this Banco Court to mark the departure as a Judge of Appeal of one of the most prodigiously energetic intellects in the Court's contemporary history. It has been a fruitful and at times exciting journey, which has left all of us breathless with admiration. However, we knew, nine years ago, what we were letting ourselves in for. This occasion marks over 20 years of judicial service, first in Western Australia and then in New South Wales.

- 2 Your professional adventurousness and self-confidence was clear at the very commencement of your legal career. You chose to attend Stellenbosch University where all courses were taught in the Afrikaans language, in which you were not fluent. You were inculcated into the system of Roman/Dutch law in a faculty dominated by one of the great South African legal academics, J C de Wet, who was once described, in words not entirely inapt to yourself, as "[p]ithy, pungent, sometimes remorseless".¹ Those of us who were taught by Bill Morrison at Sydney Law School are familiar with that academic style.

- 3 You were admitted as a legal practitioner in South Africa in 1963, becoming a partner in a well-known Johannesburg law firm the next year.

Between 1973 to 1981 you were a member of the Cape bar. In that year, at the age of 43, you took the decision to migrate to Australia with all the attendant uncertainties and disruption, at a time when few could predict with any confidence when the oppressive apartheid regime of your native land would end and no-one predicted that it could end without significant bloodshed. Again your self-confidence came to the fore. You were convinced that you could adapt from the Roman law tradition to the common law tradition. As you have often said, until the age of 43 you thought that Equity was the name of an insurance company.

- 4 You became an Australian citizen. Apparently the authorities were ignorant of the fact that you named one of your sons Graeme, because he was born on the day that Graeme Pollock scored a century at the Wanderers Ground – against Australia. We have all had to tolerate your relentless barracking for the South African cricket and rugby teams, often through gritted teeth.
- 5 Your progress in Perth was breathtaking. Your success as a counsel was immediate, first as a partner of a well-known firm of barristers and solicitors and then between 1984 and 1989 as a member of the independent Western Australian bar. You were appointed a judge of the Supreme Court of Western Australia in 1989, immediately after qualifying for such an appointment on the basis of the eight year membership of the local profession then required for such appointment.
- 6 As a judge of that Court your Honour participated in all areas of the Court's jurisdiction, as a trial judge in both civil and criminal matters and on both civil and criminal appeals. This Court was the ultimate beneficiary of your broad range of experience.
- 7 You made a contribution to the administration of justice throughout Australia as one of the judges who, during the course of the '90s, transformed the way civil litigation was conducted in this nation. You were the principal driving force behind the introduction of case management and

the recognition of alternative dispute resolution in Western Australia as the first judge in charge of the Expedited List, as the chair of the relevant court committees and from 1993 to 2001 as the judge in charge of the Civil List.

- 8 As Chief Justice Malcolm said at your farewell from the Supreme Court of Western Australia:

“You were the State’s number one mover and shaker in the reform of civil procedure.”²

- 9 Through your example, through your writings and through continual contact with judges seeking to achieve the same results in other States, including New South Wales, your influence was national.

- 10 In your own address on your retirement in Perth you indicated the nature of the reform process when you said:

“Reformist judges in each State frequently discussed with each other what changes were being introduced and how they were working. We all learnt from each other. Something would be tried in one State and the best parts would be copied in another. Each State acted as an experimental test tube for the country as a whole. It was an excellent example, I thought, of the strength of the federal system.”³

- 11 Today attention is focused on harmonisation and uniformity of practice. We should, however, recognise that harmonisation and uniformity, once achieved, can become an impediment to major reform by the operation of the lowest common denominator approach to decision-making. Each generation is prone to suffer the conceit that it has discovered answers of permanent validity. The principal myth associated with the Greek goddess of concord, Harmonia, is that she received a necklace on her wedding day, which proved disastrous for all who later possessed it.

- 12 In 2001 your Honour migrated again – from Perth to Sydney – first as an Acting Judge of the Court of Appeal for over a year and subsequently as a

permanent judge for over eight years. This was an early manifestation of the emergence of a national judiciary. Once again you were the pioneer.

- 13 Your entire period of judicial service has been characterised, to the last day, by your unflagging enthusiasm, your extraordinary capacity for rapid digestion and analysis of legal material and your intensity of application, which everyone who has served with you has come to admire. All of us share with your former Western Australian colleagues, some of whom are present here today, an immense gratitude for your guidance, inspiration and your willingness to do more than your fair share of the hard yards.
- 14 It was always a pleasure to sit with your Honour in court. The power of your intellect, the speed with which you identified the issues in the appeal and your capacity to distil the essential elements, even in the most complex of cases, was of inestimable value to all who sat with you. There were, however, touches of your background in Africa in your judicial method. On the veldt dangers emerge rapidly: big cats must be confronted as soon as they appear. This was your model. Counsel who appeared before you came to understand that your approach to exchanges with the bar table was that of the lion who does not stand in the path, but approaches at the charge, a tactic with which counsel must be equipped to deal. The Honourable Keith Mason AC told me that his practice, as a presiding judge when sitting with you, was to insist that counsel be allowed to complete the announcement of their appearances before you asked the first question.
- 15 Your principal contribution for the future of the administration of justice lies in the judgments which you delivered both in the Supreme Court of Western Australia and in this Court. Your Honour has been a prolific contributor to the courts on which you have served. In the period of just over nine years in which you served on this Court you participated in more than 900 appellate judgments, that is about 100 per year. This is a formidable output.

- 16 Even before I became a judge I was well aware of the quality of your Honour's judgments from Western Australia and your extra-judicial writing. Indeed, in my own swearing-in speech, upon the assumption of this office, you were one of only two judges whom I quoted, and the other quotation was ironic.
- 17 You have throughout your judicial career manifested the capacity to produce judgments that are both erudite, in the sense of manifesting a complete grasp of the relevant legal principles, and, at the same time, written in a manner which has a force, clarity and logical structure, so that the judgment flows and the reader can understand where your chain of thought is going and why. Your Honour has produced many landmark judgments which are still quoted today.
- 18 From your service in Western Australia there are important precedents on the nature of fiduciary obligations;⁴ on equitable compensation in the context of corporate misfeasance;⁵ on full faith and credit in constitutional law;⁶ on director's duties;⁷ on various aspects of sentencing;⁸ on the principles of subrogation;⁹ and on conflicts of interest by solicitors and the permeability of Chinese walls¹⁰ which, as you know, I believe is an inappropriate metaphor, with its suggestion of impenetrable inscrutability. In Australia we should call such an arrangement "the dingo fence".
- 19 Your contribution continued in New South Wales in virtually every area of this Court's extensive civil and criminal jurisdictions. The cases include landmark judgments on powers of other courts in the New South Wales system;¹¹ on extension of limitation periods;¹² on dealing with vexatious litigants;¹³ on promissory estoppel;¹⁴ on the liability of a litigation funder to provide indemnity for costs;¹⁵ on contempt of court;¹⁶ on complex commercial arrangements;¹⁷ and, of course, on every aspect of the law of tort from the duty of care to independent contractors;¹⁸ the duty of care of statutory authorities;¹⁹ of a prison to a prisoner;²⁰ of a retail seller of

goods;²¹ numerous treatments of the concept of causation;²² and the duty of a publican serving drinks to a patron²³ which has a distinct resonance in this week's High Court judgment.²⁴

- 20 This is a body of work of which you can be truly proud. The legal community of Australia will be in your debt for many years to come.
- 21 Throughout your years of judicial service, you also contributed to the administration of justice in the form of articles and speeches on a broad range of subjects. Your best known public role was as the Chair of the Panel appointed by the governments of the Commonwealth and the States and Territories to review the law of negligence. Your recommendations in that report were enormously influential. Most of the criticism of the tort law reform of the period is directed to changes which went beyond your actual recommendations. Your contribution to restoring an appropriate balance in the practical operation of the law in our society was of the first order. Thereafter, in judgments, articles and speeches your Honour continued to contribute to the development and application of these reforms.
- 22 Your Honour's contribution to this Court was, as in Western Australia, not limited to the production of judgments. Your Honour participated fully in the collegial life of the Court and brought your enthusiasm and experience to all aspects of the Court's internal affairs. As Chair of the Library Committee and of the Education Committee you made invaluable contributions to essential aspects of the internal workings of the Court. If judicial independence is to be a practical reality, then it is essential that judges of the Court play an active role in the internal administration of the affairs of the Court. Otherwise the real power to control the court will drift to others. You have set an example to all of your colleagues in this respect and I am personally very grateful for the scope and quality of the contribution you have made.

- 23 I know I speak on behalf of all of the judges when I say we will miss both your wit and your wisdom. Having you around was simply fun. As Justice Allsop has noted, your distinctive laugh should be made into a ring tone.
- 24 Perhaps what I will miss most, however, on a personal basis, is the intellectual stimulation that I received from you over all of your years on this Court by reason of the breadth of your interests, particularly on history and current affairs. You and I exchanged books and articles on a regular basis and I trust that this will not cease, nor require, in view of your new responsibilities, some form of disclosure on a public record.
- 25 The universal response to your Honour's appointment to the Independent Commission Against Corruption is one of congratulations both to you and to the government that had the confidence to appoint you. You are a person of exceptional independence of mind and strength of character. Together with your experience and competence, these characteristics equip you for this new role, as they did throughout your judicial service. I know I speak on behalf of all of your colleagues when I say that we acclaim your sense of public service and look forward to your continued contribution to the people of this State and of Australia.
- 26 **THE HONOURABLE JOHN HATZISTERGOS MLC, ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour, today we formally farewell you reflecting on your truly distinguished career to date, a career which has spanned across not only decades but also continents and a career of service to the law, at the Bar and on the Bench and in academia. Born in Johannesburg you graduated from the University of Stellenbosch in South Africa in 1960 with a Bachelor of Commerce and Bachelor of Laws degrees. Your successful career in South Africa included practising as a solicitor, partnership in a law firm, membership to the Cape Bar, serving on the Cape Bar Council and being an examiner in trial practice for the South African Bar Association and in Business Law for the University of Capetown.

- 27 In 1981 you migrated to Australia and I am confident everyone in this room will agree that South Africa's loss has been Australia's great gain. Your contribution to the law, particularly civil law reform in Australia, began in Western Australia which you made your new home. You quickly established your legal provenance and became in 1984 a member of the Western Australian Bar and in the following year appointed Queen's Counsel. It was not long before your talents as a leading member of the Commercial Bar in Perth were recognised by the State of Western Australia and in 1989 you were appointed as a judge of the Supreme Court of that State. It is to your credit that the Western Australian Bar Association to this day regards you with great esteem in appreciation of your outstanding service to that State as a judge.
- 28 You are known to have a superhuman capacity for work and significantly as judge in charge of the Supreme Court Civil List you were instrumental in overcoming considerable backlogs in the work of that court. This included introducing case management and establishing an expedited list and other procedures. Further, you ordered the report which eventually led to the establishment of the Court of Appeal of Western Australia.
- 29 In 2001 you were enticed eastwards and after a brief period as an acting judge of the Court of Appeal of New South Wales you were soon appointed as a permanent judge of the Court of Appeal in 2002. You continued your adventures further east by taking up a part time appointment as a judge of the Supreme Court of Fiji between 2006 and to early this year. Your expertise in negligence and tort law led you to be appointed by the former Prime Minister in 2002 as the chairman of the Panel of Eminent Persons. The panel was tasked with the significant responsibility of examining the law of negligence including its interactions with the Commonwealth Trade Practices Act of 1974. Chief Justice Spigelman commented on the extraordinary work of the panel under your leadership given the stringent time constraints that the panel operated under. The fact that the final report produced by the panel is known as the Ipp Report is evidence of your significant contribution to it and from 2002

to 2004 the report's recommendations were substantially adopted by Parliaments throughout Australia enacting reforms to personal injury. Your role in implementing major reforms of court procedure in Western Australia and in reviewing the law of negligence was recognised by the Government of Australia in 2007 when you were made an Officer of the Order of Australia for your outstanding achievements and service.

30 As an appellate judge in the New South Wales Court of Appeal you are remembered for your professional manner and your great ability to engage counsel within the court room in challenging legal debates, all the time penning clear and succinct judgments, not always an easy feat for an eminent scholar. Despite the extensive lists of achievements I have enumerated I have not yet begun to scratch the surface of your Honour's accomplishments in legal practice, judicial service and academia. Your Honour was also a Fullbright Senior Scholar, had Fellowships at the University of Western Australia, the Inns Court and the University of Cambridge in addition to being widely published. Your colleagues and those close to you speak in unison as they describe you as highly personable and a great intellect and those who have worked with you closely speak with heartfelt sincerity when they say that they greatly respect you and that you will be sorely missed.

31 I understand from your colleagues that your Honour also has a wonderful sense of humour and a sonorous laugh. They always know you are coming down a corridor because of the laugh that precedes you. There is, however, one thing that they will not miss and is of course your Honour's secret vice. Notwithstanding your unimpeachable position as a judge your Honour is outrageously biased. You do your best to conceal it but every so often you brazenly sledge other judges revealing your unbridled passion for the Springboks. I understand you and Justice Tobias have a running bet of \$5 each time South Africa and Australia play and to the great consternation of Justice Tobias your Honour is currently ahead.

- 32 In farewelling you I also congratulate you on your appointment as Commissioner of the Independent Commission against Corruption. Your wealth of experience, work ethic and knowledge will be invaluable to the Commission. Your Honour's son, Stephen Ipp, was hoping your farewell from this place would translate into more time for your favourite pastimes of cricket, rugby and cooking with your family but despite your new posting I think you of all people will be able to balance the professional and recreational spheres of life.
- 33 Your Honour, the State of New South Wales has been fortunate that such a committed, passionate and personable legal professional such as you has served its justice system for such a long period. On behalf of the State and the New South Wales Bar Association I thank you for your service and wish you all the best in the next chapter of your career. May it please the court.
- 34 **MR H MACKEN, IMMEDIATE PAST PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** On behalf of the President of the Law Society of New South Wales, Joseph Catanzariti, who is overseas today, and the 22,000 solicitors of New South Wales I am delighted to add my valedictory comments on the occasion of your Honour's departure from this court. Wonderful things have come from the west, Robert Holmes a'Court, Bon Scott, Rose Porteous, the America's Cup winning team, Special Air Service Regiment and, most relevantly today, some fantastic judicial minds, Ronald Wilson, our current Chief Justice, Robert French, come immediately to mind but most significantly for our fair State it is you, the Honourable Justice David Ipp. Your life and career are reflective of a man of many skills, a gifted mind and a driving passion for both Springbok rugby and the law. The son of Heimann and Freda Ipp, you were born in Johannesburg in South Africa. Your brother, Howard, lives in Toronto and your sister, Sheila in Houston, USA. You studied at the University of Stellenbosch and there you were able to pursue the three great passions of your life, rugby, law and Erina to whom you met there and have been

married ever since and ;your success in two out of three is not bad, rugby can be a very difficult game.

- 35 Your children have generally followed in your footsteps. Stephen is a barrister working in Melbourne, Graham is a pilot, presumably ferrying the lpps around the globe, and your daughter, Tessa, is a social worker. The tyranny of distance for the family may result in the accrual of tens of millions of frequent flyer points but yours is still a close family.
- 36 Your legal career commenced in 64 as a solicitor at Hayman Godfrey & Sanderson, Attorneys in Johannesburg. You were called to the South African Bar in 1973. Your Honour moved across the big ditch to Perth in 1981 and was admitted as a barrister there and appointed Queen's Counsel in 1985. It's reflective of the tremendous regard that you were held in by your fellow professionals and the skills you've developed as a lawyer that you were made a judge of the Supreme Court of West Australia in 1989. This probably even eclipsed the position you then held as treasurer of the Law Society of Western Australia in 1988. Then, as now, you were really going places in the legal profession. You were made a Fellow of the University of West Australia in 1999, admitted to the Inns of Court in the United Kingdom.
- 37 Plenty has been said this morning about your achievements but you were drawn ever east into the sun's morning rays. Like some of your famous West Australian compatriots your skills were required in a bigger arena than that provided by the world's most isolated capital. You were an acting judge in the Court of Appeal in 2001, appointed as a judge to this court in 2002, a position you've held until today. This appointment coincided with the release of the lpp Report into the Review of the Law of Negligence which was handed down on 30 September 2002. The discussions of the effect of the change of personal injury laws have been ventilated in this court room before you for years, you don't need my tuppence worth in respect of that particular process, it's always been the case that you say it better than most and I note a paper you delivered at

the conference to celebrate the 80th anniversary of the publication of the Australian Law Journal where you said:

“Certain of the statutory barriers that plaintiffs now face are inordinately high. Small claims for personal injuries are a thing of the past. Establishing liability in connection with recreational activities has become difficult. Stringent caps on damages and costs penalties make most plaintiffs think twice before suing. Public authorities are given a host of novel and powerful defences that are in conflict with the notion that the Crown and Government authorities should be treated before the law in the same way as the ordinary citizen. It’s difficult to accept that public sentiment will allow these changes to remain long term features of the law.”

38 I don’t need to point out to you that you had some tremendous assistance in the preparation of that report. This was not limited to the late Professor Don Sheldon, a wonderful man and a gifted surgeon who in fact corrected my deviated septum. Of more relevance to me was the professor of sociology who gave evidence to that committee, that is, my mother, who gave me the deviated septum. Thankfully no cause of action arose from the surgery which would have needed the enhanced protection the law gives to medical professionals and I have long since settled with my mother.

39 Better minds than mine have described some of the high points of your judicial life, your erudite, cogent and logical decisions are but a flick of the mouse away. The views of your brother judges are a little bit harder to obtain. I note the Honourable Justice Harrison at the swearing-out of the Honourable Roddy Meagher in 2004 said:

“Justice Ipp has been able to master the technique of looking like a Rembrandt portrait. He can sit in court for hours staring straight ahead but, as with all good paintings, the eyes follow you around the room.”

40 Justice Murray Tobias is one of your colleagues who will miss your Honour’s huge laugh that can be heard from inside the lift shaft and your feet pounding down the corridor to his room. In fact, such is your impact that his Honour said that he would have slit his throat were it not for your

Honour, you are his *raison d'être*, well, so far as coming into work applies anyway, he will miss your Honour tremendously. I am assured by Justice Tobias and those who know that in respect to the \$5 wagers the worm is turning.

41 Your appointment to the Independent Commission against Corruption will limit the opportunities for your Honour's other leisure pursuits including bushwalking, classical music, concerts and perhaps an odd bottle of wine; "a wonderful man", "gregarious", "generous to a fault", "compassionate" and "cheeky" are just some of the descriptive labels given to your Honour by your associate, tippy and other chamber colleagues. I understand that now your Honour is on the move the lolly jar will no longer require constant replenishing.

42 You take with you today the deep-seated thanks and appreciation of the solicitors of New South Wales. You are certainly the greatest legal asset we have ever received from South Africa. As for contributions from the world of the sand gropers it's a line ball between you and Bon Scott. You've demonstrated an intellectual rigour, a logical and insightful grasp of difficult facts, circumstances and a capacity to apply the law efficiently and impartially. These skills, coupled with an ingrained warmth and compassion for your fellow citizens all go very well for your new role at the Independent Commission against Corruption. As a profession we have our favourites. This is a luxury we have but, unhappily for you, you cannot have. We're not pleased to see you leaving this court, you've made a wonderful contribution to its work, however, we are very pleased the public confidence in the administration of justice in this State is protected by your stepping into the breach at the Independent Commission against Corruption. We are really pleased that your contribution can continue.

43 Today is Friday the thirteenth and viewed by some to be a dangerous day by some superstitious types and I am not sure if this is right. Today is a wonderful day for the profession and for your Honour personally. However, South Africa plays France in the next day or so and it is, after all,

Friday the thirteenth. The profession thinks you are fantastic but. that said, come on the Froggies. May it please the court.

44 **IPP JA:** Thank you, Chief Justice, for your most generous remarks and Mr Attorney and Mr Macken for your kind observations.

45 I am honoured by the presence of each of you in this court room this morning. I welcome particularly those retired judges of the High Court and this court and the judges, past and present, of the Federal Court who are here today. I would also specially mention the presence of two very old Perth friends, the Honourable Chris Steytler, until recently the President of the Western Australian Court of Appeal, and Chris Zelestis QC who has for several years been a leader of the WA Bar. I am very happy that my son, Stephen and his wife, Lee, are here from Melbourne.

46 I am an inveterate sceptic but there are two things in which I firmly believe; the rule of law and the traditions of the law. From a very early age I wanted to be involved in the practice of the law. Fifty-four years ago I commenced studying the law and I have not stopped learning since.

47 In 1884 Lord Bowen wrote:

“As fro the law, it is no use following it unless you acquire a passion for it. ...I don't mean a passion for its archaism, or for books, or for conveyancing, but a passion for the way business is done, a liking to be in court and watch the contest, a passion to know which side is right, how a point ought to be decided.”

That passion has been my touchstone and motivating force.

48 In 1956 at the age of 17 I went to Stellenbosch University in the Cape, far from my home in Johannesburg, to study law. As the Chief Justice has mentioned, the language of instruction was Afrikaans, which at that time I spoke and understood very poorly. Later, however, I became fluent. Going to that university was a fateful decision for me. In my fourth year I

met my wife, Erina. Five years later we were married and in the words of the American poet, Robert Frost, “together started out on life’s perilous journey oar to oar and wing to wing”. I have practised law in four cities and two continents. This itinerant life has not been without its crises, struggles and desponds. Without Erina’s wisdom, courage, determination, grace and support, I would not have been able to survive, let alone achieve anything. She is the foundation on which my life rests.

- 49 At Stellenbosch there were but fifteen students in my final year LLB class. All graduated. Pretty rapidly three were struck off the roll. This may remind you of the Springbok rugby team. Happily, I was not one of the three. To teach these fifteen students there were four professors and a senior lecturer, a ratio of three to one. The fact that the four professors had all obtained their doctorates at Leyden University in Holland was not coincidental. In the 1950s the movement to eradicate any influence of English law from Roman Dutch law in South Africa was at its height. Stellenbosch Law School was the leading proponent of this movement which has long since dissipated.
- 50 Much of my time as a law student was spent in listening to how English law was irrational, unprincipled, idiosyncratic and uncertain. I was taught that the civil law virtues of certainty, rationality and devotion to principle were unsurpassed. As I grew older and more experienced, however, I realised that this intense admiration for one’s own legal system is not a unique phenomenon - rather it is ubiquitous, one finds it everywhere. It is merely a manifestation of nationalism and patriotism. As one would say if charging a jury, poor guides for judgment.
- 51 I am part of a generation of lawyers who were trained by men who saw active service in World War II. It has always seemed to me that the experience at a young age of putting one’s life at risk for one’s country moulded attitudes that are not always found today. The returned soldiers who trained me were strong-minded, stern disciplinarians, with an unswerving sense of commitment of duty and of what was ethically right

and wrong. Notions of moral relativism were alien to them. They drummed into me the need for grinding preparation followed by a commitment to whatever conclusion I had reached. No hedging was allowed. One had to take the consequences if one was wrong. Stylistically no adjectives, adverbs, multi-syllabic words or compound sentences were tolerated. Unnecessary length was deplored. Simplicity and clarity counted far more than intellectual grandstanding and the complexity it brings. As an impressionable young lawyer I admired this approach and throughout my career, not always successfully, strove to emulate it.

- 52 Later as a barrister at the Cape Bar I was fortunate to appear often with and against leading silks. Some were barristers of vast skill and experience whose path to the Bench had been blocked by their political convictions. They taught me the great traditions of the Bar and how one should conduct oneself as a barrister. I think of them fondly and with gratitude.
- 53 As a careful and deliberate choice twenty-eight years ago we applied to immigrate to Australia and I have never regretted that decision. I thought of Australia as a truly democratic country where everyone is given a fair chance, no matter what creed or background or colour, and it has proved to be everything I had hoped for. Australia has given me opportunities that I never expected and I am genuinely proud to be an Australian.
- 54 On arriving in Perth in 1981 at the mature age of forty-three I had to adapt quickly to the new legal philosophy and jurisprudence and rid myself of attachment to Roman Dutch principles and influences. Success in coming to terms with equity and the common law was crucial to my survival and that of my family. Of course it was difficult at that age to learn the new system and to apply it in practice. I soon realised what Winston Churchill meant when he said, "England, like nature, never draws a line without smudging it ...in our climate the atmosphere is veiled." He must have had equity in mind. I will not mention the current law of negligence.

- 55 Necessity is a compelling taskmaster. I began to acquire an understanding and appreciation of the law of Australia. I found it thrilling to find how a 20th century judgment was based on a decision of the 19th century, that was in fact based on what Blackstone had written in the 18th century, or the case from Cook in the 17th century, who found it in Littleton's writing of the 15th century, and so to Bracton in the 13th century.
- 56 In time I became totally absorbed in Australian law and today I would not be able to express an opinion on Roman Dutch law. I have acquired a deep admiration for the ageless quality of the common law, its veneration for the past, its pragmatism and flexibility, the way it is able to adapt to modern conditions and its capacity to provide fairness and justice in individual cases.
- 57 Nevertheless, for a long time I believed that my education and training in the civil law was an asset rather than a liability, in effect, a broadening experience. After all, the same stable had produced Lords Steyn and Lord Hoffmann and the legendary barrister, Sir Sydney Kentridge QC, but *Farrah Constructions v Say-Dee* shattered this illusion. There, the High Court deplored, and I quote: "Lawyers whose minds have been moulded by civilian influences to whom the theory may come first." I immediately realised that that described me to a T. Gloom descended. After a while, however, the usual process of rationalisation kicked in and I began to feel better. It occurred to me that perhaps the High Court was thinking of Justice Hammerschlag.
- 58 Civilian lawyers prefer a unified theory of law and, I confess, so do I. I have always believed that if Albert Einstein thought that a single unified theory could explain the entire universe simple, comprehensible legal principles of overarching application should not be beyond our wit. I recognise, however, that this is contrary to the current orthodoxy which eschews top-down reasoning, focuses on historical purity and holds that

judicial decision-making should only move with baby steps away from the umbrella of authoritative canonical cases. This approach has produced an excess of subtlety and complexity and nowadays there are few aspects of legal principle that can be understood by ordinary people - an odd phenomenon in a country that prides itself on being a democracy governed by the rule of law.

- 59 It should not be forgotten that simplicity, commonsense and adaptation to change are not alien concepts, they are part of the traditional pragmatism of the common law. Where necessary, our law has not been afraid to take great leaps forward leaving established principle far behind: *Donoghue v Stevenson*, *Hedley Byrne*, *High Trees* and *Anisminic* are but a few examples of this. Maitland's aphorism remains pointedly relevant: "Today we study the day before yesterday in order that yesterday may not paralyse today and today may not paralyse tomorrow."
- 60 In 2001 I had the great good fortune to be given the opportunity to sit as a judge of this court. Being part of this institution has been a rejuvenating and life-fulfilling experience that I will always treasure. In many ways this has really been the happiest period of my professional career.
- 61 I have had the privilege of working in a court under the aegis of Chief Justice Spigelman. His leadership has added to the quality of the court and court life in countless ways. History will regard him as one of the great chief justices of our country.
- 62 I have also had the privilege to work under the skilful and considerate stewardship of Presidents Mason and Allsop. Both are outstanding lawyers and administrators. The collegiality of the Court of Appeal could not have existed without their guiding hands. The foundation of that collegiality is the working together of judges in intimate, friendly, good-humoured and non-competitive relationships. It involves respect for the worth and strengths of each other. It results in the whole of the court being greater than the sum of its parts.

- 63 A fascinating aspect of this court is the difficulty in forecasting which way a particular judge is going to decide. Although some judges may be thought to be of a particular makeup in my experience each has great independence of mind and can easily react in an unexpected way. It is a mistake to place judges in pigeon holes. I have more than once been on the receiving end of this phenomenon but not more so than when, in my first year on the court, I was sitting in a workers compensation appeal. Justices Meagher and Handley were firmly of the view that the worker's appeal should be dismissed. I thought it should be upheld. They each gave ex tempore judgments and so did I, but in dissent. As we were walking out Justice Meagher said to me, "I didn't know you were a pinko."
- 64 I shall miss the companionship that is so much part of judicial life on the Supreme Court. From the moment we arrived in Sydney all have treated Erina and I with kindness and friendliness. The warmth and hospitality of the judges and their partners have contributed greatly to the fact that our time here has been such a rewarding and agreeable experience.
- 65 I wish to pay tribute to the New South Wales legal profession. When I arrived the thought of being a judicial newcomer in what has been described as the Sydney vortex was intimidating but my fears were quickly allayed. From the time I arrived I was struck by the high quality of representation at both senior and junior level. Having practised law in so many jurisdictions I think I am well qualified to say that the New South Wales Bar stands back for none in regard to courtesy, skill, professionalism and commitment to the ideals to which all barristers should aspire. Some years ago 11th Floor Wentworth Chambers did me the honour of adopting me as a member and that association has meant a great deal to me.
- 66 I have had the good luck of having had two associates, Pam Kirwan and Sally Guth, who have facilitated my daily life with their efficiency, good humour and kindness. I owe them a great deal and thank them both.

67 I have been fortunate to have had as my tipstaves engaging young people of many different cultures and backgrounds and of high ability. I have valued and enjoyed the assistance they have given me.

68 I have tried to produce my judgments as soon as possible after the hearing, usually within a week or two. Some doubt the merits of this approach. I have been urged to take longer to think about the issues and not to be in too much of a hurry. This was particularly the case with the negligence inquiry when I was severely criticised for handing down the report on time. I have taken heart, however, from the words of the illustrious Justice Olive Wendell Holmes. On 4 April 1909, just over 100 years ago, he complained in a letter to Sir Frederick Pollock that some people regarded the fact that his decision was written at once as evidence of inadequate consideration. He wrote,

“Such humbugs prevail. If a man keeps a case six months it is supposed to be decided on great consideration. It seems to me that intensity is the only thing. A day’s impact is better than a month of dead pull.”

69 In every speech Cato the Elder made in the Roman Senate, no matter the topic, he would conclude by saying “Carthago delenda est”, Carthage must be destroyed. Given that precedent, I hope I will be forgiven if I repeat that, firstly, I had no part in the drafting of the Civil Liability Act and, secondly, that Act contains many provisions that I did not recommend.

70 Ever since when at dawn on Friday the thirteenth, precisely 702 years and one month ago, King Philip IV arrested and later tortured the Knights Templar Friday the thirteenth has been regarded as an unlucky and unhappy day but by reason of this ceremony this day has been a very happy one for me. I thank the Chief Justice for this occasion and each one of you for your presence here today. In this historic court room, in the midst of family, friends and colleagues on the Bench and in the profession, I would have to say the race is worth the running. For my part, the joy has

been in the camaraderie, the debate and the doing and, if I may say so, the doing where possible at top speed.

71 I think it fitting after almost twenty-one years to leave this court and close my judicial career with the words, may it please the court.

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- 1 See Andreas Van Wyk, “Johannes Christiaan de Wet” (1991) 2 *Stellenbosch Law Review* 5 at 11.
- 2 Supreme Court of Western Australia, Farewell to the Honourable Justice Ipp, transcript of proceedings, Perth, 1 March 2002 at 4.
- 3 Ibid at 17–18.
- 4 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187.
- 5 *Biala Pty Ltd v Mallina Holdings Limited (No 4)* (1994) 13 WAR 11.
- 6 See *Bond Brewing Holdings Limited v Crawford* (1989) 1 WAR 517.
- 7 *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395.
- 8 *Jarvis v The Queen* (1993) 20 WAR 201; *R v Liddington* (1997) 18 WAR 394.
- 9 *Woodside Petroleum Development Pty Ltd v H & R–E & W Pty Ltd* (1999) 20 WAR 380; *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291.
- 10 *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357.
- 11 *Air Link Pty Ltd v Paterson (No 2)* [2003] NSWCA 251; (2003) 58 NSWLR 388; *Orellana-Fuentes v Standard K Knitting Mills Pty Ltd* [2003] NSWCA 146; (2003) 57 NSWLR 282.
- 12 *Itek Graphix Pty Ltd v Elliott* [2002] NSWCA 104; (2002) 54 NSWLR 207.
- 13 *Wentworth v Graham* [2003] NSWCA 229; (2003) 57 NSWLR 741.
- 14 *Australian Crime Commission v Gray* [2003] NSWCA 318.
- 15 *Project 28 Pty Ltd (formerly Narui Gold Coast Pty Ltd) v Barr [No 2]* [2005] NSWCA 420.
- 16 See *Street v Hearne* [2007] NSWCA 113; (2007) 70 NSWLR 231.
- 17 *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206; (2008) 252 ALR 659.
- 18 *Maggiotto Building Concepts Pty Ltd v Gordon* [2001] NSWCA 65; *Rockdale Beef Pty Ltd v Carey* [2003] NSWCA 132.
- 19 *Amaca Pty Ltd v State of New South Wales* [2004] NSWCA 124; (2004) 132 LGERA 309
- 20 *State of New South Wales v Bujdoso* [2007] NSWCA 44; (2007) 69 NSWLR 302.
- 21 *McPherson’s Ltd v Eaton* [2005] NSWCA 435; (2005) 65 NSWLR 187.

²² See, eg, *Flounders v Millar* [2007] NSWCA 238; (2007) 49 MVR 53.

²³ *South Tweed Heads Rugby League Football Club Ltd v Cole* [2002] NSWCA 205; (2002) 55 NSWLR 113.

²⁴ *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47.

MAINTAINING THE TRADITION OF JUDICIAL IMPARTIALITY

The Honourable Justice David Ipp AO*

The image used to portray the ideal of justice is ubiquitous in the western world. Themis, the goddess of justice, is shown as blindfolded, with scales and a sword.¹ The scales reflect even-handedness. The sword is a symbol of power that executes decisions without sympathy or compromise. The origin of the blindfold is obscure. Historical research appears to indicate that blindfolded justice first began to appear with any regularity as an image during the 16th century.² The inclusion of the blindfold in justice imagery at that time coincided with the establishment of professional, independent judges. These judges stood apart from the king or emperor and did not simply act on the orders and instructions of the executive power.

The goddess of justice is blindfolded so that she cannot read the orders and instructions or even the signals a sovereign might send on how to decide a case.³ The blindfold represents the idea that political views, ideology, sympathy and even compassion are very bad guides to judgment. A blindfolded justice cannot see who comes before her, and hence cannot be impressed by powerful litigants (such as government)) who might seek to intimidate her, or persuade her by appealing to her emotions. Thus, the blindfold represents impartiality, neutrality and freedom from the influence of the senses. The blindfolded goddess acts solely on grounds of principle and reason. Intellectual rigor and a deep knowledge of the law is her guide. These are the ideals to which justice in the western world aspires.

In Australia, as a general proposition, government expects judges to be impartial. This is only a “general proposition” because government frequently expresses displeasure at judicial decisions that are contrary to government rulings or policy, and varying degrees of antagonism towards judges who make them. Government

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¹ See the general discussion in D A Ipp, “Judicial impartiality and judicial neutrality: is there a difference?” (2000) *19 Aust Bar Rev* 212

² Curtis & Resnik, “Images of Justice” (1987) *96 Yale LJ* 1727 at 1757.

³ *Ibid.*

interests that may be affected by judicial decisions are almost infinite in number. Questions of state security are a glaring example. But matters involving far more mundane issues can attract government interest. Some examples are rights to land, taxation, town planning, conservation and the environment, the use of alcohol, sentencing and even negligence. In criticising a particular case, government officers, at times, direct their remarks solely at the judicial reasoning deployed. But many criticisms involve attacks on the judge personally, and some are simply abusive. “Daft and delusional” is a recent example of a State Attorney-General’s description of a judicial officer’s decision. Very often, notwithstanding the form of the criticism, in substance it is grounded on the fact that the decision is perceived to be contrary to government interests. Government does not like judicial interference with their decision-making powers and the implementation of their policies.

Nevertheless, the Australian judiciary is safe from the kind of interference that one finds in some other countries. In Australia, there is no communication outside open court between government and judges concerning the result or the details of any decision a judge may be required to make. Government does not attempt to influence judicial decisions, as is the case in many other countries. Judges do not telephone the Prime Minister or members of the Cabinet, or senior government officials, to ascertain whether a proposed judgment is politically acceptable, and government does not privately communicate to judges the nature of the decisions they require the judge to hand down. We know that conduct of this kind has happened in many countries throughout the world and still happens. But Australia is immune from that. We take that for granted, but judicial independence of this kind is a fragile thing. If it is to continue to last, it must be buttressed and reinforced.

Why are Australian judges immune from this kind of government interference? I would say firstly (and primarily) because at a basic grass-roots level, the Australian people require their judges to be so immune. The people would be outraged were the situation to be otherwise. They have been conditioned to believe in the essential goodness of judicial impartiality; and that conditioning and that belief runs deep in the basic currents of Australian life. Government in Australia is acutely aware of the people’s demand for judicial independence of this kind. It understands full well that, were it to become known that government was attempting to interfere with judicial

decision-making, there would be a terrible outcry which could be fatal to an individual politician's continuation in power, or even that of the government itself. Heads would roll.

Secondly, the judiciary, itself, is conditioned to believe that to act other than impartially is essentially evil and inimical to a code of conduct that has been instilled in each individual judge since the time he or she began to practise the law. The importance of this conditioning of judges should not be underestimated. It is in this area that practice at the Bar plays such an important part. Independence is required of a successful barrister and the ethics and customs of the Bar underline this. Life at the Bar is such that it is soon known if a particular individual is ready to kow-tow to particular solicitors, or a particular interest group. That is why it is so important that judges continue to be drawn largely from the ranks of successful practising barristers.

It should not be thought that this happy state of affairs has always existed in the common law world. There have been many instances of serious suspicions of injustice through pro-government judicial bias. The example of Roger Casement is often cited as a trial where judicial propriety was open to question. Casement was hanged in 1916 and at that time British opinion was inflamed against persons alleged to be traitors. Many have believed that Casement's judges were determined to have him found guilty, irrespective of the merits of the case. In some quarters he is still regarded as a martyr to Irish nationalism.

Judges have been suspected of pro-government bias even when it has not been thought that the security of the State was at risk. The case of Cochrane, one of Britain's most successful captains in the Napoleonic Wars (and the model for novelist Patrick O'Brian's Jack Aubrey, the man who Russell Crowe portrayed in *Master and Commander*), is an example. There are historians who say that the judge in Cochrane's trial put the political interests of the naval and aristocratic establishment above his duty of impartiality (and, indeed, above State security - as Cochrane's resulting incarceration deprived Britain of the services of perhaps her greatest naval commander of the time).

In 1814 Cochrane was one of Britain's foremost national heroes, a skilled and fearless sailor, but he was also a popular parliamentarian, a political radical who had attacked the establishment on many fronts. His continued presence as a naval leader against the Napoleonic fleet was very much in Britain's national interest. On the other hand, as a member of parliament, Cochrane had offended the government by exposing myriad injustices within the navy and by championing the ordinary seaman.

Despite his many daring successes at sea, Cochrane was charged with stock exchange fraud. It has long been contended that powerful political enemies manufactured the case against him. According to a recent biography,⁴ those behind the prosecution trial carefully selected the trial judge. They chose none other than the renowned Lord Chief Justice Ellenborough, described by the biographer as the ruling clique's "fiercest hound".

After 13 hours of evidence at the trial, with only brief adjournments for refreshment, the prosecution case closed at 10:00 pm. The defence sought an adjournment to the next day so that it could present its case while the jury was fresh. To general astonishment, Lord Ellenborough insisted that the defence begin its case. He said that key witnesses would be absent the next day. That was not true. The following day, most attended. The defence did what it could, ploughing on into the night for another 5 hours until 3:00 am. Many members of the jury slept while several defence witnesses testified. The next day, according to Cochrane's biographer, "Lord Ellenborough summed up in one of the most loaded and devastating speeches ever uttered by a supposedly impartial trial judge, which was to become the subject of major controversy for the rest of the century."

The jury found Cochrane guilty. The Chief Justice sentenced him to a year in prison, a fine of one thousand pounds (a very large sum in those days) and required England's hero to spend an hour in the stocks opposite the stock exchange. He was the last person in England sentenced to be pilloried. It has been said that this was a sentence passed by a biased judge, anxious to serve the interests of government; a

⁴Robert Harvey, *Cochrane: The Life and Exploits of a Fighting Captain*, (Robinson: 2000).

judge who was the instrument whereby those in power took their revenge on a sailor who had, with great personal courage and skill, devoted his life to the national cause.

After serving his time in jail, Cochrane sought fame and fortune in Chile, where he became admiral and chief of the Chilean navy. Much later, in 1846, when there was a new sovereign (Queen Victoria, an ardent admirer of Cochrane) and a major shift in the British government, Cochrane was rehabilitated. Lord Ellenborough, the son of the former Chief Justice, was one of his sponsors.

Knowledge of Cochrane's case helped me to answer the most difficult question I have ever been asked in front of a public audience. In 2004 I was delivering a lecture to about 50 middle-ranking Chinese judges in Shanghai. The lecture was on judicial independence and I delivered the kind of paper that any Australian lawyer would expect. It was filled with admonitions that every trial should be conducted by an independent and impartial judge and I gave many examples as to how a judge should bring an impartial mind to bear when deciding the issues before the court. I recall showing them a slide of the great painting, *The Judgment of Cambyses*, by Gerard David, the 15th century Flemish painter. According to Herodotus, Sisamnes was a royal judge in Persia under the reign of King Cambyses II. Sisamnes accepted a bribe from a party in a lawsuit, and rendered an unjust judgment. Cambyses learned of the bribe and arrested him. Sisamnes was sentenced to death, but before the execution, his skin was flayed off (portrayed in graphic detail by David). Cambyses used the skin to string and cover the chair on which Sisamnes had sat when delivering his verdicts. To replace Sisamnes, Cambyses appointed Sisamnes's son, Otanes, as the new judge. Cambyses admonished Otanes to bear in mind the source of the leather of the chair upon which he would sit as a judge. Cambyses's instruction as to the need for judicial impartiality, emphasised as it was by the reupholstered chair, must have left a lingering impression on his new judge. I perceived that this story also impressed the Chinese judges. It had certainly impressed me when I had read it and again, recently, when I saw the original of David's painting in Bruges.

When I had finished my paper, I invited questions. One of the judges stood up. She explained that she was a judge in X, a "small" city of 5 million people about 2000

kilometres from Shanghai; in other words, deep in the provinces. She said that she was idealistic about her work and always tried hard to do her job properly. Her endeavours had been recognised and, as a reward, from time to time she was sent to Shanghai to attend lectures by visiting judges from all over the western world, including Britain, the USA, Scandinavia, Britain, Germany, Australia and others. That very week, she said, she had listened every day to foreign judges talking about judicial impartiality. They, apparently, had told the Chinese judges more or less what I had said in my paper. One would not expect anything different (although I do not think they showed a slide of the corrupt Sisamnes being flayed alive).

Then the judge came to her point. She said that understood very well the theory as it had been expounded. But she was interested in the application, in practice, of these ideals of which the western judges spoke so easily. She explained that, usually, she had no trouble from the government, or people in power. But, three or four times a year she would receive a telephone call from a person who was very important politically in the city (in other words, one or other of the political bosses). She would be reminded that the next day she would be hearing some particular case which the man would identify. The man would tell her that the case concerned one of his family members or friends or business or political associates. He would say that this person must win the case. When the judge protested, the man would warn her. He would say: "If this person doesn't win the case, not only will you never be promoted but we know all about your child, your only child. If this person doesn't win the case, your child - who is presently in primary school - will never get into the stream to go to university. He will be a labourer all his life. Your child will never receive a proper education. He will have to leave school at 15 years of age and go and work in the fields."

The judge gave me a piercing look and said: "What do you western judges say I must do in these circumstances"?

Now, you must admit that this question posed a challenge. How was it to be answered? I noticed that many of the other Chinese judges in the audience were nodding their heads in agreement with the speaker. They were all looking at me, some with sardonic expressions on their faces, waiting for me to reply.

I remembered the case of Cochrane. I replied in the following manner: “I would not presume to tell you how to behave in those circumstances. I have no personal experience of them. I do not know how I would behave in such an awful situation. It is easy for me and my colleagues because this situation would never happen in my country. That is not because we are better people. It is because we are conditioned to behave impartially, and the Australian people and members of the government, including political bosses, are conditioned to leave judges alone, and not to try and influence them. Politicians in Australia know that if they try to pressurise judges into making particular decisions, they could go to jail and their party would suffer serious consequences. So we are free to do our job properly. If we end up like Sisamnes, it will be our fault alone.”

I reminded them that China had only had its present western-style judicial system for about 20 years. I pointed out that the common law system had its roots in a history and tradition hundreds of years old. I told them that even in the 19th and 20th century, some western judges favoured government and pro-government individuals unfairly. I said that it had taken hundreds of years of judges trying to do their best that had developed a society where it was expected that judges would act impartially in litigation involving government.

I said: “You too, can only do your best, and it is for each one of you to decide, in accordance with your own conscience, what you should do when this kind of pressure is brought to bear. You are pioneers, educating the people in the benefits of an independent judiciary. You have to experience – as all pioneers do, – the terrors of the unknown jungle. It is only if and when, as a result of your efforts, and those of your successors, the Chinese people expect judges to be impartial, and want judges to be impartial, and will punish government for trying to influence judicial decisions, that your life will become easier and you will not have to face telephone calls of this kind.”

This seemed to satisfy the audience, but I should say that it has not satisfied one of two of my colleagues to whom I have told this story. They believe that I should have recommended that the judge should sacrifice her child’s interests in the furtherance

of the highest judicial ideals of independence. Of course, sacrifices of that kind are heroic, but not always practical. In 1963, as a young lawyer visiting Paris for the first time, I was inspired by the statue on the steps of the Conciergerie (the forbidding prison where Marie Antoinette was incarcerated). The statue is of the lawyer who defended the queen at her trial. The Committee of Public Safety warned him that, should he proceed to represent her, he too would meet the guillotine. Notwithstanding this threat, he did so, and was shortly thereafter executed. You may think that this is an extreme example of the cab rank rule. It was a demonstration of great courage and self-sacrifice. But, whatever I thought in 1963, for my part I was not prepared to recommend to the Chinese judge and mother that she should sacrifice the education and prospects of her child in the cause in which I so deeply believed.

There are some egregious examples of judicial propensity to side with government. German judges prior to 1930 enjoyed a fine reputation. But the judges under the Nazi regime are today excoriated. Often the United States Supreme Court has resolved cases by a majority of five to four based, apparently, on ideology rather than the law.⁵ Divisions in political philosophy have given rise to great rancour on the United States bench. This has become particularly apparent in cases involving capital punishment, race discrimination, sexual privacy, abortion, rights of the poor, of criminal defendants, and of religious minorities. The overriding importance of the personal political views of the court was particularly apparent in the great case involving the disputed electoral returns in the 2000 United States presidential election.⁶

Apart from detracting from the general reputation of the judiciary, subjective judicial decision-making based on political or social or philosophical beliefs leads to unpredictable and arbitrary results. When the well-known liberal justice of the US Supreme Court, William Brennan, retired in 1990, the journal, *The New Republic*, editorialised:

⁵ See Edward Lazarus, *Closed Chambers* (Penguin Books, 1999).

⁶ *Bush v Gore* 531 U.S. 98 (2000).

"[Brennan's] passionate judicial activism was unafraid, in a pinch, to leave constitutional text, history, and structure behind. When liberals like Brennan held sway in the courts, judicial activism often led to liberal results; now that 'conservatives' are the ones ignoring legislative history and congressional intentions, Brennan's legacy makes it harder for liberals to cry foul."⁷

According to an American commentator:⁸

"From the perspective of the more liberal [judges] and their supporters, today's Supreme Court has been engaged in a sustained and evil counter-revolution, undermining or destroying the civil rights and civil liberties that the previous Court properly championed. In curtailing affirmative action and civil rights enforcement, in limiting the right to abortion and enhancing the power of police and prosecutors, in rushing executions and curbing the power of the federal government, including the judiciary, today's Court, it is said, has been turning back the clock on social progress and retreating from the institution's own duty to enforce the constitutional promises of liberty and equality. On the other hand, conservatives, both within and without the Court, approach the innovations of the previous era from the opposite corner. In their view, the previous Court's exaltation of egalitarianism, criminals' rights and sexual freedom was a prime factor in creating the legal and moral decay of the current age. And, to them, most, if not all, of the rights revolution was illegitimate from the outset, a judicial coup d'etat that established the Court as a 'super legislature,' overturning with no constitutional authority the judgments of elected representatives. In light of such pervasive and continuing internal division, the question for the Court, as for the rest of the government, has been whether the institution's own integrity can withstand the corrupting force of bitter disagreement ..."

Maintenance of the judiciary's reputation and integrity requires the rigorous application of impartiality and objectivity. United States judges have not always been known for these characteristics.

After the political change occurred in South Africa, the South African Truth and Reconciliation Commission investigated the conduct of the judiciary during the apartheid regime. The judges mounted a strong defence of themselves. Sir Sydney Kentridge QC, the great barrister, supported them. He wrote:⁹

"During the apartheid years in South Africa many people helped keep alive the idea that the individual had rights and liberties which the state is not

⁷ "What Brennan Wrought" , *The New Republic*, August 13 1990 at 7, quoted in Glendon, Nation Under Lawyers (Farrar, Straus and Giroux, 1994).

⁸ Lazarus, above n 5 at 7-8.

⁹ *Counsel* (a journal published by the General Council of the South African Bar) September/October edition 1994.

entitled to infringe. But there are not many organised institutions of which this could be said. Among them were certainly the Bar and the Supreme Court."

He remarked:

"Throughout the period the South African Supreme Court as a whole remained an independent court which in an appreciable number of cases provided some protection against the excesses of the executive ... Government hopes that their appointees would take their side were frequently disappointed."

Nevertheless, many commentators have severely criticised the conduct of many of the judges of the old South African courts.¹⁰ According to one¹¹ it was only a handful of judges (who sat on the provincial benches) who maintained fundamental rights and to whom the new legal order now owes a great deal.

Friedman JP,¹² one of the old order judges who had done much to uphold the rule of law, accepted that "the courts' record as an upholder of the rights of the individual in the application of security legislation, cannot, with obvious exceptions, be defended". Friedman JP nevertheless described the dilemma for the South African courts in terms that I think Australian judges would well understand. He said:¹³

"The detainee would testify how he was assaulted. The police or security force members, on the other hand, would go into the witness box and deny these allegations. In this they would be corroborated by the district surgeon [a State medical officer] who would testify that no evidence of any assault was found on the detainee. One knows now from the evidence which has emerged at hearings of the [Truth and Reconciliation] Commission that many of these witnesses were prepared to lie to the Court. Despite cross-examination it was very often impossible to find that their testimony was untruthful since the court has, in each case, to make its findings on the evidence which is placed before it. That evidence included the testimony of the magistrate or police official who took down the confession, that the person making it had no visible signs of recent injuries. It must, however, be pointed out that in a number of cases evidence of a confession was in fact rejected. The fact that it was commonplace for detainees to allege that they had been tortured, did not entitle the court, in any particular instance, to depart from the principle that each case must be decided on its own facts."

¹⁰ See for example David Dyzenhaus, *Judging the Judges, Judging Ourselves* (Hart Publishing, 1998) Chapter 2.

¹¹ Dyzenhaus, *ibid* at 52.

¹² "JP" is the abbreviation for Judge-President

¹³ Dyzenhaus *ibid* at 63-64.

Today, the principal criticisms of the South African judges are that they failed to give a liberal interpretation to statutes where there was ambiguity and they construed statutes to give effect to government policy and not human freedoms. The criticism that was stifled in the past has now become very loud indeed.

Nowadays, many western countries have adopted far-reaching security legislation. Such legislation has existed for years in Northern Ireland and similar criticisms have been made about the judiciary there. In the USA, the criticisms of the judiciary in regard to the conduct of cases involving black people in the southern states prior to 1970 is well known. The legislation that has given rise to the detention in Guantanamo Bay is open to serious question and so is the reaction of the American judiciary to what has there occurred. Australia and New Zealand have now also legislated for detention without trial and have introduced other novel statutory provisions designed to shore up the security of the State.

There are many lessons to be learned from the South African experience. Principally, it should be recognised that the erosion of human rights can happen gradually and indeed, at times, imperceptibly. Inexorably, however, fidelity to the letter of the law overcomes personal and moral impulse. The decision to apply the letter of the law as opposed to protecting fundamental human rights becomes easier as judges persuade themselves of the force of their duty to the positive law and government policy. The court can become a chamber legitimising oppression. The correct balance is not easy to strike.

The challenge to prevent such a state of affairs occurring in this country is still to come for both the government and the judiciary. When the really difficult times arise, and most believe that they will, one hopes that the great institutions of this country (government, the judiciary, academia, and the media) will be ready. At this stage, there is, I think, a need for the virtues of judicial impartiality to be properly understood and emphasised, and for judges to be allowed to make unpopular decisions without being exposed to vitriolic personal attacks and abuse. This requires maturity and understanding on the part of government and those who influence public opinion. Whether these qualities will prevail is a matter for doubt. Many seem to have no understanding of what they are doing when they revel in the

process of judge bashing. It will of course be a sad day for Australia when the foundations that allow judges to be impartial are weakened and dispersed. Undoubtedly, those responsible for the weakening will be the first to suffer the consequences.

In responding to the challenge, government has to be extremely careful about the criteria for appointing judges. By necessity this also involves the processes whereby judges are appointed. In recent times much has been written and said about these issues. Many of the commentators have no experience of the law or have particular axes to grind. There is a strong movement to have judges appointed by a committee; often with laypersons being part of the committee. There is a strong movement to have judges who are “representative of the community” and there is a push for “diversity” on the bench. There have been reports of lay members of such committees focusing on the work that candidates for judicial appointment have done outside the law, for the community, and on the degree of compassion that the candidates generally display. This is presumably motivated by the notion that good judges require these qualities.

Australia has a great tradition, more than one hundred years old, of outstanding, independently minded, high quality judges, whose judgments, generally, are noteworthy for their fairness and high intellectual standard. If this tradition is to be maintained, there can be no room for discrimination, reverse discrimination or affirmative action in the appointment process.

Judicial compassion and responsiveness to individual interests are not adequate substitutes for the ideal of impartiality. In the early years of the 20th century, most judges were extremely tender hearted towards big business, while showing little compassion for women and children working long hours in factories. Other judges were strongly in favour of landlords and employers and seldom upheld the claims of workers and tenants. They were merely demonstrating judicial compassion and responsiveness for the ruling establishment at the time. This illustrates the danger of using sympathy and feelings as a basis for making decisions.

The notion of diversity and a representative judiciary should not be a mechanism for lowering standards. One is reminded of President's Nixon's unsuccessful nomination of Judge George Harrold Carswell to the U.S. Supreme Court. There was strong opposition to his appointment, both on political and professional grounds. It was said that he was a mediocre lawyer and a mediocre judge. The Republican senator, Roman Hruska, who was floor manager for the nomination, responded (with refreshing candour, it must be said) that even the mediocre are "entitled to a little representation."

The prime qualities for good judges are not dependent on their ethnic heritage, or whether they give generously to charity, or are members of Rotary or similar organisations, or whether they spend time as volunteers, or whether they are of a particular gender. At the outset, a high degree of moral integrity and strength of character is surely essential. Another fundamental requirement is a deep knowledge of the law and a feel for its principles. Yet another is innate wisdom and a sense of justice. A proved willingness continually to work long hours, to be able to make decisions reasonably quickly, and a facility for expressing oneself lucidly, are all necessary qualities. Above all, the new judge must be steeped in the notion of judicial independence.

And how are these qualities to be discerned by a committee interview? The clichéd calls for "transparency" make no allowance for transparency in the motivation of each individual committee member and in the precise mechanics of each selection. Whatever complaints have been made of the selection process in the past, they will not be cured by the introduction of a selection committee. The same defects apply, except multiplied by a factor equal to the number of people on the committee. What makes it worse is the importance that now appears to be attributed to the interview process. I suggest that is a hopeless mechanism for attempting to establish whether the candidate has the qualities of the kind I have mentioned. One cannot discern these things reliably in a committee interview of an hour or so.

Another problem with the selection committee is the dynamics of committee selection. Take the instance of a candidate who in his youth, or even later, was a card-carrying member of the Communist Party. The appointment to the bench of

such a person might in some western countries be regarded as unacceptable. Even if such a candidate filled all other criteria superbly, the prospects of a committee appointing him or her to the bench would be remote; there would be at least some strong opposition and a compromise candidate would be appointed. But under the present method, a government might be persuaded to take the risk. This is not an imaginary situation (I am not speaking of Australia, but another common law country). Such a person was appointed under the traditional system and has become an outstanding and renowned judge. Appointments by committee take the same form as other committee decisions. They are essentially compromises¹⁴.

A successful practice at the bar demands deep knowledge of the law and intellectual discipline. It inculcates a wide experience of virtually all forms of human behaviour. It requires sensitivity to human nature as well as the ability to react swiftly to changing situations and to withstand powerful pressure from opposing lawyers, clients and solicitors, and judicial officers. It involves working for and against the government and the establishment. In short, it is the ideal training ground for future judges. One explanation for the fundamental difference in approach between the United States judges and the House of Lords in dealing with security legislation and terrorist trials is that the United States judges do not come from an independent Bar.

The best (albeit not infallible) pointer to whether a person is well qualified to be a judge is the nature of the candidate's career at the bar, the candidate's proven ability as a barrister, and the candidate's reputation amongst his or her barrister peers. Choice of persons outside the reservoir of the Bar does not mean that the person will not be a good judge. There are several examples of excellent judges being appointed from the ranks of solicitors and academics, but the general rule should always be borne in mind.

With the vastly increased importance of administrative law and administrative law cases, the government and the judiciary are coming into more and more conflict. The conflicts are endemic in our system of governance. And there are those who feed off them. There was a time when many of the most successful lawyers were

¹⁴ See generally JJ Spigelman AC, Judicial appointments and judicial independence, address delivered at the Rule of Law Conference, Brisbane, 31 August 2007

politicians and vice versa. But those times have gone. With their disappearance the understanding (and, I think, some of the respect) that used to exist between these two institutions has been reduced significantly. The difficulties that have arisen in consequence can and need to be resolved. Education and restraint are required, not only by politicians and judges, but by those who influence public attitudes. Reinforcement of the notion of judicial impartiality is a task for all who have the health of our society at heart.

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Paper delivered at the launch of 'Principles of Planning Law' by Mr Les Stein

Launch of “Principles of Planning Law” by Les Stein

The Hon Justice D A Ipp AO

On its face, the title - “Principles of Planning Law” - might be thought to be mundane. On closer thought, however, the title – which is an entirely accurate description of the work – reveals its uniqueness. The book does not focus on the detail of particular statutory planning regimes, save to the extent necessary to illustrate planning law principle, and to exemplify each particular principle that is discussed. The same applies to the citation of case authority. The unique aspect of the book is that it extracts, isolates, and gathers together the underlying legal principles of planning law so that they form a coherent whole. As the author says in the introduction, “this is not a book whose purpose is to analyse decisions of the courts in individual cases to deduce the law. Instead it is a work designed to find the principles or thinking at the bottom of planning law, and therefore it uses legal decisions as illustrations”.

There are many textbooks on the law of town planning. Generally, they commence by setting out and then discussing section 1 of some town planning Act and follow through by examining the succeeding legislative provisions of the statute concerned. The unique concept underlying Les Stein's work is that it formulates universal legal principles covering all aspects of town planning. The book establishes a legal framework of planning law. It creates a jurisprudential corpus that is of universal application. It is my understanding that this has not been done before, and Justice Brian Preston, Chief Judge of the Land and Environment Court, has confirmed to me that this is, indeed, the case.

The book transforms the pragmatic, idiosyncratic collections of statutory rules that differ from State to State and from country to country into a comprehensive set of legal principles. The principles are articulated, analysed and closely examined. The principles so formulated are intended to apply to the understanding, construction and application of town planning legislation and legal problems, generally, irrespective of the particular statute that applies. For this reason, the work will be relevant and of assistance throughout Australia and, indeed, internationally. Therein lies its extraordinary originality and functionality.

The book contains a striking foreword by Patrick McAuslan, Professor of Law at the University of London, an acknowledged international authority in the field of planning. Professor McAuslan has worked in over 25 countries as policy adviser to governments on land and environmental matters and as draftsman of new laws and statutes on land, natural resources and the environment. He has published many articles and books on planning law. He has pioneered courses in planning law and environmental law at universities in United Kingdom. He was the founder of the Modern Legal Study Series published by Sweet and Maxwell, of which he served as the general editor from 1972 to 1997. He is extraordinarily well qualified to comment on the merits of this book. Professor McAuslan says, “Hereto, there has been no single work that has brought together the significant body of law that has been developed in a comprehensive, coherent and scholarly manner in the way that Professor Stein has now done in his book. The book will not only be of inestimable benefit to practising planners and lawyers, planning and law students, and others working and studying in the area of urban management, but also, I believe, will prove to be one of those books that will be of great benefit to society at large..”

The principles articulated in Principles of Planning Law are discussed in detail and in depth in simple and direct language. The author explains the social, cultural, economic and historic factors that have created planning law doctrines. His examination reveals the structure of these doctrines and makes them comprehensible within the larger context. This explains and justifies Prof McAuslan's view that the book will be of great value to all involved in planning law, at every possible level.

It is often said that the law of each nation reflects the inherent general characteristics of that nation. Thus, the English common law is known for its pragmatism, flexibility, respect for fairness, impatience with metaphysics and regard for commonsense. The laws of other developed western

European countries, such as France, Germany, Holland and Italy, are characterised on the other hand by the importance attached to certainty, to principle, to logic, to schematic coherence and intellectualism. If civilian law, as the laws of these countries is peculiarly known, were to be described in terms of colour, it would be pictured as a stark contrast in black and white, whereas the English common law would be a tonal sequence of differently shaded greys.

In the same way, the planning decisions taken in different cities reflect the personalities and characteristics of the societies in those cities. Examples are the neo-classical imperialism of Washington, the epitome of commercial, technical and industrial power represented by the sky scrapers of New York, the decadent elegance of Venice, the grace, style and charm of Paris, and the post—modern, democratically similar suburbs of fast growing Australian cities. The list is endless.

Despite this extraordinary diversity, there are common historical threads that are of application wherever humans gather together in urban configuration. The history of some five thousand years of living in cities is now known. It is thought that the first streets in urban construction followed the paths of cows. Cows tend to walk in curved lines. The first city streets, therefore, were curved. The notion of town planning incorporating curvilinear streets is a tradition that stems from the time that humans first grouped together to live in one place. Small houses found in a city in the Indus valley, dating from the third millennium BC, were two storeys high and about 10 metres long by 9 metres wide. Their size was the same as a modest house in Athens in 200 BC; they would not be out of place in parts of Redfern today. The living space provided for poorer people 5000 years ago is virtually identical to that provided in model subsidised housing estates in the 21st century.

The notion that the centre of a city must be occupied by places of power, such as government edifices, temples, citadels, monuments, towers or skyscrapers, stems from the beginning of recorded human history. Buildings of this kind, in the centres of cities, have always been constructed with the most up to date and costly building materials, decorated by all the resources of art.

The idea that huge public places of entertainment must be built away from where the elite live, and must encompass areas of open space through which sated crowds can make a quick exit without trampling on each other, stems from at least Roman times. The notion that town planning must ensure that the swarming masses should not disturb the noble, the rich and the important, is universal. One sees it in constructions that range from the Colosseum in Rome, to the Hippodrome in Constantinople, to Wembley Stadium in London, to Olympic Park in Sydney. You may be interested to know that in Rome the public open space for mass assembly and movement was known as the vomitorium. Privately, in Roman times, this was a special room adjoining the dining room, where gluttonous eaters would get rid of their food so that they could enjoy more. The business of the hasty emptying out of food was transferred to the great passages and openings that enabled a quick exit to be made from amphitheatres.

The decentralisation of the essential social functions of the city first occurred in medieval times. Suburbs are now a familiar and universal phenomenon. So is the idea, quite novel in pre-medieval times, that front doors of houses should face the street. What is sometimes described as the authoritarian aestheticism of a single uniform style set within a rigid town plan came later. But do not think that the gridiron model of town planning that one sees in Washington and New York is a recent idea. The chief point of origin of this system is Miletus, in ancient Greece, which was laid out, in a strictly controlled way, on a checkerboard plan. Greek colonists from the time of Alexander the Great followed this model in building their cities as did the Romans, in constructing their colonial empire. The gridiron city plan has been used for 2000 years in Western Europe and became the basis of North American town planning. Visitors to New York and Washington, take the gridiron plan for granted, and many believe that it is typical of American modernity and efficiency, but the concept has been known to humans, and applied, for thousands of years.

By the 16th century, functional zoning, based on use, was fairly strictly applied in Venice. Each of the small islands constituting the city was set aside for a particular industrial use; for example, one island was set aside for glassware, another for the production of weapons, another for shipbuilding and one for the burial of citizens. The canals served as the boundaries of these neighbourhoods as well as connecting links, functioning like the greenbelts and motorways of a well-designed modern town.

Thus, although urban planning as an organised profession has existed for less than a century, since time immemorial most cities have displayed various degrees of forethought and conscious design in their layout and functioning. As I have attempted to demonstrate, despite the infinitely diverse nature of cities there have always been common threads dictated by basic human aspirations, desires and needs. These ancient common threads of organised human habitation are a reflection of

the commonality of humanity, from which a pattern of common laws can be extracted.

By “common laws” I do not mean a common law system adopted by a particular nation, but a set of laws that are common to all or most nations. In recent times there has been much writing by academics who have attempted to draw together common legal norms and principles in different fields of law. This has particularly been the case in Europe and the European Union has been a fruitful field of research in this area. The notion of common laws (rather than common law) has been described as “the essential legal tradition, allowing unity to be preserved amongst diversity”. But, to the best of my knowledge, Les Stein’s *Principles of Planning Law* is the first work that has carried out this exercise in planning law.

In some ways, this is surprising, as planning law, by its very nature, lends itself to the notion of a set of legal principles of universal application. In modern times we have experienced conditions that have led to the development of general planning principles that are of general application today. These include a greater understanding of common human needs, the homogenisation of building and engineering techniques and materials, and the overwhelming growth of world-wide communication - resulting in a growing uniformity in human tastes and aspirations.

While, in theory, the legal principles governing town planning should be capable of definition, the degree and depth of knowledge, analysis and thought required to fulfil such a task would be formidable. The demands of such an arduous task perhaps explain why it has not previously been undertaken. But what I have said underlies the uniqueness of Les Stein’s *Principles of Planning Law*. It is, in the words of Professor McAuslan, “a triumph of scholarship”.

A production of such originality requires a deep knowledge of planning law; knowledge from every point of view. Knowledge derived from practical experience in many cities, in many countries and in different continents. And this has been Les Stein’s life. He was brought up in New York. He studied planning law at Osgoode Hall in Toronto. He has maintained planning law as his speciality for almost 40 years. In 1974 he published his first book on planning law called “*Urban Legal Problems*” while a lecturer at the University of Melbourne. He returned to Canada to be a Professor of Law at the law faculty at the University of Toronto and was also appointed the Professor of Planning at the Planning Faculty in that University. There he published several articles on planning in Canadian journals. During this time he was part of a United Nations team concerned with the drafting of planning schemes in Singapore, Thailand and India. He edited a work on *locus standi* published by Law Book Company. He emigrated to Western Australia and became a Professor of Law at the University of Western Australia. That I think, at least indirectly, explains why I am standing here this afternoon. While at the University there Les was appointed first as Deputy Chairman of the Town Planning Appeal Tribunal and was then Chairman for a total of 10 years sitting on planning appeals. In this time he published hundreds of judgments, and drafted the Western Australian Model Scheme Text used by all local authorities in that State. He worked with a colleague in the geography department at that University on writing and editing a 12 volume report on environmental issues. He has travelled extensively in India and worked at the Benares Hindi University for six months. He has travelled and lived in the Himalayas. Before writing the “*Principles of Planning Law*” he published a great deal in the area of town planning. Four years ago he came to Sydney to be Chief Counsel to the Sydney Metropolitan Strategy and was a member of the Planning Reform Committee set up by the then Minister. I have mentioned all aspects of Les’s life in an attempt to demonstrate not only the depth but the breadth of his knowledge of plan

The book is published by Oxford University Press, a publisher of long established high international repute; a publisher that will require a work to be of appropriate standard before lending its name to it. The work was highly refereed, and at different stages, before the publisher agreed to publish it.

The book is divided into eight parts or chapters that are, themselves, divided into further parts. The first chapter concerns the underpinnings of planning law. It discusses the values that underpin planning and the validity of the assumption that regulatory controls can properly result in the implementation of those values. It explores the conflict between the notion that planning should be deployed for the greater good of the community and thus override proper private property rights on the one hand, and on the other hand that property rights should not be interfered with. This of course is one of the great issues, not only of planning but of modern life in a democratic state. We all admire Paris, but the Paris of today could only have been created by an authoritarian regime. It was the virtually absolute powers of Emperor Louis Napoleon that enabled Baron Haussmann to restructure Paris by giving it long straight wide boulevards running through the heart of the city, and imposing regulations governing facades of buildings, public parks, sewers, and water works, city facilities and

public monuments. Much of the old Paris of dense and irregular medieval alleyways was destroyed, and the lives of many individuals were irremediably altered and indeed harmed. To varying degrees, issues of this kind remain of fundamental relevance. Importantly, the book identifies and discusses the principles whereby, in these modern times, State power is limited, but nevertheless in certain circumstances overrides private interest for the perceived benefit of others.

The book also examines environmental law and its relationship to planning law. It is trite to say that the preservation of the environment, the protection of natural resources and the conservation of water will determine the future course of humanity. In many ways the approach that courts adopt to these questions will be decisive to the way in which we will live in the future. The principles identified and discussed in the work relating to these issues will govern much of the litigation that is bound to occur in this area.

The book analyses different kinds of regulatory regimes created by planning instruments, such as zoning by-laws, development plans and local environment plans. It focuses on zoning devices and examines a multitude of different aspects of zoning. It discusses reservation of land, injurious affection, restrictive covenants and existing use rights. Uses and developments under planning schemes are examined in detail.

The book contains an in-depth discussion of policy and planning law and the legal principles that are involved in the formulation and application of policy. Here again, questions of fundamental importance are analysed by reference to the applicable legal principles in ways that will assist all involved in planning questions, no matter the part of Australia in which they reside.

Development control is examined in detail and the legal principles that have emerged in regard to development applications are identified and considered. The work discusses with subtlety what the author describes as the foremost consideration in the determination of a development application, namely, amenity, need, and public interest.

The book contains a valuable chapter dealing with conditions applicable to use, development and subdivision. Detailed attention is given to the nature of conditions and their validity.

The question that arises so often relating to whether a planning authority has failed to take into account all relevant considerations and not considered irrelevant material is examined by reference to the leading authorities. Considerations that are relevant and those that are not are analysed and the reasoning behind the applicable principles is explained. A full chapter is devoted to appeals and judicial review.

This brief overview of the work in itself gives no proper indication of the skill and lucidity with which the principles are extracted, examined and placed in context. I have merely attempted to give you a general idea of its subject matter.

Professor McAuslan says that Les Stein's book "is clearly destined to become one of the great books on planning law". He says "it combines an equal measure a clear and comprehensive analysis of the planning law of Australia, a critical comment on the law and its underlying ideology, and a deep contextual understanding and discussion of what the corpus of the law is trying to do: provide a legal framework for and the legal tools to manage the city, the social and economic driving force in virtually all countries and societies now". He says that he believes that the book will prove to be of great benefit to society at large". He describes the book as "this magisterial work". I do not think that I can add more to the subject than that.

[Print Page](#)[Close Window](#)

The Politics, Purpose And Reform Of The Law Of Negligence

THE POLITICS, PURPOSE AND REFORM OF THE LAW OF NEGLIGENCE [1]

Justice David Ipp AO*

In recent times, indemnity insurance has had to grapple with two features of the law of negligence that are endemic and which materially affect the insurance market. The first is the inconsistencies that have become the bane of the law of negligence. The second is the political influences of the different groups who have interests affected by the law of negligence. The second feature is a major cause of the first.

When, in 1932, the modern law of negligence was created by *Donoghue v Stevenson*, [2] the notion that it would develop its own universe of conflicting, hard-nosed, political interests was inconceivable. But that is what has occurred. The politicisation of negligence now ranges from the various State laws that regulate the negligence system to national structures. In many ways, Australia resembles the USA, where negligence law differs substantially from State to State and where tort reform is a recurring political issue. In the last New South Wales State election, the major parties were lobbied for their support for and against tort reform and leading politicians made public statements about the law of negligence. In the USA, tort reform is a continuing major political question. In the last US presidential election, stopping tort reform was part of the political manifesto of Senator John Edwards, the Democrat vice-presidential candidate, and it seems that it will feature again in the coming election.

Disparate groups are involved in the politics of negligence. The dominant figure is government, which has shown a readiness to make far-reaching laws that have transformed the law. Government is directly interested as a frequent defendant that, on a regular basis, is held liable in negligence to pay large sums of damages. Government is also required to finance public authorities of all kinds that are often defendants in negligence actions. In New South Wales, government is financially involved in the payment of awards to plaintiff workers in common law negligence claims governed by the *Workers Compensation Act 1987* (NSW). This direct involvement causes government to be concerned with the niceties of the law of negligence to a degree equalled by few other areas of the law.

Government, however, has wider interests. It has become obvious that the law of negligence is capable of influencing votes and, hence, political power. Looked at in more altruistic terms, government is, or should be, concerned with making just laws, ensuring the fair workings of society, and promoting national characteristics of independence and personal responsibility. Thus, government has become deeply concerned with how the law of negligence affects the insurance industry, health issues and local authorities.

The insurance industry wields a powerful influence in the politics of negligence. The 2002 insurance crisis demonstrated that insurance is the lifeblood, not only of commerce and industry, but of medical and other professional services, and many aspects of everyday life. The events of 2002 showed that, without the availability of reasonably priced indemnity insurance, the fabric of society is at risk.

Insurers are the most frequent defendants in negligence claims. But, while it is to their general advantage for the potential liability of insureds and damages awards to be reduced, this should not be taken too far. Too great a reduction in risk results in reduced demand for insurance. Moreover, insurers are able to cope with any risks that are capable of reasonable assessment. All that is then necessary is for insurers to calculate and charge premiums appropriate to the risk. Of course, the amount of the premiums will influence the extent of the market for cover. So, we are dealing with a situation of some complexity.

Public authorities are another group involved in the politics of negligence. At the time of the insurance crisis, they wielded considerable influence and were successful in their arguments. The reforms have gone to great lengths to protect them; some would say, further than is desirable.

The interests of the medical profession and other professions, apart from the legal profession, largely coincide with the interests of insurers and public authorities. The medical profession has proved to be a powerful and influential body as society needs to protect the essential services they provide. The 2002 reforms have ameliorated their position, however, and, although they remain potentially important

players, they are not presently active in the debate. Similar considerations apply to other professions such as accountants and engineers.

There are two principal counterweights to these forces, namely, lawyers and injured persons.

Lawyers often claim altruism as their reason for seeking to roll back tort reform, but they have difficulties with the media and the public in conveying this message. They have a basic handicap as the maintenance and increase of litigation is in their financial interest. Measures that reduce litigation reduce their income, and the converse is also the case. This produces, fairly or unfairly, scepticism amongst the community. There can be no doubt, however, that bodies such as Councils of the Bar Associations, Law Societies, the Law Council of Australia and the Australian Lawyers Alliance genuinely attempt to advance the rule of law and express legitimate concern for the less advantaged members of our society. It would be a serious error to discount their arguments without giving them careful consideration. Lawyers are not to be under-estimated in the politics of negligence.

Victims' associations are made up largely of persons who have been harmed by the negligence of others. They are a powerful lobby group. It is not difficult for these associations to produce individuals who have not been treated in a consistent way and who deserve and elicit considerable public sympathy. They, together with lawyers, are conducting an enduring and highly visible campaign for tort reform.

There is another large group that has not often made its voice heard. This is the vast number of persons who have been injured or disabled without having anyone to sue. They are interested in the politics of negligence as much money is expended in the negligence system that could be used to alleviate their problems. This group favours the abolition of the personal injuries tort system and supports a no-fault system of compensation for personal injuries.

They emphasise that victims of accidents who receive damages are fortunate when they have someone to sue, in comparison with many other victims of accidents or similar misfortunes who have no remedy. Those born with congenital disabilities have virtually no chance of recovering damages. It is often difficult to prove that disabling illnesses are the fault of someone else. Many are injured due to the negligence of others but cannot succeed owing to the absence of witnesses. [3] There are other anomalies. Take the situation where a careless driver injures his own wife. She sues him and his insurer pays. He, thereupon, shares in the damages awarded for his own negligence. There are other examples of this kind.

However, the question whether a no-fault system of compensation should be introduced is complex and difficult. It is open to question whether such systems have proved effective. Where they have been introduced, they appear to be beset by high administrative costs and lack of resources. Their own rigid categories of injuries can be productive of injustice and inconsistencies. As they are administered bureaucratically, with minimum involvement of the courts, there is little room to correct individual errors by decision-makers. There are ideological issues involved. Should the scheme be based on private enterprise or government bureaucracy? Questions of personal responsibility and the effect of social welfare on society colour the debate.

Lawyers, generally, oppose no-fault schemes. I have not seen any policy statement by the insurers on this question. Government, at present, does not appear to be in favour of an all-embracing system of no-fault compensation for personal injuries. Nevertheless, the New South Wales government has established a lifetime care and support scheme under the *Motor Accidents (Life-Time Care and Support) Act 2006* (NSW). By this scheme, treatment, rehabilitation and attendant care will be provided to persons who have been severely injured in motor accidents, regardless of who was at fault. Essentially, the introduction of a no-fault scheme is a political issue in the larger sense. Although largely dormant, it is very much alive.

These disparate views, opposing interests and continuing arguments raise the question: what is the purpose of the law of negligence?

Usually, it is said that the true purposes of the tort of negligence are corrective justice and deterrence. Corrective justice aims, by ordering wrongdoers to pay injured persons money, to correct the injustice that has occurred. The difficulty, however, is that the guilty individual hardly ever pays the damages or even the insurance premiums. Most tort liability for personal injuries is imposed on insurers or employer corporations or public authorities. The insurers pay the damages and the corporations or authorities pay the premiums, or act as self-insurers. The notion that tort law ordinarily requires negligent individuals to pay for the consequences of their negligence is not true. [4] Furthermore, only a

very small percentage of injured persons receive tort damages. Most receive assistance solely through social welfare.

The purpose of deterrence is self-evident. Some say that by holding defendants liable and making them pay compensation, others will be deterred from causing injury. The growth of insurance, however, is destructive of this argument. Defendants seldom pay compensation themselves. Payment of damages is, therefore, not a major deterrent.

Nevertheless, almost all persons, especially those who are concerned with their professional or business reputations, have a great dislike of being found to be negligent. In the course of the tort reform process, I became convinced, for example, that the fear of being sued and found to have been negligent was causing those involved in medical practice, particularly hospital managers, to focus very carefully on their procedures and standards. This fear applies to almost all persons and entities and is an important deterrent against negligent conduct.

Additionally, the existence of the tort of negligence, and the open court process in adjudicating upon negligence, satisfies a deep need of society, namely, the public exposure of negligent conduct, irrespective of the political importance or economic or social standing of the defendant. The curial process promotes the sense of justice being done without fear and favour. The law of negligence should protect and attribute liability to all, and in an equal way, irrespective of the identity, race, religion, politics and occupation of the parties. In this way, the law of negligence is an essential part of democratic society and the rule of law. These matters bear on the current inconsistencies in the laws of negligence and the way in which parts of those laws are administered.

Five years ago, the law of negligence was out of balance. The perception was that plaintiffs were succeeding far too easily and receiving damages so high that the community was disturbed. Some insurers had left Australia. Others refused to provide indemnity cover. Premiums were extremely high. Society was suffering. This led to tort reform legislation, designed to limit liability and damages, being passed in the Commonwealth and in every State and Territory; a striking demonstration of government interest and power in the law of negligence.

Far-reaching changes were made. The more important included raising the standard of care, defining the general principles applicable, limiting liability for dangerous recreational activities, giving increased importance to obvious risks and risk warnings, imposing limits on claims for future economic loss and claims for gratuitous care, providing thresholds for non-economic loss, abolishing exemplary, punitive and aggravated damages, providing for structured settlements, and imposing limits on claims for pure mental harm. A modified *Bolam* [5] test was introduced that now applies to all professions, not only doctors. The *Trade Practices Act 1974* (Cth) and the *Fair Trading Acts* were amended to prevent individuals bringing actions for damages for personal injury and death by reason of misleading or deceptive conduct. Consumers once more have to prove that their personal injury damages were caused by fault. The laws relating to limitation of actions relating to negligent personal injury claims have been transformed. The critical date for limitation purposes is now the date when plaintiffs first learn that they have been harmed and that some other person was responsible. Subject to certain safeguards, time runs against children and mentally incapacitated persons.

Significant changes were made to the assessment of damages. Throughout the country, there are now various legislative provisions relating to thresholds and caps. Many of these thresholds and caps are arbitrary, but there is no way, based on recognised legal principle, that could inform the selection of thresholds and caps.

One of the main purposes of the caps and thresholds was to weed out small claims. In 2002, small claims and their administrative and legal costs formed almost half of amounts paid by defendants and this, legislatures thought, was out of proportion to the overall benefit to the community. The view was taken that it was more important to provide for compensation for those who were more seriously injured and to keep premiums at a reasonable level. The reforming legislation contains several provisions designed to discourage small claims. These provisions appear to have served their purpose. Many injured persons, for whom it is now not economically worthwhile to sue, strenuously object to these laws but, at this stage, the impetus to remove them is not strong.

In some important respects, the reforms went substantially further than the recommendations of the Panel appointed in 2002 by the Commonwealth, State and Territory governments to review the law of negligence. This can readily be seen from an examination, for example, of the New South Wales *Civil Liability Act 2002*.

By that Act, protection far beyond that recommended by the Panel was afforded to public authorities. The Panel had recommended that decisions, based substantially on factors of policy, should not be used to support findings of negligence against public authorities, unless the policy decision of the defendant authority concerned was so unreasonable that no reasonable public functionary in the defendant's position could have made it. Section 43 of the Act, however, provides that *any* act or omission of a public authority, of whatever kind, does not constitute a breach of statutory duty unless the act or omission was so unreasonable that it could not be regarded as a reasonable exercise of the functions of the authority. The point I am making, that does not seem to have been generally understood, is that s 43 does not merely protect public authorities against liability for policy decisions. It limits liability for breach of statutory duty resulting from *any* act or omission of any kind – whether it be a policy decision or not. It is a hurdle in the way of *all* claims (not only those based on policy decisions) against public authorities for breach of statutory duty. It is substantially inconsistent with the notion that the Crown and government authorities should be treated before the law in the same way as an ordinary citizen.

A further protection the *Civil Liability Act* affords specifically to road authorities, not recommended by the Panel, is non-feasance protection that, in effect, reverses *Ghantous v Hawkesbury City Council*.^[6] This is a classical political decision of a kind that, in our system, is left to parliament to undertake. Contrary to the recommendation of the Panel, the *Civil Liability Act* contains several provisions conferring limited protection on volunteers for their negligent acts. Also, contrary to the recommendations of the Panel, the Act confers protection from personal liability on “good Samaritans”. Other legislative changes that the Panel did not recommend include the presumption of contributory negligence where the plaintiff was intoxicated and limitations on liability in respect of criminals. These changes, while they have a populist flavour and involve treating categories of persons differently to others, also fall within the traditional powers of parliament. They affect a limited number of plaintiffs and do not cause recurring difficulties stemming from inconsistencies in the law such as those created by the multiplicity of statutes governing negligent conduct.

The *Civil Liability Act* introduces proportionate liability in respect of claims for economic loss and damage to property, only. Under a proportionate liability regime, because a plaintiff bears the risk of one defendant's insolvency, a person who is harmed by two people may be worse off than a person who is harmed by one. Conversely, a person who negligently causes harm to another will be better off merely because someone else also caused the harm. Parliament, nevertheless, decided that it was appropriate for proportionate liability to apply to economic claims.

Five years after the reforms, there has been a metamorphosis. The insurance crisis has abated. There has been a substantial increase in the number of public liability risks written across Australia. ^[7] Insurers are declaring far greater profits and there is a newfound air of confidence in the insurance industry. A Commonwealth government review of medical indemnity has found that doctors can now obtain affordable indemnity insurance cover. Medical indemnity rates have reduced significantly. ^[8] Local authorities no longer complain that insurance problems prevent them from providing essential services. The cost and difficulties of obtaining cover are no longer the subject of media comment.

There is, however, a perception amongst some that the pendulum has swung too far in the opposite direction. Judges at the highest level have expressed unease. The legal profession and victims' associations are unhappy and are clamouring for change. They are conducting a well-orchestrated campaign for reform. This brings about an atmosphere of uncertainty and instability.

A noteworthy aspect of this campaign is that it is not directed against the provisions of the *Civil Liability Act*. There appears to be an acceptance that those provisions, on a general basis, are reasonable, balanced, and not unfair. The campaign is, rather, directed against inconsistencies and procedures in other negligence-related legislation and the unfairness that they produce. The *Civil Liability Act*, in fact, is being used as a model against which the other legislation is being unfavourably compared.

The major areas of contention are the different ways thresholds are used under the *Civil Liability Act*, the *Workers Compensation Act* (insofar as it applies to common law claims) and the *Motor Accidents Compensation Act 1999* (NSW).

Under the *Civil Liability Act*, the threshold for damages for non-economic loss is 15% of a most extreme case. ^[9] Under the *Workers Compensation Act*, no damages may be awarded to an injured worker unless the injury results in permanent impairment of at least 15% and no regard is to be had to secondary psychological injuries. ^[10] Under the *Motor Accidents Compensation Act*, no damages may be awarded for non-economic loss unless permanent impairment is greater than 10%.

Permanent impairment is a very different concept to a percentage of the most extreme case as laid down by the *Civil Liability Act*. The concept of permanent impairment is based on the American Medical Association Guide to the Evaluation of Permanent Impairment and relates to "whole of body". Peculiarly, decisions under the *Workers Compensation Act* are based on the fifth edition whereas those under the *Motor Accidents Compensation Act* are based on the fourth edition. [11] There are differences between the two editions. The Guide, although laying down objective criteria, is based on arbitrary standards without reference to the concept of pain and suffering. By way of illustration, by the Guide, a back injury requiring a fusion operation is to be assessed substantially below the threshold of 10% permanent impairment. This kind of injury will ordinarily prevent workers whose work involves physical activities from being able to continue performing that work. But, by the application of the Guides, the thresholds will not be met.

A curious aspect of the differences in the legislation is that the most onerous threshold for plaintiffs, by far, is that imposed on workers by the *Workers Compensation Act*. That is, on the most productive group in the community; arguably, the group most in need of protection against the negligence of others. The reason for this discrimination has not been given, although there is cause for suspicion. As detectives say in the movies: follow the money.

The schemes for the measure of damages as provided by the *Workers Compensation Act* and the *Motor Accidents Compensation Act* are far removed from a balanced system of objective criteria, the achievement of which might be thought desirable. Essentially, these schemes constitute a table of maims, a system with which ancient and medieval life was familiar, but which disappeared for hundreds of years from civilised societies. It is not something that developed legal systems based on the common law have generally accepted, largely because it has no regard to the circumstances of the individual case. It does not cater for the fact that, for example, the loss of a leg may mean far more to a ballerina than a computer operator.

It is now possible, for example, for three victims who sustain like injuries in one accident to receive vastly different damages awards (and, if one of the three is a worker whose claim is governed by the *Workers Compensation Act*, he or she may receive no damages at all). The point is that a claimant may receive a different award for the same injury, depending on whether the injury was sustained at work, in a motor accident or in the course of some other activity.

Then, again, different caps and thresholds apply in the different States and Territories so that a plaintiff in one State will receive a different amount for the same damages as plaintiffs with the same injuries in other States. The divergences in legislation can produce differences amounting to hundreds of thousands of dollars.

In the course of the 2002 negligence review, many stressed the desirability of bringing the law in all the Australian jurisdictions as far as possible into conformity. The Panel unqualifiedly supported this aspiration. It warned that if it were not fulfilled, perceptions of injustice would result. [12] The Panel pointed out that there was no reason, for example, why a person should receive less damages for an injury sustained in a motor accident than for one suffered while on holiday at the beach.

While consistency and coherence in the law of negligence are of fundamental importance to justice, generally, they are of particular importance to insurers. Insurers have made it clear that the lack of national consistency in the law relating to the quantum of damages make it more difficult for them to predict reliably the likely extent of liability of insureds. This translates into difficulties in setting premiums and probably results in higher premiums.

It is as well to remember that a major cause of the insurance crisis that led to the *Civil Liability Act* was inconsistency in judicial decision-making. The differences in the legislation now give rise to new inconsistencies that are, potentially, as serious – if not more so. They lie at the heart of the present dissatisfaction constantly and vociferously being aired by lawyers and victims' associations. The basic problem is that the law is not treating all citizens equally. Grievances of this kind make the law of negligence unstable. Community pressure is liable to produce changes.

There are other important differences between these three statutes that have given rise to other, but equally heartfelt, criticism. These go to rule of law issues.

Under the *Civil Liability Act*, the courts determine the damages thresholds in the traditional and normal way. This is to be contrasted with the workers compensation legislation (insofar as it applies to common law claims) and the *Motor Accidents Compensation Act*.

Under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW) (the “1998 Act”), medical practitioners, appointed by the President of the Workers Compensation Commission as “approved medical specialists”, determine the threshold of permanent impairment. [13] Their assessment is crucial to the success of a plaintiff’s claim as, if the threshold is not met, the plaintiff’s claim cannot proceed. I reiterate that, although the assessment is a requirement of the *Workers Compensation Act*, it has nothing to do with workers compensation. It applies to claims for common law negligence under the Act.

In matters of pure workers compensation, where liability is purely statutory (and strict), it has long been customary, in virtually all jurisdictions, for the physical and mental condition of worker claimants to be assessed by medical practitioners appointed by the State. No complaint is made about that. The troubling aspect of the system, however, is that the same system is being applied to determine crucial elements of common law negligence, which is a cause of action of an entirely different character.

The so-called “approved medical specialists” have no security of tenure. They may be appointed for a specific case or a specific period. Although the State has a financial interest in damages awards under the *Workers Compensation Act*, it nevertheless appoints, on a contract basis, the medical practitioners who determine issues that condition liability to pay damages. A disinterested observer may think this power of continuing appointment is capable of influencing the decisions of those medical practitioners who wish to have their contracts renewed. This is the test in law for perception of bias on the part of an adjudicator. The perception arises even if the adjudicator is a person of the highest integrity.

The legislation does not expressly prevent the approved medical specialists – concurrently with undertaking their assessments – from practising privately as medico-legal advisers, even though they may have done, or actually be doing, other work for the solicitors or even a party to the dispute. In other words, the approved medical specialists may be in receipt of considerable income from solicitors or a party to a threshold dispute. This is another factor that goes to the perception of bias. Who would feel secure knowing that the person deciding their case is being paid for doing other work for the opposition?

The legislation does not require the medical practitioners to have any particular training or qualification. They do not even have to be medical specialists recognised by the established medical colleges (despite the appellation conferred on them by the statute). They may be retired from practice and not up to date in the field of the injuries in question in the case before them. They may be appointed to decide issues in regard to which they have no particular medical expertise. The legislation does not require assessments by approved medical specialists to be made in the equivalent of open court.

Moreover, an approved medical specialist may “consult with any medical practitioner or other health care professional who is treating or has treated the worker”. [14] The *Workers Compensation Act* seems to assume that such a consultation may take place behind closed doors without any representatives of the parties being present, or even without the parties knowing that the “specialist” is being given advice. These factors would not give the parties any confidence in the decision-making process.

Under the *Motor Accidents Compensation Act*, medical practitioners “and other suitably qualified persons” appointed as medical assessors by the Motor Accidents Authority of New South Wales decide disputes about the permanent impairment of a person injured in a motor accident and other aspects of the person’s health and treatment. [15] The decision as to the degree of permanent impairment determines whether a plaintiff may recover non-economic loss. Other decisions by the medical assessors are capable of materially affecting the amount of the award. Many of the comments I have made in regard to the appointment and use of approved medical specialists under the *Workers Compensation Act* apply to medical assessors under the *Motor Accidents Compensation Act*. [16]

The systems of adjudication under these Acts lack the institutional safeguards inherent in the traditional judicial system of deciding negligence claims. That is, involving decision-making in open court, without fear or favour, by independent professional judges appointed in the time-honoured way. This watering down of the functions of the courts, and perceptions of serious defects in the process as a whole, have given rise to grievances on the part of many claimants identified by bodies such as the New South Wales Bar Association in its public campaign.

I recognise that there is a possibility that, despite the problems with the legislation, some insurers may prefer the *Workers Compensation Act* or the *Motor Accidents Compensation Act* models to the *Civil Liability Act*. Firstly, calls to issues of judicial independence may not ring as loudly for insurers as they do for lawyers. Secondly, because of the past history of judicial over-generosity with plaintiffs’ claims,

some insurers may be sceptical of the notion that judges are more reliable and consistent decision-makers than medical practitioners who have been made adjudicators. Thirdly, removing the medical practitioner adjudicators would mean more work for lawyers and greater transactional costs. These costs would be lawyers' fees for conducting litigation before judges in connection with the issues that are presently being resolved in private by the approved medical specialists and medical assessors. The additional transactional costs would translate into higher premiums, and this might affect parts of the insurers' business. These arguments need to be addressed.

As regards the rule of law issues that I have identified, I do not think it necessary to attempt to justify the desirability of a system of administration of justice whereby potentially life-altering decisions are made in the course of contested common law litigation by independent judges, rather than medical practitioners whose appointment and procedures are coloured by the problems I have identified.

As regards consistency questions, it is significant that the *Civil Liability Act* has been in force for some five years. Sufficient decisions have been given to enable insurers to determine whether an appropriate level of consistency has been maintained. I believe that the answer to this question is likely to be in the affirmative. Anecdotally, there has been no threshold creep. If that is correct, and consistency has been maintained, there is good reason to believe that the consistency will continue. In my view, the *Civil Liability Act* has produced a change of culture that has broken down the attitudes of former times. I would add that, in contrast, according to the lawyers' complaints, there has been much inconsistency in the decisions of the medical practitioner adjudicators.

The question of increased costs and higher premiums is a difficult and complex issue, not only for insurers but for government as well. But, there seems to be room to move. Take the different spins the insurers and the lawyers put on the latest insurance statistics. The figures appear to be common ground. In 2006, average compulsory third party premiums dropped to \$309 from \$428 in 1999. Workers compensation premiums have reduced by 20% in 2005/2006. Since 2001, permanent impairment benefits for injured workers have increased by 10%. In 2006, workers compensation produced a surplus of \$85 million compared with a deficit of \$3.2 billion in 2002. Average public liability premiums have reduced from \$994 in 2003 to \$801 in 2006. Since 2003, the number of public liability premiums paid and received has increased from 610,000 to nearly 700,000 in 2005. Insurers are proud of these figures. They assert that they show that the system is working fairly. Premiums have dropped, cover has increased and so have benefits. The lawyers argue differently. They complain that insurers' profits have increased substantially while payouts to injured persons have decreased substantially.

A disinterested observer might say there is merit in both points of view. Importantly, it appears from these statistics that there is space for negotiation and compromise with a view to attaining stability in the long term. That would be of great benefit to all: insurers, lawyers, and the general community.

While higher premiums would be an undesirable result, much may depend on how high the increase would be. One would have to balance the burden to the community in increased premiums against the quality of justice delivered.

It also has to be acknowledged that different insurers are involved in providing cover under the different statutes and their financial interests might differ. This is an obstacle to achieving uniformity of approach. I would suggest, however, that the obvious long-term benefits to all of consistency and stability might allow even this obstacle to be overcome.

This brings me to my final point. The lawyers' campaign is treated generally as being one side of a conflict between lawyers and insurers. I doubt, however, when properly understood, that this is so. The campaign, essentially, is for consistency with the *Civil Liability Act*. The *Civil Liability Act* has long been supported, and approved by, those who represent insurers. Consistency in the law of negligence can only be to the benefit of the insurance industry. In 2002, this was a main plank of the insurers' submissions. There is much room for common ground.

While the benefits of harmonisation, both within States and nationally, would be felt most obviously in the practical field of assessment of risks, there are other benefits. The present atmosphere of conflict, the heated language and the intense level of debate tend to harm the general goodwill of insurers in the community. The conflict is time consuming, expensive and undesirable. It tends to destabilise the industry and the law.

Nowadays, the main focus of attention in regard to inconsistencies in the law is State and territory legislation. But one should not lose sight of the federal government looming in the background. Comcare already undertakes the provision of workers compensation and *Attorney-General (Vic) v*

Andrews[17] is an encouragement to the Commonwealth to expand its reach. Penetration by the federal government into the area of indemnity insurance has the potential to control, or at least influence, the elements of the law of negligence, and the direction of such control or influence is likely to depend on the ideology of whichever party wins the next Commonwealth election. Whether such penetration will occur may depend substantially on whether the present dissatisfaction and differences of opinion between lawyers and victims, on the one hand, and insurers, on the other, can be resolved. If lawyers and insurers wish to bring stability to the state of the law, and to use the *Civil Liability Act* as the standard, now is the time.

In many ways, there is now a window of opportunity to arrive at a united front comprising lawyers and insurers, difficult as that may be, initially, to envisage. Many of the other groups who played a vital part in the reforms of 2002 are not particularly interested in the present debate, as long as the status quo represented by the *Civil Liability Act* is maintained. This applies, in particular, to public authorities and the medical and other professions. Those who presently have a serious interest in the issues are only government, insurers, lawyers and victims' associations. And, to an extent, there has been a change amongst those who wield legislative power in government.

Accordingly, there is scope for insurers to join forces with lawyers to make approaches to government, both within States and nationally, to achieve a greater degree of harmonisation of the law than is presently the case.

There is a clear clash of values and interests between the different participants in the politics of negligence. The clash, however, although clear, need not necessarily result in blindness to what is at stake. Clarity of vision, restraint, leadership, and wisdom are capable of leading to a fair, and reasonably harmonious, set of laws of negligence that will enable all to get on with the ordinary business of life.

It is obvious that unease with the current law of negligence remains, although it is now of a kind that is different from the dissatisfaction that prevailed before the reforms. In recent months, I have spoken about these issues to lawyers, insurers and others. This paper is my last shot at assisting the process.

End Notes

1. Edited version of paper delivered to conference of Australian Insurance Law Association at Noosa on 17 May 2007
- *Judge of Appeal, Supreme Court of New South Wales
2. [1932] AC 562.
3. See the discussion in P S Atiyah, "Personal Injuries in the Twenty-First Century: Thinking the Unthinkable" in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996, Oxford: Clarendon Press) at 22 in regard to the issues raised in this paragraph from which the examples given are derived.
4. See Atiyah, *id* at 13.
5. *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.
6. (2001) 206 CLR 512.
7. See Australian Prudential Regulation Authority, *National Claims and Policies Database* (available at <http://www.ncpd.apra.gov.au/Home/Home.aspx>).
8. The Hon Tony Abbott MP, Minister for Health and Ageing, Media Release: 'Medical Indemnity: more affordable, more secure' (22 February 2007).
9. Section 16(1). Further, under the *Civil Liability Act*, thresholds are imposed for gratuitous attendant care services and for loss of capacity to provide domestic services. The Act provides for the maximum that might be claimed for past or future economic loss by reference to three times the amount of average weekly earnings at the date of the award.
10. Section 151H. Further, the threshold under the *Workers Compensation Act* is not met unless physical injury alone or primary psychological injury alone causes at least 15% permanent impairment. Limitations (different to those under the *Civil Liability Act*) are imposed on damages for future economic loss.
11. Information provided by Dr K Wilding.
12. Commonwealth of Australia, *Review of the Law of Negligence, Final Report* (September 2002) at paras 13.13 and 13.14.
13. Section 320.
14. See s 324(1) of the 1998 Act.
15. See ss 58 and 59 of the *Motor Accidents Compensation Act*.
16. The State is not involved in financing the insurance of defendants under the *Motor Accidents Compensation Act*.
17. [2007] HCA 9 (21 March 2007).

Print Page

Close Window

The Metamorphosis of Slip and Fall

The Metamorphosis of Slip and Fall* The Hon Justice D A Ipp AO**

1 Before I commence with my designated topic, there is something I would like to say two things about the legislative reforms to the law of negligence in personal injury actions.

2 The first thing is this. Many reforms have been made. Several of these were recommended by the panel in which I participated. Several were not. I approve of those reforms that the panel recommended. In many respects, the reforming legislation goes further, sometimes much further, than the recommendations. I expressed concerns about this two weeks ago in a paper I delivered at a conference to celebrate the eightieth anniversary of the publication of the *Australian Law Journal*. I said:

“Certain of the statutory barriers that plaintiffs now face are inordinately high. ... Small claims for personal injuries are a thing of the past. Establishing liability in connection with recreational activities has become difficult. Stringent caps on damages and costs penalties make most plaintiffs think twice before suing. Public authorities are given a host of novel and powerful defences that are in conflict with the notion that the Crown and government authorities should be treated before the law in the same way as an ordinary citizen. It is difficult to accept that public sentiment will allow all these changes to remain long-term features of the law.”

3 In 2005, in *Landon v Ferguson*[1] (with the concurrence of Hodgson and Santow JJA), I said:

“The statutes in this State relating to workers compensation and common law damages claims by workers against their employers and others can be described as a hodge-podge. No consistent thread of principle can be detected. For example, the caps on damages under the Workers Compensation Act are lower than the caps under the Motor Accidents Compensation Act. Some workers’ injuries occur in circumstances where the workers are required to bring their claims under the Workers Compensation Act. In other circumstances workers are required to bring their claims for damages under the Motor Accidents Compensation Act. In yet other circumstances neither Act applies, but other legislation governs the claims. No detectable rational reason explains the difference in categories. In some cases it is difficult to discern under which particular statute the case falls, and difficult and sometimes illogical distinctions have to be drawn.”

4 Differences of this kind and lack of consistency in particular respects can lead to anomalies and unfairness; see for example *State of New South Wales v Ball* [2].

5 Secondly, I want to tell you a story recounted by Conor Cruise O’Brien, the great Irish statesman. It concerns a speech by Adlai Stevenson, a man well-known for having been twice defeated by General Eisenhower in close presidential elections. Adlai Stevenson eventually became the United States ambassador to the United Nations. He did so at a time when Conor Cruise O’Brien was the Irish ambassador. Delegates to the UN sit in the alphabetical order of the countries they represent. For that reason, when O’Brien, as the ambassador of Ireland, attended meetings at the UN, the Israeli ambassador sat immediately adjacent to him, to his right.

6 On a dark and miserable morning early in 1961, O’Brien was listening to Adlai Stevenson addressing the United Nations about the Bay of Pigs fiasco. Stevenson was explaining – falsely – that

the United States had had nothing to do with the Cuban invasion. This was, as it had to be, a dreadful speech, full of obvious official lies. Stevenson was very uncomfortable with what he was saying. He was noted for his fastidious choice of words but the speech he read out consisted of great gobbets of untreated bureaucratic prose. Stevenson read this stuff as if he had never seen it before, which was probably the case. He stumbled over his words in a most uncharacteristic way.

7 While this unfortunate performance dragged on, the Israeli ambassador sat next to O'Brien, his face impassive. The Caribbean has never been a region of the highest priority for Israel. Adlai Stevenson at last came to his climactic peroration. "I have told you of Castro's crimes against *man*. But there is even worse", he cried. There are Castro's crimes against *God*. "Fidel Castro has" – Stevenson turned his page and peered at his new one. "Castro" - he burst forth – "has ... *circumcised* the freedoms of the Catholics of Cuba". At this observation, the Israeli ambassador looked up sharply and turned to Conor Cruise O'Brien. "I always knew", he muttered, "that, sooner or later, we would be blamed for this". I have come to know how he felt.

8 I have sometimes thought that the recent history of the slip and fall cause of action can be told in the form of a modern legal cautionary fairy tale. It would go like this.

9 Once upon a time, there lived a diffident little cause of action called Slip and Fall. For very many years, this cause of action lived quietly and serenely in her own little onion patch (in a fairy story, one is allowed to be gender specific). There, Slip and Fall modestly operated, quite happy with her lot in life. At this time, she was under the protection of a stern and powerful guardian, called the Highway Rule. The Highway Rule blocked anyone interfering with Slip and Fall, but at the same time prevented her from operating outside her onion patch.

10 After more than 100 years of this serene existence, and despite the basic contentment that pervaded the life of Slip and Fall, shades of difference began to grow between her and the Highway Rule. These differences involved the limits of the onion patch. Save in exceptional cases, the Highway Rule prevented Slip and Fall from operating in cases of acts of non-feasance by a highway authority. She had to remain quiescent when a plaintiff tripped on an artificial structure. Much depended on whether the road authority was making a policy or operational decision. So, a great deal of argument ensued as to where the boundaries of the onion patch lay.

11 These boundary disputes made Slip and Fall dissatisfied. The grass beyond the onion patch began to look very much greener. She yearned to escape from the close embrace and control of her guardian, who had become tired and was regarded by many as old-fashioned. She began to lose her unambitious and modest disposition. She wanted to be free to roam around untrammelled by the Highway Rule.

12 In her dissatisfied state, Slip and Fall then took a fatally irreversible step. She called in aid the services of a terrible and fierce knight, Sir Ghantous Brodie, who was then, may I say, in his prime. Sir Ghantous made a violent assault on the Highway Rule and eventually prevailed. The final great battle took place in Garbar's Tower, an imposing edifice occupied by seven all-wise High Wizards. Sir Ghantous Brodie obtained the support of four of the seven Wizards and thereby obliterated the Highway Rule.

13 "Free at last", cried Slip and Fall. "No more guardian, no more boundaries; I have escaped the onion patch. I can roam where I wish." But, alas, the grass on the other side was not as green as it looked. In the course of his assault, Sir Ghantous Brodie had kicked out at a few pebbles which rolled into a dark and deep lake. Living, almost somnolent, in the dark and gloomy depths, was a monstrous troll.

14 Appearances by this appalling being were rare, but there were rumours that he was becoming restless. The problem was that the pebbles that Sir Ghantous Brodie had kicked into the lake were not the first to tickle the troll. Worst of all, a large boulder, named HIH, had recently fallen into the lake and caused many waves. The troll gradually awakened from his slumber.

15 Now I am sure you realise that this troll was the personification of Legislative Tort Reform. He slowly rose from the depths and, as he surfaced, he called for aid from four ghastly ogres. These took the human form of a judge, a law professor, a surgeon and a mayor. The troll and the panel of ogres crawled out of the lake and burst into action. Apart from interfering with life in many ways, they proceeded to make Slip and Fall subservient to the troll's will. They employed what some regard as instruments of oppression. These have become known as Limitations on Suing Statutory Authorities,

The Resources Defence and Obviousness of Risk.

16 So, Slip and Fall's freedom, in many respects, became more limited than when she lived her modest life under the Highway Rule. The perceived advantages of getting rid of the Highway Rule were subject to the law of unintended consequences. These consequences were not very pleasant to the little cause of action. She became subject to powerful constraints that she had not before experienced. Great knights, called Leading Silks, took notice of her when previously they would not have given her the time of day. And this attention was not always pleasant, though it was always very expensive. Also, Slip and Fall had to make several visits to Garbar's Tower, when, before the assault by Sir Ghantous Brodie, decades would pass before this would occur. Many times Slip and Fall has failed when she would have been successful under the Highway Rule.

17 And so, Slip and Fall wonders whether Sir Ghantous's victory was beneficial, and whether the grass outside the onion patch was truly greener. Maybe one day the great troll in the lake will be roused again; this time to free Slip and Fall. But after its extraordinary paroxysm, the troll is once again lying exhausted and apparently somnolent in the dark and muddy depths. Whether he will reverse some of his changes is a matter of speculation.

18 I will now turn to some black letter law. I propose to discuss, particularly, the statutory provisions that now apply to limitations on suing statutory authorities, the resources defence and obviousness of risk.

19 To roll back *Ghantous v Hawkesbury City Council*[3], New South Wales enacted a partial immunity for highway authorities. Section 45(1) of the *Civil Liability Act 2002 (NSW)* provides that a roads authority is not liable for harm arising from a failure to carry out road work, or to consider carrying out road work, unless the authority has actual knowledge of the risk that materialises.

20 The effect of s 45(1) is that, unless a roads authority has actual knowledge of the defect in the roadwork, it will not be liable for a failure on its part to repair or remove the defect. This is a serious inroad into the abolition of the highway rule.

21 Perhaps the answer is to follow the example of the New York Plaintiff Lawyers' Association, or, as they call themselves, the trial lawyers of New York City. The story is told by Spigelman CJ [4]. The city of New York attempted to control its burgeoning litigation bill by adopting a law to the effect that the city could not be sued for a defect in a road or sidewalk unless it had had 15 days' notice of the specific defect. The New York trial lawyers established the BAPSPC. This acronym stands for the Big Apple Pothole and Sidewalk Protection Committee. The function of this committee was to employ persons to tour the streets and footpaths of New York continually and to note each and every blemish. The committee members would then, forthwith, give the city of New York precise details of each defect. Regular reports cataloguing the notices that had been given to the City were available for sale to trial lawyers. At any one time the total cost of curing the defects of which the City had been given notice were several billion dollars. In 2004 the Mayor of New York complained that in the calendar year of 2002 alone, the City received 5,200 maps from BAPSPC spotters that identified some 700,000 blemishes. Needless to say, the City has never successfully defended a case under the 15 days' notice law.

22 The question of what is meant by "actual knowledge" in s 45(1) was recently considered in *North Sydney City Council v Roman* [5]. Two members of the Court of Appeal, Bryson and Basten JJA, held that, by that section, actual knowledge must be found in the mind of a council officer who has delegated or statutory authority to carry out the necessary repairs. On this basis, where no Council officer at a decision-making level has actual knowledge of the particular defect, immunity is conferred.

23 McColl JA dissented. Her Honour discussed the knowledge of persons such as ordinary Council workers, who learn of a defect in a road while acting in the scope of their duties and who are under a duty to report it. She held that their knowledge is to be attributed to the Council. This approach is consistent with the general law concerning the attribution of knowledge.

24 McColl JA observed [6] that the approach of the majority would discourage roads authorities from setting up effective risk reporting systems. The more incompetent the street sweeper is in reporting holes in the roads, the better the position of the Council. This is an incongruous result. Whether *Roman* is the last word on this issue is open to question.

25 Another statutory limitation on suing public authorities, introduced by the Civil Liability Act, is s 43.

Section 43(1) applies to proceedings for civil liability to the extent that such liability is based on a breach of a statutory duty by a public or other authority in connection with the exercise of, or a failure to exercise, a function of the authority. Section 43(2) provides:

“... , an act or omission of the authority does not constitute a breach of statutory duty unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions.”

26 Section 43(2) thus introduces a concept of administrative law, namely the *Wednesbury* test, where it is alleged that a public authority has breached a statutory duty in exercising, or failing to exercise, one of its functions. It constitutes a serious barrier for plaintiffs who wish to prove liability on the part of an authority. Section 43(2) goes much further than the recommendations of the negligence review panel, which proposed the application of the *Wednesbury* test only in regard to decisions based substantially on financial, political or social factors. Section 43(2), however, applies generally to all actions falling within s 43(1).

27 It is surprising that, while so much energy has been expended in opposition to so many of the various tort reforms, so little attention has been paid to the alteration to the law effected by s 43. It significantly limits the potential liability of the Crown in an area where over many years there was a struggle to require the Crown and governmental authority to be treated before the law in the same way as an ordinary citizen. Nevertheless, while voices have been raised in criticism of so many other reforms, there has been virtual silence in regard to the barrier to liability created by s 43.

28 I suggest, however, that the section does not apply to highway authorities in slip and fall cases. This needs some explanation. The essential question in such cases is whether, in exercising or failing to exercise its powers, the authority was in breach of a duty of care owed to a class of persons that included the plaintiff. [7] This question focuses on the statutory powers of the relevant public body.

29 The High Court “has favoured the imposition of a duty of care requiring the exercise of statutory powers affecting the safety of users of public roads”[8]. The point is that the powers vested by statute in the highway authority generally give it “such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care” [9]. It is to be emphasized that, while the basic claim is that the public authority was negligent because it failed to exercise statutory powers, the action, itself, is a common law action for breach of duty of care [10].

30 As the action against a highway authority is not based on a breach of a statutory duty, but on the breach of a common law duty of care, s 43 will not apply. That is so even though the breach amounts to a failure to exercise statutory powers or a wrongful exercise of such powers.

31 I turn now to the resources defence. Although this has always been part of the common law, it is now the subject of statutory formulation as contained in s 42 of the *Civil Liability Act*. This section provides that the general allocation by the authority of the financial and other resources that are reasonably available to it for the purposes of exercising its functions is not open to challenge. That is, the general allocation of financial and other resources by an authority is not justiciable. The section also provides that the functions the authority is required to exercise are to be determined by reference to the broad range of its activities and not merely by reference to the issues to which the proceedings relate.

32 Notionally, resources affect private entities as well as public bodies. Prof Mark Aronson has told me that John Fleming drew his attention to the fact that, sometimes, private defendants make decisions about the allocation of scarce resources, or decisions about the allocation of risks as between different groups, just as public bodies do. General Motors, for example, have at times decided to build heavier cars to protect their occupants at the expense of pedestrians, and at other times have decided to design lighter cars to save petrol at the cost of extra risk for their occupants. The *Civil Liability Act*, however, gives only public authorities the benefit of the resources defence.

33 The resources defence has, so far, not proved to be very successful. It has seldom been upheld. There are two principal reasons for this lack of success.

34 The first is that the High Court has held that where a defence involving availability of resources and

conflicting priorities is raised, there is an evidentiary onus on the defendant to prove why these matters reasonably justify its conduct in not taking particular measures for which the plaintiff contends [11].

35 The second is that defendants who have raised this defence have, so far, generally speaking, not called witnesses who are in a position to support the reliance by the authority on an absence of resources. The authorities have tended to rely simply on the production of their financial accounts or the explanatory evidence of a relatively low level official. In *RTA v Dederer*, for example, the NSW Court of Appeal was substantially influenced by the fact that the witness called by the authority was not a person who had the power to authorise the expenditure of funds to carry out the remedial measures for which the plaintiff contended.

36 I would add that it is open to question whether the statutory denial of justiciability of the “general allocation” of resources (as provided by s 42(b)) will be effective in all cases to preclude a challenge to a resources defence. The section denies the justiciability of the *general* allocation of resources by the authority. In most cases involving the condition of a highway the authority concerned allocates a substantial sum of money for maintenance and repair of highways. Usually, there is no allocation for a specific highway. What happens is that a sub-committee of the highway authority will decide how the general allocation of resources for highways is to be spent. This may involve deciding how to allocate resources in a specific area, involving a number of highways, or to a specific highway. Whether such a decision is to be regarded as a *general* allocation of resources within the section is open to argument.

37 At common law, evidence respecting funding constraints and competing priorities is admissible [12]. In *Ghantous*, the majority said [13] that it was no answer to a claim in tort that the wrongful acts or omissions of a public authority were the product of a policy decision taken by the executive. Their Honours said that local authorities were in no preferred position.

38 Of course, the formulation of a duty of care in a given case includes the consideration of competing or conflicting responsibilities of the authority. Nevertheless, in *Graham Barclay Oysters Pty Limited v Ryan*, [14] Gleeson CJ observed [15]:

“When Courts are invited to pass judgment on the reasonableness of government action or inaction, they may be confronted by issues that are inappropriate for judicial resolution, and that, in a representative democracy, are ordinarily decided through the political process.”

In *RTA v Palmer*, [16] Spigelman CJ said [17]:

“This Court should be slow to extend the reasoning in *Brodie* by imposing liability for negligence with respect to the allocation of public funds.”

In *Dederer*, however, the Court of Appeal was of the opinion [18], notwithstanding these authorities, that if there are to be limits respecting the justiciability of funding priorities, those limits must be found by reference to criteria of reasonableness. The political nature of setting priorities in the allocation of public funds between competing claims on scarce resources is simply a factor that bears on unreasonableness, albeit that – depending on the circumstances – it may be a compelling factor.

39 All this means, I think, that in most cases the resources defence will remain justiciable by the courts, and it will not always be easy for a public authority to discharge the onus on it.

40 I next come to obviousness of risk. When removing the highway rule the majority in *Ghantous* emphasised a major limitation on the liability of road authorities, namely, the concept that road users must take reasonable care for their own safety. Their Honours observed [19] that the duty of road authorities does not extend to ensuring the safety of road users in all circumstances. They expressed the rationale as follows [20]:

“In general, [pedestrians] are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces ... [P]ersons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. Of course some allowance must be made for inadvertence.”

41 This led some judges, particularly at first instance, to hold that in all circumstances where a risk was obvious, no duty of care was owed. This was put to rest by *Thompson v Woolworths (Queensland) Pty Limited* [21], *Vairy v Wyong Shire Council*[22] and *Mulligan v Coffs Harbour City Council*[23]. I think today it is generally accepted that the expression "obviousness of risk" does not denote a principle or rule of the law of negligence. It is merely a descriptive phrase that signifies the degree to which risk of harm may be apparent. It is a factor that is relevant to whether there has been a breach of the duty of care. The weight to be attached to the obviousness of the risk depends on the totality of all the circumstances. In some circumstances, it may be of such significance and importance as to be effectively conclusive [24].

42 Plainly, the distinction between duty of care and breach is of importance. If obviousness of the risk excludes a duty of care, there can be no apportionment of damage in a case where there is contributory negligence. If obviousness of the risk goes to breach, apportionment will be a live issue.

43 In cases involving a road authority's duty of care, there is presently a difference in the New South Wales Court of Appeal as to whether the obviousness of the risk is relevant to the existence of the duty or whether it goes only to breach of duty. *Temora Shire Council v Stein*[25] and *Sutherland Shire Council v Henshaw*[26] are examples of cases that hold that the obviousness of the risk goes to breach. *Burwood Council v Byrnes* [27] and *Richmond Valley Council v Standing*[28] are examples of cases that hold that the obviousness of the risk is relevant to the existence of a duty of care. The Victorian Court of Appeal is also of this view [29].

44 The reasoning in the cases which hold that the obviousness of the risk is relevant to duty is based on the statement of Gaudron, McHugh and Gummow JJ in *Ghantous*[30] that:

"The formulation of the duty in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety is even more important where, as in *Ghantous*, the plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface."

45 I would suggest that there is no absolute category of cases in which obviousness of the risk determines the existence or non-existence of a duty of care. What has been said in cases such as *Ghantous* can only be regarded as general guidelines. The majority expressly stated this in *Ghantous* [31] when observing that persons ordinarily will be expected to exercise sufficient care by looking where they are going and avoiding obvious hazards. Their Honours noted that "[e]ach case will, of course, turn on its own facts". [32] This means that no universal rule can be applied in regard to this issue. Each case has to be judged by reference to its own circumstances.

46 In *Henshaw*, Bryson JA pointed out [33]:

"A rule of law which meant, or had the effect that if a hazard in a road is so obvious that a pedestrian can observe it, the highway authority is not obliged to do something about it on the calculation that pedestrians will take reasonable care for their own safety has an air of parody; that the hazard was so bad that nothing needed to be done about it."

This reasoning is irrefutable. It supports the proposition that no absolute rule can be laid down.

47 I suggest that the answer to the difficulties posed by this issue is to be found in the notion of reasonableness, which permeates all aspects of the law of negligence. It is reasonable for a road authority to conduct itself in the belief that pedestrians (using sidewalks, footpaths, pavements and the like) will keep a proper look-out for the type of defects or unevenness on the surface of the walkway that are to be expected in the particular area or environment. This is consistent with the notion, referred to in *Ghantous* [34], that "a highway is not to be criticised by the standards of a bowling green." The notion of reasonableness explains the emphasis courts have placed on the fact that uneven surfaces should be expected in public footpaths because of tree roots, the effect of weather, deterioration and the like.

48 The fundamental concept of reasonableness also explains the approach of the courts, as

expressed by Bryson JA in *Henshaw*, as follows [35]:

“As a generalisation cases based on tripping hazards where there are height discrepancies in the order of 25mm or 1 inch between otherwise regular paving slabs generally do not succeed; discrepancies treated as tripping hazards are usually greater and often are highly irregular or have some other unusual features.”

49 The “unusual” features may constitute a trap. Whether a hazard is obvious (or a trap) often depends upon the nature of the environment in which it is located. Where a defect in a highway does give rise to a risk, the question is whether that risk is not only obvious, but one to be expected in the particular area by a pedestrian in the ordinary course of human experience. If the defect is, say, a bump on a sidewalk in Bondi Junction, the highway authority will not be expected to take steps to remedy it. This is consistent with the authority not being required to give every highway a perfectly level surface. It is also consistent with the notion of reasonableness.

50 But, it would not be reasonable for a road authority to do nothing and allow a gross hazard in the roadway to remain as a danger to pedestrians, simply on the ground that it was obvious. Obviousness of risk of this kind will not prevent the recognition of a duty of care owed by a road authority to a pedestrian. It is not the law that, where the hazard is so bad, nothing need be done about it. This would be unreasonable.

51 The question of reasonableness has to be considered in the context of the place where the fall occurred. For example, what is to be expected on a verge next to a highway lined with large old trees is not what would expect in a busy concreted parking area in commercial premises where trucks offload frequently and workers walk about constantly. On the verge one would expect there to be uneven patches caused by tree roots, the effect of weather, deterioration and the like. These generally do not exist in commercial premises. One would not expect commercial premises to have concealed holes in the concreted parking area [36].

52 On the other hand, it may be reasonable to expect uneven surfaces on private land as well as public land. This was held to be the case when a plaintiff fell on a private footpath while visiting a municipal swimming pool. The footpath was in grounds owned by the Council. The Court of Appeal observed [37] that the plaintiff had not fallen in premises where the surface of the ground might be expected to be even. The plaintiff had been walking in the open air, on a path traversed by many members of the public over many years. In essence, it was little different from a public footpath. There was no reason for the plaintiff to pay less attention to the level of the surface of the footpath on which she fell than any public footpath. The fact that she fell on private ground made no difference. It did not affect the reasonableness of her conduct.

53 There is another qualification to the ordinary rule that a road authority may expect pedestrians to take reasonable care for themselves. Where the facts show that, in a particular area or in a particular respect, pedestrians are not exercising reasonable care for their own safety, that rule can no longer be applicable. Thus, for example, in *Edson v Roads and Traffic Authority*[38] it was established that about 25,000 people each year crossed the four lanes of the F5 freeway near Campbelltown in an area that was entirely uncontrolled by traffic signs or other means. This meant, the Court of Appeal held, that even though the risk to the pedestrians was obvious, the road authority was not entitled to assume that pedestrians in the area would exercise reasonable care for their own safety. The authority could not rely on pedestrians to look after themselves [39]. This is but another example of the way in which reasonableness informs the law of negligence.

54 I turn now to non-delegable duties. The law in this respect has been made very clear by the recent High Court decision in *Montgomery v Leichhardt City Council*. The common law duty of a highway authority is to take reasonable care that the exercise of or failure to exercise its statutory powers does not create a foreseeable risk of harm to road users [40]. The duty is not a duty to ensure anything [41]. In particular, it is not a duty to ensure that no worker behaves carelessly. In some circumstances, an authority may discharge its duty of care by employing independent contractors. Each case depends on its own facts as well as the statute applicable. The High Court held that, in the particular circumstances of the case, the Leichhardt Municipal Council did not owe a non-delegable duty of care to the plaintiff and was not liable for the negligence of the independent contractor it had engaged.

55 In this brief summary, I have attempted to show how the modest action of slip and fall has changed in character since the abolition of the highway rule. Many of the difficulties that slip and fall plaintiffs

now face are mirrored by obstacles in the way of plaintiffs generally. But, I doubt that these difficulties are permanent. The pendulum of negligence is constantly in motion. Although there have been times when its movement has been excessively rapid, it has generally moved slowly. I suspect that it is moving towards the advantage of plaintiffs again, albeit pretty slowly.

END NOTES

* Edited version of a paper delivered on 30 March 2007 to the New South Wales State Conference of the Australian Lawyers Alliance.

** Judge of Appeal, Court of Appeal, Supreme Court of New South Wales.

1. (2005) 64 NSWLR 131 at [17].
2. [2007] NSWCA 71.
3. (2001) 206 CLR 512 (hereafter *Ghantous*).
4. See "Negligence: Is Recovery for Personal Injury Too Generous?", Address by the Hon J J Spigelman, AC, to the 14th Commonwealth Law Conference, London, 14 September 2005.
5. [2007] NSWCA 27 (hereafter *Roman*).
6. *Id* at [59].
7. See *Ghantous*, above n 3 at 540 per Gaudron, McHugh and Gummow JJ.
8. *Id* at 574 per Gaudron, McHugh and Gummow JJ.
9. *Id* at 559 per Gaudron, McHugh and Gummow JJ.
10. See *Leichhardt Municipal Council v Montgomery* [2007] HCA 6 (hereafter *Montgomery*).
11. See *Ghantous*, above n 3 at 585, [180] per Gaudron, McHugh and Gummow JJ; *New South Wales v Bujdoso* (2005) 80 ALJR 236 at 245-246, [49] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ. See also *Waverley Council v Ferreira* [2005] Aust Torts Reports 81-818 at 68,083, [78] and *Great Lakes Shire Council v Dederer* [2006] NSWCA 101 at [295]-[306] (hereafter *Dederer*).
12. See *Ghantous*, above n 3 at 559-560, [104] per Gaudron, McHugh and Gummow JJ.
13. *Id* at 560 [104].
14. (2002) 211 CLR 540.
15. *Id* at 553-554, [6].
16. (2003) Aust Torts Reports 81-693.
17. *Id* at 63,754, [182].
18. *Dederer*, above n 11 at [278].
19. *Ghantous*, above n 3 at 577-578, [151].
20. *Id* at 581, [163].
21. (2005) 221 CLR 234.
22. (2005) 223 CLR 422.
23. (2005) 223 CLR 486.
24. See *Consolidated Broken Hill Limited v Edwards* [2005] Aust Torts Reports 81-815 at [53].
25. (2004) 134 LGERA 407.
26. [2004] NSWCA 386 (hereafter *Henshaw*).
27. [2002] NSWCA 343.
28. [2002] Aust Torts Reports 81-679.
29. *Whittlesea City Council v Merie* [2005] VSCA 199.
30. *Ghantous*, above n 3 at 581, [163].
31. Above n 3 at 581, [163].
32. *Ibid*.
33. Above n 26 at [67].
34. Above n 3 at 526, [7] per Gleeson CJ, referring to *Littler v Liverpool Corporation* [1968] 2 All ER 343 at 345 per Cumming-Bruce J.
35. *Henshaw*, above n 26 at [70].
36. *The Premier Group Pty Ltd v Lippis* [2007] NSWCA 36.
37. *Bathurst City Council v Cheesman* [2004] NSWCA 308.
38. (2006) 65 NSWLR 453.
39. See also *Dederer*, above n 11.
40. *Montgomery*, above n 10 at [26] per Gleeson CJ. See also *Ghantous*, above n 3 at 577, [150] per Gaudron, McHugh and Gummow JJ.
41. See *Montgomery*, above n 10 at [26] per Gleeson CJ.

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Themes In The Law Of Torts

THEMES IN THE LAW OF TORTS

Justice David Ipp AO

Over the last 80 years, the law of torts has been a weathervane, blown by the winds of political, social and economic change that have swept through the western world. These movements underlie the two great themes that have pervaded the law of torts during this time.

The first and most obvious theme is the dominance of the tort of negligence. The conceptual breadth of Lord Atkin's neighbour principle resulted in it becoming an all-conquering generalised action. Through his genius and the fluid principles he enunciated in *Donoghue v Stevenson*[1] the tort became infinitely adaptable and capable of applying to all forms of social and economic activities.

The second theme is the movement of the tort of negligence from a defendant-oriented position that endured until after the Second World War, to the rampant pro-plaintiff attitude that prevailed during the last quarter of the twentieth century, followed by an abrupt U-turn tending to a more balanced approach.

Donoghue v Stevenson, over time, shattered the old-established categories of negligence. Non-intentional torts were colonised. Occupier's liability was subsumed, as was nuisance. The highway rule was abolished. The tort advanced into previously unexplored territories. In 1964, in a change of major significance, negligence reached beyond physical injury when the House of Lords held [2] that pure economic loss arising from negligent misstatement was actionable.

Since then many other novel situations have come to fall within the ambit of negligence. Claims by workers against employers have taken forms unheard of before 1960. Claims for pure mental harm arising out of a wide range of circumstances are available to a wide range of persons. A disappointed legatee can now bring an action against the solicitor for the testator [3]. Claims for wrongful birth have been recognised [4]. It has become easier to establish negligence on the part of public bodies for failure to exercise statutory powers. The concept of non-delegable duties has developed. Liability for defective products has expanded.

These advances have not come without cost to clarity and principle. The law of negligence is permeated with uncertainty. Its elements are blurred and it is often difficult to determine when duty ends and breach begins. At times, breach impinges on causation. Although foreseeability is a part of duty, scope and causation, the test for foreseeability changes, depending on the element concerned. In difficult cases, the "abracadabra of causation" [5] continues to be the despair of those who have to grapple with the concept. It is sometimes difficult to know where the onus to disentangle laid down by *Watts v Rake*[6] ends and the measurement of contingencies as required by *Malec v J C Hutton Pty Ltd*[7] begins. There is a morass of differing legislative provisions. The result for a litigant depends upon whether the claim falls under the motor accidents legislation, the workers compensation legislation, the civil liability legislation, or other statutes dealing with particular categories of plaintiffs, and in which State or Territory the litigant sues.

The swings in the pendulum that constitute the second major theme reflect the vacillations over the last 80 years between the extremes of the *laissez faire* individualism of early capitalism and the paternalism of socialist doctrine.

Before 1932, the law of negligence was establishment-minded. Owners of property, landlords,

employers, large corporations, particularly railway companies and public bodies, had an easy time of it. Plaintiffs seldom succeeded and when they did the damages awarded to them were relatively low in today's terms.

Donoghue v Stevenson was the harbinger of a revolution in attitude. The courts began to shift ground. Legislation introduced the doctrine of apportionment of damage and did away with the defence of contributory negligence. [8] The defence of common employment was abolished. Employers were required See *Hamilton v Nuroof (WA) Pty Ltd* [9] to avoid exposing employees to unnecessary risks. The special defences available to landlords, occupiers and vendors were overcome by the generalised neighbour principle. The notion that a duty of care could be owed to a careless invitee or an invitee who was aware of the dangerous condition of premises was accepted [10]. Perhaps the most significant case of all was *Wyong Shire Council v Shirt* [11]. Lower courts often misapplied *Shirt* by determining breach of duty solely in terms of its gossamer test for foreseeability. By 1980, the test for negligence bore little relationship to the moral foundation of Lord Atkin's neighbour principle.

The difficulties for defendants increased as the concept of non-delegable duty began to find favour. In a landmark decision, the High Court held in *Kondis v State Transport Authority* [12] that an employer could not displace the duty to provide a safe system of work by delegating performance to an independent contractor.

The high point of the nursemaid theory of employer's liability was *McLean v Tedman* [13] where the employer was held liable for failing to provide a safe system of work when one of its employee garbage collectors ran across the road without looking. The employee was even held not to be guilty of contributory negligence. The pro-plaintiff attitude affected not only liability. It applied also to damages. The great Dixon was not immune from the syndrome. A predisposition to plaintiffs is apparent from *Watts v Rake* [14] where the sole reason the Chief Justice gave [15] for holding that the defendant and not the plaintiff should disentangle pre-existing injuries from injuries caused by the accident was a "*presumptio hominis*". Not even the use of the Latin phrase can disguise this ruling as being devoid of authority and reasoning. It was motivated solely by policy, not principle. It is a reversal of the hallowed rule of the common law that they who assert must prove. Dixon CJ's observation was explained and watered down in *Purkess v Crittenden* [16] but has been used to the advantage of plaintiffs ever since.

Perhaps the greatest contribution to excessive damages awards was *Griffiths v Kerkemeyer* [17] where it was accepted that a plaintiff could recover damages for gratuitous services even if they did not cost the plaintiff a cent. In practice, the gratuitous services head of damage is often the largest portion of the award.

In *Bennett v Minister of Community Welfare*, [18] Gaudron J held [19] that once it is established that the defendant owed the plaintiff a duty of care, breached that duty, and the plaintiff suffered a foreseeable injury, the onus of disproving causation passes to the defendant. This approach represents another departure from the "they who assert must prove" rule. It has the potential significantly to expand liability for negligence. It has been applied irrespective of whether there is good reason to relieve the plaintiff of the requirement to prove factual causation. In practice, the onus of proof that is thereby shifted to the defendant will be virtually impossible to discharge. Mason P, after analysing *Bennett* and like authorities, has resisted this abolition of the element of causation. He has said [20] that Australian law has not adopted a formal reversal of proof of causation in negligence. Nevertheless, there are a growing number of cases where the *Bennett* theory has been followed.

In 1992, in *Rogers v Whitaker*, [21] the High Court departed from the *Bolam* principle [22], that being a rule that a medical practitioner is not negligent if he or she acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion. The High Court held that negligence was a matter for the court and not for medical practitioners. This ruling made it easier for plaintiffs to sue their doctors. *Rogers v Whitaker* also held that a medical practitioner has a duty to warn the patient of a material risk inherent in proposed treatment. Some doctors now spend more time in explaining the risks of the procedure than in examining the patient.

The pro-plaintiff approach was not confined to courts. In 1974, the most extreme pro-plaintiff legislation ever seen in this country was enacted, namely, the *Trade Practices Act 1974* (Cth). Its

misleading and deceptive conduct provisions created a form of strict liability entirely. This was a startling and radical negation of the long entrenched common law concept of no liability without fault. It was open to the courts to construe this legislation as impliedly requiring the proof of fault, and one brave judge did so. [23] The Federal Court, however, quickly overturned his judgment and consigned it to oblivion. [24] A sign of the times was that this extraordinary piece of social engineering occurred without protest. Consumers had become far more important than producers. The misleading conduct provisions swiftly began an imperial march of their own and soon rivalled, and to a degree overtook, the tort of negligence [25]. Section 52 became the plaintiffs' weapon of choice, with negligence pleaded only as an alternative. Unsurprisingly, provisions of this kind have also been curtailed by tort law reform.

Generally, as Professor Atiyah remarked, P S Atiyah, [26] by the turn of the last century judges had stretched the law in favour of plaintiffs to accommodate novel claims and to lower the barriers to liability. They had, as Spigelman CJ has observed, [27] also stretched the facts in favour of plaintiffs. It was the Cole Porter era of negligence. In the words of the master: "In olden times, a glimpse of stocking was something shocking. But nowadays, goodness knows, anything goes".

Eventually, before any legislative intervention, the tide began to turn. The stretching stopped. Courts began to show a greater orientation towards defendants. Liability of organisers of sports events was restricted severely [28]. The duty to take care to prevent harm to another from the deliberate criminal acts of a third party was recognised only in limited circumstances [29]. The High Court emphasised that no person lives in premises that are risk free and the fundamental question is whether it is reasonable to require occupiers to protect entrants from a risk of injury [30]. *New South Wales v Lepore* [31] held that the liability of a school authority under its non-delegable duty of care owed to pupils did not extend to intentional criminal conduct against a pupil by a teacher. *CSR Limited v Eddy* [32] held that *Griffiths v Kerkemeyer* did not extend to claims by injured plaintiffs for loss of the ability to provide gratuitous care to others. Wrongful life claims were not upheld [33].

Vairy v Wyong Shire Council [34] and *Mulligan v Coffs Harbour City Council* [35] indicate the difficulties that plaintiffs now face in suing public bodies for damages in diving cases. Notably, the High Court made no reference to *Tomlinson v Congleton Borough Council* [36] in which the House of Lords observed that, when people chose to undertake inherently risky activities, there was "an important question of freedom at stake", as well as moral issues of personal responsibility. The High Court did not take up these issues.

This is one of several instances of Australian tort law diverging from that of England. Another marked theme of the last 80 years is the development of a distinctive Australian law of torts.

By 2002, there was an insurance crisis. Some insurers had left Australia. Others refused to provide indemnity cover. The cover that was provided was expensive and often difficult to obtain. This state of affairs had serious consequences. Some obstetricians and neurosurgeons gave up practice, hospitals or parts of hospitals closed, local authorities were forced to close roads and swimming pools, volunteers refused to continue transporting the infirm and elderly, some social activities ceased.

In the end, government decided that the country could not afford the past years of compensation voluptuousness. Legislation was passed in the Commonwealth and every State and Territory. The uniformity of purpose, extent and rapidity of these reforms was unique.

Generally, judges and lawyers do not like legislative intervention in the common law of negligence. But such legislative intervention has occurred since the early twentieth century [37] and is an inevitable consequence of what has been described [38] as the "sovereign principle" of negligence; that is, Lord Atkin's observation that liability for negligence is "based upon a general public sentiment of moral wrongdoing for which the offender must pay". [39] Diplock LJ put the point in a different way when he said [40] that the law of negligence was "the application of common morality and common sense to the activities of the common man". [41] McHugh J echoed these sentiments when saying:

"Negligence law will fall – perhaps it already has fallen – into public disrepute if it

produces results that ordinary members of the public regard as unreasonable" [42].

These notions explain why legislation follows when the approach of the courts becomes far removed from community attitudes.

The legislative reforms, although differing in detail, were designed to make it more difficult for plaintiffs to succeed and to reduce the damages that courts could award. The thrust of the legislation must be regarded as expressing powerful general public sentiment. Nevertheless, the High Court has made no comment as to the weight courts should attach to the reforms, particularly when determining novel negligence claims. The inference to be drawn from the cases is, it seems, not much – if any. *Tame v New South Wales* was delivered at the height of the insurance crisis and while the reform process was under way. Nevertheless, the High Court extended the ambit of liability for mental harm far beyond the boundaries imposed by earlier cases (and by the House of Lords[43]) and, later, expanded the reach of liability for mental harm even further [44].

Cattanach v Melchior [45] was also decided in the midst of the reforms. The High Court held that an action lay for wrongful birth. The majority based their decision on legal principle and eschewed any reliance on policy or concepts of morality. Their approach was that, in its typical modern application, negligence is simply a complex of legal rules, devoid of moral content. A leading academic [46] described this decision "as a determined attempt to distance the court from the political arena of tort reform and reassert the supposed neutrality of 'legal principle'".

In parts of Australia, legislation soon reversed *Tame* and *Cattanach*. Public sentiment disapproved

The current position is that the courts are markedly less pro-plaintiff than in the pre-reform era. The approach is more balanced and it is difficult to discern a bias either way. Of course, that is as it should be.

On the other hand, statutory reforms have moved substantially in favour of defendants. Small claims for personal injuries are a thing of the past. Establishing liability in connection with recreational activities has become difficult. Stringent caps on damages and costs penalties make most plaintiffs think twice before suing. Public authorities are given a host of novel and powerful defences that are in conflict with the notion that the Crown and government authorities should be treated before the law in the same way as an ordinary citizen. It is difficult to accept that public sentiment will allow all these changes to remain long-term features of the law.

Since the introduction of the reforms, the insurance crisis has abated. There has been a substantial increase in the number of public liability risks written across Australia [47]. A Commonwealth government review of medical indemnity has found that doctors can now obtain affordable indemnity insurance cover. Medical indemnity rates have reduced significantly [48]. Local authorities no longer complain that insurance problems prevent them from providing essential services. The cost and difficulties of obtaining cover are no longer the subject of media comment.

It does not follow, of course, that there is general satisfaction with the tort of negligence. But this appears to be the nature of the beast. Dissatisfaction has been endemic since before *Donoghue v Stevenson*. Current discontent with the law of negligence is based on two factors. One is the extent of the reforms. If I may say so, the reforms of which I approve are those that the panel appointed by the various governments to review the law of negligence recommended. The reforms go much further. Certain of the statutory barriers that plaintiffs now face are inordinately high.

The second factor is the ever-present uncertainty in the law of negligence. The different statutes are confusing and many common law rules are not easy to apply. The present position appears to be that, in determining the existence of a duty of care, the totality of the relationship between the parties is decisive; considerations such as vulnerability, inequality of bargaining power, control, and reliance must be taken into account. Proximity, although out of favour, is not irrelevant.

These are not easy directions to follow when attempting to arrive at the correct destination. On the face of it, the exercise looks pretty much like determining what is fair, just and reasonable.

Indeed, the House of Lords has held that "fair, just and reasonable" is part of the test for the existence of a duty of care [49]. But this test has been rejected by the High Court [50] principally on the basis that there is a danger that questions of negligence "will be reduced to a discretionary judgment" . [51]

The problem remains, however: what are the applicable norms and how is one to be weighed against the others? That is, what weight and priority does one give to each? After reading the judgments in *Perre v Apand Pty Ltd*, [52] the task appears to be reminiscent of that undertaken by the little red fire engine that went searching for its mother.

The modern law of negligence, from *Donoghue v Stevenson* and the neighbour principle onwards, has grown through policy decisions. Policy, in this context, is the application to novel situations of what is fair, just and reasonable. The courts are familiar with the test of reasonableness. After all, it is the foundation of negligence and permeates every element. In other fields of the law, the courts apply broad concepts such as reasonableness and unconscionability every day. Perhaps, in the future, the test of fair, just and reasonable will prevail. It does have persuasive advantages. It converts what is the practical, everyday test for negligence into the legal test. It does away with the uncertainties of principle that presently exist. It simplifies the law and makes it comprehensible to all.

Where, indeed, lies the future? The main challenge is to arrive at an expression of governing principles that will bring a reasonable degree of certainty, conceptual unity and clarity to the tort. The search for a pragmatic test for the existence of a duty of care will continue. Perhaps greater emphasis will be given to the moral considerations that moved Lord Atkin.

The High Court, in recent times, has clarified principles that were obscure or vague or conflicting [53]. There is a need to continue with this task and this, I think, will be a future trend.

An ongoing struggle, however, exists between the philosopher kings of policy and the black-letter lawyers who claim to propound principle alone. The essential formlessness of the tort, and the infinitely varying moral merits of the cases requiring adjudication, tend to produce judicial inconsistency. Judges metamorphose from Marcus Aurelius in one case into Baron Parke in the next. A decisive end to the conflict may not be possible. Perhaps it will be another battle of the Somme: many casualties but no resolution.

There is another important matter. The ferment in the law of negligence has caused many to re-examine the purpose underlying the tort. Whilst most lawyers regard negligence as a means of corrective or distributive justice, a growing number of judges and academics disagree. Lord Hoffmann spoke for this group when he said:[54]

"Compensation, both for financial loss and general damages, goes only to those who can prove negligence and causation. Those unable to do so are left to social security: no general damages and meagre compensation for loss of earnings. The unfairness might be more readily understandable if the successful tort plaintiffs recovered their damages from the defendants themselves but makes less sense when both social security and negligence damages come out of public funds. So any increase in general damages for personal injury awarded by courts only widens the gap between those victims who can sue and those who cannot".

In the vast majority of cases, the guilty individual hardly ever pays the damages or even the insurance premiums. Most tort liability for personal injuries is imposed on insurers or employer corporations or public authorities. The insurers pay the damages and the corporations or authorities pay the premiums, or act as self-insurers [55]. The notion that tort law ordinarily requires negligent individuals to pay for the consequences of their negligence is simply not true.

The cost of delivering tort compensation (consistently estimated, in aggregate, as much as 40%

or more of the total cost of the tort system) [56] is very high. While those who have deep-pocket defendants to sue may recover millions of dollars for momentary negligent acts, the overwhelming majority of injured persons are left to social welfare.

These matters have led some to argue for a no-fault system and the abolition of large parts of the tort of negligence. In some respects, the pressure exerted by this group has begun to bear fruit. The Legal Access Reform Group of the Commonwealth Health Minister's Advisory Council supports the removal of long-term care costs from the tort system and their provision through a statutory administrative process. The medical profession and some leading academics strongly support the proposal. The New South Wales government has established a lifetime care and support scheme under the *Motor Accidents (Life-Time Care and Support) Act 2006* (NSW). By this scheme, treatment, rehabilitation and attendant care will be provided to persons who have been severely injured in motor accidents, regardless of who was at fault. Eligibility for the scheme is to be determined by the severity of the person's injuries. These are indications that, eventually, government will, on a no-fault basis, cover a substantial portion of the cost of harm caused by negligence.

Since *Donoghue v Stevenson*, and the expansion of the tort of negligence, intentional torts have gone into hibernation. As the *Civil Liability Act* is not applicable to intentional torts, Darwinian theory would suggest that there should be a resurgence of torts of this kind. There has already been an increase in trespass, wrongful arrest and malicious prosecution claims. This trend is likely to continue.

I now come to the Galapagos Islands Division of the law of torts, namely, defamation. The tort of defamation has evolved all on its own and has created legal forms and practices unknown anywhere else. The giant turtles of defamation have evolved their own dialect, arcane customs and overly subtle distinctions. Defamation pleadings are as complex, pedantic and technical as anything known to Dickens [57]. Interlocutory disputes continue to beset plaintiffs and there are often massive delays in getting defamation cases to trial. Damages seem out of proportion to damages awards in other categories of cases. Many of these problems are the product of legislation, and improvement will be slow until the legislation is changed.

Despite the need for the protection of privacy in modern life, New South Wales has recently abolished the need to prove public interest when establishing the defence of truth. It has thereby reversed a qualification that has existed for most of the last century and opened the way for the media to publish the most intimate details of private lives.

Some of the great legal issues of the 21st century will have to be resolved by defamation proceedings. The limits of freedom of speech are going to be tested. The law is going to be asked to balance the right to speak freely against issues of privacy, State security, and the fairness of trials. The position in defamation law of politicians and public figures will continue to be controversial. In many ways the kind of society in which we will live is going to be determined by decisions on the law of defamation. An important challenge will be to apply modern techniques of case management to defamation and to simplify the procedure and the law. There needs to be swift and cheap access to defamation trials and reliance on unnecessary technicalities should be eradicated. The law of defamation, like the law of negligence, should be readily comprehensible to ordinary people.

In future years, there is a likelihood that new torts will evolve. Obvious possibilities involve workplace harassment, and sexual, religious, racial, and other forms of discrimination. It will not be surprising to find torts based on the interference with trade or business by unlawful means. The scope of misfeasance in public office is likely to expand in scope and to become easier to establish. The progress in genetics, information technology, communications and other scientific fields will undoubtedly give rise to new forms of tort litigation. The law of torts remains strong and will continue to play a vigorous and important role in our society.

END NOTES

1. [1932] AC 562.
2. *Hedley Byrne & Company Ltd v Heller & Partners Limited* [1964] AC 465.
3. *Hill v Van Erp* (1997) 188 CLR 159.
4. *Cattanach v Melchior* (2003) 215 CLR 1.
5. J G Fleming, *The Law of Torts* (9th ed, 1998, Sydney: LBC Information Services) at 305.
6. (1960) 108 CLR 158 at 160 per Dixon CJ.

7. (1990) 169 CLR 638.
 8. See *Law Reform (Miscellaneous Provisions) Act 1965* (NSW), s 9(1).
 9. See *Hamilton v Nuroof (WA) Pty Ltd* (1956) 96 CLR 18.
 10. *Commissioner for Railways (NSW) v Anderson* (1961) 105 CLR 42.
 11. (1980) 146 CLR 40.
 12. (1984) 154 CLR 672.
 13. (1984) 155 CLR 306.
 14. (1960) 108 CLR 158.
 15. *Id* at 160.
 16. (1965) 114 CLR 164.
 17. (1977) 139 CLR 161.
 18. (1992) 176 CLR 408.
 19. *Id* at 420 to 421.
 20. See *TC by his tutor Sabatino v The State of New South Wales* [2001] NSWCA 380 at [59].
 21. (1992) 175 CLR 479.
 22. *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at 586 per McNair J.
 23. See *Westham Dredging Co Pty Ltd v Woodside Petroleum Development Pty Ltd* (1983) 66 FLR 14 at 29 per St John J.
 24. *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325 (Morling, Neaves and Spender JJ).
 25. It was only the limiting effect of *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 that prevented s 52 from swamping the entire law of negligently caused personal injuries.
 26. P S Atiyah, *The Damages Lottery* (1997, Oxford: Hart Publishing), chapters 2 and 3.
 27. See J J Spigelman, 'Negligence: Is recovery for personal injury too generous?' (2006) 14 *Tort L Rev* 5 at 9.
 28. See *Agar v Hyde* (2000) 201 CLR 552 and *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.
 29. *Modbury Triangle Shopping Centre Pty Limited v Anzil* (2000) 205 CLR 254.
 30. (2005) 80 ALJR 341.
 31. *Neindorf v Junkovic* (2003) 212 CLR 511.
 32. (2005) 80 ALJR 59.
 33. *Harriton v Stephens* (2006) 226 ALR 391; (2006) 80 ALJR 791.
 34. (2005) 223 CLR 422.
 35. (2005) 223 CLR 486.
 36. [2004] 1 AC 46 at 84.
 37. For example, the workers compensation statutes.
 38. *Overseas Tankships (UK) v Morts Dock & Engineering Co (The Wagon Mound [No 1])* [1961] AC 388.
 39. *Id* at 426.
 40. In *Doughty v Turner Manufacturing Company Limited* [1964] 1 QB 518.
 41. *Id* at 531.
 42. See *Tame v New South Wales* (2002) 211 CLR 317 at 354.
 43. *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310; *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.
 44. *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269.
 45. (2003) 215 CLR 1.
 46. See P Cane, 'Reforming Tort Law in Australia: A Personal Prospective' (2003) 27 *MULR* 649 at 671, footnote 81.
 47. See Australian Prudential Regulation Authority, *National Claims and Policies Database* (available at <http://www.ncpd.apra.gov.au/Home/Home.aspx>).
 48. The Hon Tony Abbott MP, Minister for Health and Ageing, Media Release: 'Medical Indemnity: more affordable, more secure' (22 February 2007).
 49. See *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 618 per Lord Bridge of Harwich.
 50. See *Sullivan v Moody* (2001) 207 CLR 562; cf Kirby J in *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540.
 51. *Sullivan v Moody* (2001) 207 CLR 562 at 579 per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.
 52. (1999) 198 CLR 180.
 53. See for example *Leichhardt Municipal Council v Montgomery* [2007] HCA 6
 54. See *The Gleaner Company Ltd v Abrahams* [2004] 1 AC 628 at 646.
 55. P S Atiyah, "Personal Injuries in the Twenty-First Century: Thinking the Unthinkable" in Peter Birks (ed), *Wrongs and Remedies in the Twenty-First Century* (1996, Oxford: Clarendon Press) at 13.
 56. See P Cane, *Atiyah's Accidents, Compensation and the Law* (6th ed, 1999, London: Butterworths) at 338-339.
- See *Burrows v Knightley* (1987) 10 NSWLR 651 at 654 per Hunt J.

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Problems with Fact-finding

Problems with Fact-finding [1]

Justice David Ipp[2]

HE: I can remember everything as if it were yesterday. We met at nine.

SHE: We met at eight.

HE: I was on time.

SHE: No, you were late.

HE: Ah yes, I remember it well. We dined with friends.

SHE: We dined alone.

HE: A tenor sang.

SHE: A baritone.

HE: Ah yes, I remember it well. That dazzling moon ...

SHE: There was none that night. And the month was June. [3]

This lyric illustrates the unreliability of human memory as well as the difficulties attendant on making findings of fact.

Fact-finding is labour on the factory floor of the judicial system. It is not glamorous work. Judgments on fact go unreported; they have no enduring fame. Nevertheless, justice depends on correct factual findings, and a fundamental measure of a legal system is the accuracy and skill with which facts are found. It is curious how little attention has been given to this facet of the judicial task [4]. We accept with a knowing smile the virtual impossibility of remembering with accuracy past events in the ordinary course of life, such as those about which Maurice Chevalier and Leslie Caron so nostalgically sang. Nevertheless, the justice system has, as one of its basic foundations, the assumption that witnesses are capable of accurately describing events that took place years ago, and that judges can reliably tell what evidence is true and what is false.

Witnesses may be deliberately untruthful, but there may be many other causes of inaccuracy in a witness's testimony. These include imperfect observation, faulty memory, an over-active imagination, emotional disturbances, self-interest, and other biases. Witnesses may be dishonest about only parts of their evidence. Little is more deceitful than half the truth. Judges must take care to differentiate between a witness that is being honest or deceitful, and a truthful witness who is giving accurate or inaccurate testimony. Distinguishing truth from intentional deceit is a different exercise from distinguishing between true and false memory. A liar intends to be deceptive, whereas the faulty rememberer tries to be truthful. [5]

Discerning what is accurate or inaccurate in the testimony of a truthful witness may be the most difficult task of all. Witnesses sympathetic to a litigant may, unconsciously, give a strong colouring to the facts, and remember things that were not seen, and misrepresent things that were seen. The renowned American judge, Jerome Frank, told of a trial judge who had to decide on the disposition of the family home by the deceased, Mr Humphrey. After hearing the testimony and the lawyers' arguments, the judge announced:

"Gentlemen, provided Mr Humphrey said - in the light of these Missouri decisions - 'daughter, if you'll come and live with me, I'll give you this house,' then I'll decide for the plaintiff".

The court reporter, unfortunately, could not read his notes recording the crucial evidence. The judge accordingly asked the principal witness, the daughter's maid, to take the stand and repeat her testimony. This is what she said:

"I remember very well what happened. It was a cold and stormy night. We were all sitting around the fire. Old Mr Humphrey said to his daughter: 'Daughter, in the light of the Missouri decisions, if you'll come and live with me, I'll give you this house'". [6]

Many distinguished judges have expressed deep scepticism about oral evidence. Apart from the telling of deliberate lies, observation and memory are often fallible, and humans have an unlimited capacity for honestly believing something that bears no relation to what really happened.

Cognitive Illusions

Recent psychological research has established that the more episodes of a certain type we experience, the harder it becomes to distinguish among them. On the other hand, repetition of episodes strengthens the overall memory for the entire class of event. A person who suffered many beatings as a child will find it difficult to recall details from any particular attack – unless something unusual occurred during it. But the person will never forget what it was like to be subjected to such violence.[7] This suggests that the usual forensic technique of discrediting a witness by focusing on the peripheral detail of the crucial event may be unreliable and unfair.

Recent psychological research has also established that high levels of stress do *not* produce general impairments in memory. Emotional stress *enhances* memory for the central features of the stressful experience. An extremely stressed person, however, will remember central aspects of the experience but will fail to remember trivial detail. In the same way, distinctive, emotional stimuli often impair memory at the expense of other stimuli [8]. Thus, a person experiencing a traumatic event will remember the main details of the event far better than peripheral details. This explains why robbery victims often remember details of the assailant's weapon but not much about his appearance.

In one particular study, eyewitnesses who correctly identified, in a photo line-up, the person who stole a calculator in a staged theft, remembered fewer peripheral details about the event than did those who wrongly identified an innocent person as the culprit. In a worrisome secondary finding, because the mistaken witnesses provided many peripheral details about the 'crime', mock jurors regarded them as more credible than the witnesses who correctly identified the thief's identity at the expense of peripheral detail.

Many experiments have shown that information provided to witnesses after an event affects how they later remember it. Studies have shown that persons who fall prey to misleading information consciously remember witnessing things that they have not seen. They hold these false memories with great confidence [9]. An example of this is an occasion when an El Al cargo plane crashed into an apartment building near Amsterdam. One hundred and ninety three persons were asked whether they had seen television footage of the plane striking the building. In reality the crash had not been captured on film. Nevertheless, 55% claimed to have seen it on television. Two-thirds of a group of law students claimed to have seen this crash footage and some even provided details about what they had seen.

Researchers found that 44% of persons asked claimed to have seen a non-existent film of the crash that took the life of Princess Diana and were capable of providing details about their false memory. In 1998, a study revealed that nearly 30% of the members of the American Ex-POW Association had never been prisoners of war [10].

In a widely praised work, *Remembering Trauma*[11], Prof Richard J McNally, a professor of psychology at Harvard University, notes that a significant minority of people can unwittingly come to believe that they experience stressful events that never happened [12]. To the casual observer, the notion that someone might remember having experienced a trauma that never actually occurred seems absurd. Yet people remember atrocities that never happened and experience emotional distress congruent with belief in their authenticity. Prof McNally concludes: "Suggestive, misleading information provided after an event routinely distorts witnesses' memory reports of the event" [13]. Prof Schacter, the chair of Harvard University's Department of Psychology, has described recent psychological research showing that memory malfunction and suggestibility can result in a person mistaking fantasy for reality [14]. He, too, asserts: "people can develop detailed and strongly held recollections of complex events that never occurred" [15].

Judges often disbelieve witnesses who have reconstructed their evidence. But, recent research has established that, unlike what most people believe, recollection is a reconstructive, not a reproductive, process. Recalling one's past is not replaying a videotape of one's life and working memory. When we remember an event from our past, we "reconstruct it from encoded elements distributed throughout the brain" [16]. Accordingly, to admit that one's testimony is reconstructed is no more than to admit a facet of human nature; all memory is reconstruction. The mere fact of reconstruction should not be a reason for rejecting evidence.

According to psychologists, internal contradictions and unsatisfactory evidence may be caused by the stress of the court atmosphere and the hostile demeanour of the advocate. Age can affect the confidence of witnesses. Young people are usually more confident witnesses than the middle aged and elderly. There are truly many pitfalls in deciding on the veracity of evidence.

Nevertheless, even though the traditional approach is by no means infallible, my observation after more than 40 years experience in the field, is that the time spent over many years observing evidence being led, and witnesses being questioned, is of great assistance to a trier of fact. One cannot help but develop antennae sensitive to *deliberate* untruths. Although truthful but inaccurate evidence remains extremely difficult to detect, it is beneficial to be aware of this painful fact from one's own practice of the law. The recent movement to broaden the reservoir of judicial appointments means that more and more judges will be devoid of this experience. There have undoubtedly been outstanding judges who have not come from busy practices at the Bar. But, as a general rule, the appointment of persons who have not spent many years observing the behaviour of witnesses in court will not do much for reliability in fact-finding. This is a problem that needs to be recognised.

Demeanour

The difference between success in life and ruin may turn on a single demeanour finding which another judge may not have made, or the same judge may not have made on a different day [17]. Demeanour findings are often idiosyncratic and unpredictable.

All of us know that the way persons behave when they tell stories can often be helpful in determining whether they are being truthful or evasive. A person's intonations, fidgeting, composure, yawns, facial and body movements, the use of eyes, hands, air of candour or of evasiveness, even complexion, may furnish valuable clues [18]. But it is so difficult to put the right construction on them. An experienced English judge, MacKenna J, has put the problem with precision [19]:

"I doubt my own ability, and sometimes that of other judges, to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth. He speaks hesitantly. Is it the mark of a cautious man, whose statements are for that reason to be respected, or is he taking time to fabricate? Is the emphatic witness putting on an act to deceive me, or is speaking from the fullness of his heart, knowing that he is right? Is he likely to be more truthful if he looks me straight in the face than if he casts his eyes on the ground, perhaps from shyness or a natural timidity?"

Understandably McKenna J said that he relied on those considerations as little as he could help.

Cultural and ethnic differences cause serious difficulties to judges making demeanour findings. Sir Thomas Bingham (as he then was) illustrated these clearly when he said [20]:

"[H]owever little insight a judge may gain from the demeanour of a witness of his own nationality when giving evidence, he must gain even less when ... the witness belongs to some other nationality and is giving evidence either in English as his second or third language, or through an interpreter. Such matters as inflection become wholly irrelevant; delivery and hesitancy scarcely less so. ... If a Turk shows signs of anger when accused of lying, is that to be interpreted as the bluster of a man caught out in a deceit or the reaction of an honest man to an insult? If a Greek, similarly challenged, becomes rhetorical and voluble and offers to swear to the truth of what he has said on the lives of his children, what (if any) significance should be attached to that? If a Japanese witness, accused of forging a document, becomes sullen, resentful and hostile, does this suggest that he has done so or that he has not? I can only ask these questions. I cannot answer them. And if the answer be given that it all depends on the impression made by the particular witness in the particular case that is in my view no answer. The enigma usually remains. To rely on demeanour is in most cases to attach importance to deviations from a norm when there is in truth no norm."

A finding based on demeanour is essentially an intuitive exercise. The Oxford English Dictionary defines "intuition" relevantly as "The immediate apprehension of an object by the mind without the intervention of any reasoning process". It is the absence of rationality that makes demeanour findings so arbitrary, so ephemeral, so uncertain, so personal and subjective, so susceptible to sub-conscious prejudice, so susceptible to error.

There are some cases where decisions have to be made on the basis of demeanour. A collision at a controlled intersection with similar damage to the vehicles and no witnesses is an example. But there are many cases that could be decided on the probabilities where judges *choose* to rely on demeanour. As Lord Rodger has said: "A weak judge will often try to cut off any appeal from his decision by structuring his opinion so that it is made to rest on his unappealable assessment of the witnesses" [21].

Judicial partiality

Cognitive illusions on the part of judges impair accurate fact-finding. Hindsight illusion can lead a judge to over-estimate what could have been foreseen by others and to regard what actually happened as inevitable. Overconfidence on the part of judges leads to illusions about the value and accuracy of their own judgment. What psychologists call "false-consensus bias" leads some to view their own behaviour and responses as typical and appropriate, and different behaviour as odd and inappropriate. Research has demonstrated that the way in which a question is framed can significantly affect the answer (that is, from truthful witnesses) and judges need to be aware of this.

All these illusions are capable of erroneously, and profoundly, influencing a judge's opinion as to the veracity of evidence. Judge Frank said, aptly: "There can be no greater hindrance to the growth of rationality than the illusion that one is rational, when one is the dupe of illusion" [22].

Another aspect of fact-finding that needs to be examined is the inevitable existence of prejudices and biases, or tendencies towards such attitudes and feelings, in each and every judge.

We have all encountered judges who do not transgress the boundaries of apprehended bias, but who appear to favour or disapprove of plaintiffs, defendants, landlords, tenants, women, black persons, immigrants, workers, employers, police, government bodies, and so on [23]. Other judges are more disciplined and control themselves so that no partiality can outwardly be detected. But that does not mean that they do not have feelings, both conscious and sub-conscious, that are capable of influencing their decisions.

In the controversial Canadian case of *R v RDS*[24] the trial judge disbelieved a police officer, saying that in her experience white police in Halifax lied when giving evidence against black youths. Four judges of the Canadian Supreme Court held that this was an acceptable approach and it was quite in order that the differing life experiences of judges be used to assist them in the decision-making process [25]. As a general proposition this is debatable. For my part it is a licence to give free reign to personal prejudice. Moreover, during a trial, parties would not be informed of the judge's personal experiences and beliefs and would not be able to combat what might be tendencies to prejudice and bias.

In some ways, *RDS* raises issues of judicial notice [26]. The established rule is that a court may judicially notice a fact whenever it "is so generally known that every ordinary person may be reasonably presumed to be aware of it" [27]. A judge's life experience may cause him or her to form assumptions about certain groups of people that are not held by all. There are great dangers in relying on assumptions about the behavioural characteristics of particular groups of people. Judges are generally required to act on evidence actually adduced, and should be conservative about taking judicial notice of matters of supposed notoriety. Judges should make every effort to suppress feelings and attitudes that are neither impartial nor neutral, when deciding whether a witness is telling the truth.

An inter-disciplinary approach

I suggest that there is a need for appropriate self-understanding and self-knowledge on the part of judges so as to combat the harmful affect of cognitive illusions and judicial bias. Some form of education for judges in this area would not go amiss. Without a proper understanding of self, judges cannot be aware of all their prejudices or be able to guard against them [28].

As recent advances that psychologists have made in understanding memory become better known, judges (and, I suspect, barristers) will be expected to be cognisant of the psychological factors that influence memory and perception (and, if possible, of signs that those factors are inappropriately affecting a witness).

There is no organised attempt by judges and lawyers to learn about the developing techniques in understanding memory, and how it works, and the factual illusions that beset so many. There is no training in exploring the mind. Other disciplines, including economic, political, and medical, have made considerable advances in studying these cognitive illusions [29]. I suggest that accurate judicial fact-

finding requires an understanding of them and this may require an interdisciplinary approach. Although continuing judicial education is the order of the day, fact-finding is not subject to the rigor of scientific analysis. Judges are left to apply common sense or intuition. This is a highly subjective platform and leaves considerable scope for irrational decisions that are difficult to overturn on appeal.

Fact-finding techniques

What then are the techniques that a careful judge should apply in deciding which witness or what version should be believed?

Apart from developing self-awareness, I suggest that judges should focus on probabilities and inconsistencies, rather than demeanour. Close attention should be paid to contemporaneous documents. Where oral testimony is in conflict with contemporaneous documents, it may be unreasonable to believe what the witness says. The probabilities and consistency of the witness's version should be measured against the incontrovertible and agreed facts as well as the remainder of the witness's evidence (including that given on other occasions). Regard should then be had to the other facts found. Other facts relating to credit may be relevant. But the probabilities, together with external and internal consistency, should always be the touchstone of factual findings. Finally, attention must be given to the demeanour of the witness. I would consign demeanour to the bottom of the list [30].

Where there are differences between expert witnesses that are capable of being resolved rationally by examination and analysis, and there is no suggestion of dishonesty or undue partisanship, a decision based solely on demeanour will not provide the losing party with a satisfactory explanation for his or her lack of success. A justifiable grievance as to the way in which justice was administered will then arise. A coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal and judges must then enter into the issues canvassed before them and explain why they prefer one case to the other [31].

The approach of appellate courts

The rule in New Zealand is that an appellate court will only interfere with the trial judge's findings of fact in exceptional circumstances. The traditional view is entrenched, namely, an appellate court should not reverse the decision of a trial judge on a question of fact unless that decision is shown to be wrong. The fact that the trial judge hears and sees the witnesses is regarded as being of paramount importance [32].

In Australia, the approach has been the same but there are signs of a more liberal approach. In *Fox v Percy* [33] Gleeson CJ, Gummow and Kirby JJ emphasised the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses [34]. They referred to remarks made by Atkin LJ [35]: "I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour." [36]

In *CSR Limited v Della Maddalena* [37] Kirby J, with the concurrence of Gleeson CJ, said [38] that *Fox v Percy* had brought about "an important change in the statement by this Court of the jurisdiction and powers of intermediate appellate courts". His Honour said that the change "involved a shift to some degree from the more extreme judicial statements commanding deference to the findings of primary judges said to be based on credibility assessments". The degree to which the shift in emphasis has occurred is not yet clear. Nevertheless, their Honours' judgment indicates that reliance upon the subtle influence of demeanour requires careful consideration in each case before it is permitted to trump appellate intervention [39].

There are major policy reasons for limiting the power of appellate courts to overturn factual findings of trial judges. Were a complete rehearing on fact as well as law to be allowed, the burden on the appellate courts would be increased enormously. Apart from the increase in personnel and government cost that this would require, litigation would drag on even longer than it now does, appeals would last far longer, there would be great uncertainty in forecasting the prospects of success on appeal and the costs of litigation would increase a great deal. These problems explain judicial reluctance to widen the scope of appeals on fact. They explain the general approach that every litigant should be entitled to a full contest on the facts at the trial level only, and that the facts should be open to review thereafter only if some obvious and significant error is demonstrated [40].

Controlling demeanour findings

I suggest, however, that, to keep pace with current knowledge of the mind and personality, the law must develop some means by which control is exercised over demeanour findings.

One way is by rejecting the approach of some trial judges who merely set out the evidence adduced by one side, then the evidence adduced by the other, and then assert that having seen and heard the witnesses he or she prefers or believes the evidence of the one and not the other. If that were to be the law, many cases could be resolved at the end of the evidence simply by the judge saying: "I believe Mr X but not Mr Y and judgment follows accordingly". That is not the way in which our legal system should operate [41].

Often important issues of credibility involve sub-issues. Often, objective facts, or facts that are probable, are capable of having significant bearing on the sub-issues. In cases of this kind, it is incumbent upon trial judges first to resolve the sub-issues and to explain, by reference to the relevant facts, the conclusions to which they have come. This having been done, they should then turn to the ultimate facts in issue and explain how their decisions on the sub-issues have assisted them in forming a conclusion on the ultimate issue. It is only when adequate reasons of this kind are given that an unsuccessful party will be able to understand why the judge has believed his or her successful opponent [42]. A failure by a judge, when making a demeanour finding, to deal with the issues in this way should be regarded as an error of law [43].

I do not suggest that trial judges would not be entitled to make demeanour findings contrary to the probabilities – merely, that they should give properly reasoned decisions if they do so. In choosing between witnesses on the basis of probability, a judge must of course bear in mind that the improbable account may nonetheless be the true one. The improbable is, by definition, that which *may* happen, and obvious injustice could result if a story told in evidence were too readily rejected simply because it was bizarre, surprising or unprecedented.

Sir Richard Egglestone [44] gives a good example of this. A woman was considered to be suffering from hallucinations because of her complaint that the head of her late husband, an African American, had rolled down the steps into her kitchen and had been retrieved by the devil wearing a black cloak. In fact, the devil was an eminent scientist. He had been making a study of the heads of criminals. On the night in question, he had been carrying the head of an African American who had died in gaol. He dropped the head in the street and it rolled down the steps of the old woman's house. As the removal of the head was unlawful, he had wrapped a black cloak around his face and, calling out "Where's my head? Give me my head!", had gone to retrieve it, confident that he would not be recognised.

An example closer to home is that recounted by Sir Zalman Cowen. One of his aunts, an aged but independent lady with a heavy Polish accent, suffered an unfortunate accident in a London street. She was severely injured, and was taken to hospital where she had difficulty in identifying herself to the hospital staff. They became concerned about her mental state and, in a valiant effort to establish her credentials, she persisted in telling her incredulous audience, "My nephew is the Governor General of Australia".

So, to conclude, I suggest that - despite the compelling policy reasons to limit fact appeals - appellate courts should regard demeanour-based findings of fact, contrary to the probabilities, as appealable error if adequate reasons are not given for them. Such a rule would advance the administration of justice. The virtually untrammelled power of trial judges to make what, practically speaking, are final decisions affecting the fate of individuals, on the ground of what the judges happen to feel about witnesses' physical reactions when testifying, is an anachronism in a system of justice that prides itself on objectivity and rationality.

END NOTES

1. Edited version of paper delivered at the Winter Conference of the New Zealand Bar Association on 2 September 2006 at Queenstown
2. Judge of Appeal, Supreme Court of New South Wales
3. *Gigi*, Alan Jay Lerner
4. Shortly before this paper was delivered, McClellan CJ at CL delivered his paper, *Who is telling the truth? Psychology, common sense and the law*, at the 2006 Annual Conference of the Local Courts of New South Wales. Both papers were prepared independently of the other, each author not knowing that another paper on the subject was being written by someone else. Perhaps this presages an awakening of interest in the topic.
5. See discussion in *Goodrich Aerospace Pty Ltd v Arsic* [2006] NSWCA 187 at [20]
6. *Courts on Trial*, Princeton University Press (1973), at 19
7. *Remembering Trauma* McNally, Harvard University Press (2003) at 36

8. McNally, *op cit* at 50
9. McNally, *op cit* at 68
10. McNally *op cit* at 277
11. Harvard University Press (2003)
12. McNally *op cit* at 277
13. McNally *op cit* at 69
14. Schacter D L, *How the Mind Forgets and Remembers*, Souvenir Press (2003)
15. Schacter *op cit* at 111
16. McNally, *op cit*, at 35
17. See Dworkin R, *Law's Empire*, The Belknap Press of Harvard University Press Cambridge (1986) at 379-381, (referred to in Sharp L, *Cognitive Heuristics and the Law*, (1995) 20 Bulletin of the Australian Society of Legal Philosophy 71 at 78).
18. Frank, *Courts on Trial*, *op cit* at 21
19. MacKenna J in an extra-judicial observation referred to in Bingham, *The Judge as Juror: The Judicial Determination of Factual Issues*, (1985) 38 Current Legal Problems 1 at 8
20. Bingham *op cit* at 10-11
21. Rodger, *What Are Appeal Courts For?* (2004) 10 Otago LR 517 at 521
22. Frank J, (1930), *Law and the Modern Mind*, 6th printing, Peter Smith (1970), p xx (referred to in Sharp *op cit* at 71).
23. Mason K, *Unconscious Judicial Prejudice*, (2001) 75 ALJ 676 at 684, Sharp *op cit* at 86-92
24. [1997] 3 SCR 484
25. See generally, Ipp D A, *Judicial Impartiality and Judicial Neutrality Is there a difference?* (2000) Australian Bar Review 212
26. Mason *op cit* at 679
27. *Holland v Jones* (1917) 23 CLR 149 at 153
28. Allison JR, (1994), *Ideology, Prejudgment, and Process Values*, 28 New Eng L Rev 657 at introduction, circa footnote 5, (referred to in Sharp *op cit* at 74)
29. Sharp *op cit* at 71
30. See the discussion in *Evidence, Proof and Probability*, Eggleston, Weidenfeld and Nicolson (1983) at 192-193
31. *Wiki v Atlantis Relocations (NSW) Pty Ltd* [2004] NSWCA 174
32. See for example *Rae v International Insurance Brokers Limited* [1998] 3 NZLR 190 at 199
33. (2003) 214 CLR 118
34. At 128 –129, [30] - [31]
35. In *Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana")* [(1924) 20 LI L Rep 140 at 152]
36. See discussion in *Goodrich Aerospace Pty Ltd v Arsic* at [11] to [15]
37. (2006) 80 ALJR 458
38. at 465, [19]
39. as Tobias JA points out in *Walden v Black* [2006] NSWCA 170 at [83]
40. Bingham *op cit* at 11
41. *Goodrich Aerospace Pty Ltd v Arsic* at [28]
42. *Goodrich Aerospace Pty Ltd v Arsic* at [29]
43. See the remarks of Hayne J in *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 at 1835, [130]
44. Eggleston *op cit* at 200-201 (the story apparently comes from Wigmore)

The Trial Judge's Duties from an Appellate Point of View: Edited Version of a Paper given at a Conference in Beijing organised by the National Judicial College, Beijing, 13 October 2004 and to the Shanghai Judicial College, Shanghai, 19 October 2004.

THE TRIAL JUDGE'S DUTIES FROM AN APPELLATE POINT OF VIEW* The Honourable Justice David Ipp[1]

The modern system of litigation

The duties of a trial judge can best be understood against the background of the modern system of the administration of justice and, in particular, the appellate process.

All developed and developing countries rely on some form of adversarial or inquisitorial system of justice to resolve disputes. It was not always so. I understand that the Chinese tradition focused more on achieving harmony between the parties. This remains a highly desirable means of avoiding litigation. The notion of mediating disputes without recourse to litigation is becoming more and more important throughout the world. In this area, particularly, there is much to be learnt from the Chinese experience.

Where harmony cannot be achieved, and agreement cannot be arrived at, and negotiation fails, it seems that the adversarial or inquisitorial systems of litigation (or a combination of the two) proffer the best option.

In the West, it was not always so. Once upon a time trial by ordeal and trial by battle were the accepted means of dispute resolution. Trial by ordeal took many forms. One involved the accused person being tied up and thrown into a deep river. If the victim drowned, guilt was conclusively established. If not, he or she was regarded as innocent.

Another form involved requiring the accused to clasp a red hot piece of iron for several minutes. After the hand had been severely burnt, it would be bound, usually with paper containing religious writing. After a few days the binding would be removed. If the wound was healing satisfactorily, innocence was proved. If not, the accused would be shown to be guilty and would be executed.

Trial by battle involved an armed duel between the litigants. It was accepted that he who was telling the truth would vanquish his opponent. The unsuccessful party would be left bleeding to death on the ground.

Despite its defects, I would like to think that the present system of trials before legally trained trial judges under the umbrella of a body of appellate tribunals, resulting in open and reasoned justice, is some improvement.

A fundamental aspect of the modern system is the judge's reasons for judgment, and I will be focusing on this part of the judge's task.

The appellate system[2]

The primary purpose of a trial judge's reasons for judgment is to explain to the parties, appellate courts and the general public how the judge came to his or her decision. This is an essential element of open and fair justice. The reasons for judgment must explain the judge's reasoning process and should not, in effect, have the practical result of negating or frustrating the losing party's right of appeal. The technique and content of the trial judge's reasons for judgment must bear these matters in mind.

The primary function of appellate courts is to review decisions made by trial courts. A trial court's primary function, on the other hand, is to decide cases after hearing the oral or written testimony of witnesses. The trial court will determine the facts of each case, usually where there have been substantial conflicts between the parties. The trial judge will then apply the law to those facts and enter judgment for one party or the other. Appeal courts are concerned with determining whether the trial court result should be upheld or set aside.

Another distinguishing feature of appellate judges is that they function collegially through units consisting of multiple judges (known as benches). Trial judges sit alone (or in conjunction with a jury). Juries are not involved in the appellate process.

In deciding appeals, Australian appellate courts generally consider only those facts that were determined by the judge or jury in the trial court. They rarely receive additional evidence. The decisions of appellate courts are made on the transcript of the oral testimony and the written evidence given at the trial, and the exhibits and pleadings before the trial court. Counsel for the parties deliver written submissions to the appellate court usually a few days before the hearing, and at the hearing make oral submissions in open court.

Oral submissions are regarded as an integral part of the process. When these take place, the judges

participate in the debate. There is often intense questioning of counsel. In the course of this questioning the argument becomes refined, issues are isolated and crystallised and often, what were initially only half-articulated ideas assume considerable importance. In this way, the system provides a mechanism for the search for the true issues in dispute and, indeed, the truth.

An appeal is not a common law right in Australia but is a right created by statute. Today there is a widespread and deeply held belief amongst Australian lawyers that every losing litigant should have an opportunity to have at least one appeal. Judges are human beings and to err is human. For that reason, it is believed that justice requires at least one appeal. In Australia there is a structure of intermediate appellate courts with the highest court in the land being the High Court of Australia.

The High Court only hears appeals by leave. There are presently only seven members of the High Court. This necessarily limits the amount of cases it can hear. For this reason, in practical terms, for about 90% of the cases in Australia, the intermediate appellate courts are the final appellate courts. Appellate courts perform a number of important functions.

Firstly, they provide a means of establishing a correct and uniform interpretation of the law. In each State, and in the federal system, there are numerous trial judges. Even if those judges are all able and conscientious, it is inevitable that differences of view as to the content of the law will be displayed. An important element of justice for the society as a whole is that the law should be applied evenly, and in a consistent and uniform way, to all persons within the jurisdiction. A system of appellate courts, with a common ultimate appellate court, is necessary to achieve a reasonable level of constancy and certainty in the law.

Secondly, appellate courts provide a means for the ongoing development and evolution of the law. Legislation alone cannot deal with all the issues that arise in litigation. Appellate courts, through their decisions, declare, make and reshape legal doctrine in an attempt to ensure that the law evolves in line with the changes in political and social values in the community.

Thirdly, appellate courts heighten the legitimacy and acceptability of judicial decisions. Losing litigants in the trial court are sometimes convinced that they have lost unjustifiably. The opportunity to take the case to a higher, multi-judge forum provides a healthy outlet for such feelings.

Fourthly, appellate courts provide a means for the institutional sharing of judicial responsibility for decisions. The work of the collegiate system of appellate courts provides an assurance that the system is functioning under a proper regime of legal decision-making.

The High Court usually sits as a bench of five or seven judges. The intermediate appellate courts usually sit as benches of three judges. A feature of the judicial practice in the Australian system is individuality. Appellate judges are under no obligation to collaborate with their colleagues to produce a single set of reasons. In the American tradition, by contrast, reasons for decision are more often a product of debate, deliberation, negotiation and compromise, amongst appellate judges. Debate and deliberation are features of the Australian process, but it takes place primarily between individual judges and counsel for the parties rather than between the judges.^[3]

In the New South Wales Court of Appeal, most appeals last one day. Sometimes, however, two or even three appeals will be heard in one day. More complex appeals will last for longer, often two to four days. Rarely, an appeal will take five days or more. Appeals are far shorter than trials, as in appeals counsel concentrate only on those aspects where the trial judge is said to be wrong. The rhetoric of appellate counsel is usually far less flamboyant than that of counsel appearing at a trial. In appeals, counsel concentrate on rational argument to persuade, whereas in trials counsel often resort to emotion and feelings.

Court hours are usually 21/2 hours in the morning and 2 hours in the afternoon. But a judge's working hours bear little relationship with court hours. Much time has to be spent reading, absorbing and analysing written material. An appellate judge is often faced with appeal materials comprising hundreds and sometimes thousands of pages of paper. When argument on the appeal takes place, the judge is expected to be on top of the facts, the law and the issues. Then comes the process of writing the judgment. The argument will have been recorded and typically the judge will first read that, then do some research, read the relevant cases, re-read and analyse the material, form a view, work out some way of condensing it all into some comprehensible form, and then commence writing.

Judgments range in length from say 10 pages to several hundreds of pages. Most judges start at about 8.00 to 8.30 am and stay at work to 6.00-6.30 pm. Some work every evening till late at night. Others start at 7.00 am or earlier and leave work earlier.

In the New South Wales Court of Appeal, as a general rule, a judge of appeal sits in Court (with two other judges) four days a week with one day off for writing judgments, and this will go on day after day, apart from holidays, throughout the year. As I have said, there is usually at least one appeal each day. So, each judge of appeal will hear about four appeals a week. The work of preparing for the new appeal and writing judgments for the appeals that have been heard is done whenever one can snatch some time. Early in the morning before Court starts, after Court in the afternoon, in the evening, and sometimes over weekends.

The work of the trial judge

The trial judge will initially have to read the pleadings, which in some courts may comprise more than 100 pages of closely reasoned allegations, and will, on a daily basis, read the transcript of the evidence that has been led and exhibits that have been tendered. This will usually involve between 100 to 200 pages of evidentiary material each day.

Hearing times are usually from 10.00 am to 1.00 pm and from 2.00 pm to 4.00 pm each day. Prior to 10.00 am the trial judge will usually be involved in case management of other cases. When the judge is not in court he or she will be studying the evidence and preparing the reasons for judgment to be given. When the case is over, the trial judge will usually have to read all the material again in order to write the judgment. Cases can take less than a day. Some cases go on for several months.

A judgment is expected to set out the issues in dispute, the relevant facts and the reasons for the judge's decision. The reasons comprise an analysis of the facts and the law and an explanation as to how the judge applies the law to the facts as found.

As far as appellate judges are concerned, the all-important task of the trial judge is to find the relevant facts. This usually requires deciding between two or more conflicting versions. How does a judge go about deciding whether a person is telling the truth? Generally, it is now recognised that the demeanour of witnesses is not always a reliable guide to credibility. Tests by psychologists have demonstrated that a nervous, hesitant witness, who stammers and sweats, is just as likely to be telling the truth, as a calm, confident, and articulate person. Therefore, it is dangerous to decide the facts by basing the decision on the looks of a witness, or aspects of behaviour in the witness box, or on the witness' self-assurance.

Some years ago a forensic psychologist addressed a group of judges of which I was part. Without any prior explanation, he showed us a film of a motor car accident. He then questioned us about what we had seen. He then showed the film again. The evidence of most of us was inaccurate. And this was a few minutes after observing the occurrence. What can be said about the reliability of witnesses who testify years after the events in issue?

Good judges, being aware of the dangers of personal impressions, decide credibility questions largely by weighing up probabilities. That is, probabilities judged by reference to the ordinary course of human behaviour. The judge will look for corroborative facts, contemporaneous conduct that is consistent with one version and not another. This would make it difficult for a witness who tells an outlandish story to be believed. But a good trial judge will carefully weigh up all the evidence and attempt not to discount evidence simply because, at first glance, the witness is telling an unusual story.

Reasons for judgment and judicial accountability

The reasons for judgment lie at the heart of every appeal. Except for judgments of the High Court, all judgments might be taken on appeal. Once a judgment is given, it is scrutinised for errors. Usually, the judge has limited time to write the judgment. Once it is delivered, however, armies of highly paid barristers and solicitors will examine it at their leisure. Every word, every reference, every authority, will be subjected to analysis, and any error will be exposed.

The appeal process is very public. The judgments of the appeal court will stand forever, with judges' mistakes recorded for posterity, for succeeding generations of lawyers to examine, discuss and pontificate upon. Academics will spend months, sometimes years, studying judgments and then writing to expose weaknesses. Text books become permanent records of judicial errors, as do other judgments by other judges. Not only do judges in higher courts expose what they regard as errors by lower courts, it is not unusual for judges on the same court to criticise the reasoning of their colleagues.

There can be no other profession where the work of the individual is exposed to such rigorous scrutiny and such public and lasting exposure of error. I think it laughable when members of the public say that judges are not held accountable. They are indeed held accountable and in a merciless way.

For reasons of pride, most judges do not readily admit to being upset when they are overturned on appeal. But the fact is that most do not regard it as a happy experience and will do their best to ensure that their judgments are up to the appropriate standard. This is a healthy phenomenon and an important part of the administration of justice.

The approach on appeal to findings of fact by the trial judge

The approach of appellate judges in Australia to factual findings made by trial judges emphasises the importance of those findings.

The approach of appellate courts is dictated by the fact that the judges of such courts neither see nor hear the witnesses. As I have explained, the appeal takes place simply on the transcript of the relevant evidence led at trial. Appellate judges accept that not having seen and heard the witnesses puts them in a permanent position of disadvantage as against the trial judge. Thus, appellate judges are very reluctant to overturn the decision of trial judges as regards what are known as "primary" facts.

Appellate judges distinguish between the finding of a specific (or primary) fact and a finding of a fact that is really an inference from facts specifically found. An example of this distinction may be seen in negligence cases. Here the trial judge must first determine what the defendant in fact did. What was actually done constitutes specific or primary facts. Secondly, the trial judge must decide whether what

the defendant did amount to negligence. Accordingly, a judge must first find the primary facts and then draw from them the inference of fact whether or not the defendant has been negligent.

Appellate judges are particularly reluctant to reject findings of primary fact, particularly where the finding could be founded on the credibility or bearing of a witness. On the other hand, the appellate court has the right and duty to decide whether a particular inference should be drawn from proved facts.[4]

Nevertheless when it comes to primary facts, an appellate court is not precluded from reversing a trial judge's finding, even when it is based, expressly or inferentially, on demeanour (that is, on the way the witness behaved while giving evidence). Before doing so, however, there must be something that points decisively (and not merely persuasively) to error on the part of the trial judge in acting on his or her impressions of the witness.

One way in which this can occur is where the undisputed and documentary evidence is so convincing that no reliance on the demeanour of witnesses could rebut it.[5] In other cases, incontrovertible facts or uncontested testimony will demonstrate that the trial judge's conclusions are erroneous, even when they appear to be, or are stated to be, based on credibility findings. In some, quite rare, cases, an appellate conclusion may be reached that the decision at trial is "glaringly improbable" or "contrary to compelling inferences," and, hence, the decision will be set aside.

But when it comes to drawing inferences, the fundamental principle remains that an appellate court is in as good a position as the trial judge to come to a decision.[6]

The basic elements of reasons for judgment

Giving reasons for judgment is regarded as a function of due process, and therefore of justice.

Fairness requires that the parties should know why they have won or lost. The reasons for judgment should enable the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the judge's decision.[7]

A judicial decision must be a reasoned decision arrived at by finding the relevant facts and then applying the relevant rules or principles. A decision that is made arbitrarily cannot be a judicial decision; for the hallmark of a judicial decision is the quality of rationality. The requirement to give reasons furthers judicial accountability.

The reasons must be sufficient to give effect to the right of appeal. It is not for nothing that in some bilingual countries the judgment of the court is given in the language of the unsuccessful party. The basis for the decision must be apparent, as otherwise the losing party cannot know whether there has been a mistake of law or of fact. Just what that will involve depends upon the nature of the case.

Some cases turn upon a simple contest of credibility between two witnesses. Others involve detailed and complex factual and legal issues requiring close reasoning and analysis. If inadequate reasons are given, that may frustrate the unsuccessful party's right of appeal. If that occurs an appeal court will set aside the judgment.

Reasons need not be lengthy and elaborate; nor do they need to refer to all the evidence led in the proceedings. Reference should be made, however, to all relevant evidence (albeit not necessarily in detail). Where there is conflicting evidence of significance to the outcome, reference should be made to both sets of evidence.

Where one set of significant evidence is preferred over another, the trial Judge should set out findings sufficient to explain why. Similarly, where a dispute involves a form of intellectual exchange, with reasons and analysis advanced on either side, the Judge must enter into the issues that have been canvassed and explain why he or she prefers one case over the other. Generally speaking, however, it is not desirable to make absolute rules as to how reasons should be given. This is because issues are so infinitely various. For instance, when the court, in a case without documents depending on eye-witness accounts, is faced with two irreconcilable accounts, there may be little to say other than that the witnesses for one side were more credible.

It has been emphasised[8] that the loser is entitled to have from the judge a candid explanation of the reasons for the decision. This is not only for the exercise of any appeal rights that may exist. "It is also to uphold the intellectual integrity of our system of law which must daily demonstrate, by its performance in particular cases, its adherence to the law, attentiveness to argument, impartiality and logical reasoning".[9]

A judgment is also written for the legal representatives of the parties and for the profession generally. Even if the litigants do not fully understand the analysis, their lawyers are entitled to have it demonstrated that the judge had the correct principles in mind and properly applied them.

In addition, judgments are written for other judicial officers. They may be written for judges lower in the hierarchy and for judges in the same court. No judge of a superior court can approach his or her functions without an awareness that a judgment may be reported and that it may establish a legal principle, binding until set aside by an appellate court. Knowledge of this fact tends to impose a discipline and quality control upon all judges.

The importance of finding the primary facts

Sometimes, when the trial judge has not made findings as to essential primary facts that are in dispute, the appellate court will not be able to decide the matter itself. That is because, not having

seen or heard the witnesses, it will not be able to decide, reliably, which witness is to be believed. When that occurs, the appeal court will set aside the judgment and remit the case to the trial court for rehearing, usually before a different judge. This means that it is vitally important for a trial judge to make all necessary factual findings.

Sometimes, a trial judge can focus on only one or two issues because, by reason of the view the judge takes, those limited issues will be decisive. But if the case goes on appeal, the appellate court may be of a different opinion. The appellate court may decide that the trial judge was wrong and the case does not turn on those limited issues. The appellate court will then want to know the primary facts on the other issues. If the trial judge has not decided the other primary facts, the case will have to be remitted for retrial. Thus good practice is to decide all relevant facts that are in issue.

A simple example of this is a case where a worker sues an employer for damages for personal injuries that, the worker alleges, were sustained by reason of the employer's negligence. Even if the trial judge thinks that the employer was not negligent (and for that reason, the worker should lose the case) he or she should go on to decide the amount of damages (and the primary facts in that connection) that the worker would have been entitled to had he been successful on the negligence issue. This is necessary in case the appellate court decides that the trial judge was wrong in regard to negligence and wishes to dispose of the case finally on appeal. If the trial judge has not made findings as to damages, the case will have to be remitted to the trial judge for a further hearing as to damages, there will be delays and wasted costs will be incurred.

Findings as to which expert witness is to be preferred

In resolving conflicts between expert witnesses, the judge remains the judge and is not obliged to accept evidence simply because it comes from a witness eminent in a specialised field. But, a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal by the judge, unless it can be discounted for other good reasons (such as demonstrated partisanship or lack of objectivity).

A problem that often arises concerning expert evidence involves the influence of demeanour in deciding which expert is to be preferred. Appellate judges recognise that in some instances the trial judge may decide who is telling the truth solely by reference to the demeanour of the parties, even though it is recognised that this is not always desirable. But when it comes to the evidence of expert witnesses, different considerations apply.

In some disputes between experts, demeanour will be crucial. This may occur where an expert witness has given dishonest or misleading evidence, or has become an advocate for a party, or where the evidence given is inherently unreliable for other reasons. Demeanour may also be crucial in situations where the court may not be in a position to decide whether the facts on which the witness relies are true and may not be able to judge the scientific or professional accuracy of the principles. Where experts state different conclusions and rely for them upon facts and principles that differ, a judge may not be in a position to give objectively convincing reasons for his or her choice. It may, in the end, have to depend upon the impression that the witness has made.

Demeanour might also play a partial role in a decision whether to prefer one expert to another. A judge may be persuaded by a combination of the logical force of an expert's views together with the way in which the evidence was given.

But, where the issue in dispute involves differences between expert witnesses that are capable of being resolved rationally by examination and analysis, and where the experts are properly qualified and none has been found to be dishonest, or misleading, or unduly partisan, or otherwise unreliable, a decision based solely on demeanour will not provide the losing party with a satisfactory explanation for his or her lack of success. A justifiable grievance as to the way in which justice was administered will then arise.

I can offer two examples of trial judges offending this rule.

In the first example,[10] the trial judge decided the case solely by preferring one expert witness to another. The only explanation he gave for preferring the one witness was the "very persuasive" quality of the witness, his view that the witness was the "most eminent" of the medical practitioners who gave evidence and his view that the witness was "the most impressive witness" whether lay or expert. Thus, apart from the question of the "eminence" of the witness, the most important issue in the case was resolved solely by the judge's subjective opinion as to which witness was regarded as the most "persuasive" and "impressive". This was regarded as inadequate reasoning in the particular case and the judgement was set aside.

In the second example,[11] the trial judge decided the case virtually solely on the strength of the following remarks that he made:

"I have had the advantage not only of hearing the various witnesses give evidence but also of seeing the way in which they have reacted to the questions that they were asked. Having done so, I prefer the expert evidence that was given for the defendants to that which was given for the plaintiffs."

Again, on appeal, this reasoning was regarded as entirely inadequate. The losing party had no real idea why the professional opinions expressed by his expert witnesses were rejected. Accordingly, the judgment was set aside and a new trial was ordered.

Delay in giving judgment

Delay in giving judgment, at least when it is substantial, adds another dimension in considering the adequacy, or otherwise, of reasons.

A long delay can give rise to disquiet. Those who win may feel they have been deprived of justice for far too long. Those who lose might suspect that the task has become too much for the trial judge and that he or she has been unable to grapple adequately with the issues. In an extreme case, an unreasonable delay that results in prejudice to a losing party may amount to a denial of procedural fairness.

Delay does not ordinarily, of itself, indicate that the trial has miscarried or that the judgment is unsafe. However, a comparison between the judgment and the issues in the trial may indicate that its effect has been such as to constitute a miscarriage.

Where there has been substantial delay, statements by the judge of a general assertive character, which might otherwise be accepted as encompassing a detailed consideration of the evidence, might be treated with reserve. It has been said that a delay of the order of 10 months was such as to require a more comprehensive statement of the evidence than would normally be required in order to manifest, for the parties and the public, that the delay has not affected the decision.[12]

In a case of substantial delay involving a period of over 20 months from the end of the hearing, the English Court of Appeal said:[13]

"A judge's tardiness in completing his judicial task after a trial is over denies justice to the winning party during the period of the delay. It also undermines the loser's confidence in the correctness of the decision when it is eventually delivered. Litigation causes quite enough stress, as it is, for people to have to endure while a trial is going on. Compelling them to await judgment for an indefinitely extended period after the trial is over will only serve to prolong their anxiety, and may well increase it. Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive to the rule of law. Delays on this scale cannot and will not be tolerated. A situation like this must never occur again.

Because of the delay in giving judgment it has been incumbent on us to look with especial care at any finding of fact which is now challenged. In ordinary circumstances where there is a conflict of evidence a judge who has seen and heard the witnesses has an advantage, denied to an appellate court, which is likely to prove decisive on an appeal unless it can be shown that he failed to use, or misused, this advantage. We do not lose sight of the fact that the judge had transcripts of the evidence, as well as very extensive written submissions from counsel. But the very fact of the huge delay in itself weakened the judge's advantage, and this consideration had to be taken into account when we reviewed the material which was before the judge. In a case as complex as this, it is not uncommon for a judge to form an initial impression of the likely result at the end of the evidence, but when he has come to study the evidence (both oral and written) and the submissions he has received with greater care, he will then go back to consider the effect the witnesses made on him when they gave evidence about the matters that are now troubling him. At a distance of twenty months, Harman J denied himself the opportunity of making this further check in any meaningful way."

In a Western Australian case,[14] evidence was received by the trial Judge between 29 February 2000 and 19 June 2000 and closing submissions were presented between 12 and 15 September 2000.

More than 17 months later, on 27 February 2002, submissions were heard in relation to a decision of the High Court delivered in 2001. Then, on 13 December 2002, almost 10 months later, the judgment was delivered, after a total delay of almost two years and three months. The appellate court concerned said:

"It is hardly surprising that this inordinate and inexcusable delay (for that is undoubtedly what it was) led to disquiet and suspicion. Nor is it surprising that we were presented (by responsible and experienced counsel) with submissions (of a kind which no appellate court ever wishes to see) criticising the delay, and its apparent consequences, in trenchant terms. The making of those submissions was even less surprising given that, notwithstanding that the delay was explained by the trial Judge by saying that it had been occasioned by the need to thoroughly absorb and review the evidence and submissions, the judgment runs, as we have said, to only 24 pages of text and makes no attempt to refer to much of the relevant evidence or to set out, in any adequate way, the trial Judge's reasons for preferring significant sets of evidence over other significant sets of evidence. Moreover, this was a factually and legally complex case which involved an intellectual exchange with reasons and analysis advanced on either side. However, the trial Judge, in significant instances, did not enter into the issues canvassed before him in any adequate way or provide explanations for his decisions which treated those intellectual exchanges with the respect which they plainly warranted." [15]

It may be of interest to look at the appellant's grounds of appeal relating to the judge's delay in giving judgment in that case. The grounds were as follows:

"(a) Following a trial which lasted for 67 days (with more than 6,000 pages of transcript and almost 800 exhibits) and having taken in excess of 2 years to deliver his judgment, the Trial Judge erred in failing to provide adequate findings and reasons to enable a proper understanding of the basis upon which his determination of value had been reached and in particular failed to:

(i) identify with specificity the evidence he found to be irrelevant;

- (ii) identify with specificity what evidence he relied upon and what evidence he rejected in reaching his decision;
- (iii) weigh the merits and demerits of each party's evidence; and
- (iv) demonstrate that all the facts, evidence and pleadings had been carefully assessed.

(b) It should be inferred from the inadequacy of the reasons contained in the judgment and the lengthy delay in providing the judgment that the trial Judge had overlooked large parts of the pleadings, essential evidence and argument in the case and that his findings were unsafe, resulting in a substantial miscarriage of justice."

In the result the judgment was set aside and a new trial was ordered. The enormous inconvenience to the parties of this result is obvious when regard is had to the length of the trial and the fact that the trial judge took more than two years to deliver his judgment.

Overly lengthy judgments

Many trial court judgments suffer from over-consideration of details, especially factual details, just as appellate courts judgments suffer from over-consideration of every point of law. There is a great problem with trial courts' judgments that offer a plethora of facts, unfocussed by any issue or other principle of organisation.

Where reasons for judgment are excessively long, problems arise. Prolixity is an enemy of comprehensibility and, indeed, cogency. Lengthy judgments by trial judges tend to be in a form that does not facilitate the discernment and understanding of the significant issues in the appeal. One of the major reasons for the inordinate length of some judgments is the mechanical recounting of large tracts of submissions and evidence. There is good reason not to repeat these arguments verbatim, but to summarise them succinctly. It should be a rule of practice for judges to keep the quoted extract to a minimum; the minimum being that particular portion which enables the judge to make a particular point - and no more.

Further, it is generally unnecessary and undesirable to express every line of thought, including those that have proved to be unhelpful, in the judge's chain of reasoning. This again can cause debate and confusion on appeal. It is preferable for trial judges to confine themselves to the reasoning that leads to their final conclusions.

The overriding concern for judges should be to make clear and precise findings and to make findings on all important matters. The English Court of Appeal has said in this regard:

"A judge's task is not easy. One does often have to spend time absorbing arguments advanced by the parties which in the event turn out not to be central to the decision making process. Moreover the experienced judge commonly has thoughts about avenues which it might be crucial to explore but which the parties have not themselves examined. It may be his duty to explore these privately in order to satisfy himself whether they are relevant. Having done the intellectual work there is an understandable temptation to which many of us occasionally succumb to record our thoughts for posterity in the judgment or to refrain from shortening a long first draft.

However, judges should bear in mind that the primary function of a first instance judgment is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. The longer a judgment is and the more issues with which it deals the greater the likelihood that: (i) the losing party, the Court of Appeal and any future readers of the judgment will not be able to identify the crucial matters which swayed the judge; (ii) the judgment will contain something with which the unsuccessful party can legitimately take issue and attempt to launch an appeal; (iii) citation of the judgment in future cases will lengthen the hearing of those future cases because time will be taken sorting out the precise status of the judicial observation in question; and (iv) reading the judgment will occupy a considerable amount of the time of legal advisers to other parties in future cases who again will have to sort out the status of the judicial observation in question. All this adds to the cost of obtaining legal advice." [16]

Judicial criticisms

In view of the effect that judicial criticism may have on the reputation of an individual, judges must take proper care before making adverse remarks about their credibility, honesty or professional competence. Judges should be conscious of the harm that may be done, unfairly, to those involved in the case by an incautious manner of expressing reasons for judgment.[17]

Nevertheless, in an appropriate case a judge may be duty bound to make comments or even findings of this kind. Adverse criticism of a person, even trenchant criticism, is sometimes required in a judgment, and praise may likewise be proper; but strict relevance to the matters to be determined is the only touchstone by which the propriety of either is to be assessed.

Calm detachment in thinking and moderation in expression are essential to the Judge's task. A careful and balanced criticism may properly "be made in forceful words, in biting words if need be, with the purpose of bringing the demands of a healthy social conscience to the attention of a Parliament or a Government".[18]

Some practical hints on writing judgments

Judges and lawyers waste a great deal of time in reading long judgments with a great detail of facts citing a maze of authorities. Many judgments require a great deal of effort to cut away the unnecessary mass of material to get at the real issue and the fundamental reasoning of the judge that

has been applied to arrive at the particular decision. A great fault is the tendency to ramble rather than clearly define and discuss the issues. There is also a tendency to use the same stereotyped words that have been used by judges for decades.

It has been said that brevity, simplicity and clarity are the hallmarks of good judgment writing.[19] But the greatest of these is clarity. The concept of clarity carries with it thoroughness in consideration and the utmost care in the formulation of propositions.

Justice Sheller of the New South Wales Court of Appeal has made the following very useful practical suggestions when writing judgments: [20]

"The correct judicial method comprises the application of the relevant law, formulated clearly and correctly to a carefully found factual situation. [21] This precise statement covers four steps in the judicial process of decision making -

1. defining the problem;
2. identifying the choice of solutions;
3. selecting a solution;
4. publicly explaining how the preferred solution was reached and justifying it.

The first three steps involve gathering and putting in order information, and weighing the advantages and disadvantages of the possible solutions. The writers on the subject have tended to formalise the fourth step by advocating a fixed form of judgment writing. [Justice Kitto] decried the convenient practice of beginning each task with a tedious formula that shows the task itself to be yet another turn of a ponderous treadmill.[22]

It may not be essential or always appropriate but you can do worse than proceed by the following steps -

1. The introduction, setting the stage, by reciting the nature of the case and how it comes before the court, so as to give an immediate sense of overview, rather than plunging straightaway into the facts.
2. The questions to be decided, the issues.
3. The essential facts, selectively and logically, and some would say, usually in descending sequence of importance rather than chronologically[23] so as to tell the story in a simple and readable way. It is insufficient compliance with the obligation to give reasons for a judge to make a mere finding on liability that the incident occurred at a particular place on a particular date, that the incident was caused by the defendant's negligence and that the judge accepts the plaintiff's version of the accident. The reasons should specify what happened and where and when it happened, summarise the evidence that goes to liability, make findings on the evidence indicating where there is conflict, and why some rather than other evidence is preferred. [24]
4. The determination of the issues; that is to say, an analysis and application of the legislation and case law to the facts.
5. The conclusion - the disposition of the case.

Too rigid an application of this stark formula may lead to the omission of a vital ingredient. The judgment must state and address the argument, particularly that of the unsuccessful party. Too often appellants claim that the trial judge's silence about their arguments meant that they were forgotten or ignored. The arguments must be stated, and, if rejected, refuted."

An American judge has suggested the following tips for good judgment writing:[25]-

1. cut down facts - do not load judgments with useless detail;
2. do not reproduce the record - summarise rather than quote the pleading;
3. authorities only cited - there is no need to set out large passages from other judgments;
4. meritless points merit no time;
5. eliminate [unnecessary] footnotes ... ;
6. summarise statutes - again, avoid block quotations; and
7. avoid string citations - cite the key cases rather than all the cases."

Dedication and commitment to the judicial task

The reasons must demonstrate that the judge has fulfilled his or her duty and displayed the requisite dedication and commitment in deciding the case.

The realisation that one's future has been decided by a disinterested or lazy judge can be a chilling experience. The great Russian author, Tolstoy, in his last great novel, Resurrection, evokes a feeling of dread in the reader when describing the three judge trial court that is to decide the fate of an innocent woman charged with murder. He wrote:

"[The President of the Court] was anxious to begin the sitting and get through with it as early as possible, in time to call before six o'clock on the red haired woman with whom he had begun a romance in the country last summer. The second judge is feeling gloomy having just been told that his wife would not be making any dinner that evening. The third member of the court was suffering from gastric catarrh."

Tolstoy explains:

"Now, as he ascended the steps to the platform, his face wore an expression of deep concentration, resulting from a habit he had of using various curious means to decide the answers to questions which he put to himself. Just now he was counting the number of steps from the door of his study to his chair; if they would divide by three, the new treatment would cure his catarrh. If not, the treatment

would be a failure. There were 26 steps, but he managed to get in an extra short one and reached his chair exactly at the 27th."

Not a bench that you would be hoping for if you were on trial for your life.

Conclusion

The reasons for judgment must show that the judge has paid careful attention to the evidence and arguments of counsel, has properly applied his or her mind to all the important issues in the case, has properly understood the relevant law and has appropriately applied the law to the facts. Unless this is apparent, the judicial duty will not have been fulfilled.

(Edited version of a paper given at a conference in Beijing organised by the National Judicial College, Beijing, 13 October 2004 and to the Shanghai Judicial College, Shanghai, 19 October 2004.

1 Judge of Appeal, Supreme Court of New South Wales.

2 Much of what follows under this heading is adapted from what is said in Meador & Bernstein, *Appellate Courts in the United States* (West Publishing, 1994) at 1-5.

3 Professor Peter Cane, "Justice Michael Kirby's Echo Chamber", Paper given at Supreme Court of New South Wales Annual Conference, 21 August 2004.

4 *Warren v Coombes* (1979) 142 CLR 531.

5 *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306.

6 *Abalos v Australian Postal Commission* (1990) 171 CLR 167 (at 178 per McHugh J).

7 *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 (at 279 per McHugh JA).

8 Justice M Kirby, "On the Writing of Judgments" (1990) 64 ALJ 691 (at 692 - 693).

9 *Id* at 693.

10 *Wiki v Atlantis Relocations (NSW) Pty Limited* [2004] NSWCA 174.

11 *Moylan v The Nutrasweet Company* [2000] NSWCA 337.

12 *R v Maxwell*, unreported, NSWCCA, 23 December 1998.

13 *Goose v Wilson Sandford & Co*, unreported, England and Wales Court of Appeal (Civil Division), 13 February 1998.

14 *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2004] WASCA 149.

15 *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2004] WASCA 149 at [37].

16 *Customs and Excise Commissioners v A* [2003] 2 All ER 736 per Schiemann LJ (at 753-754, [82]-[83]).

17 Chief Justice M Gleeson, "Aspects of judicial performance", revised version of a paper "The Role of the Judge and Becoming a Judge" delivered to the National Judicial Orientation Programme, 16 August 1998, Sydney.

18 Sir Frank Kitto, "Why Write Judgments" (1992) 66 ALJ 787 (at 789).

19 *Ibid*.

20 Justice C S C Sheller, "Judgment Writing" (1999) 4 *The Judicial Review* 127 (at 132-134).

21 *Amoco Australia Pty Ltd v Rocca Bros Engineering* (1973) 133 CLR 288 (at 296 per Menzies J).

22 Kitto, *op cit*, at 787.

23 Stevenson & Zappen, "An Approach to Writing Trial Court Opinions" (1984) 67 *Judicature* 336 (at 343).

24 *New South Wales Insurance Ministerial Corporation v Mesiti* (unreported, NSWCA, 1 December 1994).

25 See Judge C G Douglas III, "How to Write a Concise Opinion" (1983) 22 *Judge's Journal* 4 (at 7), quoted in Sheller JA, *op cit* at 133.

Ethical Problems with Judicial Activism: Edited Version of a Paper given at a Conference in Beijing organised by the National Judicial College, Beijing, 12 October 2004 and to the Shanghai Judicial College, Shanghai, 19 October 2004.

**ETHICAL PROBLEMS WITH JUDICIAL ACTIVISM*
The Honourable Justice David Ipp[1]**

Three forms of judicial activism

In modern times the common law world has seen at least three forms of judicial activism. The first is activism in reforming procedural rules. The second is activism in political and social reforms and the third is activism in human rights. Inherent in each of these forms of judicial activism are difficult and important questions of judicial ethics.

All three forms of judicial activism involve increases in judicial power. The corollary of increased judicial power is increased judicial responsibility. Judicial responsibility is no longer seen as a function of State power; nor as a function of the prestige and independence of the judiciary itself. Rather, it is now regarded as the function of an institution that serves the community. This view requires the judiciary to combine impartiality with responsiveness to the individual members of society, at whose service only the system of justice must work. A former Chief Justice of Australia, Sir Anthony Mason, has said:

"[W]e must recognise that the courts are institutions which belong to the people and that the judges exercise their powers for the people. The requirement that judges respond to the needs of the individual members of society contains within it the expectation that judges will intervene in order to achieve justice." [2]

These principles inform all aspects of judicial activism.

Procedural activism

There is an unmistakable trend, throughout the common law world, towards increased intervention by judges in the pre-trial and trial process.[3] This is what I mean by procedural activism. The factors that have contributed to this change are manifold. They include both long-term political and social movements and more immediate pressures.

Judicial responsibility is the function of an institution that serves the community. This brings with it a desire that judges should respond to the needs of the individual members of society, and, accordingly, should intervene in the trial process in order to achieve justice.

The moral force of any judgment of a court derives from the fulfilment of the judge's task of deciding the dispute by attempting, fairly and in public, to determine the truth.

Judicial activism in reforming procedure involves judges taking steps, themselves, to cope with increases in litigation and injustices through unnecessary delays and excessive costs. Over the last 20 years what has been called managerial judging has become generally accepted in most developed adversarial judicial systems. Courts have moved away from a passive role in civil litigation to one in which judges actively manage cases in an attempt to minimise delays, encourage early settlement and reduce costs. It is now recognised that procedural rules can be manipulated to benefit the powerful and prejudice the weak. An imbalance in legal representation can work a grave injustice. Judges who insist on being absolutely passive in the courtroom while such manipulation occurs, tolerate, in effect, the injustice that may result. If this is the norm, the courts will lose the confidence of society.

The greater readiness of judges to intervene has brought our system closer to the European civil inquisitorial system. On the other hand, there have been reports that the European systems of inquisitorial justice have themselves become more adversarial. It may be that, with the influence of the European community and the constant communication between judges throughout the world, procedural differences between countries are becoming less marked.

Case management

Case management entails the overall management of pre-trial procedures and the trial itself. Case management is designed to achieve cheaper, swifter and more efficient justice. Case management involves the judge assisting in the determination of the true issues in the case, fixing time limits for the taking of procedural steps, and even, if necessary, restricting questioning of witnesses, the length of addresses and number of expert witnesses who can be called.

In most jurisdictions in Australia it is accepted that courts have a legitimate interest in ensuring that litigation is conducted efficiently and expeditiously.[4] It is recognised that the conduct of litigation is not merely a matter for the parties, but is also one for the court. The court may have regard to the

need to avoid disruptions in its lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard.

There are a number of problems that have come to the fore with judicial case management.

It is difficult to establish norms and rules governing the exercise of judicial case management powers. Judges make managerial decisions based on their own conceptions of fairness and justice. Some say that the perception of judicial impartiality essential to the adversary system is thereby undermined.

There is undoubtedly a danger in judges going beyond conscientious case management to define justice for themselves. Nevertheless, it is now accepted that without managerial judgment the overall state of litigation would be in a far worse condition. The individual litigant's interest in fairness must be balanced against the competing interest in fairness shared by all other current and potential litigants. In any event, judges are accustomed to making discretionary decisions, many of which are not based on clearly defined standards or rules, but are made "in the interests of justice". In itself, there is nothing remarkable about the judge being a decision maker. The novel aspect, in the adversarial system, of managerial decisions made by a judge, is that they are normally not decisions on the legal merits of the case but take into account other, extraneous, matters, often of economic character, such as the court's limited financial and other resources.

As a safeguard against judicial misconduct, case management takes place in open court, usually with a complete transcript of the proceedings and case management decisions are themselves subject to appellate review.

Another problem is the insidious influence of statistics and time standards. As case management has grown, so have statistic gathering methods. Modern record keeping systems are used with computer technology to measure judicial performance. This may give rise to unfair and illusory results. In consequence, judges may become more concerned with statistics regarding their performance than with the quality of their decisions. Furthermore, forcing judges to act within the confines of time standards may pressure them to use less formal procedures in order to expedite the litigation process. There is no easy answer to these difficulties. The overriding factor, however, is that the limited resources now days available to the courts make case management an essential element in the proper and efficient administration of justice. Realistically, without case management, the lists in most jurisdictions would collapse.

Yet another problem is that, by the very nature of pre-trial case management, judges have to make decisions before all the facts are known. They may overestimate the extent of their wisdom, intrude erratically into the pre-trial preparation and reach ill-founded conclusions in cases about which they know very little. Again, these problems, to a greater or lesser degree, are inherent in case management and case management is necessary for the control of modern litigation. In the long run, these disadvantages can only be reduced, not eliminated. But above all, the best guarantee of justice is the quality of the individual judge.

Judicial activism in political and social reforms

The basic theory

While the duty of the legislature is to enact laws designed to further the common good, the duty of the judiciary is to uphold those laws, and more generally to uphold the constitutional framework and the rule of law.[5]

An emperor said more than 1,200 years ago that judges should judge justly according to the written law, not according to their own inclination.[6] This was long thought to be the judicial ideal. According to this concept of judicial conduct, judges must follow the law and not act upon their own predilections or fancies.[7] It has been said that a judge who feels free to decide cases upon external standards rather than the system's internal content, might as well act upon any subjective standard that he or she finds attractive. The existence of ascertainable law which judicial officers are bound to apply is the key to any system that seeks the benefit of law and order.

The duty of judges, that was at one time universally accepted, is to suppress their preconceptions and leanings of the mind and make decisions based solely on the merits of each individual case. It may be thought that, for this reason, the more acutely judges are aware of their own subconscious attitudes the better judges they will be. They will then better be able to overcome their own biases and prejudices and make findings without being influenced by them. Once again, ideal judicial conduct is epitomised by the blindfolded goddess of justice.

Should the blindfold be removed?

But a movement, contrary to these precepts, has arisen in some parts of the common law world. This movement promotes the idea of judicial activism in the field of social reform and argues that the blindfold should be removed from the goddess. A leading Canadian judge has expressed the view that "the classical image of justice - the goddess blindfolded - is a deficient icon in a complex, multicultural society".[8]

These remarks were made after the decision of the Canadian Supreme Court in *R v RDS*. [9] In this case a white police officer arrested a black 15 year old male who had allegedly interfered with the arrest of another youth. The accused was charged with assaulting a police officer. The police officer

and the accused were the only witnesses, and their accounts of the relevant events differed widely. The Youth Court judge, Judge Sparks, determined that the accused should be acquitted. While delivering her oral reasons, the judge remarked that police officers had been known in the past to mislead the court. She said that police officers overreact, particularly when they are dealing with non-white groups. She said:

"That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of the accused that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day. At any rate based upon my comments and based upon all the evidence before the court I have no other choice but to acquit."

The prosecution complained that the comments of Judge Sparks raised a reasonable apprehension of bias and appealed. The intermediate court of appeal overturned her decision.

The Canadian Supreme Court, however, by majority, reinstated the decision of Judge Sparks. It is interesting first to look at the reasons of the minority. They concluded that the judge's comments stereotyped "all police officers as liars and racists, and applied this stereotype to the police officer in the present case".^[10] The minority was of the view that the issue was not whether racism existed in Canadian society; rather it was whether there was evidence before the court upon which to base a finding that the particular police officer in question was motivated by racism. They thought that there was no evidence to that effect presented at the trial and emphasised that judicial decisions should not be based on racial or other generalisations.

Two of the judges in the majority, on the other hand, stated:

"The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging. It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function".^[11]

They said, further:

"An understanding of the context or background essential to judging may be gained from the judge's personal understanding and experience of the society in which the judge lives and works ..." ^[12] The proposition that judges are entitled to rely on their "personal understanding and experience of the society", unsupported by evidence from witnesses, in order to believe or disbelieve a particular witness, is not the law in Australia.

One of the two judges who made the remarks in question, l'Heureux-Dubé J, subsequently wrote an article in which she said, in regard to Judge Sparks:

"[T]he trial judge's comments did not evidence an impermissible partiality based on unfounded myths and stereotypes, but rather, demonstrated that she had properly taken into account the reality of the inequitable social context in which the alleged offence was committed, and her own experience of this social context. She then appropriately related this understanding of the world to the conduct of the trial before her. In this sense, the judge was not neutral. But she was impartial.

Judges should not aspire to neutrality. When judges have the opportunity to recognise inequalities in society, and to make those inequalities legally relevant to the disputes before them in order to achieve a just result, then they should do so. Impartiality does not demand that judges close their eyes to the reality of the society in which legal disputes occur, but rather that they remain open minded to the possibilities for deeper understanding that differing viewpoints and experiences can provide".^[13] If this view is correct, the goddess of justice must have her blindfold removed in order to understand the world around her.

However, if this is accepted, there is the clear danger that one will be faced with the notion of the goddess of justice, blindfold removed, being absorbed entirely by her own personal image. Cases will then be decided according to the individual inclinations and prejudices of the judge in question.

In my opinion, the idea that a judge should apply his or her understanding of the social context of each case is capable of allowing the judge to indulge in individual, personal prejudice.^[14] Assume that Judge Sparks had said "in my experience black youths often lie when accused by white police officers; therefore, I believe the white policeman". Such an observation would universally be regarded as unacceptable judicial discrimination. It is very difficult then to suggest that it is desirable for a judge to conclude that a white police officer should be disbelieved merely because of the judge's experience, generally, with white police officers when they are in conflict with black witnesses. Such a conclusion, if followed by someone with different life experiences and different social attitudes, could well result in the application of an entirely different criteria. This will give rise to general loss of respect for the rule of law.

Most lawyers, throughout the world, are aware of judicial officers who have displayed generalised prejudices towards different groups in society. Examples are women, persons from minority racial groups, refugees, foreigners, workers, employers, landlords, tenants and others. Accordingly, I do not agree that Judges should not aspire to neutrality.

In my opinion, it is the essence of justice that judges exercise control and discipline over their own feelings and judge each case on its merits, impartially and neutrally, without regard to personal bias

and generalisations.

Making new law

In the common law world, judges make law when social, political or ethical attitudes change so fundamentally that they are no longer accommodated by established rules, when new situations evolve that are not covered by existing precepts, and when there is a need to rationalise existing principles.

Lord Reid explained:

"There was a time when it was thought almost indecent to suggest that judges make law - they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more." [15]

Even in a civil law system, the courts must still unravel obscurities, ambiguities, and conflicts and fill in gaps between the legislative provisions. In these ways it cannot be denied that judges make law.

Law-making in private law cases that raise social, economic and political issues is a contentious idea. Some judges have strongly criticised what they term judicial activism, that is, too great a readiness to change established laws. On the other hand, there is the attitude of judges epitomised by the famous English judge Lord Denning, who was always ready to take the law in new directions. He referred to those who were more reticent as "timorous souls". He was once asked by a student to make no more changes to the law until the exams were over.

There is no do doubt that some cases frequently enable the judiciary to change the direction of society. Justice McHugh has recognised that "[w]hile most of the work of the courts is concerned with 'the disinterested application of known law', from time to time courts must decide issues that are intensely political, economic and social as well as legal". [16]

In the 1980s and 1990s, deliberate alterations of the law by judges took place with relative frequency. Far-reaching changes were made to land rights, the law of negligence and the law relating to legal representation for persons charged with serious offences. There has now been a reaction to that. Justice Heydon recently made a number of points regarding judicial activism. He said [17] that the purpose of the rule of law is to remove both the reality of injustice and the sense of injustice. It exists not merely because of the actual remedies it provides for damages, injunctions and other specific remedies, and criminal sanctions. It also exists to prevent a damaging release of uncontrollable forces of disorder and primal urges towards private revenge against wrongdoers by assuaging the affront to human dignity experienced by the victims of wrongdoers. The rule of law channels potentially destructive energies into orderly courses.

A key factor in the speedy and just resolution of disputes is the disinterested application by the judge of known law drawn from existing and discoverable legal sources independently of the personal beliefs of the judge. Judicial activism may be described as using judicial power for a different purpose. Judicial activism in this sense harms the rule of law. Often, judicial activism involves furthering some political, moral or social programme.

It has been said that judges are appointed to administer the law, and not elected to change it or undermine it. Judges are given substantial security of tenure in order to protect them from shifts in the popular will and from the consequences of arousing the displeasure of either the public or the government. They must use this power with great care.

One of the most important functions of a judiciary in a democratic state is to shield the people from illegal conduct by government. This idea stems from the proposition that "the Ruler is under the Law". The Ruler does not have unlimited and despotic power. The Ruler must obey the law as construed by judges. This is the basic principle of parliamentary democracy.

This principle, however, can only work if judges are consistent and steadfast in their application of the law. Once judicial decision-making is arbitrary, inconsistent, and detached from fixed, objective and fair rules of law, it will fail to command the respect and obedience of the people and the system will collapse.

It is in this respect that the doctrine of precedent is of importance. It "is a safeguard against arbitrary, whimsical, capricious, unpredictable and autocratic decision making. It is of vital constitutional importance. It prevents the citizen from being at the mercy of an individual mind uncontrolled by due process of law". [18] Disloyalty to precedent in effect gives judges uncontrolled discretionary power. However, it must also be recognised that the application of known legal principles will not always be possible. Sometimes novel situations arise to which the known principles cannot be applied. Then we need theories "for deciding whether an existing authority is to be applied, distinguished or overruled". [19] Reliance on precedent is not always possible, or even desirable. Changes in social or political conditions sometimes require new law, and old principles may simply be entirely inappropriate for circumstances not previously contemplated.

Judges' individual political and social beliefs

Judicial activism involving political and social reform is a dangerous phenomenon. By that, I mean activism by conservative judges, to ensure that cases are decided in accordance with conservative values and activism by liberal judges to ensure that cases are decided in accordance with liberal

values. Judges should not decide cases in accordance with their personal inclinations.

The problems caused by this kind of judicial activism can be seen in the United States. According to some commentators, in the United States, political and social judicial activism has won the day. There is a strong view amongst many in that country that the function of the courts has become political and the courts are rightly open to public attack on political grounds. They consider that judicial activism in the USA has resulted in a politicised judiciary. If that is right, subjective judging has detracted substantially from the rule of law.

Often the United States Supreme Court has resolved cases by a majority of five to four based, apparently, on ideology rather than the law.[20] Divisions in political philosophy have given rise to great rancour. This has become particularly apparent in cases involving race discrimination, sexual privacy, abortion, rights of the poor, of criminal defendants, and of religious minorities. The division along political lines was particularly apparent in the case involving the disputed electoral returns in the 2000 United States presidential election.[21]

Apart from detracting from the general reputation of the judiciary, judicial activism leads to unpredictable and arbitrary results depending on the subjective intentions of the judge concerned. When the well-known liberal Justice of the US Supreme Court, William Brennan, retired in 1990, the journal, *The New Republic*, editorialised:

"[Brennan's] passionate judicial activism was unafraid, in a pinch, to leave constitutional text, history, and structure behind. When liberals like Brennan held sway in the courts, judicial activism often led to liberal results; now that 'conservatives' are the ones ignoring legislative history and congressional intentions, Brennan's legacy makes it harder for liberals to cry foul".[22]

According to an American commentator:[23]

"From the perspective of the more liberal [judges] and their supporters, today's Supreme Court has been engaged in a sustained and evil counter-revolution, undermining or destroying the civil rights and civil liberties that the previous Court properly championed. In curtailing affirmative action and civil rights enforcement, in limiting the right to abortion and enhancing the power of police and prosecutors, in rushing executions and curbing the power of the federal government, including the judiciary, today's Court, it is said, has been turning back the clock on social progress and retreating from the institution's own duty to enforce the constitutional promises of liberty and equality.

On the other hand, conservatives, both within and without the Court, approach the innovations of the previous era from the opposite corner. In their view, the previous Court's exaltation of egalitarianism, criminals' rights and sexual freedom was a prime factor in creating the legal and moral decay of the current age. And, to them, most, if not all, of the rights revolution was illegitimate from the outset, a judicial coup d'etat that established the Court as a 'superlegislature,' overturning with no constitutional authority the judgments of elected representatives ...

In light of such pervasive and continuing internal division, the question for the Court, as for the rest of the government, has been whether the institution's own integrity can withstand the corrupting force of bitter disagreement ..."

The antidote to this judicial disease is, as far as possible, the rigorous application of impartiality and responsibility in the use of established precedent. Of course, this should not preclude the principled development of the law so that it keeps pace with changing social and community values, and it cannot preclude the development of new principles applicable to new situations not covered by existing rules. But, as one of the founders of the United States Constitution, Alexander Hamilton, said: [24]

"Considerate men of every description ought to prize whatever will tend to begat or fortify [integrity and moderation] in the court; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today."

There has been a call for a return to the classical judicial virtues described as:

"Self-restraint, self-discipline (implying submission to the authority of statutes, precedents, etc), thoroughness of legal research, power of logical analysis, a sense of justice, a knowledge of the world, a lucid writing style, commonsense, openness to colleagues' views, intelligence, fair-mindedness, realism, hard work, foresight, modesty, gift for compromise, commitment to reason, and candour".[25]

It cannot be doubted that every judge should aspire to these qualities. But care must be taken to ensure that judges are not rigid and do not fear change. Fear of change and refusal to adapt to change are themselves engines for injustice. Judges must take great care to strive for the appropriate balance in this difficult area.

Judicial activism involving human rights

What occurred in South Africa in the latter half of the twentieth century provides an important case study of judicial passivity in regard to the abuse of human rights. This case study is redolent with lessons for judges all over the world.

Prior to 1948 there was relatively little institutionalised segregation of races in South Africa. After 1948, when the Nationalist Party came into power, the system of apartheid was implemented. So began what became an all embracing web of racial laws promulgated by Parliament. These resulted in discriminatory laws relating to voting rights, rights to live in residential areas, rights to work in business

areas, rights to work in particular occupations, rights to be educated in an equal manner, freedom of movement rights, rights of sexual freedom and marriage. In the cause of white supremacy, people were forcibly removed from their homes. Family members were separated from each other and many were sent to live in impoverished areas. On the grounds of race, the right to vote and the right to work were restricted.

These policies were all implemented by Acts of Parliament. In other words, there were laws promulgated by Parliament which authorised the oppressive and discriminatory system. When serious opposition manifested itself, the government appealed to patriotism and nationalism. The word went out that the world did not understand the good faith and morality of those in power. The general attitude grew that those who were not for the government were against the nation. Eventually, the opposition became more organised and went underground. Acts of sabotage occurred. This was followed by further legislation. The power of the security police was increased. They were given vast powers to detain persons for interrogation without trial. Eventually the power to detain without trial became a power to detain indefinitely. Those opposed to the regime attempted to resort to the courts. This led to the government enacting new laws reversing the onus of proof, creating new crimes with vague and broad elements, enabling the State to prove guilt easily and making it more difficult for accused persons to prove their innocence. It became difficult to trace the whereabouts of people who were detained. People began to disappear. There were stories about persons, interrogated by the police, jumping out of the windows of high rise buildings and apparently committing suicide. Allegations were made of police brutality and torture but they were difficult to prove. Things went from bad to worse but suddenly, after more than 40 years, the tide turned. Nelson Mandela was released from prison and, in 1994, a new regime under a democratic constitution took over the country.

It is against this background that the actions of the courts need to be considered. But before doing so, it should be noted that South Africa has long had a powerful legal tradition. Although the procedure was modelled on English law and the English system, the substantive law was Roman Dutch which was essentially a liberal and humane body of laws. South Africa has produced outstanding lawyers and judges. Those who emigrated from the country included three members of the House of Lords and the Chief Justice of Massachusetts in the United States. Other barristers in England have become leaders of the profession.

Many of the lawyers who remained were also of the highest quality and imbued with the tradition of individual liberty. Some were appointed to the Bench. Humanitarian South African judges had a schizophrenic task. On the one hand, embedded in legal tradition, was respect for human beings, and the idea that statutes should be interpreted to give maximum effect to human liberty. On the other hand, the judges were required, as part of their daily work, to give effect to laws that were discriminatory, unjust and instruments of oppression.

In the result, a vast number of the judges adopted a literalist approach. They interpreted the racist statutes in a literal way and in support of the ruling regime. I will give a few examples.

In *Minister of the Interior v Lockhat* [1961] 2 SA 587 (A) the Appellate Division, South Africa's highest Court of Appeal during the apartheid regime, was faced with a challenge to the validity of a proclamation dividing the city of Durban into group areas. The ground of challenge was that whites had been given the best areas while only the poor areas were available to Indians and that suitable accommodation in the Indian areas would not be available for some time. Mr Lockhat, an Indian, argued that the effect of the division was to discriminate to a substantial and therefore unreasonable degree against Indians, and such unreasonable discrimination had to be expressly authorised by the enabling legislation to be valid.

The trial judge upheld the challenge on the ground that, in the absence of specific authority in the statute to the contrary, common law presumptions must prevail. He said:

"The exercise of a power to proclaim group areas can and should ... be exercised without the inevitable result that members of different races are treated on a footing of partiality and inequality to a substantial degree."

The trial judge's decision was taken appealed. The highest court in the country overturned the decision of the trial judge. Although the power to discriminate unreasonably was not expressly given in the acts, the Court thought that it was "clearly implied". According to the judgment of the Appellate Division, it was not for the Court to decide whether the Group Areas Act would be for the common good of all the people. The question before the Court was purely a legal one, namely "whether this piece of legislation impliedly authorises, towards the attainment of its goal, the more immediate and foreseeable discriminatory results complained of". [26] Accordingly, the Indian people were required to move out of their homes in which they had lived for very many years and move into impoverished and undeveloped areas.

In 1964 a Cape Town barrister, Albie Sachs, was detained under security legislation. Sachs applied for a declaratory order that the detaining authority was not entitled to deprive him of "any of his rights and liberties save to detain him for interrogation and save to deprive him of access to other persons". [27] Sachs sought an order that he was "entitled to at least the same rights and liberties while in custody as are enjoyed by awaiting trial prisoners or other non-convicted persons who are being

detained under the provisions of some other law". He sought an order that he should be allowed out of his cell for reasonable and adequate exercise and recreation and to be permitted to receive an adequate supply of reading and writing materials, subject to the scrutiny of those detaining him. He asked to be provided with the ordinary comforts of life such as soap and similar materials. The relevant statute did not deal with any of these issues. An intermediate appellate court granted Mr Sachs the orders sought. The judges held that a detainee had the right both to exercise and to an adequate supply of reading matter and writing material. The judges said that to deprive a detainee of that right amounted "in effect to punishment" and that it would be "surprising to find that the legislature intended punishment to be meted out to an unconvicted prisoner".

The Appellate Division, however, overruled this decision. They pointed out that the offences covered by the statute were directed against the safety of the State itself. The Court considered that the statute impliedly authorised "psychological compulsion". Because of what the Court understood to be implied in the statute, it attributed the intention to Parliament of authorising the compulsion to which Mr Sachs was subjected by the police.

The Court recognised, nevertheless, that it had a choice between two interpretations of the statute. The first was that Parliament intended that the detainee should continue to enjoy all his ordinary rights and privileges, save only for those that were necessarily impaired either by the very fact of detention itself or by the other express provisions of the section. On the other hand, Parliament could have intended that the continued detention should be as effective as possible but "subject only to considerations of humanity as generally accepted in a civilised country". The Court considered that the second was the true purpose even though for detainees, "broadly ... classed as intellectuals", the deprivation of reading matter or writing materials during their detention might result in "psychological compulsion". So, Mr Sachs remained detained, without trial, in this way.

Ironically, after change had come to South Africa and a new constitution was promulgated, Mr Sachs became Justice Sachs, a judge of the Constitutional Court of South Africa, the highest court in the land.

Generally speaking, under the old regime, the judges nearly always believed the police. They imposed heavy sentences on persons accused with crimes against the State. The death sentence was frequently ordered. The courts, generally, refused to interfere with administrative orders made by the government and government offices. They refused to make orders interfering with police action in detaining people without trial and with the conditions under which they were imprisoned.

The courts were particularly sensitive to criticism. In 1971, a legal academic, Professor Van Niekerk, offered a simple solution for judges who had to deal with the dilemma that judges faced in regard to dealing with police evidence in the face of constant allegations of torture. He suggested that, as it was widely accepted that solitary confinement for a long period is in itself torture, judges should simply refuse to accept any evidence procured in the confinement. This suggestion was not adopted. Van Niekerk was subsequently charged with contempt of court and attempting to defeat or obstruct the ends of justice. Eventually the Appellate Division found Van Niekerk guilty of contempt of court and held that he had the intent of attempting to defeat or obstruct the course of justice.[28] The Appellate Division considered that Van Niekerk's views were designed to influence the court in actual cases. He was asking the court to engage in conduct which the court said would "manifestly be a gross dereliction of duty" for he was asking judges to act "contrary to their obvious duty to consider all evidence on its merits". This approach tended to stifle any further criticism of the judges.

After change had occurred in South Africa, the South African Truth and Reconciliation Commission investigated the conduct of the judiciary during the apartheid regime. The judges mounted a strong defence of themselves. They were supported by an eminent former member of the South African Bar, who became an Acting Judge of the Constitutional Court, and was a leading member of the English Bar, Sir Sydney Kentridge QC. In an article published in the September/October 1994 edition of the journal "Counsel" he said:

"During the apartheid years in South Africa many people helped keep alive the idea that the individual had rights and liberties which the state is not entitled to infringe. But there are not many organised institutions of which this could be said. Among them were certainly the Bar and the Supreme Court."

He remarked further:

"Throughout the period the South African Supreme Court as a whole remained an independent court which in an appreciable number of cases provided some protection against the excesses of the executive ... Government hopes that their appointees would take their side were frequently disappointed."

Nevertheless, many commentators have severely criticised the conduct of many of the judges of the court.[29] According to one commentator [30] it was only a handful of judges who sat on the provincial benches who maintained fundamental rights and to whom the new legal order now owes a great deal. Judge Gerald Friedman, one of the old order judges who had done much to uphold the rule of law, accepted that "the courts' record as an upholder of the rights of the individual in the application of security legislation, cannot, with obvious exceptions, be defended".[31] Judge Friedman described the dilemma for the courts as follows:

"The detainee would testify how he was assaulted. The police or security force members, on the other

hand, would go into the witness box and deny these allegations. In this they would be corroborated by the district surgeon [a state medical officer] who would testify that no evidence of any assault was found on the detainee. One knows now from the evidence which has emerged at hearings of the [Truth and Reconciliation] Commission that many of these witnesses were prepared to lie to the Court. Despite cross-examination it was very often impossible to find that their testimony was untruthful since the court has, in each case, to make its findings on the evidence which is placed before it. That evidence included the testimony of the magistrate or police official who took down the confession, that the person making it had no visible signs of recent injuries.

It must, however, be pointed out that in a number of cases evidence of a confession was in fact rejected.

The fact that it was commonplace for detainees to allege that they had been tortured, did not entitle the court, in any particular instance, to depart from the principle that each case must be decided on its own facts."^[32]

Today, the principal criticisms of the South African judges are that they failed to give a liberal interpretation to statutes where there was ambiguity and they construed statutes to give effect to government policy and not human freedoms. The criticism that was stifled in the past now became very loud indeed.

South Africa is not alone amongst western countries which have adopted far-reaching security legislation. Such legislation exists in Northern Ireland and similar criticisms have been made about the judiciary there. In the USA, the criticisms of the judiciary in regard to the conduct of cases involving black people in the southern states prior to 1970 is well known. The legislation that has given rise to the detention in Guantanamo Bay is open to serious question. Australia and New Zealand have now also legislated for detention without trial.

There are many lessons to be learned from the South African experience. Principally, it should be recognised that the erosion of human rights happens very gradually and indeed, at times, imperceptibly. Inexorably, however, fidelity to the letter of the law overcomes personal and moral impulse. The decision to apply the letter of the law as opposed to protecting fundamental human rights becomes easier as judges persuade themselves of the force of their duty to the positive law and government policy. The court then becomes a chamber legitimising oppression. It gives substance to claims made by the government that the rule of law exists under the particular regime.

CONCLUSION

Appropriate judicial conduct must tread a fine line between judicial activism of the kind that results in judges making new laws to satisfy their own political, social beliefs, and judicial alertness to protect human rights by construing legislation in a humanitarian way and in being acute to examine claims of police and other authoritarian misconduct against individuals. This is a difficult task indeed, but essential for the proper maintenance of the rule of law. Above all, it is consistent with the judicial duty of neutrality and impartiality.

(Edited version of a paper given at a conference in Beijing organised by the National Judicial College, Beijing, 12 October 2004 and to the Shanghai Judicial College, Shanghai, 19 October 2004.

1 Judge of Appeal, Supreme Court of New South Wales.

2 Sir Anthony Mason, "The Role of the Courts at the Turn of the Century" (1993) 3 JJA 156 (at 166).

3 Ipp JA, "Judicial Intervention in the Trial Process" (1995) 69 ALJ 365.

4 See, for example, Part 1, rule 3(1) of the Supreme Court Rules 1970 (NSW).

5 See Collins, "Democracy and Adjudication" in MacCormick and Birks (eds), *The Legal Mind* (Clarendon Press, 1997) at 67.

6 Justice J B Thomas, *Judicial Ethics in Australia* (2nd ed, LBC, 1997) at 61.

7 *Ibid.*

8 Justice C L'Heureux-Dubé, "Reflections on Judicial Independence, Impartiality and the Foundations of Equality" *CIJL Yearbook*, Vol VII p 106.

9 [1997] 3 SCR 484.

10 *R v RDS* [1997] 3 SCR 484 (at [6] per Major J).

11 *Id* at 507, [38]-[39] per L'Heureux-Dubé and McLachlin JJ.

12 *Id* at 508, [44] per L'Heureux-Dubé and McLachlin JJ.

13 L'Heureux-Dubé J, "Reflections on Judicial Independence. Impartiality and the Foundations of Equality", *CIJL Yearbook*, Vol VII at 105-106.

14 See Ipp JA, "Judicial Impartiality and Judicial Neutrality: Is there a difference?" [2000] *Aust Bar Rev* 212.

15 Lord Reid, "The Judge as Lawmaker" (1972) 12 *JSPTL* 22 at 22.

16 Justice M McHugh, "The Strengths of the Weakest Arm", Keynote address, Australian Bar Association Conference, Florence, 2 July 2004.

17 Justice J D Heydon, "Judicial Activism and the Death of the Rule of Law" [2003] *Aust Bar Rev* 110

at 112.

18 Id at 132.

19 Justice K Mason, "What is wrong with top-down legal reasoning?", Sir Maurice Byers Memorial Lecture, 26 February 2004.

20 See Lazarus, *Closed Chambers* (Penguin Books, 1999).

21 *Bush v Gore* 531 U.S. 98 (2000).

22 "What Brennan Wrought" *The New Republic*, August 13 1990 at 7, quoted in Glendon, *A Nation Under Lawyers* (Farrar, Straus and Giroux, 1994) at 165.

23 Lazarus, *op cit*, at 7-8.

24 *Federalist Papers*, No 78.

25 Judge Richard Posner, *The Federal Courts: Crisis and Reform* (Harvard University Press, 1985) at 220.

26 *Minister of the Interior v Lockhat* [1961] 2 SA 587 (A) at 602.

27 *Rossouw v Sachs* [1964] 2 SA 551 (A).

28 *S v Van Niekerk* [1972] 3 SA 711 (A).

29 Dyzenhaus, *Judging the Judges, Judging Ourselves* (Hart Publishing, 1998) Chapter 2.

30 Id at 52.

31 See Dyzenhaus, Id at 53.

32 See Dyzenhaus, Id at 63-64.

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JUDICIAL BIAS*

The Honourable Justice David Ipp[1]

Introduction: the duty of judges to be impartial

Australia does not have a formal Code of Judicial Ethics but there are settled rules in Australia governing the conduct of judges which are substantially the same as the Code of Judicial Ethics for Judges of the Peoples' Republic of China.

General Principles

In Australia a prime duty of a judge is to be impartial. It is fundamental to the Australian judicial system that every trial must be conducted by an independent and impartial judge. A judge will be disqualified from hearing a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind when deciding the issues before the court.

It is a basic requirement that justice must both be done and be seen to be done. So, even the appearance of departure from impartiality is prohibited. The reason for this is that even if there is no bias, but there is the appearance of bias, the integrity of the judicial system can be undermined. Public confidence depends upon the impartial administration of justice, and public confidence depends significantly on appearance as well as reality.

If, during pending litigation, a question arises as to whether the judge might not be impartial, no attempt will be made to work out how the judge may actually decide the case. The only thing that matters is whether there is a possibility of bias (real and not remote). For a judge to be disqualified, merely the possibility of bias is sufficient, it is not necessary to prove that the judge will probably be biased.

Similarly, if the case has already been decided and it is argued that the judge was biased, there will be no inquiry as to whether this actually influenced the outcome of the case or the actual thought processes of the judge.[2] The sole investigation will be into whether there was the appearance of bias.

Public confidence in the administration of justice requires that where there is the possibility of an appearance of bias, the judge must withdraw from the case. If he fails to disclose his interest, remains the judge and decides the case, the decision cannot stand. It will be set aside by an appeal court.

Themis - the image of justice

The concept of judicial impartiality and neutrality is embodied by an icon, the goddess of justice. The image of the goddess has been known to western culture for more than 2,000 years. In Ancient Greece, 3,000 years ago, she was called Themis. To the ancient Romans she was known as Justitia. Statues or paintings of this goddess are placed in or outside many of the great courts of the West.

The image of the goddess is that of an imposing woman with sword, scales and a blindfold.

The scale is a metaphor for justice. Justice means that each person must receive, in the scale, that which is due to him or her, no more and no less. That is the basic idea of justice.[3]

The sword, represents the rigour of justice, which does not hesitate to punish. The goddess imposes righteous justice, she does not merely express opinions.[4]

Why is the goddess blindfolded? The origin of the blindfold is obscure. Historical research appears to indicate that blindfolded justice first began to appear with any regularity as an image during the 16th century.[5] The inclusion of the blindfold in justice imagery at that time coincided with the establishment of professional, independent judges. These judges stood apart from the King or Emperor and were not simply acting on the orders and instructions of the executive power. The point is that a blindfolded Justice cannot see the orders and instructions or even the signals a sovereign might send on how to decide the case.[6]

More than 400 years ago an iconographer wrote that justice is blindfolded "for nothing but pure reason, not the often misleading evidence of the censors, should be used in making judgments"[7]. The blindfold represents the idea that political views, ideology, sympathy and even compassion are very bad guides to judgment. A blindfolded justice cannot see who comes before her, and hence cannot be impressed by the power of the litigants or witnesses who might seek to intimidate her, or persuade her by appealing to her emotions.

Thus, the image of the goddess conveys the idea that the judge must act with even-handedness, as epitomised by the scale; making decisions without sympathy or compromise, as epitomised by the sword; and without regard to those who are powerful and influential or those who incite sympathy that could, through emotion, wrongly sway the judgment (as epitomised by the blindfold). The blindfold represents neutrality. It represents freedom from the corruption of the senses. It assumes that insight and wisdom come from within. We ascribe to the sightless justice the rectitude of one who receives information only through the filter of the law.

The blindfolded goddess illustrates the notion that judges must decide cases solely by reference to the evidence that is led before them. To fulfil this duty properly, judges often have to give decisions that many people do not like. One sees this often in sentencing, but there are many other examples; cases involving political and religious ideas, rights to land, taxation, town planning and even negligence. Judges are not there to please the majority or the media. The system depends upon judges being independent and impartial.

The duty of impartiality manifests itself in a number of principles of Australian law. I shall try to outline and illustrate a number of these. However it should be kept in mind that these principles are largely interwoven and related.

1. A judge must not be interested in the case

(a) Direct Interest

The most obvious example of a judge with a direct interest in the case is the judge who accepts a bribe to decide in favour of one of the parties. There can be nothing more inimical to the idea of justice.

A different kind of direct interest in proceedings is where the judge has a direct financial interest in the litigation. A ban on financial bias has always been fundamental our legal system.[8]

Such a financial interest in the litigation will be sufficient to disqualify the judge. The principle behind this is that in such cases, a reasonable observer would always hold a reasonable apprehension that the judge might not bring an impartial mind to the question.[9] In a famous case in England in 1852[10] the then Lord Chancellor of England, Lord Cottenham, owned a substantial shareholding in a company which was a party in an appeal on which he sat. It was held that he should have disqualified himself. The House of Lords said:[11]

"No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim that no man is to be a judge in his own cause should be held sacred. And that is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest."

In 1919 a person who had been appointed to act as one of the arbiters in a dispute involving a railway company held a small number of ordinary shares in the railway company. The appellate court held that this gave rise to an appearance of bias and, even though the rule could be irksome it had to be upheld. The judge should have disqualified himself. He did not. Therefore the judgment was set aside.

(b) Indirect Financial Interest

The kind of case that gives trouble from time to time is where the judge has a remote and very small financial interest in the dispute. Two recent cases in Australia illustrate the point.[12]

One case[13] concerned a judge who, through a family trust, owned some 9,000 shares in a bank which could have been affected by the outcome of a case he was due to hear. There was no possibility that the outcome could have affected the market value of the bank's shares. When the proceedings came on for hearing, the judge disclosed his shareholding in the bank. The judge overruled the objection of one of the parties saying that, as the issues in the case could have no impact on the share price of the bank, an objective observer, knowing all the relevant facts, could not entertain a reasonable apprehension that he, the judge, would not decide the case impartially or without prejudice. The High Court of Australia upheld the judge's refusal to disqualify himself.

In another case[14] a judge inherited 2,400 shares in another bank that was a party to litigation before him. The judge did not disclose his inheritance to the parties and gave judgment in favour of the bank. The net assets of the bank were of the order of \$8,000,000,000. The outcome of the case could not have affected the value of the judge's shares in the bank. Again, the High Court held that the judge was not disqualified from delivering judgment.

The principle to be discerned is that there must be a material connection between the interest of the judge and the result of the case that the judge is deciding. Where the result of the case would have no bearing upon the value of shares held by the judge, the judge does not have the kind of financial interest in the outcome of the litigation that would require disqualification. On the other hand, where the outcome of the case would cause the value of shares held by the judge to fluctuate, the judge

should disqualify himself or herself.

(c) Non-Financial interest

Financial interest is not the only type of interest that may give rise to an apprehension of bias. On 25 November 1998, the highest Court of the United Kingdom, the House of Lords, ruled that General Pinochet, the former Head of State of Chile, was not immune from arrest and extradition in relation to crimes against humanity he allegedly committed whilst in office.[15] At the start of that hearing, the Court gave permission for Amnesty International (an international organisation dedicated amongst other things to improving the lot of political prisoners) to intervene in the case.

After the House of Lords gave judgment in the appeal, it became known that one of the five judges, Lord Hoffmann, was an unpaid director and chairman of Amnesty International Charity Limited, an organisation set up and controlled by Amnesty International. It also became known that Lord Hoffmann's wife was employed by Amnesty International. General Pinochet then applied to the House of Lords to set aside its earlier decision on the grounds that the links between Lord Hoffmann and Amnesty International had not been declared and were of a kind that would give rise to the appearance of possible bias.

In December 1998 a newly constituted panel of five judges in the House of Lord held unanimously that the relationship between Amnesty International and Lord Hoffmann did disqualify him from hearing the case. The judgment of the House of Lords that previously had been given had to be set aside.[16] The decision to set aside one of the House of Lords' own judgments was novel. It had never happened before. But the overriding principle could not be doubted, that is, no one should be a judge in his or her own cause.

The conclusion in the Pinochet case was not dependent on Lord Hoffmann personally holding any view, or having any objective, regarding the question whether General Pinochet should be extradited. Lord Hoffmann, it was held, had an interest in the outcome of the present proceedings simply because he had some involvement with Amnesty International Charity Limited which, in turn, had a close relationship with Amnesty International Limited.

(d) Other interests

The examples of the kind of interest that a judge could have in a case are infinite. An old example is that of the 18th century English judge, Mr Justice Buller, who was said always to hang people for sheep stealing. That was because he had several sheep stolen from his own flock.[17]

Another example is that of a West Australian Magistrate who, in a contempt of court proceeding, stepped from the bench to give evidence. He then returned to the bench to determine the matter. The Supreme Court remarked "[i]t is obvious a man cannot be at the same time judge on the bench controlling the proceedings, and witness in the case subject to the directions of the court".

(e) Interests of Family or Friends

Sometimes, it is not the judge who has an interest in the case but a member of the judge's family. In a recent case in New South Wales, a complex set of facts gave rise to two separate legal proceedings. The first proceeding came before a judge whose brother was a partner in a large firm of lawyers. For various reasons, it was possible that if the judge decided the case in a certain way, his brother might benefit. The judge should have known this. Nevertheless, he did not disclose that his brother was a partner in the lawyers' firm and did not disqualify himself. Later the parties found out about the judge's brother. One asked him to disqualify himself, but the judge refused. The case, by then, had been running for several days and it would have been very expensive for the parties had he disqualified himself. The New South Wales Court of Appeal held that a fair-minded lay observer might reasonably have apprehended that, by reason of his brother's interest in the case, the judge might not bring an impartial mind to the resolution of the dispute.[18]

In reality, it is elementary that where cases involve close relations or friends the judge cannot sit.

To go further, in Australia, it is accepted that there is a real danger of actual bias and the appearance of bias if a child of the judge appears before him or her as a lawyer for one of the parties. That, as I understand the position, is not the case in England.

Where a judge has a personal friendship with one of the parties to the proceedings or a serious, intimate and ongoing relationship with a solicitor for one of the parties, an appearance of bias is generated.

(f) Gifts and other financial sources

Obviously, judges should not accept gifts from litigants, potential litigants or witnesses. It is uncertain from what sources a judge may properly receive money in addition to his judicial salary. There can be

no objection to the judge receiving the proceeds of ordinary investments, or the rents of any property that the judge may own. But it would be unacceptable in Australia for a serving judge to engage in any capacity in any commercial enterprise. In the United States, Justice Fortas, a justice of the United States Supreme Court, was required to resign from the Court after he had accepted \$20,000 from the family foundation of a financier who was subsequently imprisoned for stock fraud. Although Justice Fortas returned the sum and denied awareness of any impropriety at the time, he was compelled to resign from the Court. The same result would follow in Australia.

2. The duties of a judge regarding behaviour in court

The duty of impartiality is sometimes breached because of the judge's conduct in the litigation before him. The primary principle in this respect is that each party must be given a fair opportunity to convince the judge of the merits of their case.

(a) Duty to listen to both sides of the case

Judges must be patient and listen to both sides of the case. Not allowing a party or a party's lawyer a proper opportunity to present his case is contrary to one of the fundamental principles of the system. [19] It was said of Lord Campbell, a 19th century English Lord Chief Justice, that during submissions by counsel

"his Lordship could no longer keep his seat but, getting up, marched up and down the bench, casting at intervals the most furious glances at the imperturbable counsel and at last folding his arms across his face, leaned as if in absolute despair against the wall, presenting a not inconsiderable amount of back surface to the audience".[20]

Lord Campbell has not been alone in this kind of behaviour. Another Lord Chief Justice of England, Lord Hewart, has been described as follows:

"He lacked only the one quality which should distinguish a judge: that of being judicial. He remained the perpetual advocate. The opening of a case had only to last for five minutes before one could feel - and sometimes actually see - which side he had taken; thereafter the other side had no chance".[21]

Another example is a case in 1970, involving a lower court, where the presiding magistrate on repeated occasions during a defendant's case observed in a loud voice "Oh God" and laid his head across his arm and made groaning and sighing noises.[22]

In another case, the appellant argued that interruptions by the judge made it impossible for his counsel to put his case properly. His complaint was upheld by the Court of Appeal. The following was said: [23]

"In the very pursuit of justice our keenness may outrun our sureness, and we may trip and fall. That is what has happened here. A judge of acute perception, acknowledged learning, and actuated by the best of motives, has nevertheless himself intervened so much in the conduct of the case that one of the parties - nay, each of them - has come away complaining that he was not able properly to put his case; and these complaints are, we think, justified."

Another potential problem is judicial humour - judges making jokes in the courtroom.[24] Judges may feel a desire to display their wit to a captive audience. However judges may underestimate the seriousness with which litigants regard legal proceedings. Care must be taken to ensure that it does not appear that the judge is taking the occasion lightly or is making fun of someone involved in the case. This is again a threat to the appearance of impartiality.

(b) An open mind - the prohibition of pre-judging the case and provisional views

A judge is required to keep an open mind throughout the hearing of the case, until judgment is given. A party who believes, on reasonable grounds, that the judge has decided, in advance, to disbelieve his evidence cannot have confidence in the result of the proceedings.[25] Where a judge makes statements during the case which indicates that he has made up his mind finally as to the result, he will be regarded as having demonstrated a reasonable apprehension of bias and the judgment will be set aside.

This occurred recently in a case in New South Wales where the judge had to decide, before the trial was finished, whether a particular piece of evidence should be admitted into evidence. In giving this decision, he said that he had "formed a very strong view" that certain documents he had inspected "established that there was the commission of a fraud or there was an involvement in a deliberate abuse of power". The problem, however, was that the final issue in the main case (which still had to be decided) was whether there had been a fraud or a deliberate abuse of power. Thus, in the course of determining whether the document should be admitted, the judge had indicated, implicitly, that he had decided the result of the case before all the evidence had been led. For that reason, the New South Wales Court of Appeal set aside his final judgment.[26]

It must be borne in mind, however, that the fact that a judicial officer may indicate his or her thinking in

the course of the hearing does not, of itself, automatically suggest pre-judgment or warrant disqualification. It has been said:[27]

"At the trial level, modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. ... Judges, at trial or appellate level, who, in exchanges with counsel, express tentative views which reflect a certain tendency of mind, are not on that account alone to be taken to indicate prejudgment. Judges are not expected to wait until the end of a case before they start thinking about the issues, or to sit mute while evidence is advanced and arguments are presented. On the contrary, they will often form tentative opinions on matters in issue, and counsel are usually assisted by hearing those opinions, and being given an opportunity to deal with them."

The dangers of judicial intervention must be recognised. A judge may think that that any view that he may express before the conclusion of the case is merely provisional, and that evidence or argument later presented may cause him to change his mind. But litigants often do not understand this. They may mistake a provisional view for a concluded pre-judgment.[28] Nevertheless, it is generally recognised that it is not uncommon and is sometimes necessary, for a judge, during argument, to "[formulate] propositions for the purpose of enabling their correctness to be tested" and that "as a general rule anything that a judge says in the course of argument will be merely tentative and exploratory".[29]

While listening to both sides means giving each side a reasonable hearing, it does not mean allowing a party to argue interminably or repetitively or by advancing futile submissions. The principle is exemplified by the following remarks:

"The [judges] duty in the interest of justice is to secure a fair, and efficient and expeditious trial. That may require them to intervene to avoid irrelevance, to curb prolixity and to protect witnesses. ... A tendency has ... developed to regard tolerance and patience as the ultimate judicial virtues. That they are judicial virtues no one doubts; but to make them paramount can all too easily lead to a court process in which almost everything goes and goes for a very long time ... Without being unpleasant or talking excessively, a judge can and should intervene to confine advocacy to the issues, to stop repetitious or oppressive cross examination and to discourage long-windedness". [30]

In most jurisdictions, judges are overworked, there is a huge press of litigation, and judges become anxious about cases waiting for trial. It is important to establish a balance here.

(c) Cases only to be decided by points raised in argument

A judge should not decide a case on a point that has not been raised in argument before him or her without giving notice to the parties so that they can make submissions to the court on the point. Further, the duty to remain impartial means that while a case is pending a judge must not communicate with one party or that party's lawyer without the other parties being present.

(d) Preconceived notions of witnesses

Decisions based on preconceived notions of the credibility or skill of a witness are also liable to be set aside. In the course of the trial of a personal injuries case a judge made statements critical of evidence given by the defendant's medical witnesses in previous cases. The judge, for example, said that the doctors' opinions were "almost inevitably slanted in favour of the Government Insurance Office by whom they have been retained, consciously or unconsciously". The judge said that the evidence of one of the doctors was "as negative as it always seems to be - and based as usual upon his non-acceptance of the genuineness of any plaintiff's complaints of pain". The High Court held that the judge's remarks would have brought about in the minds of the parties and in members of the public a reasonable apprehension that the judge might not bring an unprejudiced mind to the resolution of the matter before him.[31] For that reason, the judgment was set aside.

(e) Previous judgments or extra-judicial opinions causing doubt as to impartiality of the judge

Sometimes judges may have to disqualify themselves because previous judgments given by them would cause litigants to doubt whether they would decide the case impartially. If a judge has made credibility findings against a particular party in one case, it would be wrong for that judge to hear another case involving the same party where that party's credibility would again be in issue. The reason is that the judge would have a preconceived idea of whether the witness will tell the truth and the rule is that the judge must decide the case only on evidence before him.

The mere fact that, in the past, the judge has decided a case in a particular way, will not, however, give rise to impermissible judicial bias.[32] The ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially. It is not that he will decide the case adversely to one party. [33]

Sometimes, when a judge has expressed strong opinions outside court, he may be disqualified from sitting in a case where questions arise that involve issues concerning those opinions. If it is afterwards discovered that the judge has expressed such opinions, his judgment may be set aside. This occurred in a personal injuries case where the judge, in learned articles he had written for legal journals, had expressed firm views as to unacceptable practices of insurers. It was said that it was possible that a person, holding such pro-claimant and anti-insurer views as expressed by the judge in those articles, might unconsciously lean in favour of the claimant and against the defendant in resolving the factual issues between them. Thus, a lay observer with knowledge of the facts would have held a reasonable apprehension of bias.

3. What should be done where a reasonable apprehension of bias may arise?

(a) The general rule and practice

Whenever there is any appearance that the judge may not be able to exercise impartiality and neutrality the judge must disqualify himself from sitting in the case.

In Australia it is the current and standard practice of judges to disclose to the parties, at the outset of a case, the existence of an interest that they might have in one of the parties. That disclosure is designed to advise the parties of facts upon which they can make an informed decision as to whether the judge's interest could possibly lead him to prejudge the issues. Sometimes, the judge will add to the disclosure a statement to the effect that he does not believe that the interest disclosed is a problem. Once disclosure has been made, the parties are able to direct argument as to whether the outcome might possibly be affected by the interest disclosed. If ultimately the judge has any doubt about the matter he or she will withdraw.[34]

It is of course highly desirable, if cost, delay and convenience are to be avoided, that the judge stand down at the earliest possible stage. The parties should not be confronted with a last minute choice between adjournment and waiver of an otherwise valid objection. It is generally desirable that disclosure should be made to the parties in advance of a hearing.[35]

If a judge is alerted to a matter prior to trial that throws doubt upon whether he or she ought to sit, it is incumbent upon the judge to inquire into the full facts in order to be able to make full disclosure.

Judges ought to look at the list of cases set down for hearing in the future to determine there are any matters involving an organisation in which he or she has an interest that ought therefore to be allocated to a different judge.

(b) The judge's duty is to disclose matters rather than for parties to investigate the judge

It is the fundamental duty of a judge to disclose all facts that might give rise to a suggestion of bias. A litigant is not entitled to ascertain by direct questioning of a judge any facts concerning the judge which, if so revealed, might lead to an application that he or she disqualify himself or herself upon the grounds of reasonable apprehension of bias.[36] It will be an insult to judicial integrity for a judge to be subjected to any obligation to answer questions of a litigant. It is not for the litigant to pry into the judge's background. It is for the judge to disclose a fact if it seems to him that it may be thought to have a bearing upon his neutrality.

(c) Importance of only disqualifying oneself where there are proper grounds for such disqualification

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit in cases. The objectivity that surrounds the concept of the fair-minded person means that a judge should not automatically disqualify himself or herself when requested to do so by one of the parties on the basis of an allegation of pre-judgment or bias. By acceding too readily to suggestions of appearance of bias, judges may encourage parties to believe that by seeking the disqualification of a judge they will have their case tried by someone thought to be more likely to decide the case in their favour.[37] A judge therefore has a duty to disqualify himself or herself only for good reason.

(d) Procedure in deciding and reviewing decisions regarding applications for disqualification

The decision of a judge whether or not to disqualify himself is a decision for the judge alone.

Nevertheless, the decision of the judge not to disqualify himself or herself is subject to appeal. Where there is such an appeal to a higher court it may be necessary for evidence to be admitted of the circumstances that gave rise to the challenge to the primary judge.

It is inevitable that appellate courts, removed from the pressure of a possible need for immediate decision and enjoying the advantages of hindsight, will on occasion conclude that a decision of a

judge at first instance that he should not disqualify himself was mistaken. Such a conclusion does not involve any personal criticism of the judge. It is simply an instance of the ordinary working of the appellate process.

4. Prejudice

(a) Generally

A judge must come to his or her decision only by reference to evidence and not any personal beliefs or prejudices. Judges in Australia take an oath on appointment whereby they undertake "to do right to all manner of people after the laws of the State without fear and favour, affection or ill will". By this oath judges undertake to make decisions independently and objectively, without arbitrariness or individual prejudice.

As was demonstrated above, a blindfolded justice cannot be impressed by the power of the litigants or witnesses who might seek to intimidate her. A blindfolded justice will administer objective justice between all parties - between a widow and a wealthy corporation, between a doctor and a patient, between the prosecutor and a hardened criminal, between the State and an alleged traitor.

Thus, for judges to make decisions based on their subjective and generalised views of the personal characteristics of a particular group of people to which a party or witness belonged, would involve a degree of partiality and lack of neutrality that would be fundamentally wrong.

(b) Political views of a litigant or witness

In accordance with this principle, a decision based on sympathy with the political views or race of a party or witness should be set aside. Decisions made on these grounds are fundamentally inimical to the notion of judicial impartiality and neutrality. Thus, for a judge to hold a strong commitment to some political or social cause may shake public confidence in the administration of justice as much as a shareholding in one of the parties. For this reason, the judge should make no comment on the political views or race of any of the litigants or witnesses.

(c) Religious Bias

Religious bias will also disqualify a judge. An example of this principle concerns a magistrate, who was a member of a particular council of a religious body. One of the objects of the council was to oppose the renewal of liquor licences. The magistrate was present at a meeting of the council at which it was decided that the council should oppose the renewal of certain licences. The council opposed the renewal of a particular licence. The hearing of the application for renewal took place before the magistrate concerned. It was held that the magistrate was disqualified on account of bias, and that the decision to refuse the licence was bad.[38]

(d) Gender Bias

Care must be taken to avoid gender bias. Unfairness may result if a judge fails to accept that a woman's experience may be different from that of a man.[39] Findings of fact should be realistic and should make allowance for disadvantage, including disadvantage by reason of gender. Subject to this, however, there can be no room for discrimination, reverse discrimination or affirmative action in the judgmental process.

(e) Bias against particular party or counsel

I once heard a very experienced judge say that the most difficult part of the job was to overcome his dislike of certain counsel. Perceived favouritism of the judge for opposing counsel is a common ground of complaint by litigants in person. The converse occurs when a judge goes to extreme lengths to demonstrate that he does not favour a lawyer with whom he is known to be friendly. The more judges are aware of their subconscious feelings the better judicial officers they are, as the better they can control internal bias.

(f) The impossibility of complete impartiality

I have discussed a number of types of prejudice that might bring a judge's impartiality into question. However, my final task is to demonstrate that complete impartiality is next to impossible. As judges are human beings they must harbour likes and dislikes, prejudices, emotions for and against different people, social and political causes and have feelings about many issues that arise in

the general course of human life. An important task of the judge is to curb these feelings, to try and prevent any of them having any bearing on the decision to be made, and to do nothing that would give any indication of bias.

Judicial compassion and responsiveness are not adequate substitutes for the ideal of impartiality. In the common law world, in the early years of the 20th century, most judges were extremely tender hearted towards big business, while showing little compassion for women and children working long hours in factories. Other judges were strongly in favour of landlords and employers and seldom upheld the claims of workers and tenants. They were merely demonstrating judicial compassion and responsiveness for the ruling establishment at the time. This demonstrates the danger of using sympathy and feelings as a basis for making decisions and particularly expanding the law.

Unconscious bias is a major problem. Bias is such an insidious thing that, even though a person may in good faith believe that he or she was acting impartially, his or her mind may unconsciously be affected by bias.[40] We cannot get rid of our upbringing, our habits and our natures. It has been said: "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own".[41]

For this reason "the conscientious judge will, as far as possible, make himself aware of his biases".

[42] As an American judge once said:[43]

"Those who sit in judgment strive, usually with success, to control their emotions. If one were to define 'bias' and 'partiality' to mean 'the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will".

The judge went on to say:

"The human mind, even in infancy, is no blank piece of paper. We are born with predispositions and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices. Without acquired slants, preconceptions, life could not go on The standard of dispassionateness obviously does not require the judge to rid himself of the unconscious inference of such social attitudes.

In addition to those acquired social value judgments, every judge, however, has many unavoidable idiosyncratic 'leanings of the mind', uniquely personal prejudices which may interfere with his fairness ... The conscientious judge, will, as far as possible, make himself aware of biases of this character, and, by that very self-knowledge, nullify their effect".[44]

This issue was poignantly addressed in the trial of the Nazi war criminal Adolf Eichmann. After he was captured in Argentina in 1960 and taken to Israel he was charged with war crimes. He appealed to the Supreme Court of Israel on the ground that "the judges of the District Court, being Jews and feeling a sense of affinity with the victims of the plan of extermination and Nazi persecution were psychologically incapable of giving the appellant an objective trial". The District Court had dealt with the issue as follows:

"The judge, when dispensing justice in a court of law, does not cease to be a human being, with human passions and human emotions. Yet he is enjoined by the law to restrain and control such passions and emotions, else there will never be a judge qualified to try a criminal case which evokes deep feelings and revulsion, such as a case of treason or murder or any other grave crime. It is true that the memory of a catastrophe shocks every Jew to the depths of his being, but once this case has been brought before us it becomes our duty to control even these emotions when we sit in judgment. We shall abide by this duty".[45]

The Israeli Supreme Court rejected Eichmann's argument.

Conclusion

I have explored today a judge's duty of impartiality. While it is impossible for any of us to approach each case as a "blank piece of paper", it is incumbent upon us to, as far as possible, act as dispassionate arbiters, being persuaded only by the evidence before us. Decisions should not be made by reference to the personal attributes of the judge without reference to the merits of the individual case. That is not the ideal of justice.

* Edited version of a paper given at a conference in Beijing organised by the National Judicial College, Beijing, 11 October 2004 and to the Shanghai Judicial College, Shanghai, 19 October 2004.

1 Judge of Appeal, Supreme Court of New South Wales.

2 *Ebner v Official Trustee* (2000) 205 CLR 337 (at 345, [7]).

3 Curtis & Resnik, "Images of Justice" (1987) 96 Yale LJ 1727 (at 1748-1749).

4 *Id* at 1757.

5 *Ibid*.

6 *Ibid*.

7 Cesare Ripa, *Baroque and Rococo Pictorial Imagery* (E Maser ed, 1971) at 120; referred to by Curtis & Resnik, *op cit* at 1748.

- 8 Justice J D Heydon, "Practical impediments to the fulfilment of judicial duties", Keynote address delivered to the national Judicial Orientation Programme, Sydney, 13 October 2003.
- 9 See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (at 358, [58]).
- 10 *Dimes v Proprietors of Grand Junction Canal* (1852) 3 HLC 759.
- 11 *Id* at 793 per Lord Campbell.
- 12 Both these cases were appealed to the High Court and heard together in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
- 13 *Ebner v Official Trustee in Bankruptcy* (1999) 91 FCR 353.
- 14 *Clenae Pty Ltd v ANZ Banking Group Ltd* [1999] 2 VR 573.
- 15 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet Ugarte (No 1)* [2000] 1 AC 61.
- 16 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet Ugarte (No 2)* [2000] 1 AC 119.
- 17 Pannick, *Judges* (OUP, 1988) at 59.
- 18 Note that in the circumstances of the case, the apprehension of bias was held to be waived by counsel at the trial: *Smits v Roach* [2004] NSWCA 233.
- 19 Justice J B Thomas, *Judicial Ethics in Australia* (2nd Ed, LBC, 1997) at 21.
- 20 Ballantine, *Some Experiences of a Barrister's Life* (Henry Holt & Co, 1882) at 126, quoted in Thomas J, *op cit*, at 21.
- 21 Harvey, *The Advocate's Devil* (Stevens, 1958) at 32, quoted in Thomas J, *op cit*, at 21.
- 22 *R v Hircock, Farmer Leggett* [1970] 1 QB 67.
- 23 *Jones v National Coal Board* [1957] 2 QB 55 (at 64-65).
- 24 Chief Justice M Gleeson, "Aspects of judicial performance", revised version of a paper "The Role of the Judge and Becoming a Judge" delivered to the National Judicial Orientation Programme, 16 August 1998, Sydney.
- 25 *R v Watson; Ex Parte Armstrong* (1976) 136 CLR 248 (at 265).
- 26 *Kwan v Kang* [2003] NSWCA 336.
- 27 *Johnson v Johnson* (2000) 201 CLR 488 (at 493 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
- 28 *Brassington v Brassington* [1962] P 276 (at 282).
- 29 *R v Watson; Ex Parte Armstrong* (1976) 136 CLR 248 (at 264 per Gibbs ACJ).
- 30 Opening Speech by the Lord Chief Justice of England, Bar Conference, 2 October 1993, at 3-4, quoted in Ward, "Dealing with Parental Irresponsibility" in Cranston (ed), *Legal Ethics and Professional Responsibility* (Clarendon Press, 1995) at 133.
- 31 *Vakauta v Kelly* (1989) 167 CLR 568.
- 32 *Masters v R* (1992) 26 NSWLR 450 (at 471); *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 173 CLR 78 (at 86).
- 33 *In Re JRL; Ex Parte CJL* (1986) 161 CLR 342 (at 352 per Mason J).
- 34 *Clenae Pty Ltd v ANZ Banking Group Ltd* [1999] 2 VR 573 (at 576, [7]).
- 35 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65.
- 36 *Limbo v Little* (1989) 65 NTR 19.
- 37 *Re JRL; Ex Parte CJL* (1986) 161 CLR 342 (at 352 per Mason J). See also *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 (at 348, [20]).
- 38 *R v Fraser* (1893) 9 TLR 613.
- 39 Australian Law Reform Commission, *Equality Before the Law: Womens' Equality*, Report No 69, 1994 at [2.21].
- 40 *R v Gough* [1993] AC 646 (at 659).
- 41 Justice B N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) at 13.
- 42 *In Re J P Linahan* 138 F 2d 650 (1943) (at 651 per Frank J).
- 43 *Ibid*
- 44 *Id* at 651- 653.
- 45 Pannick, *op cit*, at 219.

Personal Responsibility in Australian Society and Law: Striving for Balance - Edited version of Oration delivered at Annual Scientific Meeting, Australian and New Zealand College of Anaesthetists, Perth, WA on 1 May 2004

PERSONAL RESPONSIBILITY IN AUSTRALIAN SOCIETY AND LAW: STRIVING FOR BALANCE

The Honourable Justice David Ipp*

For many years now, courts throughout the common law world have awarded damages to plaintiffs without paying any regard to the concept of personal responsibility. Many of these cases are collected in websites on the internet. In a speech I recently made to the Australian and New Zealand College of Anaesthetists in Perth I referred to two examples of cases of this kind which were said to be part of the Stella awards, that is, awards given to the most outlandish examples of negligence verdicts. Mediawatch, citing a website described as *overlawyered.com*, said the two cases to which I had referred were fictitious. *Overlawyered.com* however, itself lists very many cases of the same genre. Three are worth mentioning.

The first is the case that was the inspiration for the Stella Awards. The Stella Awards are named after Stella Liebeck who spilled a 49-cent coffee on herself while eating a hamburger. She sued McDonalds and successfully recovered over \$500,000.[1]

The second is the case of Shelly Moore, who left her daughter, Shannon, unattended in her car. The car burst into flames and Shannon was horrifically burnt. Shannon sued Philip Morris who made the Marlboro cigarettes Ms Moore smoked. Shannon's claim was that a smouldering cigarette caused the fire and her injuries were the tobacco company's fault for failing to design a cigarette that would not stop burning. Philip Morris settled for \$2 million.[2]

The third is a case where two carpet installers, who admitted that they read the label of the adhesive they used, admitted they understood the adhesive was inflammable and should not be used inside, used it inside anyway, caused an explosion, were burned badly, sued and won \$8 million.[3]

These three examples are typical of the vast number of negligence cases that have been resolved, in recent times, with little regard to the personal responsibility of the plaintiff for the loss sustained.

What does personal responsibility mean? It means taking responsibility for one's own decisions and actions. It means personal accountability to the standards of society.

This simple proposition carries with it implications that are contrary to many trends in popular modern day culture. Being responsible for one's behaviour means acknowledging the existence of objective standards against which behaviour can be measured. This means that people can be wrong, hence, guilty, hence, personally responsible. But there are those who are against guilt of any kind. They believe in a form of absolute relativism. Everything you do is caused by socio-economic factors.

Nothing is your fault. Every act is explicable and, indeed, exculpatory by reason of the difficulties you suffered when you were brought up, by hardships inflicted on you by your parents, your family, your school, your peers, your employers. Even those found guilty of the most serious crimes seek to excuse themselves on grounds of this kind. This is not the traditional view of personal responsibility. One of the problems with personal responsibility is that the concept carries with it the notion of failure. Failure is an unpleasant feature of life that many do not wish to recognise. There are those who hold the anodyne view that no one should fail. Coupled with this approach is a disapproval of excellence. Excellence requires a judgment to be made against fixed standards and an acknowledgment that those who achieve excellence are personally responsible for their success. The "tall poppy syndrome" is a product of a dislike of excellence. Lying behind a dislike of tall poppies is a refusal to acknowledge that those who do not achieve success, and who fail, are personally responsible for their own destiny.

In a recent article in the Sydney Morning Herald, John Huxley said:

"Increasingly, Australians live in a society in which it is always someone else's fault; in which perpetrators masquerade as victims; in which personal responsibility has been replaced, all too frequently, by a readiness to lie, to sue, to redirect blame or, worse, to find scapegoats."

It was not always so. Since ancient times, taking personal responsibility for one's own behaviour has been regarded as fundamental to what it means to be fully human, to lead an ethical life and, therefore, to participate in a just society. Without a fully realised concept of personal responsibility, society cannot be ordered in a fair way.

The urge to blame others, nevertheless, is deeply embedded in the human psyche, and has been there since time immemorial. You will recall that, when God asked Adam, "Have you been eating from

the tree I forbade you to eat?", Adam replied, "It was that woman; that woman you put with me; she gave me some fruit from the tree, and I ate".

A heart-warming feature of the early Australian people was that they seemed beyond blaming others. They did not claim to be victims; they presented as a rugged, stoical, independent, self-reliant, yeomanry. Their ethos was the antithesis of the culture of blame. The image of Australians was one of persons overcoming hardship with laconic and dry humour, pursuing their desire to be their own masters. Henry Lawson put it this way:

"They call no biped lord or "sir"
and touch their hats to no man".

According to Donald Horne, at the turn of the 20th century, there was a generally heroic and adventurous view of the Australian, tall, lean, suntanned, self-reliant yet comradely, tough yet sentimental.

Of course, the Australian soldiers reinforced this image. In historical works on the Australian Army, words such as "sacrifice", "cheerful", "confident", "stalwart", and "readiness to take risks" appear over and over again. This idea continued into the age of prosperity. Australians in the professions, in industry and in commerce, asserted a talent for hard work, devotion and improvisation, self-belief and resourcefulness.

But attitudes changed, particularly as from the 1970's. Since then, there has been what has been described as a "retreat from responsibility". This retreat is far more extensive than absurd results in litigation, higher insurance premiums and politicians who never accept blame. It is something that has penetrated the very roots of our society.

Even the very nature of our sporting heroes, a uniquely important group of role models in Australian society, has undergone a metamorphosis. Don Bradman, when asked how he wanted to be remembered, said:

"If I had to put it into one word? "Integrity".

He said:

"A good captain must be a fighter; confident but not arrogant, firm but not obstinate; able to take criticism without letting it unduly disturb him".

Compare this statement with that of a present day cricketing icon who denied personal responsibility for taking a banned substance. He said:

"The tablet was given to me by my mum."

As Adam had said before, "It was that woman".

Our modern cricketing hero later stated that he was a "victim"; a victim of "anti-doping hysteria". That is another phenomenon that accompanies the retreat from personal responsibility. I mean the claim for victim status.

The role of the courts in this area is revealing. As the values of society change, so does the law as interpreted by the courts. The courts' response is generally slow, often several years behind the current of popular opinion. This is a saving grace, as a responsible judiciary does not follow fashion and respond to every whim and fancy of an ever-changing public. But an examination of the judgments of the courts over a given period will demonstrate the values of the time. Let me give you three examples from the highest courts in Australia.

An inattentive driver of a slowly travelling car has been held to be liable in damages for breach of a duty of care owed to a person who, dressed in a dark overcoat on a rainy night, sought to cross the road at a highly unlikely spot without any real lookout for oncoming traffic. The argument was accepted that drivers are responsible to those who take no care at all for their own safety.

The plaintiff in another case was a garbage collector who was injured in the course of his employment when hit by a motor vehicle while running across a road carrying a garbage bin. He was struck by a vehicle travelling on its correct side of the road. The court found that the employer was negligent in failing to instruct the garbage man to be careful and not to run across the road without looking. The garbage man, who ran across the road without looking, was held to have not been negligent at all. His employer was found liable for all his damages. This has been described as the nursemaid theory of employer's liability.

In a Queensland case, a man hurt his leg to an insignificant degree in a minor traffic accident. He was partly to blame and the defendant, the driver of a vehicle was also partly to blame. The injury healed but over time, merely because he had been involved in an accident and been injured, the man became depressed. In consequence, more than a year later, he committed suicide. The driver was held responsible for the man's death and had to pay substantial damages to his dependants. But, in more recent times, there has been a major change.

Legislation limiting liability and reducing damages payable for negligence has been introduced throughout Australia. These changes are based on the review of negligence undertaken in 2002. The report of the panel on which the new legislation is based stated:

"The panel's starting point is that personal injury law comprises a set of rules and principles of personal responsibility. The panel sees its task as being to recommend changes that impose a reasonable burden of responsibility on individuals to take care of others and to take care of themselves ...".

Many far-reaching changes based on the concept of increased personal responsibility have now been made by legislation throughout the country. These changes involve such measures as reducing liability for obvious risks and imposing limits on the damages that can be recovered.

The courts are now attributing greater weight to the notion of personal responsibility when determining liability in negligence cases. For example, the High Court has said: "People of full age and sound understanding must look after themselves and take responsibility for their actions". The Chief Justice of New South Wales has said:

"In many respects the tort of negligence is the last outpost of the welfare state. There have been changes over recent decades in the expectations within Australian society about persons accepting responsibility for their own actions. Such changes in social attitudes must be reflected in the identification of duty of care for purposes of the law of negligence. The recent authoritative statements in [the High Court] give greater emphasis, in the development of the law of negligence, to the acceptance by individuals of a personal responsibility for their own conduct, than may have been given in the past."

This approach has been applied in several recent cases, by the High Court most recently in the case of a plaintiff who was severely injured in a motor car accident after drinking for several hours at a leagues club. The plaintiff failed. Gleeson CJ said that the consequences of the plaintiff's argument involved both an unacceptable burden upon ordinary social and commercial behaviour and an unacceptable shifting of responsibility for individual choice.

It may be that this new attitude reflects a fundamental swing in the grassroots of Australian society. There has undoubtedly been a dampening in the enthusiasm for litigation. In the busiest court in the country, the District Court of New South Wales, filings are down by some 50%. A floor of barristers doing only negligence work has closed down in Sydney. Several firms of solicitors have experienced a substantial reduction in work. Far less actions are being instituted against doctors. It has become far more difficult for plaintiffs to succeed.

There are two aspects of this new-found regard for personal responsibility that must be borne in mind. Firstly, the notion of personal responsibility involves a duty - a duty to take care for one's own safety. But there are rights that attach to the recognition of this duty. One of those rights is to receive the information necessary to exercise an informed decision about one's own destiny. This underlies the acceptance by the courts that patients have the right to be given all necessary information about medical treatment they are to receive. The paternalistic idea that the doctor knows best is not compatible with true personal responsibility.

Secondly, there is a dark side to the idea of personal responsibility. The way in which the concept can be perverted can be seen from the ideas of those responsible for the provision of medical care and assistance to wounded soldiers at the commencement of the First World War. Senior medical officers believed that it was the personal responsibility of soldiers to bear pain with equanimity. They thought that the experience of pain was character building and, indeed, healing. For that reason, initially, they refused to allow wounded soldiers to be operated upon under anaesthetic.

When taken to extremes, the notion of personal responsibility perverts the concept of the modern compassionate society. Personal responsibility is used to argue for abolition of or severe reductions in government programmes for health, education and equal opportunity. It is the catchcry of those who wish to make significant reductions in social welfare, who wish to have freedom to act with commercial rapacity, to pollute and mislead. Personal responsibility, used in this way, is opposed to the concept of an inter-dependent and mutually co-operative community.

In truth, the notion of complete individual independence from others is an illusion and a self-destructive notion. One of the principal theses of Isaiah Berlin, the English philosopher, was that most of the cardinal values to which human beings aspire clash. They are not compatible with each other. Justice may clash with mercy and compassion; unrestrained liberty may have to make way for forms of social welfare; the pursuit of truth does not justify torture. As Berlin pointed out, "total liberty for wolves is death to the lambs".

A properly balanced position is difficult to achieve. Proponents of extreme views are vociferous in their support of their side and in their condemnation of the other. Nevertheless, the judiciary is well aware of the conflict and the need to establish a new equilibrium. Although individual cases may at times seem out of kilter, the trend seems clear. There is a strong desire to create a society where there is a communal obligation to provide proper care for those in need of assistance, but where there is also due regard for the values of striving for excellence, independence of spirit, self-reliance and personal responsibility for one's own actions. I am optimistic that this is being achieved.

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* Edited version of oration delivered at Annual Scientific Meeting, Australian and New Zealand College of Anaesthetists, Perth, WA on 1 May 2004.

1 The initial amount awarded to Ms Liebeck was \$2.86 million. See *Liebeck v McDonalds Restaurants* [1995] WL 360309 (New Mexico District Court). The punitive component of this award was reduced by the trial judge so that the total award was \$640,000. However the matter was then settled before an

appeal was heard.

2 See Myron Levin, "Tobacco Giant, in a Shift, Pays Victim" LA Times, Oct 2 2003.

3 Falkner v Para-Chem Prod Liab Rep P 16,663 [2003].

Policy and the Swing of the Negligence Pendulum

POLICY AND THE SWING OF THE NEGLIGENCE PENDULUM*[1] D A IPP[2] Précis

The law of negligence is especially prone to influence by moral, social, economic and political values. As society becomes more complex and technologically advanced, novel circumstances giving rise to negligence claims arise. Policy then becomes determinative. It is this influence of policy that explains the uncertainty and changes to the law of negligence since 1932. However, judges are reluctant to confront the effect of policy on their decisions and to explain their reasons by reference to its influence. It is important that judicial reliance on policy be fully and transparently reasoned. There are two vexed questions inherent in the judicial application of policy; when are community values to be applied and how are they to be determined? This article discusses these issues, the changes that have been made and the capacity of the law to satisfy community needs as regards negligence and whether legislative change is appropriate.

Some principles of the law remain immutable, but not those that govern negligence. Although the common law of negligence had a long and uneventful childhood, adolescence brought about a personality change that led, in adulthood, to incipient signs of gross instability. If the modern era can be regarded as negligence's senior years, one can only note the erratic and unpredictable dementia that has required legislative repair.

What has brought about such change and uncertainty? And why do other branches of the common law remain fairly constant, undergoing only gradual and placid variation, far removed from the limelight and criticisms by politicians, the media and the general public?

It is true that the law of contract is being stifled by industrial law, contract review and trade practices statutes that cut across the binding effect of agreements. But, nevertheless, the long-standing principles of the common law of contract continue to exist in their familiar form. The bastions of equity are even stronger, protected as they are by the fierce guardians of its pristine purity. I speak of course of those ruthless equity cleansers in the High Court and (not without the opposition of some bold spirits)[3] in the higher courts of New South Wales.

The reason for public interest in the law of negligence is no mystery. Negligence, as a concept, is easy to comprehend. It does not require an understanding of arcane rules to grasp the issues involved in a particular case. Lay persons regard themselves as well-qualified to express opinions in the area, and many feel strongly about issues that are publicised. While reading a newspaper over the breakfast table, judgments can be made by ordinary citizens in the space of a few minutes. All negligence cases arise in the ordinary course of human endeavour and there is a general belief that the assessment of negligence is nothing more than common sense, an attribute that not a few members of the public think is lacking in several judgments of courts around the country.

While the common or garden qualities of negligence are the key to why it is such an easy and ready target, they do not explain the changes to both principle and judicial approach that have occurred over the last 75 years. The reasons for these oscillations have to be sought in the essential nature of the tort of negligence and stem, to a substantial extent, from Lord Atkin's famous neighbour test, whereby, in *Donoghue v Stevenson*,[4] he propounded the modern principles of this branch of the law. Since 1932, Lord Atkin's words have become required study by every succeeding generation of lawyers in the common law world. He said:[5]

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

While this test seems on its face to be simple and easy to apply, it contains within itself fundamental policy issues. Of paramount importance is that the determination of who is a "neighbour" according to Lord Atkin's formula is essentially a matter of policy. While foreseeability may only involve the exercise of judgment in assessing what should have been contemplated, the concept of "reasonably" foreseeable requires issues of policy to be considered. Other elements of negligence, apart from whether a duty of care is owed to a particular person, are permeated by policy considerations. Proof that a duty has been breached may depend on economic issues and questions of social utility. Factors

of this kind may have to be balanced in order to determine whether precautions should have been taken to avoid harm. Causation involves normative considerations.[6] Whether damages should be recoverable in a particular case may involve serious questions of moral, social, economic and other values.[7] Thus, for example, economic loss is actionable only under controlled conditions.[8] Policy lies at the root of several recognised defences to negligence claims. Liability may be denied where the plaintiff was acting illegally at the time the injuries were suffered.[9] Immunity on the grounds of public policy is granted in the conduct of prosecutions by the Crown Prosecution Service. [10] Arbitrators are protected against claims by disappointed litigants.[11] Public policy protects claims by students against examiners.[12] A duty of care does not arise in connection with combat operations against the enemy.[13] Barristers' immunity is well known.[14] A fire brigade is not under a common law duty to answer a call for help and is not under a duty to take care to do so.[15] The coastguard has no duty of care to respond to an emergency at sea or to respond reasonably.[16] Police officers do not owe a duty to individual members of the public who suffer injury through careless failure to apprehend a dangerous criminals;[17] in *Tame v New South Wales*[18] McHugh J said that it was "preposterous" to suggest that a police officer had a duty of care in recording and using statements of witnesses.[19]

Policy considerations lie, invisible, behind much judicial reasoning. Justice Oliver Wendell Holmes famously said:[20]

The life of the law has not been logic; it has been experience.

But the sentence immediately following this aphorism is equally illuminating:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a great deal more to do than the syllogism in determining the rules by which men should be governed.

The law of negligence is especially prone to influence by moral, social, economic and political values. This is well illustrated by Lord Wilberforce's comments:[21]

Though differing in expression, in the end, in my opinion, the two presentations rest upon a common principle, namely that, at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy. Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says, with Stephenson LJ, that there is a duty but, as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether, with Griffiths LJ, one says that the fact that consequences may be foreseeable does not automatically impose a duty of care, does not do so in fact where policy indicates the contrary. This is an approach which one can see very clearly from the way in which Lord Atkin stated the neighbour principle in *Donoghue v Stevenson* [1932] AC 562, 580.

As society becomes more complex and technologically advanced, novel circumstances giving rise to negligence claims arise. Policy then becomes determinative. It is this influence of policy that explains the uncertainty and changes to the law of negligence in recent times.

Lord Atkin observed[22] that the law of negligence should be based on a general public sentiment of moral wrongdoing - a statement said by the Judicial Committee of the Privy Council in *The Wagon Mound*[23] to be the "sovereign principle" of negligence. Much as this concept is anathema to some, herein lies the heart of the law of negligence. Of course, "public sentiment" in this sense does not mean attitudes that change with the whim of fashion. It does not mean transient beliefs in some political platform, or media driven public anger or approval in regard to issues of the moment. Rather, public sentiment is a reflection of deep-seated moral, political, social and economic values; a reflection of the values of society itself.

Public sentiment in the Lord Atkin sense also does not mean a judge's subjective view of community values. Lord Steyn has stressed the need for objectivity, saying:[24]

[J]udges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.

In *Cattanach v Melchior*[25] McHugh and Gummow JJ quoted with approval the remarks of Lord Radcliffe made in the course of a lecture on the influence of policy in the law. Lord Radcliffe said:[26] Public policy suggests something inherently fluid, adjusted to the expediency of the day, the proper subject of the minister or the member of the legislature. The considerations which we accept as likely to weigh with them are just not those which we expect to see governing the decisions of a court of law. On the contrary, we expect to find the law indifferent to them, speaking for a system of values at any rate less mutable than this.

The problem is that judges differ in their identification and acceptance of these values, however "less mutable" they may be. The uncertainty to which this gives rise is aggravated by the many respects in

which policy affects liability for negligence.

Another aggravating factor is that judges are reluctant to confront the effect of policy on their decisions and to explain their reasons by reference to its influence. Principle seems to be more certain than policy. That is why judges, as a rule, prefer to explain their decisions by reference to principle rather than policy. But principle often disguises policy, and policy often transmogrifies into principle. Public sentiment in the Lord Atkin sense does change, but it is very difficult to discern when that sentiment is sufficiently deep-rooted and broadly based to require a change in the law. Judges do not conduct market surveys. They do not take the pulse of constituents. They do not stand for election on a program of change. Furthermore, there is often a long time-lag before a court discerns a change in public sentiment and an even longer one before judges are prepared to depart from their own attitudes that have been entrenched over the years. In these circumstances it is important for judicial reliance on policy to be fully and transparently reasoned.

According to Professor Fleming:[27]

Lord Atkin's proximity has cast a baleful shadow over judicial ruminations on duty. Borrowed from the context of causation, where proximate cause and its mirror image remoteness had long served to identify the problem of limiting responsibility for consequential damage, it became a convenient screen for not disclosing any specific reasons behind a decision for or against a finding of duty. The judicial tendency to take refuge in seemingly bland, neutral concepts, like foreseeability and proximity, under the pretence that they represent 'principle' has its roots in the embarrassment with which the British conservative tradition has generally treated the role of policy in judicial making.

Professor Jane Stapelton points out that judges are inclined to use phrases which have become banal, which merely flag the existence of a particular gate through which the plaintiff must pass, and which do not reveal "what precise substantive issues will, in the relevant circumstances of a particular case, be regarded as relevant to whether the plaintiff is, respectively, owed a duty or can establish negligence-in-fact".[28] She comments:[29]

What is needed is the unmasking of whatever specific factors in each individual case weighed with the judges in their determination of duty. It is not acceptable merely for a judge baldly to assert that the plaintiff was proximate; or that a duty was justified because the parties were in a 'special relationship', or because the plaintiff had 'reasonably relied' on the defendant, or merely because it was 'fair, just and reasonable'. Without more, these are just labels.

The current formula employed in England for determining whether a duty of care exists involves foreseeability, proximity and what is fair and reasonable (*Peabody v Parkinson*).[30] Kirby J, alone of the High Court, has supported this concept in Australia. In *Sullivan v Moody*,[31] Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ rejected this approach, saying:[32]

Developments in the law of negligence over the last thirty or more years reveal the difficulty of identifying unifying principles that would allow a ready solution of novel problems. Nonetheless, that does not mean that novel cases are to be decided by reference only to some intuitive sense of what is 'fair' or 'unfair'.

Their Honours propounded the application of well-developed principles of the law of negligence, rather than broad concepts of fairness and reasonableness. It is, however, important to recognise to what extent those principles, themselves, are dependent on policy (and notions of fairness and reasonableness, in any event). An historical examination of the development of the law of negligence reveals the influence and importance of factors of this kind.

Negligence as a technical term began to crystallise in the early 19th century.[33] The earliest illustrations of tortious negligence were found in the liability of recognised categories of relationships, like occupiers of land and visitors, owners of goods and carriers, innkeepers and paying guests, and surgeon and patients. Gradually, with the industrial revolution, the concept of negligence as a separate basis of liability emerged. New inventions and the introduction of machinery, urbanisation and faster traffic along roads and railways created untold new sources of risk. Plaintiffs suffered injuries never before experienced. "Public sentiment" in the form of considerations of social justice demanded that fundamental changes be made to the law of negligence.

Despite advancement in the rights of plaintiffs, the law was, at first, heavily weighted against them.

This is graphically illustrated by the remarks of Lord Abinger, whose views reflected the general attitudes of Victorian society. In 1839, in *Priestley v Fowler*,[34] a butcher's servant sued his master who had allowed other servants to overload a van with goods. As a result the plaintiff was thrown out of the van, thereby fracturing his thigh. The Court of Exchequer was clearly startled by the novelty of the proceeding. Lord Abinger, speaking for the court, said:[35]

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent ... If the owner of the carriage is responsible for the sufficiency of this carriage to his servant, he is responsible for the negligence of his coach-maker or his harness-maker or his coachman.

He regarded such a prospect as too awful to contemplate.

Three years later, in 1842, Lord Abinger was again alarmed, this time in *Winterbottom v Wright*.^[36] There, he held the repairer of a mail coach not to be liable to a coachman who had been injured by a defective axle. He was fearful of imposing tortious liability, believing that that would unjustly subject persons in the position of the repairer "to be ripped open by this action of tort".

As public sentiment changed, however, so, gradually, did the law. In 1883, by *Heaven v Pender*,^[37] the concept of "duty" was irrevocably established as an element of the tort of negligence. It was there accepted that, within the recognised categories, a person who caused injury to the person or property of another by failing to use ordinary care and skill would be liable for the damage caused.

In 1932, with *Donoghue v Stevenson*,^[38] came the metamorphosis. *Winterbottom v Wright* was overturned and the neighbour test accepted.^[39] So was established the modern generalised duty of care. A plaintiff no longer had to come within the pre-existing category of recognised factual situations to succeed. Lord Atkin laid down that foreseeability was a necessary element of the tort and, by use of the restricted notion of "neighbour", recognised that there would have to be some other limiting factor that would restrict liability.

But this change was a near-run thing. Lord Atkin's view prevailed only by a 3:2 margin. Lord Buckmaster and Lord Tomlin dissented. Lord Buckmaster said:^[40]

The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

Now the common law must be sought in law books by writers of authority and in judgments of the judges entrusted with its administration.

Lord Buckmaster observed that the law books gave no assistance and no case directly involving principles of the kind pronounced by Lord Atkin had ever succeeded in the courts. He agreed with the emphatic statement of the Scottish judge who said that "it would seem little short of outrageous" to make the manufacturers of the ginger beer "responsible to members of the public for the condition of the contents of every bottle which issues from their works".^[41]

Lord Tomlin agreed with Lord Buckmaster and referred to the "alarming consequences" of accepting the validity of the proposition upheld by Lord Atkin. He said that "the reported cases - some directly, others impliedly - negative the existence as part of the common law of England of any principle affording support to the [view of the majority]".^[42]

Lord Atkin and the other two members of the majority did not expressly call upon policy to explain the change they favoured. They said merely that the judgments in cases such as *Winterbottom v Wright* erred.^[43] Lord Atkin said that the distinctions drawn in the earlier cases were "unnatural".^[44] He said that the proposition he was advancing was:^[45]

[One] which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense.

But it would have to be acknowledged that, frequently, reasoning that is unnatural to one judge, lawyer, or layman, is natural to another. Take the House of Lords in *Donoghue v Stevenson*. Three eminent Lords in Ordinary thought that the prevailing state of the law was unnatural. Two did not. The statement that the new, general rule avoided what was "unnatural" concealed the true reasoning underlying the change, as did the statement that earlier judges had erred. The truth is that the majority's reasoning was based on policy, policy pure and simple.

Lord Atkin sought to justify the change he was proposing by saying that it reflected the opinion of everyone "in Scotland or England who [is] not a lawyer". It is not surprising that judges in negligence cases frequently pray in aid such lay spirits as the man on the Clapham omnibus, the traveller on the London Underground, or some inhabitant of Emu Plains. The problem, however, is that the supposed view of these notional lay members of the public depends on the subjective perception of the judge concerned. The conjuring up of Mr Everyman is a bid to invoke, in some intuitive way, Lord Atkin's public sentiment of moral wrongdoing.

It would be more in accord with the judicial function, however, if judges were rather to say: I think that a change to the law should be made; firstly, because of my perception of public sentiment (which is as follows); secondly, I think (for the following reasons) that the law should be changed to reflect that sentiment. Such reasons should include (if appropriate) why a change to the law is needed, a discussion of the merits of the sentiment and why the contemplated change is a natural development of the common law, or is consistent with its general trend.

Lord Atkin did not go into this kind of detail. Nevertheless, his reasoning was candid and transparent. Virtually all cases, both before and after *Donoghue v Stevenson*, where momentous changes have been made to the law, the reasoning of the judges concerned is laden with citations from prior cases

from which the judges seek to draw support. This often conceals the true basis for the change in the law, namely, policy considerations. Lord Atkin, however, only cited the prior decisions for the purposes of making it clear that he was well aware of the existing law, but nevertheless thought that it was wrong.

The reasoning of the minority in *Donoghue v Stevenson* is revealing. Lord Buckmaster's agreement with the proposition that "it would seem little short of outrageous" to impose a generalised regime of product liability upon manufacturers tells us something about his temperament, but nothing about his reasoning. Lord Tomlin invoked Lord Abinger's spectre of prospective plaintiffs being ripped open[46] (a declamatory statement also devoid of reasoning), but he did at least flick on the floodgates switch. [47]

Following judges of the past and foreshadowing some judges of the future, Lord Buckmaster and Lord Tomlin resisted change by reference to existing authority. Their approach, as I have mentioned, was that, although the law may be changed gradually to meet new conditions, principles cannot be changed or additions made to them simply because of the merits of a particular case. One must seek the principles in "the reported cases". This, perhaps, is the first (although fairly rudimentary) articulation of incrementalism. It is also one of the last attempts to define the law of negligence by reference to existing authority, and not general principle. This approach was consigned to history by *Dorset Yacht Co Ltd v Home Office*. [48]

Lord Reid gave a refreshing antidote to the anodyne invocation of existing authority, when he said: [49]

There was a time when it was thought almost indecent to suggest that judges make law - they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the common law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong doors open. But we do not believe in fairy tales any more.

Today, it would be difficult to find a judge who thinks that, if authority cannot be found in the cases, the law cannot be changed. But a view does exist that, if principles derived from established authority are capable of application to a novel case, they must, of necessity, apply to that case; on this view, established principles should not be nullified by policy. Thereby, without reference to broad policy implications, the law of negligence widens its reach to new and complex situations. This reluctance to apply policy to reject an extension of the tort of negligence conceals the application of a different kind of policy, namely, a policy of expansion, a policy that strengthens the law of negligence as "the last outpost of the welfare state". [50]

Donoghue v Stevenson began a sharp swing of the pendulum in favour of plaintiffs. Claims of a kind never before brought before the courts made their appearance. Seven years later, in *Chester v Waverley Corporation*, [51] Rich J complained about the attempts that had been made to extend the law of tort. He said that the developments seem to consist "in a departure from the settled standards for the purpose of giving to plaintiffs causes of action unbelievable to a previous generation of lawyers". He said "defendants appear to have fallen completely out of favour". Subsequent events proved him to be correct.

The next major change was introduced in 1963 by *Hedley Byrne and Co Ltd v Heller & Partners Ltd*, [52] which held that a defendant could be liable for economic loss caused by negligent statement. Denning LJ in dissent in *Candler v Crane, Christmas and Company* [53] had earlier proposed such a rule. Asquith LJ, part of the majority in rejecting the rule in that case, justified his decision by pointing out that Lord Atkin's question "who then, in law, is my neighbour?" had never been applied where the damage complained of was not physical in its incidence to either person or property. Asquith LJ was applying established principles. Denning LJ, on the other hand, boldly asserted that *Le Lievre v Gould* [54] (the leading case that, in 1893, had laid down the contrary) was "infected by ... cardinal errors". The fact that that infection had persisted for some 60 years did not bother his Lordship. He referred to other seminal cases in the law of negligence where judges were divided in opinion and said: [55] On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.

Denning LJ concluded that "a duty to use care in statement is recognised by English law". [56] He felt compelled to explain the new rule, which he himself said was novel, as being an existing principle of the common law. It had simply not been discerned previously; what had been said in *Le Lievre v Gould*, and in the cases that had followed it, was in error; the judges concerned had used the wrong password.

Hedley Byrne v Heller presaged an increase in the velocity of the pendulum as it moved in favour of plaintiffs. Arguments that would have failed 50 years before now began to succeed as a matter of course. Unsurprisingly, this swing coincided with a more liberal public sentiment that focused on individual rights (rather than on overall benefits to the community) and favoured plaintiffs above defendants. Compassion for the injured and desire to compensate fully those harmed by the

negligence of others prevailed. Several changes were made to the law of negligence that were to the benefit of plaintiffs. Many were candidly justified on policy grounds.

For example, prior to *Griffiths v Kerkemeyer*,^[57] it was the law that hospital, medical and nursing expenses could only be recovered if they were legally or at least morally incurred by the victim. *Griffiths v Kerkemeyer*, however, held that a plaintiff could recover the value of those services even if he or she did not pay for them. Mason J said, baldly, that the old view was "no longer acceptable"^[58] (plainly, for reasons of policy - albeit unstated).

In *Kars v Kars*,^[59] the High Court extended the liability to pay damages for gratuitous future care to those instances where the tortfeasor, rather than a third party, provided the care. Previously, in 1984, Burt CJ, a judge with deep knowledge and understanding of the common law, said in *Snape v Reid*:^[60]

It would, in my opinion, be against fundamental principle to allow a recovery in such a case.

Nevertheless, the High Court thought that recovery should be allowed. Toohey, McHugh, Gummow and Kirby JJ did so after a long discussion of policy considerations.

In *Hackshaw v Shaw*^[61] Deane J,^[62] in explaining why the separate measures of duty owed by occupiers of land to different categories of entrant should be abolished, relied on matters of social policy.

In *Tame v New South Wales*,^[63] the High Court overruled *Chester v Waverley Corporation*^[64] and did not follow the House of Lords in *White v Chief Constable of South Yorkshire Police*.^[65] It refused to impose certain restrictions previously recognised in regard to claims for psychiatric damage (but retained those based on the requirement of normal fortitude and sustaining a recognised psychiatric injury).^[66] The High Court held that the common law of Australia "should not, and does not" limit liability for damages for psychiatric injury to cases where the injury is caused by a sudden shock, or to cases where a plaintiff has directly perceived a distressing phenomenon or its immediate aftermath. Policy considerations were candidly discussed and the change of the law was motivated on those grounds. Gummow and Kirby JJ said that the approach they favoured "denies, for policy reasons, liability on the part of bearers of bad news without invoking requirements or distinctions which appear to have an insecure basis in contemporary psychiatry".^[67]

Established principle was long to the effect that highway authorities were immune from claims arising out of their negligence in the exercise of their powers for the construction, maintenance and repair of public roads, including footpaths.^[68] In *Brodie v Singleton Shire Council*,^[69] however, the majority of the High Court abolished the immunity. Gaudron, McHugh and Gummow JJ set out the various considerations that led them to remove it.^[70] These considerations included whether there were "sufficient reasons of public policy for denial of a remedy against the respondent Councils, if an action otherwise lies against them in negligence". Kirby J, as part of the majority, also took policy considerations into account. The minority, Gleeson CJ, Hayne and Callinan JJ, considered aspects of policy, but came to the opposite conclusion.

Apart from making changes to the law that advantaged plaintiffs, courts in the last 30 years of the 20th century adopted a general adjudicatory approach that was sympathetic to plaintiffs. The concept of foreseeability became drained of meaning. The concept of reasonableness became less and less stringent. Duties of care were recognised in circumstances that today seem problematic.

In 1985, in *Bankstown Foundry Pty Limited v Braistina*,^[71] McHugh JA contrasted decisions (delivered some 20 years previously) on the application of the general principles of negligence with the then more recent decisions of the High Court. His Honour concluded that the standard of care required has "moved close to the border of strict liability".^[72] In the same year, Kirby P^[73] referred to other decisions of the High Court and other courts that further illustrated the point made by McHugh JA. Mason, Wilson and Dawson JJ, however, in the appeal from the New South Wales Court of Appeal in *Bankstown Foundry Pty Limited v Braistina*, resisted the proposition that the law had changed, as McHugh JA and Kirby P had observed. They said:^[74]

What must be asserted is that the law has not changed. It is as accurate today as it was thirty years ago to say that the duty 'is that of a reasonably prudent employer and it is a duty to take reasonable care to avoid exposing the employees to unnecessary risks of injury (*Hamilton v Nuroof (WA) Pty Limited* (1956) 96 CLR 18 at 25 per Dixon CJ and Kitto J).

Their Honours, nevertheless, accepted^[75] that:

[I]t is undoubtedly true, as McHugh said, that what reasonable care requires will vary with the advent of new methods and machines and with changing ideas of justice and increasing concern with safety in the community ... What is considered to be reasonable in the circumstances of the case must be influenced by current community standards.

Schiller v Mulgrave Shire Council^[76] is a good example of how, during this period, judges were quick to impose liability for negligence on defendants. The plaintiff was injured when a dead tree fell on him while he was walking along a track in a National Park. The council having the control and management of the Park was held liable by the High Court on the basis that it knew or should have

known of the danger posed by dead trees. It was said that the Council should have taken steps to discover and take care of these trees.

This result would have seemed ludicrous 40 years before then by judges such as Lord Buckmaster. Today the result appears to be simply wrong. Recently, in *Secretary to the Department of Natural Resources and Energy v Harper*,^[77] the plaintiff was injured when she was struck by a falling tree while walking through a National Park in windy conditions. The Victorian Court of Appeal held that the Department had not breached its duty of care to the plaintiff by failing to erect a sign warning of the danger imposed by hazardous trees in high wind conditions. The risk created by dangerous trees was an obvious one. The burden of erecting signs would be disproportionate to the remote risk and would therefore be unreasonable.

In 1992, in *Hughes v Hunters Hill Municipal Council*,^[78] the plaintiff tripped on a footpath paver that had become dislodged as a result of the natural growth of a tree root. The plaintiff was actually aware of the dislodged paver and the possible danger it posed. Despite this, the New South Wales Court of Appeal held that the Council had been negligent in planting a tree when it was foreseeable that tree roots would, over time, dislodge footpath pavers. In recent years, however, the New South Wales Court of Appeal and other intermediate appellate courts, following *Ghantous v Hawkesbury Shire Council*^[79] where it was held that citizens were expected to look where they were going and to avoid obvious hazards in footpaths, have eschewed this approach and there have been a series of cases where defendants have successfully resisted the claims of pedestrians who have tripped on uneven footpaths.

In *Lowns v Woods*^[80] a general practitioner was at his surgery one morning when a young woman not known to him knocked on his door and asked him to examine her brother who was lying on the roadway some 300 metres away, in the throes of an epileptic seizure. The doctor refused to attend on the young man on the ground that he was not his patient, but was held liable for negligence; the doctor was said to owe a duty of care to this person with whom, previously, he had had no connection. This decision is to be contrasted with *In Re F*^[81] where Lord Goff held that a doctor was entitled to ignore a person who by chance encounters someone who is ill or has sustained injury. The approach in *Lowns v Woods* was a startling change from the attitude manifest in 1956 by Lord Denning when he wrote the foreword to *Professional Negligence*.^[82] His Lordship, a judge not known for conservatism, said:

One hundred years ago the courts said that a solicitor was not liable except for gross negligence. This phrase has been discarded but the cases are treated much the same now as then. The courts hesitate long before holding that a solicitor is negligent. Likewise with doctors and hospitals.

Then there is *Nagle v Rottneest Island Authority*.^[83] A young man was injured when he dived into water at Rottneest Island and hit his head on a submerged rock. People had been diving from that rock for several years. It was a popular holiday spot. The majority of the High Court held that the diver's injury was caused by the Authority's failure to warn of the presence of the submerged rocks that were ordinarily plainly visible. This was so despite the acknowledged fact that diving at the site may have been "foolhardy or unlikely". This case has been explained by the notion that the rock was partially obscured from the diver's vision by the effect of reflective sunlight on the water's surface. This is one of those decisions that the traveller on the train to Fremantle has never been able to comprehend.

Lisle v Brice^[84] cannot be left out of this list. A man committed suicide three years after a motor accident caused by the defendant's negligence. He suffered what Thomas JA described as "relatively minor injuries". He became depressed in consequence of the accident and this led to his suicide. The defendant motorist was held liable for loss of support to the deceased's children. Thomas JA expressed his misgivings with this result but thought he was compelled to arrive at it by reason of the existing state of the law of negligence. There is little doubt as to what the spectator at the Gabba would think of this decision.

Since *Nagle* public sentiment has turned. Unbridled recognition of liability coupled with overly large damages awards brought about strong public resentment. Judicial generosity with insurers' moneys had foreseeable consequences. Premiums rose exponentially, insurance cover became difficult to obtain. The fabric of society was damaged. Education, health care, sporting events, professional practice, business enterprise, charitable institutions, rural get togethers, all suffered. No wonder the public objected. The community had been harmed by blinkered application of the full compensation theory.

The judiciary responded. It became less easy for plaintiffs to succeed. The concept of autonomy and responsibility for one's self began to be emphasised.^[85] In *Agar v Hyde*^[86] it was recognised that persons who participated in dangerous games could not hold those who make the laws for the games liable merely because they could have made the game less dangerous. Gaudron, McHugh, Gummow and Hayne JJ approved the following statement by Lord Hoffmann in *Reeves v Commissioner of Police of the Metropolis*:^[87]

... there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take

responsibility for their actions. This philosophy expresses itself in the fact that duties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed.

A very clear policy manifesto.

In *Reynolds v Katoomba RSL All Services Club Limited*[88] Spigelman CJ, in holding the law does not recognise a duty of care "to protect persons from economic loss, where the loss only occurs following a deliberate and voluntary act on the part of the person to be protected", said:[89]

In many respects the tort of negligence is the last outpost of the welfare state. There have been changes over recent decades in the expectations within Australian society about persons accepting responsibility for their own actions. Such changes in social attitudes must be reflected in the identification of duty of care for purposes of the law of negligence. The recent authoritative statements in *Perre v Apand Pty Limited* and *Agar v Hyde* give greater emphasis, in the development of the law of negligence, to the acceptance by individuals of a personal responsibility for their own conduct, than may have been given in the past.

The Chief Justice here recognised the significance of public sentiment in the Lord Atkin sense.

Spigelman CJ returned to the topic in *Waverley Municipal Council v Swain* saying:[90]

Bus v Sydney County Council (1989) 167 CLR 78 identified a change in the law, between *Sydney County Council v Dell'Oro* (1974) 132 CLR 97 and 1986 to the effect that the law has 'progressed' by giving greater weight to the possibility of inappropriate conduct on the part of others. It now appears possible to identify a change in the law in the other direction, ie greater weight is being given to the proposition that people will take reasonable care for their own safety.

In *Tomlinson v Congleton Borough Council* Lord Hoffmann stated his policy view in striking terms. He said:[91]

My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. I find it difficult to express with appropriate moderation my disagreement with the proposition of Sedley LJ (at para 45) that it is 'only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability'. A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees, or some lack of capacity, such as the inability of children to recognise danger (*British Railways Board v Herrington* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves (*Reeves v Commissioner of Police* [2001] 1 AC 360).

This approach has been applied in several recent cases[92] and has given rise to a belief on the part of some that the pendulum has begun to reverse itself. This would surely be in accord with public sentiment, if public sentiment is to be regarded as providing the incentive to legislatures throughout the country to take steps to reduce the ease with which plaintiffs have been able to establish liability for negligence and recover overly large amounts of damages. The restrictive legislation in New South Wales embodied in the Civil Liability Act 2002 and the Civil Liability Amendment (Personal Responsibility) Act 2002 has either been duplicated in material respects or foreshadowed by virtually every State and Territory in the country.

Nevertheless, there have been at least three cases in recent times where the High Court has handed down decisions against the trend.

I have already mentioned *Tame* which removed several barriers against recovery for mental harm.

The reach of *Tame* was broadened by *Gifford v Strang Patrick Stevedoring Pty Ltd*[93] which extended the right to claim for mental trauma to children of an employee who was killed in an accident in the course of his employment. The children suffered nervous shock upon being informed of their father's death later that day. Typical of the press comment on this decision was the headline, "Employers face lawsuit avalanche".[94]

I come now to *Cattanach & Anor v Melchior*. [95] The parents of a perfectly healthy and normal child, who was born in consequence of the negligent failure by a doctor to warn of certain consequences associated with a sterilization operation the mother was contemplating, were held entitled to recover from the doctor the costs of rearing the child.

Obviously, this case raised issues of fundamental social importance. Hayne J, in dissent, observed that the law should not admit the head of damage claimed "because it would be necessary to put a price on the value to the parent of the new life".[96] He said that "public policy forecloses that inquiry" and explained in detail why he came to that conclusion. Heydon J, also in dissent, based his decision on three powerfully articulated policy considerations, including the fact that what happened to the

plaintiffs was incapable of characterisation as a loss. He said that the law assumes that human life has a unique value and brings into existence corresponding duties of a unique kind. Accordingly, the impact of a new life in a family is incapable of estimation in money terms. Gleeson CJ, who also disagreed with the majority, rested his decision on the fact that the plaintiff was claiming economic loss of a kind not recognised by the common law. This, too, was a decision based on policy grounds, albeit a different policy to that referred to by Hayne and Heydon JJ.

McHugh and Gummow JJ were prepared to allow that underlying values respecting the importance of human life, the stability of the family unit, and the nurture of infant children until their legal majority, were an essential aspect of the welfare of the community.[97] They then posed the question whether there was a general recognition in the community that there should be no award of damages for the cost to the parents of rearing and maintaining a child who would not have been born were it not for the negligent advice of a gynaecologist. They answered it in this way:[98]

[T]he answer to the second [question] must be that the courts can perceive no such general recognition that those in the position of Mr and Mrs Melchior should be denied the full remedies the common law of Australia otherwise affords them. It is a beguiling but misleading simplicity to invoke the broad values which few would deny and then glide to the conclusion that they operate to shield the appellants from the full consequences in law of Dr Cattanach's negligence.

McHugh and Gummow JJ gave several reasons for holding that the broad values of the importance of human life should not defeat the claim for the costs of bringing up the child.

Firstly, they distinguished between a broad policy, attributing proper regard to the importance of human life, and a specific policy that would lead to the parents' claim being defeated because of the application of the broad policy. In essence, they were of the view that it was speculative to say that the specific policy was sufficiently accepted by the community to justify affording an immunity to the appellant.[99]

Their Honours gave no reasons for their view as to the lack of acceptance of the specific policy. Their decision in this respect would have been intuitive and based on subjective experience. In the same intuitive way, the High Court has regarded policy factors as being sufficiently accepted, and immutable, to cause them to change the law in cases such as *Griffiths v Kerkemeyer* and *Brodie*, and substantial reliance has been placed on policy factors in decisions such as *Crimmins v Stevedoring Committee*[100] and *New South Wales v Lepore*. [101] The decision not to apply the specific policy, when seen in this light, was itself a policy decision.

Secondly, McHugh and Gummow JJ said:[102]

The differential treatment of the worth of the lives of those with ill health or disabilities has been a mark of the societies and political regimes we least admire. To prevent recovery in respect of one class of child but not the other, by reference to a criterion of health, would be to discriminate by reference to a distinction irrelevant to the object sought to be achieved, the award of compensatory damages to the parents.

This is reasoning based squarely on moral values; that is, policy.

Thirdly, they said:[103]

To suggest that the birth of a child is always a blessing, and that the benefits to be derived therefrom always outweigh the burdens, denies [the mother's claim for pain and suffering in respect of pregnancy and birth, the effect on her health, lost earning capacity, medical and related costs, and other expenses].

The view that this category of damages should be recognised, despite the receipt of the benefit resulting from the birth of the child, involves balancing a view of human life and family values against the full compensation theory; it is a policy decision.[104]

Fourthly, they said that the appellant's argument denies "the widespread use of contraception by persons such as the Melchiors to avoid just such an event". [105] Again, a policy factor is involved, namely, an assessment of the social utility and value to be attributed to the steps taken to avoid the birth of the child when balanced against the benefits received from the birth.

Fifthly, they said that the perceived disruption to familial relationships by the child becoming aware of the litigation was speculative. This reasoning was akin to that which led their Honours to the view that the specific policy was not sufficiently accepted by the community to be applied; as I have noted, that was a policy-based decision.

Sixthly, McHugh and Gummow JJ considered it to be contrary to principle to set off the benefits of having a child against the costs of maintaining a child, as the benefits received fell under a different head of damage. It was open to their Honours to resolve the different heads of damage issue by applying policy considerations of the kind relied on by the minority (this has been the approach of many other courts faced with the same problem in different parts of the common law world). Their decision not to do so was accordingly one based on policy.

McHugh and Gummow JJ went on to apply the ordinary principles of negligence in upholding the parents' claim. They did so, however, for reasons of policy that led them to reject the specific policy

considerations relied on by the minority. As Kirby J, in effect, pointed out, their reasoning bears a striking resemblance to subjective considerations of fairness and reasonableness (the approach rejected in *Sullivan v Moody*[106]).

Kirby J acknowledged[107] that:

[It is] self-evident that courts take such policy considerations into account in deciding novel questions of this kind.

His Honour, however, rejected the public policy arguments of the minority, saying,[108] amongst other things, that, if the application of ordinary legal principles is to be denied on the basis of public policy, it is desirable that such policy be founded on empirical evidence, not mere judicial assertion.

With great respect to his Honour, it is, I think, fair to observe that, while it may be desirable for policy considerations to be founded on empirical evidence and not mere judicial assertion, that practice, in the past, has rarely, if ever, been utilised. There was no empirical evidence, for example, in *Tame, Brodie, Griffiths v Kerkemeyer, Kars v Kars*, nor was there in *Donoghue v Stevenson* and *Hedley Byrne v Heller*. It is difficult to imagine the kind of evidence that would be admissible or available (or remotely reliable) to prove such matters as the value of human life to the community, the community attitude to whether a parent should recover the costs of rearing an initially unwanted new child, and the community attitude to whether the benefits of having a new child should be set off against the cost of rearing the child.

Kirby J, in detailed reasons, discussed the issues under headings entitled, "The competing choices", "Option 1: No damages", "Option 2: Limiting compensation to immediate damage", "Option 3: Extra costs of disabled births", "Option 4: Compensation with discount for joys and benefits" and "Option 5, Compensation to include foreseeable costs of child-rearing". As the headings indicate, these issues cannot be divorced from policy values of a social and moral nature.

In substance, Kirby J, for countervailing policy reasons, did not approve of the policy considerations that underlay the judgment of the minority.

Callinan J said:[109]

I cannot help observing that the repeated disavowal in the cases of recourse to public policy is not always convincing.

But he nevertheless concluded[110] that "no identifiable, universal principle of public policy dictates any different result".

As Professor Peter Cane[111] remarks:[112]

Whatever one thinks of the result in *Cattanach v Melchior*, the judgments make for fascinating, if exhausting, reading. One thing they demonstrate beyond a shadow of doubt is that there are strong arguments on both sides of the issue. However, they also show that strong answers are available to all of the arguments in both directions. The fact of the matter is that each of the Justices ultimately had to make a judgment-call based on a personal value-laden assessment of the relative weight of the competing arguments.

In summary, although the majority's final disposition of the appeal was explained in terms of established legal principles, their essential reasoning in recognising the parents' claim was as much based on policy as that of the minority. As Professor Cane observes,[113] "legal principle" cannot tell us whether Dr Cattanach should have been held responsible for the cost of rearing Jordan Melchior. *Cattanach v Melchior* raises the vexed questions inherent in judicial application of policy: When are community values to be applied and how are they to be determined?

In *Woods v Multi-Sport Holdings Pty Limited*,[114] Callinan J said:[115]

Contrary to the suggestion of the learned current author of *Cross on Evidence*, judges are not free to apply their own views and to make their own inquiries of social ethics, psychology, politics and history without requiring evidence or other proof ... Two reasons why this is so are immediately apparent. The first is that the parties must be given an opportunity to deal with all matters which the court regards as material. The second reason is that rarely is there any universal acceptance of what are true history, politics and social ethics.

The remarks of Kirby J in *Cattanach*[116] are consistent with this approach.

In *Woods*, McHugh J appeared to be of a different opinion. He said:[117]

In *R v Henry*, (1999) 46 NSWLR 346 at 362, Spigelman CJ said that the means of acquiring information 'for the purposes of policy development should not be confined by the rules of evidence developed for fact finding with respect to matters that only concern the parties to a particular case'. As a result, as the learned author of *Cross on Evidence* has pointed out, '[i]t is clear from the cases that judges have felt themselves relatively free to apply their own views and to make their own enquiries of social ethics, psychology, politics and history where relevant without requiring evidence or other proof' (Heydon, *Cross on Evidence*, 6th Aust Ed (2000), p 122 [3010]).

The views of McHugh J (and Spigelman CJ in *R v Henry*) reflect the traditional approach manifest in the statement of Justice Cardozo[118] that a judge "must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself". This has long been accepted. In the great cases where major changes to the law have been made, courts have explained and justified those changes by reference to policy factors and values that were not established by evidence. The courts took judicial notice of these matters, having derived the requisite knowledge about them from the sources identified by Justice Cardozo.

Of course, judges are not free to apply policy considerations without restriction. Were this to be the case, there would be rule by judges - not rule by law. Stephen J emphasised the caution needed in applying policy factors when he said:[119]

Policy considerations must no doubt play a very significant part in any judicial definition of liability and entitlement in new areas of the law; the policy considerations to which their Lordships paid regard in *Hedley Byrne* are an instance of just such a process and to seek to conceal those considerations may be undesirable. That process should however result in some definition of rights and duties, which can then be applied to the case in hand, and to subsequent cases, with relative certainty. To apply generalised policy considerations directly, in each case, instead of formulating principles from policy and applying those principles, derived from policy, to the case in hand, is, in my view, to invite uncertainty and judicial diversity.

It is again worth repeating Justice Cardozo's observations on this issue:[120]

[R]estrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.

Professor Stone[121] noted that the legal system contained within itself several checks on arbitrariness (described by him as "steadying factors") in the application of value factors.

No right-thinking person would condone a system where the subjective intuitions, feelings and prejudices of judges are given free rein (even when couched in terms of objective community values). Arbitrariness and uncertainty would prevail if unbridled application of policy values were to be allowed. This lies at the heart of the cautionary admonitions so often expressed against reasoning based on presumed moral, social, economic or political values. Nevertheless, by its inherent nature, policy factors inevitably play a crucial part in the application of the law of negligence. The principles governing such application have yet to be worked out properly and expressed in a coherent, systematic, form. It may well be that the issue, by its very nature, is not capable of being resolved by clear and certain rules.

Nevertheless, at this stage of the law's development, public confidence in the law of negligence requires frank recognition of the process involved. Moreover, the requirement that policy factors be spelt out when they inform judicial decision-making is a fundamentally important part of the restrictive forces that confine the application of policy within acceptable limits.

Judicial candour has not always met with approval. Lord Radcliffe said:[122]

We cannot run the risk of finding the archetypal image of the judge confused in men's minds with the very different image of the legislator.

and:[123]

I think that the judges will serve the public interest better if they keep quiet about their legislator function.

Lord Devlin, according to Professor Peter Birks,[124] "professed a preference for an undercover, benevolently dishonest approach to judicial law-making." Professor Birks was referring to Lord Devlin's remarks in his book *The Judge*:[125]

It is facile to think that it is always better to throw off disguises. The need for disguise hampers activity and so restricts power. Paddling across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of the river by an army in uniform and with bands playing.

Nowadays, however, the current attitude, at least in Australia, is that expressed by Sir Anthony Mason:[126]

The importance of public confidence in the administration of justice makes it all the more important that courts should be concerned to render decisions that are both legally sound and just, and that judges should identify and justify the standards, values and policy considerations on which they rely. The requirements of accountability, openness and transparency reinforce the necessity for this

approach.

And:[127]

[T]he duty of the judge is to reveal fully the reasons for the decision. That duty is a legal duty which is reinforced by the modern emphasis on judicial accountability, transparency and openness. In the long run, full exhibition of the process of reasoning that leads to a judicial decision is likely to promote public confidence in the system, even if it does reveal steps and value judgments which are debatable and may be criticised. Likewise, full exhibition of the reasoning may lead to judgments that are comprehensible because they relate doctrine to its underlying foundations rather than simply discuss complex doctrinal issues without reference to those foundations.

It goes without saying that this approach is required, not only where, for policy reasons, courts propound new principles of negligence, but where courts, for policy reasons, apply established principles of negligence to novel situations, thereby establishing the potential for liability for negligence in circumstances where, in the past, liability has not previously been recognised.

There is another aspect of *Cattanach v Melchior* that warrants comment. The decision occupies 124 printed pages of reasoning and citation of authority. The question in issue, however, was not particularly complex. It was dealt with succinctly in newspaper coverage and the essence of the problem was thereby exposed to the lay reader. It evoked considerable controversy in the media, where it attracted much criticism and some support. The Queensland and New South Wales governments have foreshadowed legislation to reverse this decision. It remains to be seen whether this will occur.

Whether parliament should legislate in regard to the principles of negligence has evoked different opinions amongst the judiciary.

Kirby J in *Cattanach* referred to the recent spate of legislation involving the law of negligence and said:[128]

The setting of such bounds by legislatures can be arbitrary and dogmatic. Subject to any constitutional restrictions, parliaments, motivated by political considerations and sometimes responding to the 'echo-chamber inhabited by journalists and public moralists' may impose exclusions, abolish common law rules, adopt 'caps' on recovery and otherwise act in a decisive and semi-arbitrary way.

His Honour observed that judges, in contra-distinction, "have no authority to adopt arbitrary departures from basic doctrine".

Hayne J, in discussing[129] the legislation in question, has expressed a different viewpoint, namely: All aspects of the debates that I have identified generated political controversy. Lawyers, and organisations of lawyers, made their contributions to the debates. All this being so, why should a judge now venture upon this subject of 'Restricting Litigiousness'? Is this not a matter now for the legislative branch rather than the judicial branch?

There are many aspects of the debate which are matters for the legislative branch. They include both questions of policy and questions about how a chosen policy is to be effected. Whether some rights of action should be curtailed or abolished is, in the end, a matter to be determined by the legislature. If some rights of action are to be curtailed, it will be for the legislature to choose how that is to be effected. It would be wholly wrong for me to venture into that territory and I will not do so.

Spigelman CJ anticipated legislation in his influential article, *Negligence: The Last Outpost of the Welfare State*. [130] Although his Honour suggested that legislation be enacted after invoking the resources of all of the law reform commissions, government regarded the need for change as too urgent to undertake that process.

My own opinion on the merits of legislative interference will not come as a surprise. For my part, I do not see parliamentary alteration of the law as being necessarily any less desirable than changes effected by the courts.

It is open to serious question whether courts always make changes consistent with the existing authorities. History shows that public policy considerations have caused courts to move in directions diametrically opposed to the leading decisions of the past.

In addition, courts have not always been consistent and changes based on policy have not always been successful. For example, in *Grincelis v House*[131] Kirby J said:

Having, in *Griffiths v Kerkemeyer*, embraced the principle that an injured plaintiff is entitled to recover damages for his or her needs met by the provisions of gratuitous services by family or friends, this court was set upon a path that has repeatedly demonstrated the 'anomalies', 'artificiality' and even 'absurdities' of the 'novel legal doctrine' which it adopted in substitution for its own earlier stated opinion.

Callinan J was also critical of *Griffiths v Kerkemeyer*. [132]

Moreover, changes made by courts on policy grounds have not necessarily resulted in consistency or certainty within the common law world. Three members of the High Court, the House of Lords,^[133] and other courts of high authority in other countries have come to a conclusion different to that of the majority in *Cattanach*. In *Tame*, policy considerations caused the High Court to extend liability for negligence, thereby applying a different rule to the House of Lords in *White v Chief Constable of South Yorkshire Police*.^[134] Differences on many issues, based on policy considerations, abound between courts of the highest authority in Australia, England, New Zealand, Canada and the USA. Does this mean that the public sentiment in these countries differs? Or does it mean, perhaps, that judges simply have idiosyncratic, subjectively intuitive views as to the relevant policy factors? As I have attempted to demonstrate, judges have long been instrumental in changing the law of negligence on policy grounds. Shifts in policy have caused judges to swing the negligence pendulum, gradually at first, then violently, then erratically. Policy factors have often not been acknowledged, although they have been ever-present and significantly influential. Issues that will in the future come before the courts will be more and more complex. One only has to think of the startling developments in genetics and information technology. It is undeniably the case that the courts now face a challenge, involving the application of policy considerations, to adapt and apply the tort of negligence so that it meets the needs of society. If this challenge is not properly met, courts will no longer be regarded as being able, reliably and efficiently, to transform Lord Atkin's public sentiment into new law. Changes will be made by other means.

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1 Edited version of a paper delivered on 15 September 2003 at Government Risk Management Conference, Perth

2 Judge of Appeal, Court of Appeal, Supreme Court of New South Wales

3 See for example *Harris v Digital Pulse Pty Ltd* (2003) 197 ALR 626

4 [1932] AC 562

5 at 580

6 Stapelton, 'Cause-in-Fact and the Scope Of Liability for Consequences' (2003) 119 LQR 388; *Chester v Afshar* [2002] 3 WLR 1195

7 *Cattanach v Melchior* (2003) 199 ALR 131

8 *Perre v Apand Pty Limited* (1999) 198 CLR 180 particularly Gleeson CJ at 192 and Gaudron J at 199 to 200

9 *Trindade & Cane, The Law of Torts in Australia* (3rd ed) at 578 to 580.

10 *Elguzouli-Daf v Commissioner of Police* [1995] QB 335

11 *Sutcliffe v Thackrah* [1974] AC 727

12 *Thorne v University of London* [1966] 2 QB 337

13 *Shaw, Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 361

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 57 (1977) 139 CLR 161
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 67 at 500 (emphasis added)
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President's Lecture to Annual Scientific Congress of Royal Australasian College of Surgeons- Justice Ipp

President's Lecture to Annual Scientific Congress of Royal Australasian College of Surgeons
Brisbane 8 May 2003.

D A Ipp
Judge of Appeal, New South Wales Court of Appeal

Judges and Judging

There is a certain tension between the medical and legal professions. This tension is neatly captured by the following piece of cross-examination, said to be real-life. The witness is a forensic pathologist.
Counsel: Doctor, before you performed the autopsy, did you check for a pulse?

A. No

Q. Did you check for blood pressure?

A. No

Q. Did you check for breathing?

A. No

Q. Then it is possible that the patient was alive when you began the autopsy?

A. No

Q. How can you be so sure, doctor?

A. Because his brain was sitting on my desk in a jar.

Q. But could the patient have been alive, nevertheless?

A. It is possible that he could have been alive and practising law somewhere.

The misunderstandings that lie at the heart of this encounter are what moved me to give this talk.

During my recent exertions in the field of negligence it became quite clear to me that many medical practitioners regarded the judicial process with suspicion, and misconceptions about judges and the work that they do, abound. I thought that it might help if I told you something about the judiciary and the nature of the judicial task and function.

Judicial independence

Like medical practitioners, Judges take an oath on appointment. This oath underlies all judicial work. The oath is, "to do right to all manner of people after the laws of the State without fear and favour, affection or ill-will". By this oath judges undertake to make their decisions independently and objectively, without arbitrariness or individual prejudice.

To fulfil this duty properly, judges often have to give decisions that many people do not like. One sees this often in sentencing, but there are many other examples; cases involving refugees, land-rights, taxation, town planning, and even negligence. Judges are not there to please the majority or the media. The system depends upon judges being independent.

Judicial independence means, substantially, protection from interference from government, from the rich and powerful and from other pressure groups. In this country there is no doubt that the judges are independent and I am sure that none of you would have it otherwise. In Australia, government does not attempt to influence judicial decisions, as is the case in many other countries; judges do not telephone the prime minister, or members of the cabinet, or government officials, to ascertain whether a proposed judgment is politically acceptable, as happened in the Soviet Union and still happens elsewhere.

As part of the need for judicial independence, judges have security of tenure and, also, immunity from being sued. These aspects may need some explanation.

Security of tenure is crucial. There has been a development in Australia that has led to a significant amount of jurisdiction being removed from judges and put in the hands of administrative tribunals. These tribunals deal with many areas close to the heart of government. Taxation, immigration, refugees, and social welfare are examples. Most tribunal members have no security of tenure. The terms of their appointments are fixed by contract between them and the government. If they do not satisfy the government, their contracts will not be renewed. And by the nature of their work they are dealing constantly with cases in which government is a party or has a vital interest. Who would care to

litigate where the presiding judicial officer depends for his or her salary and continued employment on the satisfaction of the other party involved. This is not judicial independence. Courts presided over by judges provide the contrasting situation.

There are two reasons for judges' immunity from suit. Firstly, if rich and powerful litigants could sue judges, there would be a grave challenge to the notion of judicial independence. Judges under financial threat would not be independent, and could not be relied upon to give impartial decisions. Secondly, the judicial system would collapse if dissatisfied litigants could sue judges. Remember that in every case there is a losing party. Regrettably, disappointed litigants in this country do not treat judges in the same way as the members of a certain African tribe treat their chief. After the chief has pronounced judgment in a dispute between opposing parties, the entire tribe bows deeply and cries in unison, "You are right, O lion".

Judicial independence is bound up with impartiality and neutrality. Probably, you have all seen the image used to portray the idea of justice. The goddess blindfolded, with scales and a sword. The scales reflect even-handedness. The sword is a symbol of power that executes decisions without sympathy or compromise. The blindfold on the goddess indicates that justice should not see the signals a ruler might send on how to decide a case. A blindfolded justice cannot see who comes before her, and hence cannot be impressed by the power of the litigants or witnesses who might seek to intimidate her. The blindfold represents neutrality and impartiality. It protects justice from information that could corrupt. A blindfolded justice will administer objective justice between all parties, between the State and a traitor, between the Director of Public Prosecutions and a hardened criminal, between a widow and a wealthy corporation, between a doctor and patient.

The elements of appropriate judicial conduct

Judicial neutrality and impartiality are the foundation of appropriate judicial conduct. If there is a possibility of conflict of interest, the judge must withdraw from the case. For example, fairly recently the House of Lords set aside their own judgment against ex-president Pinochet of Chile because one of its members was associated with Amnesty International, a charitable organisation involved as a party to the case.

It is important that a judge should show no bias in favour of or against either party or counsel. I once heard a very experienced judge say that the most difficult part of the job was to overcome his dislike of certain counsel. The more judges are aware of their sub-conscious feelings the better judicial officers they are, as the better they can control internal bias.

The next critical element of a successful judicial system is the integrity of the judges. In this country, that can be taken as a given. Bribery and corruption of judges is unknown.

Next is knowledge of the law. The ancient philosopher, Maimonides, pointed out that it would be wrong to appoint a person who did not have adequate legal knowledge. He said that even though such a candidate may possess other admirable qualities, "it is forbidden to appoint him a judge since if you do so he will acquit the guilty and condemn the innocent, not because he is wicked, but because he is lacking in knowledge."

The final element is dedication and commitment. The realisation that one's future will be decided by disinterested, or lazy judges can be a chilling experience. Tolstoy, in his last great novel, *Resurrection*, evokes a feeling of dread in the reader when describing the three judge trial court that is to decide the fate of an innocent woman charged with murder. He writes: "[The President of the Court] was anxious to begin the sitting and get through with it as early as possible, in time to call before six o'clock on the red haired woman with whom he had begun a romance in the country last summer". The second judge is feeling gloomy having just been told that his wife would not be making him any dinner that evening. The third member of the Court was suffering from gastric catarrh. Tolstoy explains: "Now, as he ascended the steps to the platform, his face wore an expression of deep concentration, resulting from a habit he had of using various curious means to decide the answers to questions which he put to himself. Just now he was counting the number of steps from the door of his study to his chair; if they would divide by three, the new treatment would cure his catarrh. If not, the treatment would be a failure. There were 26 steps, but he managed to get in an extra short one and reached his chair exactly at the 27th".

Not a bench that you would be hoping for if you were on trial for your life.

This, I am glad to say, is not typical behaviour in this country. Of course, judges in Australia are by no means perfect. All are fallible. But, generally, they attempt to meet community expectations concerning judicial duties and take their work very seriously.

Trial judges and findings of fact

Most judges in Australia preside over trials, that is, cases where witnesses appear and evidence is led. Trial judges sit alone, and many prefer trial work for that reason. The most important task of a trial judge is to decide who is telling the truth and to find the facts. In many cases the judge will be faced by competing versions of the truth told by equally plausible or implausible witnesses. It is often a very difficult task to decide who is telling the truth, or whether the version being put forward is accurate (which is a different thing).

An appeal court will only interfere with a credibility finding in very limited circumstances. If the trial judge believes that one witness is more reliable than another, save in special circumstances that is the end of the matter. This is a drawback of the appeal system, but the rationale is that judges can only decide whether witnesses are telling the truth if they see and hear them testify. Appeal judges do not see and hear witnesses, so they will not overturn a trial judge's credibility finding unless they are persuaded that the trial judge misused his or her advantage of being in court when the witnesses gave evidence.

The panel appointed to review the law of negligence had particular regard to this problem when considering cases where patients say that, had the surgeon told them of the risks of the treatment, they would not have had the operation. The panel recommended that the courts should *not* have regard to a plaintiff's own testimony, about what he or she would have done had the defendant provided the appropriate information. The panel recognised that there is enormous difficulty in counteracting hindsight bias in making judgments of this kind, and if the trial judge believes what the patient says he or she would have done, that view of the truthfulness of the patient, in practice, is likely to be conclusive. This the panel regarded as undesirable. Therefore, we recommended that the patient's hindsight testimony on this question should not be admissible in evidence. The trial judge must make an objective decision based on what a reasonable person would do in the circumstances. Such a decision is far easier to upset on appeal. This recommendation has been accepted in many jurisdictions.

How does a judge go about deciding whether a person is telling the truth? Generally, it is now recognised that the demeanour of witnesses is not always a reliable guide to credibility. Tests by psychologists have demonstrated that a nervous, hesitant witness, who stammers and sweats, is just as likely to be telling the truth, as a calm, confident, and articulate person. Therefore it is dangerous to decide the facts by basing the decision on the looks of a witness, or aspects of behaviour in the witness box, or on the witness's self-assurance.

Some years ago a forensic psychologist addressed a group of judges of which I was part. Without any prior explanation, he showed us a film of a motor car accident. He then questioned us about what we had seen. He then showed the film again. The evidence of most of us was inaccurate. And this was only five minutes after observing the occurrence. What can be said about the reliability of witnesses who testify years after the events in issue?

Good judges, being aware of the dangers of personal impressions, decide credibility questions largely by weighing up probabilities. That is, probabilities judged by reference to the ordinary course of human behaviour. The judge will look for corroborative facts, contemporaneous conduct that is consistent with one version and not another. This would make it difficult for a witness who tells an outlandish story to be believed. In this area, again, years of practice at the Bar stand the judge in good stead. There one sometimes learns that one's own client, who initially seemed to be entirely credible, is an arrant liar. And the opposing party, who on paper seemed to be fundamentally dishonest, turns out to be entirely truthful. At the Bar one learns to take nothing at face value, to delve into the facts, and to search below the surface for the truth. This is part of the essential training of judges.

The appeal system

A recurring criticism of the system is that judges are not accountable. This assertion loses sight of the appeal system. This represents a valuable safeguard against judicial error.

In appeals, the case is not presented afresh, instead argument takes place on the evidence that was

led before the trial judge. Appeal judges look at the written record of what the witnesses said when testifying before the trial judge. Appeals are far shorter than trials, as in appeals counsel concentrate only on those aspects where the trial judge is said to be wrong.

The rhetoric of appellate counsel is usually far less flamboyant than that of counsel appearing at a trial. In appeals, counsel concentrate on rational argument to persuade, whereas in trials counsel often resort to emotion and feelings. It is not to be denied, however, that a good advocate will always inject some drama into the proceedings, whatever they are. A story is told of a barrister appearing before Lord Denning, a renowned judge, in the English Court of Appeal. The case concerned a matter of statutory interpretation and the powers of a local town council. The barrister commenced his argument by explaining that he was acting for an 80 year old widow, who had lived all her life in the one house, raised her family there, looked after her aged husband there and had heartlessly been ejected by the local council. Lord Denning interrupted. He said, "Mr Smith, you know that it is quite unnecessary to tell us about those matters. They are quite irrelevant and we will pay no attention to them." A few seconds silence followed. Lord Denning then said: "How old did you say the widow was?"

Making law

It is now candidly recognised that judges sometimes make new law. Another famous English judge, Lord Reid, explained:

"There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the common law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens. But we do not believe in fairy tales any more".

Judges make law when social, political or ethical attitudes change so fundamentally that they are no longer accommodated by established rules, when new situations evolve that are not covered by existing precepts, and when there is a need to rationalise existing principles.

It must be borne in mind, however, that about 90% of the time of judges is spent in the application of the known law, not in making new law. The High Court of Australia, the apex of the judicial hierarchy, has by far the most important task in this regard and fairly often is required to make new law. Intermediate courts of appeal have a significantly lesser creative role, while judges sitting alone hardly ever become involved in law making.

There is presently a sharp controversy in judicial circles regarding the extent to which judges should make new law. Until fairly recently, deliberate alterations of the law by judges took place with relative frequency. Far-reaching changes were made to land rights, the law of negligence and the law relating to legal representation for persons charged with serious offences. There has now been a reaction to that. Some judges have strongly criticised what they term judicial activism, that is, too great a readiness to change established laws. On the other hand, there is the attitude of judges epitomised by Lord Denning, who was always ready to take the law in new directions. He referred to those who were more reticent as "timorous souls". He was once asked by a student to make no more changes to the law until the exams were over.

It may well be that the pendulum has begun to turn against judicial law making on policy grounds; but this remains to be seen.

Sentencing

No other aspect of a judge's work attracts as much criticism as the sentencing of criminals. The problem is that every person thinks he or she is an expert on sentencing, and everyone has an opinion on what should be an appropriate sentence.

Virtually all of the criticisms are uninformed. It is all very well to criticise a sentence over the breakfast table. It is another to hear the evidence, know the full story, and sentence the prisoner according to law. Experience teaches us that when lay people are put in positions whereby they are responsible for setting punishment over others, they are far more lenient than judges.

The fact is that sentences are significantly influenced by legislation, and there is a large body of sentencing law built up over many years. The discretion of judges is by no means unfettered.

Those who say that higher sentences would reduce the rate of crime should ponder the fact that, after white settlement in this country had begun, for very many years the only sanction for criminal conduct was death. That did little to deter criminals. One sees in most countries the phenomenon of higher sentences coupled with rising crime rates. Most informed commentators contend that increased sentences are not effective means of protecting the public from crime.

A judge's working day

Whatever may be the labours that modern judges have to undertake they are easier in one respect than the judges of the past. Until early in the 20th century, courts sat very late, sometimes through the night, to get a verdict. The manners of the 19th century are illustrated by the following story, written in 1857 by Lord Campbell, a Chief Justice of England, about Lord Kenyon, a previous Chief Justice. In those days toilet facilities for judges were unknown, and a porcelain vase, with a handle to it, was placed in a corner of the court, near the bench, for use by the judge. One day a law student, who was taking notes in the court, decided to get rid of some ink that was too thick for him to use. When no one was looking, he poured the ink into the porcelain vase. Lord Campbell writes, "His Lordship, soon after having occasion to come to this corner, was observed in the course of a few moments to become much disconcerted and distressed. In truth, discovering the liquid with which he was filling the vase to be of a jet-black colour, he thought that the secretion indicated the sudden attack of some mortal disorder. In great confusion and anguish of mind he returned to his seat and attempted to resume the trial of the cause, but finding his hand to shake so much that he could not write, he said that on account of indisposition he was obliged to adjourn the court. As he was led to his carriage by his servants, the luckless student came up to him and told him what had occurred, expressing deep contrition for his thoughtlessness and impertinence, and saying that he considered it his duty to relieve his Lordship's mind by this confession". The Chief Justice replied, "Sir, you are a man of sense and a gentleman. Dine with me on Sunday".

Lord Campbell noted that the next Chief Justice, Lord Ellenborough, followed the same practice. He said that he had often heard the judge's large seals, dangling from his watch-chain, rattle against the porcelain vase, as he took the vase in his hand, in front of the litigants and onlookers, although he decorously turned his back on them.

In modern times, court hours are usually only two and a half hours in the morning and two hours in the afternoon. But a judge's working hours bear little relationship with court hours. I do not want to lay it on, but judges work long hours each day, and many work most evenings.

Much time has to be spent reading, absorbing and analysing written material. A trial judge will initially have to read the pleadings, which in some courts may comprise more than one hundred pages of closely reasoned allegations, and will, on a daily basis, read the transcript of the evidence that has been led and exhibits that have been tendered. This will usually involve between one to two hundred pages of evidentiary material each day. When the case is over the trial judge will usually have to read everything again in order to write the judgment.

An appellate judge is often faced with appeal materials comprising hundreds and sometimes thousands of pages of paper. When argument on the appeal takes place, the judge is expected to be on top of the facts, the law and the issues. Then comes the process of writing the judgment. The argument will have been recorded and typically the judge will first read that, then do some research, read the relevant cases, reread and analyse the material, form a view, work out some way of condensing it all into some comprehensible form, and then commence writing.

Now in the NSW Court of Appeal, where usually three judges sit on each case, as a general rule a judge sits in court four days a week with one day off for writing judgments, and this will go on day after day, apart from holidays, throughout the year. Usually, a judge sits in at least one appeal each day. So each judge of appeal will hear about four appeals a week. The work of preparing for the new appeal, and writing judgments for the appeals that have been heard, is done whenever one can snatch some time. Early in the morning before court starts, after court in the afternoon, in the evening, and sometimes over weekends. Virginia Woolf rightly observed that the daily toil of barristers "leaves very little time for friendship, travel or art. That explains why most barristers are hardly worth sitting next to at dinner – they yawn so". Judges fall into the same category.

The importance of the judgment: judicial accountability

A judgment is expected to set out the issues in dispute, the relevant facts and the reasons for the judge's decision. The reasons comprise an analysis of the facts and the law, and an explanation how the judge applies the law to the facts as found. In a major case, a judgment could be more than one hundred pages long.

The judgment lies at the kernel of any appeal. Except for members of the High Court, all judges can be taken on appeal, where their judgments are scrutinised for errors. Usually, the judge has limited time to write the judgment. Once it is delivered, however, armies of highly paid barristers and solicitors will examine it at their leisure. Every word, every reference, every authority, will be subjected to analysis, and any error will be exposed. The appeal process is very public. The judgments of the appeal court will lie there forever, with judges' mistakes recorded for posterity, for succeeding generations of lawyers to examine and discuss and pontificate upon. Academics will spend months, sometimes years, studying judgments and then writing to expose weaknesses; textbooks become permanent records of judicial errors, as do other judgments by other judges. Not only do judges in higher courts expose what they regard as errors by lower courts, it is not unusual for judges on the same court to criticise the reasoning of their colleagues.

There can be no other profession where the work of the individual is exposed to such rigorous and scrutiny and such public and lasting exposure of error. I think it laughable when I read that judges are not held accountable. They are indeed held accountable and in a merciless way.

For reasons of pride, judges do not readily admit to being upset when they are overturned on appeal. But the truth is revealed by this story, told by a judge in the course of a speech on his retirement. A judge is confronted by the devil. The devil offers the judge the traditional Faustian bargain. "I will absolutely guarantee you will never be reversed on appeal," says the devil. "But in return you must forfeit your immortal soul, damned to Hell for all eternity. And in addition the souls of your parents, your brothers and sisters, your wife, your children, and all your friends." The judge thinks about this for a minute. Then he says, "What's the catch?"

The individual qualities that help a judge on the bench.

Confidence born of experience in the law is an important part of a judge's armoury. Nevertheless, confidence accompanied by absent-mindedness can cause problems. A story is told of a judge presiding over a criminal trial with an accused person who was not represented by a lawyer. When the evidence had been completed he said to the accused "Is there anything which you wish to say before I send the jury out, Mr Guilty?"

Quickness of mind is another asset on the bench. More than 100 years ago a trial judge had an egg thrown at him while he was leaving the court. He remarked immediately that he would take no action as the egg must have been intended for his brother Mr Justice Bacon who was sitting in an adjoining court.

Another example is that of the judge who sentenced an agricultural labourer for deplorable bestiality. In somewhat indistinct tones his lordship said, "Prisoner, the jury have convicted you of the most disgusting and degrading offences. Your conduct is viewed by all right minded men with abhorrence. The sentence of the court is that you be kept in penal servitude for seven years." It was painfully obvious that this diatribe had not been audible to the prisoner, who had stood with his hand cupping his ear, straining to learn his fate. Therefore the judge said, "Orderly, repeat to the prisoner the sentence of the court".

The task was beyond the powers of the orderly, but he did his best. He shouted at the condemned man, "His Lordship says you are a dirty old bastard, and he has put you away for 17 years." Whereupon his Lordship observed, "Orderly, I have no objection to you paraphrasing my sentence, but you have no power to increase it".

For the judicial task one needs what is called a legal mind. The best example of the legal mind that I can give you is the story of a seven-year old boy, the grandson of a judge. The boy was sitting on his grandfather's knee while the old man explained that the Lord created the world in six days and rested on the seventh. The child was silent for some time and then asked: "What has the Lord being doing since then?" His grandfather replied, "having his portrait painted". The point is that the boy had a legal mind, an inquiring intellect that accepted nothing at face value.

Complaints about judges

It is sometimes said that judges do not understand human nature as they live in an ivory tower. I suggest to you that by the nature of their training and work, judges acquire a unique and deep exposure to all facets of life. Over many years in the profession and on the bench, judges learn about the best and worst aspects of human nature. They are faced with criminal conduct ranging from the most appalling violence to highly sophisticated fraud; they observe dishonesty in all its forms, and the effects of greed and corruption; they have to assess an infinite number of forms of negligence and the consequences of careless conduct, they preside over cases involving persons who break their promises and act unconscionably; on the other hand, on a daily basis, they observe instances of admirable honesty, of selfless acts and great altruism.

In recent times, judges have been exposed to much criticism. In the past few months I have seen responsibility attributed to the judiciary, not only for injustice in judicial decisions, but increase in juvenile crime, increase in crime generally, the refugee problem, the insurance crisis, the negligence crisis, the crisis in health care, the state of the roads, the financial problems of local councils, domestic violence, and poor relations between men and women. Most of this criticism is misguided but it does reflect a changed attitude to the position of judges.

These days, the trials and tribulations of the modern judiciary, and the fact that many judges on appointment experience a reduction in income of as much as 60 to 75%, cause a significant number of leading barristers to refuse offers of judicial appointment. It is, nevertheless, of some comfort that judicial life is still sought after by many eminent lawyers.

A worrying phenomenon, however, is that many judges are now retiring long before the statutory limit that is 70 years of age in most courts. That is a pity because, as a general rule, judges, like some wines, improve with age. In 1994 I spent some time in Virginia, USA, and there sat on the bench with the 5th Circuit, the highest federal court of appeal for a number of southern states. The court was comprised of a judge who was 90 years of age, another who was 80 and a young man of 70. They were very hard working, bright and perceptive. The presiding judge showed me the wonderfully decorated court of Richmond, Virginia, elaborately furnished with crystal chandeliers, wood panelling and leather of the highest quality. He said to me that the court had been built before the war. I asked him, "first or second world war". He looked at me oddly and said, "the war of northern aggression". Degrees of heat in the USA are used to connote the extent to which the court is familiar with the facts before the case starts. The 5th circuit was known as a red-hot court as the judges were always on top of the facts before counsel commenced arguing. These old judges told me that, as I had not read the papers, my presence on the court would make it luke-warm.

Of course, there have been a fair number of bad judges over the years. Some judges regularly fall asleep, particularly after lunch. Barristers have been known to drop heavy volumes on the floor to wake them up. Other common complaints range from appalling ignorance to gross rudeness, from arrogant bullying to impatience that does not allow parties to put their cases properly. Worst of all is the perverse instinct for unfairness that some have displayed. No doubt, even today, there are judges who exhibit stupidity, vanity, intolerance, irascibility and other human weaknesses.

But I think that times have changed, and behaviour that was winked at in the past is no longer tolerated. Courtesy and understanding from the bench are not unusual qualities. Judges are expected to behave with self-restraint and self-control. The vast majority of judges will not allow witnesses to be bullied in their courts, and bullying and unreasonable interference by judges will be frowned upon by higher courts. In New South Wales there is an independent body to which complaints about judicial performance can be made.

Of course, judges make mistakes. But the present system of peacefully settling disputes seems to be amongst the best humans can devise. It was not always so. Once upon a time trial by ordeal and trial by battle were the accepted means of dispute resolution. Trial by ordeal took many forms. One involved the accused person being tied up and thrown into a deep river. If the victim drowned, guilt was conclusively established. If not he or she was regarded as innocent. Another form involved requiring the accused to clasp a red-hot piece of iron for several minutes. After the hand had been severely burnt, it would be bound, usually with paper containing religious writing. After a few days the binding would be removed. If the wound was healing satisfactorily, innocence was proved. If not, the accused would be shown to be guilty and would be executed. The judgment as to whether the wound was healing satisfactorily would be made by the local priest.

Trial by battle involved an armed duel between the litigants. It was accepted that he who was telling the truth would vanquish his opponent. The unsuccessful party would be left bleeding to death on the

ground.

Despite its defects, I would like to think that the present system is an improvement.

The capacity of judges to hear cases involving other disciplines

During the recent review of the law of negligence there were medical practitioners who contended that judges were not qualified to hear cases involving the practice of medicine. They said that medical practice was too specialised, too esoteric, and what did judges know about medicine? How could judges judge difficult questions of medical practice?

The fact is that the court system accommodates these concerns. Medical practice is not the only specialised profession which gives rise to litigation. On a daily basis, judges decide cases involving difficult and abstruse questions involving all forms of engineering and virtually all areas of modern science. Judges decide esoteric questions involving manufacturing and computer technology, telecommunications, flying and maintaining advanced aircraft, driving locomotives, navigating ocean-going vessels, and an infinite number of unusual disciplines.

In a complex trial, skilled counsel on both sides are instructed by experts as to the relevant material, and they put the facts before the judge in a comprehensible form. That is their task, that is their speciality, that is what they have been trained to do over many years. The judges themselves are experienced in absorbing material, even novel and technical material. That is their task and speciality, that is what they have been trained to do over many years. Just as surgeons specialise in surgery, so do judges specialise in judging. The presence of a good judge affords citizens in dispute the opportunity of resolving their conflict before a highly trained and experienced arbiter, who, above all, is impartial and neutral. That is the constitutional right of all citizens of this country. Unsurprisingly, litigants object to disputes in which they are involved, be they against, engineers, pilots or doctors, being decided by a tribunal of engineers, pilots or doctors, as the case may be.

This view underlay the panel's recommendation that an adapted Bolam test should apply to medical negligence. The panel recommended that the courts should defer to an opinion widely held by a significant number of respected practitioners in the field, but considered that the court should have the power to intervene in exceptional cases where it considered that the opinion was irrational. We considered that the retention of the courts' overriding supervisory power was justified by the ability of judges to deal with issues of this kind.

The vexed question of expert evidence

During the negligence inquiry, many doctors complained about the quality of expert evidence. They believed that, in many medical negligence cases, judges were making wrong decisions as they were accepting unreliable medical evidence.

I wish to say two things about this phenomenon. Firstly, in every medical negligence case where the decision goes against the doctor, some other medical practitioner has given evidence against that doctor. Some other medical practitioner has testified that in his or her opinion, that doctor was negligent and the judge has preferred the evidence of that expert. The judge will not normally decide against a practitioner without cogent expert evidence that supports the decision. So in virtually every instance where a doctor has been held to be negligent, some medical expert has testified that in his or her opinion that was the case.

Secondly, if the medical profession is concerned that the wrong people are being allowed to give expert evidence, the remedy is in its hands. It would not be difficult for the colleges to establish a list of persons qualified to give expert evidence in particular fields. A rule could then be made declaring it to be unprofessional conduct for a practitioner not on the list to give expert evidence. That would immediately put a stop to those who the profession regards as unqualified from giving expert evidence.

Conclusion

A judge's life today is not what it was 50 or even 20 years ago. But there are compensations. Not least is the satisfaction derived from being afforded the opportunity of ensuring that justice is done. Then, as the great American judge, Learned Hand, explained:

“A judge’s life, like every other, has in it much drudgery, senseless bickerings, stupid obstinacies, captious pettifogging. These take an inordinate part of his time; they harass and befog the unhappy wretch, and at times almost drive him from that Bench where like any other workman he must do his work. If that were all, his life would be mere misery, and he a distracted arbiter between irreconcilable extremes. But there is something else that makes the work – anyway to those curious creatures who persist in it – a delectable calling. When the case is all in, and the turmoil stops, and after he is left alone, things begin to take form. From his pen or in his head, slowly or swiftly as his capacities admit, out of the murk the pattern emerges, his pattern, the expression of what he has seen and what he has therefore made ... That is a pleasure which nobody who has felt it will be likely to underrate.” These sentiments describe well the participation by judges in the attempt to achieve justice.

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Negligence - Where Lies the Future?

Negligence – Where Lies the Future? [1]

David Ipp

Isaiah Berlin, the English philosopher, said, “both liberty and equality are among the primary goals pursued by human beings through many centuries; but total liberty for wolves is death to the lambs, total liberty of the powerful, the gifted, is not compatible with the rights to a decent existence of the weak and the less gifted” [2]. Berlin was illustrating his thesis that most of the cardinal values to which human beings aspire clash, they are not compatible with each other. Justice may clash with mercy and compassion, unrestrained liberty may have to make way for forms of social welfare, the pursuit of truth does not justify torture.

The law of negligence is not immune from this phenomenon. In a Utopia, society would have sufficient resources available to ensure that every person injured by the negligence of another would be compensated to the fullest extent. But we do not live in a Utopia. Nevertheless, there are those who contend that it is a basic human right to recover full compensation for negligence according to the rules of the common law. This ignores the consequences of such lack of restraint for the rest of the community. Rich J in *Chester v Waverley Corporation* [3] was rightly scornful of this approach, saying that “the law must fix a point where its remedies stop short of complete reparation for the world at large, which might appear just to a logician who neglected all social consequences which ought to be weighed on the other side”.

Over the last 100 years there have been vast changes in the law of negligence. The law of negligence closely reflects the social attitudes of the people and as these change so, following some distance behind, does the law of negligence. After all, as Lord Atkin observed in *Donoghue v Stephenson* [4], the law of negligence is based on a general sentiment of public wrongdoing [5].

The pendulum has swung from a judiciary that, at the turn of the 19th century, closely identified with defendants such as landlords, property owners and employers to one that, at the end of the 20th century, strongly sympathised with the claims of plaintiffs, generally. This movement has not been without opposition. Again, this is exemplified by Rich J in *Chester v Waverley Corporation* [6] who remarked (in regard to the appellant’s argument that the court should recognise an action for nervous shock), “The attempt on the part of the appellant to extend the law of tort to cover this hitherto unknown cause of action has, perhaps, been encouraged by the tendencies plainly discernible in the development which the law of tort has undergone in its process towards its present amorphous condition. For the so-called development seems to consist in a departure from the settled standards for the purpose of giving to plaintiffs causes of action unbelievable to a previous generation of lawyers. Defendants appear to have fallen completely out of favour. In this respect perhaps judges are only following humbly in the footsteps of juries”.

This paper is intended to be a report on the review of the law of negligence recently undertaken by a Panel appointed by the Commonwealth and the Governments of the States and Territories of Australia. The Panel received evidence to the effect that throughout the country the absence of insurance or the availability of insurance only at unaffordable rates has adversely affected many aspects of community life. Small local authorities, particularly in rural areas, that have been unable to obtain public liability insurance, have closed roads for the maintenance of which they are responsible. This means that in some areas people have to undertake detours of long distances, sometimes 100 kilometres or more, to reach neighbouring communities or individuals. Some country hospitals, that cannot obtain insurance at affordable rates, have closed down completely. Other hospitals, including city hospitals, experience difficulties in providing important facilities. The problems faced by members of the medical and other professions are well known. For example, many young and some older obstetricians have refused to practice as such and have turned to other, less risky areas of the medical profession. Not a few neurosurgeons have given up their practices. Some schools and kindergartens have had to close and others are not able to offer the facilities they would wish. All manner of community gatherings and events can no longer take place. These range from dances to pony rides, from country fetes to city concerts, from surfing carnivals to Christmas carols. The basic fabric of community life is being harmed. This is not something that can be ignored.

There is no conclusive evidence that the state of the law of negligence bears any responsibility for this situation. But the fact is that insurance companies assert that they are not prepared to provide the necessary insurance (or are only prepared to provide it at unaffordable rates) because of the unpredictability of the law, the ease with which plaintiffs succeed and the generosity of courts in awarding damages. There is evidence to suggest that the insurance crisis is at least partly attributable

to the conduct of certain insurance companies, but that is not to say that the state of the law of negligence has not contributed to the current state of affairs.

There is much to suggest that the pendulum has begun to change direction once more, and plaintiffs are finding it more and more difficult to succeed. But this will be a slow process, too slow to be a satisfactory remedy for the present situation. Accordingly, it is not difficult to understand that the Ministers found it necessary to instruct the Panel, in its Terms of Reference, that “[t]he award of damages has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another” and to require the Panel to make recommendations “for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death”.

The Panel itself found that there was “a widely held view in the Australian community that there are problems with the law stemming from perceptions that:

- (a) The law of negligence as it is applied in the courts is unclear and unpredictable.
- (b) In recent times it has become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants.

(c) Damages awards in personal injuries cases are frequently too high.”

These findings are in accord with the concerns about the law of negligence expressed by a number of judges over the last few years. Many of the judicial warnings about the state of the law are collected in the seminal article, *Negligence: The Last Outpost of the Welfare State*, [7] by Spigelman CJ. The Chief Justice’s analysis in this article was a significant factor leading to the setting up of the Panel. One of the most recent, and most powerful, statements in this regard was that by McHugh J in *Tame v Morgan* [8] where his Honour said, “I think that the time has come when this court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall – perhaps it has already fallen – into public disrepute if it produces results that ordinary members of the public regard as unreasonable”.

The law of negligence is a branch of the law that affects everyday life more than most others. It is easy for citizens to understand and many have opinions on judgments that are given daily in negligence cases. Loss of respect for the law of negligence detracts from the regard in which courts are held and weakens the conventions that bind the community. There is a compelling need, therefore, to bring about reforms that will more adequately balance the interests of plaintiffs against those of the wider community.

The present state of diversity in the law of negligence is extreme. Not only are there significant differences between jurisdictions, but also within jurisdictions. There are separate statutory provisions dealing with motor accidents, civil liability generally, and workers’ compensation. In some jurisdictions there are statutes that deal separately with other classes of claims. As a result, in any particular jurisdiction, a claimant may receive a different award for the same injury depending upon whether the injury was sustained in the course of employment, in a traffic accident, or in the course of some other activity. A different award may be made for similar injuries depending upon the State or Territory in which the injury was sustained. Judicial differences in the approach to assessment of damages produce significant variations in damages awards in similar cases, sometime involving hundreds of thousands of dollars.

These differences make it more difficult for insurers reliably to predict the likely extent of liability of insured persons. This results in higher premiums. The differences between the laws applicable in the various jurisdictions also give rise to perceptions of injustice. These perceptions of injustice are exacerbated by the fact that negligence claims are decided according to the law of the State or Territory in which the negligent conduct occurred. A Tasmanian who suffers severe injuries through the negligence of another while in Sydney, could well obtain - in the District Court of New South Wales - an award that would exceed, by some \$200,000 dollars, an award that a Sydney resident, suffering the same injuries while on holiday in Hobart, would receive from the Supreme Court of Tasmania. Differences in the law may extend to questions of liability – not only the quantum of damages. There are now statutes in, or foreshadowed in, most jurisdictions dealing with liability for negligence. Many contain provisions affecting liability that differ from each other.

The Panel was asked only to make recommendations concerning the law of negligence as it relates to claims for personal injuries and death (and not in regard to other claims based on negligence). This distinction itself gives rise to problems and may be thought to be unsatisfactory. It compounds the lack of uniformity in the law and is likely to lead to unnecessary complexity and uncertainty. There is no sign that there will be any legislative attempt to ensure that the rules of negligence relating to personal injuries, on the one hand, and property or economic damage, on the other, will remain the same. Thus, for example, it is likely that there will be joint and several liability in regard to damages for personal injuries but proportionate liability for property and economic damage.

Whether, in regard to claims for personal injuries, there is going to be a measure of national conformity, or whether the law is going to develop in different directions in each individual State and Territory, remains to be seen. The Panel recommended that there be national uniform legislation, but this

recommendation has not been accepted. Nevertheless, there appears to be a strong desire amongst the states and territories for a reasonably uniform national approach.

A Joint Communiqué issued after the Ministerial Meeting held in Brisbane on 15 November 2002 stated that the Ministers had agreed that the "key recommendations" of the Panel relating to liability "should be implemented on a nationally consistent basis and each jurisdiction agreed to introduce the necessary legislation as a matter of priority". The Ministers agreed to work towards harmonising the law as to damages. They agreed that "a system of thresholds and/or scales for general damages coupled with restrictions on legal costs is an imperative" and noted that "most states are moving in this direction." It seems likely that the states and territories will to a large extent go their own way on damages, although each is likely to introduce a system of thresholds and caps, at least in regard to certain heads of damage. The Ministers noted "the progress made by New South Wales" and noted that its Civil Liability Amendment (Personal Responsibility) Bill 2002 (now the Act of like name) implemented "most of the recommendations" of the Panel. They noted that "the Bill provides a model to develop nationally consistent reform". The implication is that the legislation in other jurisdictions will be based on the New South Wales legislation. In a number of respects that legislation went significantly further than the recommendations of the Panel.

The Council of Australian Governments met on 6 December 2002 and agreed to implement most of the Panel's recommendations as to liability and to legislate for thresholds and caps on damages. There is a real prospect that the other States and Territories will legislate for reforms to the law of negligence in their respective autumn sittings in 2003.

In summary, there is a real prospect that, at least as regards personal injuries, there will be a measure of national conformity as regards liability. While there will be thresholds and caps on damages, these are likely to differ in each jurisdiction.

I shall mention, briefly, some of the more important recommendations of the Panel, as these concern issues that are likely to be the subject of contention in the future.

A major reason for the relative ease with which plaintiffs have been able to succeed in claims for negligence is the *Wyong Shire Council v Shirt* [9] "undemanding" standard of care. In the language of *Wyong Shire Council v Shirt*, a risk of injury is foreseeable unless it can be described as "far fetched or fanciful". The Panel determined to change this. The issue was: to what degree? The Panel considered that only a shift of emphasis was required. It was important not to make the test too demanding.

In *Czarnikow Limited v Koufos* [10] the various members of the House of Lords discussed the use of many phrases that could be incorporated in an appropriate formula. Examples are "the loss must be foreseeable as a serious possibility" or "a real danger" or as being "on the cards" or "not as a possibility of academic interest", or "liable to result" or "likely to result" or a "grave risk". Barwick CJ in *Caterson v Commissioner of Railways* [11] preferred the phrase "not unlikely to occur". The Panel considered recommending a test based on foreseeing a "real risk" of danger. But the Privy Council in *Wagon Mound (No 2)*, [12] in overturning the decision of Walsh J in *Miller Steamship Company v Overseas Tank Ship (UK)* had held, [13] in effect, that "a real risk" was a risk that was not "far fetched". Hence, the test in *Wyong Shire Council v Shirt*. The Panel believed that it was necessary to use a new phrase to signal that a change in emphasis is required. It recommended that it cannot be negligent to fail to take precautions against a risk of harm unless that risk can be described as "not insignificant".

In this regard, just as in *Caterson*, Barwick CJ said that "not unlikely" did not mean "likely", so did the Panel consider that "not insignificant" did not mean "significant". There is a degree of magnitude that is neither insignificant nor significant. The degree to which there is a change to the *Wyong Shire Council v Shirt* standard of care will be a central issue for the future.

It is apparent that in some judicial pronouncements the concepts of foreseeability and reasonableness are conflated. Some jump from the proposition that a risk is foreseeable to the conclusion that a reasonable person should have taken precautions against it. But foreseeability is merely a precondition of liability. The fact that a risk is foreseeable does not, by itself, justify the conclusion that a reasonable person would have taken precautions against it. The courts should go on to apply the remainder of the negligence calculus and determine the reasonableness or otherwise of the defendant's conduct. A question for the future is the degree to which courts will attach importance to this issue. See in this regard the admonitions of McHugh J in *Tame v New South Wales* [14]. The Panel recommended that legislation entrench this requirement.

I now turn to the difficult question of causation. The Panel considered that a major problem in the law relating to causation is that commonly known as "evidentiary gaps". That is, gaps in proving that the harm, or all the harm, was brought about by the negligence of the defendant. A paradigm example is where a worker contracts mesothelioma as a result of successive periods of exposure to asbestos while working for different employers [15]. Another is where harm is brought about by the cumulative operation of two or more factors and it is not possible to determine the relative contribution of the various factors to the total harm suffered [16].

There is authority to the effect that the evidentiary gap may be bridged where the defendant's conduct has materially contributed to the harm or even to the risk of harm (that is, even where it is not established that the defendant's conduct satisfies the "but for" test). The Panel considered that whether the evidentiary gap could be bridged in such a case was a normative issue; a value judgment had to be made as to whether the defendant, in a particular case, should be held to be responsible for the

plaintiff's damage. The Panel considered that this normative issue was often concealed by recourse to phrases such as "commonsense" and "real and effective cause", and courts should be required to make explicit the reasoning on issues of this kind.

Some have dealt with evidentiary gap problems in accordance with the approach of Gaudron J in *Bennett v Minister for Community Welfare* [17] where her Honour said, "... generally speaking, if an injury occurs within an area of foreseeable risk, then in the absence of evidence that the breach had no effect or that the injury would have occurred even if the duty had been performed, it will be taken that the breach of the common law duty of care caused or materially contributed to the injury". This approach casts the onus of proof on the issue of causation on to the defendant. This represents a fundamental change in the law and has the potential significantly to expand liability for negligence. The problem is that this approach has been applied generally, in negligence cases that are not out of the ordinary, regardless of whether there is an evidentiary gap, and without requiring consideration of whether there is any good reason to relieve the plaintiff of the requirement to satisfy the "but for" test. Apart from the potential that this approach has for relaxing the requirements for causation, generally, the Panel considered it to be undesirable as it did not squarely address the issue of the evidentiary gap but rather hid it from view. This is because, in practice, the onus of proof that is shifted to the defendant is impossible to discharge, precisely because there is an evidentiary gap.

Accordingly, the Panel recommended that there should be legislation to the effect that the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

The Panel recognised however that, in exceptional cases, it was appropriate that the evidentiary gap should be bridged. It believed that this should be done on normative grounds where the court considered that in all the circumstances of the case responsibility should be attributed to the defendant [18]. Again, the Panel recommended legislation that would require the court to consider and express the reasons for so attributing responsibility.

What, in effect, is proposed is a "truth in causation" approach. This is despite the fact that, as Justice Oliver Wendell Holmes noted in 1891, "there is an awful lot of rot talked about causes by judges" [19]. In substance, the Panel's recommendations in these respects have been accepted by the New South Wales legislature (with the likelihood that they will be adopted by other legislatures). The issues of causation that they involve are difficult, however, and are likely to recur. In the USA and England, cases of so-called toxic torts are increasing in number. They typically involve causation issues that raise evidentiary gaps. Lord Hoffmann addressed this question in *Fairchild v Glenhaven Funeral Services Limited* [20] by setting out the requirements for the relaxation of the 'but for test'. One of these included the circumstance, in case involving an employee who was suffering from mesothelioma caused by exposure to asbestos brought about by more than one employer, that medical science could not prove which exposure was more likely to have caused the disease.

There is reason to expect that courts in this country will soon face many cases of this kind. These questions will have to be addressed in all jurisdictions.

Finally, in regard to causation, the Panel made one other recommendation. This was that "the plaintiff's own testimony, about what he or she would have done if the defendant had not been negligent, is inadmissible". This is an issue that is particularly prevalent in medical negligence cases that involve failures by medical practitioners to inform patients of the risks of operations. The Panel considered that the difficulty of counteracting hindsight bias in this context undermines the value of such testimony. In practice, the judge's factual finding, based on the plaintiff's credibility, is likely to be determinative, regardless of relevant circumstantial evidence. As a result, such decisions tend to be very difficult to challenge successfully on appeal. The Panel considered that this is an issue that should be decided on the basis of inference, having regard to all the circumstances except the plaintiff's own testimony as to what he or she would have done. In this sense it will not dissimilar from evidence of intention in a contractual context. This, too, is a recommendation that has been accepted by the New South Wales legislature.

As regards medical negligence, there was enormous pressure from the medical profession to recommend the *Bolam* [21] test. The profession wanted to preclude the courts from being the ultimate arbiter of the standard of care. The *Bolam* test determines negligence by reference to the view of a "responsible body of medical opinion". But cases reveal that doctors are also often unreliable arbiters of the conduct of their peers. There are some appalling practices that have been condoned by groups of respected practitioners.

Nevertheless, doctors asserted that they knew what was acceptable practice, and judges did not; hence, judges should not sit in judgment on them. But, judges sit in judgment on all citizens. That is their constitutional task. Very good reason needs to be shown before society will allow any particular group to have special treatment.

Eventually, the Panel came to a compromise solution. It recommended an extension to the *Bolam* test with a more limited role for the court. The recommendation was that a medical practitioner should not be held to be negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational. This recommendation, it was thought, would prevent reliance being placed on localised practices that are isolated from mainstream professional activities, would filter out idiosyncratic

opinions and ensure that the relevant opinion is soundly based. This, it was thought, would be a far more reliable test than *Bolam*.

Now many other professions have lobbied for a change to the law so that the standard of care recommended for medical practitioners apply to them as well. This raises a number of difficult questions. Should all professions be covered by this rule? And what is a profession? Should, for example, psychologists, herbalists, acupuncturists, chiropractors, osteopaths, podiatrists and other groups on the fringes of the medical profession have the benefit of this rule? What about other professions, such as engineers, architects, quantity surveyors, lawyers? And how is a profession to be defined? It is of interest that in New South Wales the Panel's recommendation has been made applicable to all professions but the statute does not define a profession.

One may also ask why the rule should only apply to professions. Should it not also apply to trades? Why should neurosurgeons have the benefit of the rule and not electricians. One answer may be that only those occupations governed by strict self-regulatory disciplines, which have strong ethical requirements and a tradition of service to the community, should be able, to the limited degree proposed, to set their own standards. There can be little doubt that, in all jurisdictions, these issues will require resolution in the near future.

The whole question of professional negligence is complicated by the deficiencies in the system with regard to expert evidence. Doctors are affronted that retired specialists make a good living giving expert evidence about issues with which they may no longer be familiar. There is a widespread perception that many experts are unreliable and biased. In most jurisdictions there appeared to be a widespread perception that, in many instances, expert witnesses consciously or subconsciously slant their testimony to favour the party who retains them.

Representatives of the medical profession told the Panel that decisions about the competence of doctors are often made on the basis of credibility decisions as between experts. They pointed out that many of these decisions are justified on the grounds of demeanour alone – a notoriously poor test. The system thus tends to produce unreliable results (often about issues that affect the livelihood of individuals) and consequential dissatisfaction. Of course, these criticisms are not confined to cases about doctors.

These problems have remained unresolved for many years. The Panel recommended that consideration should be given to implementing trials of a system of court appointed experts. There were particular concerns that there was a lack of suitable forensic criteria relating to the establishment of whether or not a person was suffering from a recognised psychiatric illness. The Panel recommended that experts be appointed to develop guidelines, for use in a legal context, for assessing whether a person has suffered such an illness. The Panel also recommended that the experts concerned should be instructed to develop options for a system of training and accreditation of forensic psychiatric experts. This recommendation followed many representations to the Panel that expressed dissatisfaction with psychiatric and psychological experts.

The Terms of Reference required the Panel to make recommendations limiting the liability of public authorities. At all levels of government there is concern as to the frequency and nature of claims against public authorities. The Panel was told that there are two categories of case that cause problems. The first category concerns those claims based on an alleged failure to take care to make a place, over which the authority has control, reasonably safe for users. The difficulty that arises is that usually the authority will have a limited budget available for the performance of its functions. Usually the authority will make decisions in good faith about the allocation of the budget. The Panel was told that there was a widespread view amongst local councils (in particular) that the law of negligence is being applied in such a way as to allow decisions, made in good faith about the allocation of scarce resources between competing activities, to provide the basis for findings of liability against public authority. The Panel was told that this was having a detrimental impact on the ability of public authorities to perform their functions in the public interest.

The second category of case is that where public authorities' decisions, based on political, economic, social or environmental policy, are challenged. Claims of this kind often involve very substantial sums of money and result in lengthy and complex litigation.

The Panel considered that it was undesirable that the issues raised by these types of cases be canvassed in negligence actions. Courts are neither politically representative nor politically responsible; hence, they are not well qualified, either in terms of expertise or procedure, to adjudicate upon decisions that are essentially political in nature. Moreover, proper consideration of the reasonableness of such policy decisions may be very expensive and time-consuming.

The Panel recommended that there should be legislation to the effect that a policy decision (that is, a decision based substantially on financial, economic, political or social factors or constraints) should not be used to support a finding that the defendant was negligent, unless the decision was so unreasonable that no reasonable public functionary in the defendant's position could have made it. Whether this recommendation will be sufficient to satisfy governments is open to question. The New South Wales legislature has gone much further than the Panel's recommendation in limiting the potential liability of public authorities for negligence. It has adopted the policy defence insofar as it applies to the allocation of resources. But it has also provided that, generally, no action will lie against a public authority for breach of a statutory duty unless the conduct of the authority constituted

Wednesbury unreasonableness. It has also provided that an authority can only be liable for a failure to perform a function if the claimant, notionally, could have obtained an order for mandamus requiring the authority to exercise the function in question.

It remains to be seen what other jurisdictions will do in regard to public authorities. It does seem clear that, in most, some kind of legislative action will be taken.

As regards mental harm, the Panel did not make recommendations inconsistent with the recent pronouncements of the High Court in *Tame v New South Wales*. The Panel, however, made a significant recommendation in regard to consequential mental harm. It recommended that damages for economic loss resulting from negligently caused consequential mental harm should be recoverable only if, firstly, the mental harm consists of a recognised psychiatric illness and, secondly, the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.

In other words, the Panel considered that claims for consequential mental harm should not be treated as parasitic on associated claims for physical harm and thereby freed from the constraints that attach to claims for pure mental harm. This recommendation, if adopted, will have major effect in cases where plaintiffs suffer no permanent physical impairment – that is, where the only continuing effects of the negligence are mental rather than physical. Cases involving soft tissue injuries are the obvious examples of this category of case. This recommendation has now been adopted in New South Wales. The Panel made several recommendations designed to promote the importance of personal responsibility and personal autonomy. It recommended that there should be no liability for failure to warn of an obvious risk. It recommended that a provider of recreational services should not be liable for personal injury or death suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk. It recommended that a court should be able to reduce a plaintiff's damages by 100% where it considers that it is just and equitable to do so. It recommended that the standard of care owed to oneself when assessing contributory negligence should be the same as the duty owed to one's neighbour. And it recommended that the law as to voluntary assumption of risk should be changed so as to make it easier for that defence to succeed.

The Panel identified various concerns with non-delegable duties. Courts often give the impression, when they impose a non-delegable duty, that they are not imposing a form of strict liability but rather a form of liability for breach of a duty committed by the defendant in the course of being an employer of an independent contractor. In other words, the impression given is that a non-delegable duty can only be breached by conduct on the part of the defendant that in some sense involves fault. This is so, although it has been said often that a non-delegable duty is not a duty of care [22]. There is considerable confusion in the area and the grounds on which the existence of a non-delegable duty will be found to exist are not clear.

The Panel formed the view that liability for breach of a non-delegable duty is in essence equivalent to an extension of the principles of vicarious liability. That is to say, the existence of a non-delegable duty should be found where the court considers it appropriate that the employer of an independent contractor should, in effect, be held to be vicariously responsible for the conduct of the contractor engaged by it. The Panel considered that the theory of non-delegable duties should be seen, candidly, as an extension of the theory of vicarious liability.

The Panel did not make any substantive recommendations regarding non-delegable duties. It was more concerned to ensure that liability for breach of a non-delegable duty would be regarded as liability for negligence (and, therefore, subject to the Panel's recommendations, generally). The recommendations made in this respect have, in effect, been adopted in New South Wales.

It is of interest that recently the Court of Appeal of England has, by a majority, held that a principal who engages an independent contractor to perform an inherently risky operation has a duty to choose a contractor who could properly meet any liability that might occur [23]. The court did not impose a non-delegable duty.

The search for coherent principles determinative of the existence of non-delegable duties remains an important issue for future resolution.

The Panel concluded that *Planet Fisheries Pty Limited v La Rosa* [24] has prevented the development of a conventional system of tariffs based on judicial decisions. The absence of such a tariff system makes it more difficult for lawyers to advise their clients about the amount of general damages likely to be awarded. It makes the outcome of cases less predictable and hinders the settlement of claims. The Panel therefore recommended that legislation be passed allowing courts to refer to awards of general damages in earlier cases and to allow counsel to bring to the court's attention awards of that kind. This recommendation has been followed in New South Wales.

The Panel was impressed with a publication issued in England by the Judicial Studies Board. The publication is known as Guidelines for the Assessment of General Damages in Personal Injury Cases. The Guidelines contain upper and lower limits of awards of general damages in respect of a vast number of types of injury suffered by plaintiffs. In practice, the Guidelines indicate the awards likely to be made on the basis of past practice. By all accounts they have been markedly successful. They tend to promote consistency and certainty in the assessment of general damages.

The Panel recommended that a similar publication be issued in this country. I understand that this is under consideration by the Commonwealth Attorney General. Such a publication should have the same

influence here as the Guidelines have had in England and should also assist in bringing about a greater degree of conformity in the different states and territories. Judges are unlikely to go beyond the existing upper and lower limits of awards and in time the wide discrepancies between awards in different states are likely to be reduced.

The Panel recommended a threshold for general damages based on 15% of a most extreme case and a cap of \$250,000.

The proposal as to the threshold is based on New South Wales legislation. The point of the threshold is that, in New South Wales, cases that are assessed below 15% of a most extreme case are typically cases of soft tissue injuries, which ordinarily heal rapidly. The compensation payable in such cases tends to be in the region of \$50,000. In this category of cases, general damages represent a very significant proportion of the total amount recovered (as do legal costs), and damages for economic loss a small proportion. Thus, the effect of the threshold in practice would probably be to cut out of the system cases where the injuries are relatively minor, where the economic loss, if any, is relatively insignificant and where legal costs are proportionately high. This was the justification for the proposal. The recommended cap of \$250,000 reflects more or less the amount of what would be regarded as the maximum amount that might be awarded in all states except New South Wales, Victoria and Tasmania. A very high amount for general damages in New South Wales and Victoria would be in the vicinity of \$350,000, and a very high amount in Tasmania would be substantially less than \$250,000.

In 1970 Professor Atiyah asserted [25] that damages awarded for pain and suffering and disabilities "could be multiplied or divided by two overnight and they would be just as defensible or indefensible as they are today". On this basis it may be thought that complaints about a reduction in general damages, designed to achieve national uniformity, would be difficult to sustain. Nevertheless, it is most unlikely that this recommendation will be accepted nationally – although it may be accepted by individual jurisdictions. It has not been accepted in New South Wales.

The Panel recommended a cap on damages for loss of earning capacity of twice average full time weekly earnings. The basis for this recommendation was the fact that only 2.4% of Australian employees earn more than twice average weekly earnings and the Panel considered that those who fell into the higher earning category could reasonably be expected to protect themselves against the effects of the proposed cap by insuring against loss of income. In this regard it is to be noted that the annual value of a disability support pension payable to a person who is totally incapacitated for work is only \$10,966 and the annual value of unemployment benefits is only \$9,620. It is unlikely that this recommendation will be accepted but there appears to be a fair probability that a cap of three times average weekly earnings should be imposed. New South Wales has indeed instituted such a cap. Damages for gratuitous services remain a difficult problem. They often represent a large portion of the total award. There was evidence that damages under this head represent, on average, about 25% of the total award in claims for more than \$500,000. There was much criticism from certain sectors of awards for gratuitous services. Suspicions were expressed as to the bona fides of the claims and the relative ease with which they are asserted (and the difficulties which defendants have in combating them). Few submissions however went so far as to suggest that they should be abolished. There are, of course, many who strongly support the recognition of this head of damage.

The Panel concluded that it would be counter-productive to abolish claims for gratuitous services. If this occurred plaintiffs would have a strong incentive to retain professional carers to provide the services and this could lead to an increase in total damages awards. Nevertheless, the Panel thought that some limit should be placed on such claims.

In the end, the Panel recommended caps of gratuitous services based in effect on the average weekly earnings. It also recommended a threshold on the basis that damages for gratuitous services should not be recoverable unless such services have been provided or are likely to be provided for more than six hours per week and for more than six consecutive months. The New South Wales legislature has instituted such limitations.

Discount rates in Australia range from three per cent in the ACT to seven per cent in Tasmania. The rate ranges from five to six per cent in the other States. The Australian Government Actuary informed the Panel that a realistic discount rate would be in the order of two to four per cent. Accordingly, the Panel recommended a nationally uniform discount rate of 3%. This recommendation has received no acceptance and discount rates in nearly all jurisdictions exceed this percentage. Curiously, while those who oppose change to the law of negligence have been vociferous in their criticism of some of the Panel's recommendations, they have said nothing about discount rates, which, in practice, is the greatest factor in reducing awards of damages. The Panel concluded that using a discount rate higher than can reasonably be justified by reference to the appropriate criteria would be an unfair and entirely arbitrary way of reducing damages. Furthermore, the group that would be most disadvantaged by doing so would be those who are the most in need – namely, the most seriously injured.

Another curiosity is that neither plaintiffs nor defendants supported empowering courts to make compulsory orders for periodic payments of damages such as those that are provided under the social security system. They did however support empowering courts to make orders, by consent, for structured settlements. Structured settlements involve settlement agreements pursuant to which the defendant is required to pay part of the agreed damages periodically. The Panel supported the principle of structured settlements but in view of the opposition to compulsory periodic payments made

no recommendation in that regard.

As required by the Terms of Reference, the Panel made several recommendations concerning limitation of actions.

The Panel considered that it was wrong in principle for time to run against ignorant plaintiffs. But the Panel was of the view that once plaintiffs know that they have suffered damage and that someone else has negligently caused that damage, it would be sufficient for plaintiffs to have three years from the date of such knowledge to bring their claims. No extensions should be allowed.

Then there was the thorny question of whether time should run against children or mentally incapacitated persons. Of course children and incapacitated persons are not able to protect themselves. On the other hand, it may be thought that society can reasonably expect parents and guardians to take necessary steps on behalf of their charges to initiate claims within the time limits imposed on the rest of the community. Doctors, particularly obstetricians, argue that it is unfair and unjust for them to face claims sometimes 20 years after treatment, when records have been destroyed, witnesses have disappeared and memories have faded. After balancing the competing interests involved, the Panel recommended that time should run against children and incapacitated persons. This recommendation has been accepted in New South Wales. The present picture of the law relating to limitations is one of disunity, and there is now an opportunity for bringing about some degree of national uniformity in this area. Whether it will be taken remains to be seen.

The Panel believed that if its recommendations were accepted, to any reasonable extent, they would have little effect if they did not apply to any claim for personal injuries or death resulting from negligence, regardless of whether the claim is brought in tort, contract, under a statute or any other cause of action. An overarching recommendation having this effect was therefore made. It is likely that it will be adopted in any legislative scheme that seeks to put the recommendations, or any of them, into effect.

The Panel was required to make recommendations concerning the *Trade Practices Act*. The Panel appreciated that if reforms proposed by it were to be adopted, it would become more difficult for plaintiffs to succeed in claims based on negligence. Some may not succeed at all and others may only succeed to a lesser extent. Lawyers will inevitably search for different causes of action on which to base the same claims. The Act would be an obvious target in this search. The Panel's recommendations relating to the Act were designed to prevent the legislation in question from becoming a surrogate source of claims.

The Panel noted that, originally, the misleading or deceptive conduct provisions of the Act were intended to apply only to commercial and financial transactions, not to claims for personal injury or death. The objective of Act, it was thought was to provide measures against unfair trading. The courts have construed the Act widely, however, with the result that the misleading or deceptive conduct provisions are capable of applying to personal injuries claims. Questions arise in this regard. Why should consumers be entitled to recover damages from defendants who are not negligent but who innocently make mistakes? What is there about consumers that entitle them to be paid compensation in consequence of conduct devoid of fault?

Consumers and economists were offended by the recommendation that the *Trade Practices Act* should be amended to prevent individuals bringing actions for damages for personal injury and death by reason of misleading or deceptive conduct. They asserted that consumers would lose rights. This assertion loses sight of the fact that nothing in the recommendation prevents consumers from suing for negligence. What consumer advocates and economists are disturbed about is that consumers will once more have to prove that their damages were caused by fault. This shows that the controversy is not one of basic human rights, merely one of competing interests

The differing legislative activity throughout the country is indicative of the broader community's dissatisfaction with the current state of the law of negligence. The challenge for the future (and an extraordinarily difficult one in the light of the differing legislation around the country) is to ensure that the principles of negligence become clearer, less complex, and more certain and, also, that they produce results that ordinary members of the public do not regard as unreasonable [26].

1 Paper January 2003 – Supreme Court & Federal Court Judges' Conference

2 From his lecture entitled "The Pursuit of the Ideal,"

3 (1939) 62 CLR 1 at 11.

4 [1932] AC 562 at 580.

5 This statement was said by the Judicial Committee in *The Wagon Mound* [1961] AC 388 at 426 to be the sovereign principle of negligence.

6 (1939) 62 CLR 1 at 11.

7 (2002) 76 ALJ 432

8 (2002) 191 ALR 449 at 473

9 (1980) 146 CLR 40 at 47

10 (1967) 3 WLR 1491

11 (1973) 128 CLR 99

12 *Overseas Tank Ship (UK Limited) v Miller Steamship Company Pty Limited* (1967) 1 AC 617

13 At 643

14 At 473

15 *Fairchild v Glenhaven Funeral Services Limited* [2002] 3 WLR 89

16 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613

17 (1992) 176 CLR 408 at 420 to 421

18 This approach has been followed by the English Court of Appeal: see *Chester v Afshar* [2002] 3 WLR 1195 (where the court explained in clear normative terms why causation was established in a situation akin to *Chappel v Hart* (1998) 195 CLR 232; see also *Fairchild v Glenhaven Funeral Services Limited* [2002] 3 WLR 89).

19 The letter from Holmes to Pollock of 7 June 1891 where this was said was referred to by Burt CJ in *Mitor Investments Pty Limited v General Accident Fire and Life Insurance Corp Limited* (1984) WAR 365 at 370.

20 [2002] 3 WLR 89

21 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

22 *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687 per Mason J

23 *Gwilliam v West Hertfordshire Hospitals NHS Trust* [2002] 3 WLR 1425 (note the strong dissent Selby LJ)

24 (1968) 119 CLR 118

25 *Accidents, Compensation and the Law*, 1st edition at 204

26 To paraphrase McHugh J in *Tame v Morgan*.

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Enduring Values and Change

Enduring Values and Change [1]

D A Ipp

The Bar is an ancient institution. The Black Books of Lincoln's Inn contain a continuous record of the Inn's proceedings that date back to before 1450. In them you can read accounts of Bar dinners that took place in the 15th century, where pupils ate with their Masters. What is happening here this evening had its origins in the 15th century, and I doubt whether even the menu has changed. In the 600 or so years of its existence the Bar has stood for certain values that have had a major influence over the way in which the law has been practised and our society has developed. The existence of an independent Bar is no accident. It derives from its history, traditions and customs, its rules of conduct and the quality of its members. These days, as we all know, the Bar is under constant threat. It faces attacks by the media, the government and others who demand that fundamental changes be made to the way in which barristers practise the law. Many of these demands are made by the envious and the ignorant, but I think nevertheless that there is agreement amongst most that the practice of the law must change. Many articles have been written and papers delivered on the need for change and the nature of the changes that should be made. Rest easy. I am not going to discuss that. I have three main propositions this evening. Firstly, there is little that is new in the criticisms that are now being made of barristers and lawyers. Secondly, no matter what changes are made, the traditional values and attitudes of barristers are likely to endure. Thirdly, despite this comforting thought, there is a strong need to protect the institution, to remain vigilant in doing so and to adapt to change.

Let me start with the first proposition, that is, there is little new in the criticism that we hear so often. Some 50 years ago the great English barrister and judge, Lord Birkett, remarked that "the courts are open to all - like the Ritz Hotel". This aphorism was uttered as part of a critical comment concerning the costs of litigation and the fees earned by barristers. Lord Birkett was later asked if the aphorism was his own. He said that he was compelled to answer that it had been attributed to Mr Justice Matthew but, in fact, said Lord Birkett, before that it had been attributed to Lord Bowen and, indeed, before that, to Lord Justice Chitty. Subsequent research, however, has revealed that words to the same effect were spoken by John Horne Tooke, a radical British politician who was prominent towards the end of the 18th century [2]. Who knows when they were first spoken. They remain as fresh as ever.

Nowadays there is a prevailing view that commercialism in the legal profession is so rampant and such an evil influence that fundamental changes are required. Law reform commissions throughout the country have been occupied in investigating how to reduce lawyers' fees. In the United Kingdom it has been suggested that silks should earn no more per hour than a successful surgeon, which as I understand it is less than half what busy silks in London are presently charging. This is in a context in which the senior partners of Slaughter and May now earn 1.2 million pounds per annum and partners of less than a year 600,000 pounds. The incomes of the leading silks in London are nearing 2 million pounds per year [3]. Younger lawyers in large firms are also earning relatively high amounts. New York law firms in London are paying New York rates. Millbank Tweed's London office now pays newly qualified lawyers nearly 80,000 pounds per annum. That is over A\$200,000.

What does this all mean? Is it a novel modern phenomenon that will result in the corruption of those who practise the law?

Any such concern should be alleviated by a brief historical examination of like fears. At the end of the nineteenth century there was already a sense that the profession had compromised its integrity by becoming too commercial. In 1895 "The American Lawyer" complained:

"The Bar has allowed itself to lose, in large measure, a lofty independence, a genuine learning, a fine sense of professional dignity and honour ... For the past 30 years it has become increasingly contaminated with the spirit of commerce which looks primarily to the financial value and recompense of every undertaking [4]."

In other words, the dreaded spirit of commerce had begun infecting the Bar since 1865. There are several instances in the early part of the 20th century of complaints that the law had become a business and profits were the main concern of lawyers. In 1934 the then Chief Justice of the United States described the successful lawyer as "the proprietor or general manager of a new type of factory, his legal product is increasingly the result of mass production methods" [5]. He deplored the commercialisation of practice which he felt was to be profoundly at odds with professional traditions of

autonomy and public service.

Against this, it will be a surprise to learn that in the 1870's and 80's the legendary leader of the English Bar, Judah P Benjamin, was earning 45,000 pounds per annum at the London Bar at a time when a successful country doctor was earning 500 pounds per year [6]. 90 times more. The equivalent ratio today would put modern Queen's Counsel at more than 20 million pounds a year. It seems that silks today have a way to go.

Another complaint, frequently heard is that barristers utilise their talents in the service of the wealthy, occupying their time in ways to advise others how to get round the law. This sentiment is not new.

About 100 years ago, the American author, John Dos Passos, complained:

" It may safely be said that the prevailing popular idea of the lawyer, too often justified by the facts is that his profession consists in thwarting the law instead of enforcing it... It is the common belief, inside and outside of the profession, that the most brilliant and learned of the lawyers are employed to defeat or strangle justice [7]."

But these feelings are much older. The renowned Livia, the wife of Emperor Augustus of Rome was a promiscuous and sexually licentious woman when young. When she grew old, she became puritanical in nature. She thought that there was far too much adultery in Rome. She prevailed on her husband to pass an edict making adultery punishable by death. This law was very unpopular, not least amongst the prostitutes, many of whom were married. It prevented them from earning their living. They persuaded Livia to ask Augustus to exempt them from the edict, which he did. Thereupon, many women, seeing a loophole in the edict, pretended to be prostitutes, and escaped its consequences. On advice from his lawyers, Augustus created a register of prostitutes. Thenceforth no woman not on the register would be exempt from the proscription against adultery. Human nature being what it is, however, several aristocratic women, also on legal advice, registered as prostitutes to circumvent the prohibition. Augustus did not let this pass. He made a further edict to the effect that any registration as a prostitute, solely for the purpose of committing adultery, would be void. The courts in Rome thereupon became clogged with cases involving the question whether woman who had registered as prostitutes were genuinely bona fide prostitutes. Augustus was furious. He made a speech in the senate damning lawyers for spending all their energies on advising rich women how they could legally commit adultery and not in promoting justice.

The message is obvious: the nature of humans in general and lawyers in particular is unchanging. The great feature of the Bar, however, is that it trains and produces independent barristers and demands ethical conduct from its members, notwithstanding the inherent defects in the raw material with which it has to work.

Nevertheless, amongst many there is despondency about the decline of law practice from its legendary virtuous and collegiate past. Within the legal profession itself many share the sense that law has freshly descended, from a noble profession infused with civic virtue, to crass commercialism. This sense of decline reflects the gap between practice and professional ideology. In the flesh, working life is experienced as more mundane, routine, commercial, money driven, and client dominated than it is supposed to be. It is doubtful, however, that the belief that the way it is supposed to have been - in whatever golden age is in contemplation - is the way that it truly was.

In other words, I suggest that there is no need to be melancholic about the attacks on the profession.

These are but part of the facts of life with which lawyers have always had to live.

I now come to my second proposition, namely, that no matter what changes are made, the traditional values and attitudes of barristers are likely to endure.

I commence by stating the obvious, namely, while many facets of the law have not altered, many changes have been made that represent fundamental alterations in the way that law is practised. Let's look at some of them.

The law is far less closed. Religion and race are no longer matters that prevent participation in the profession, or admission to a particular set of chambers. Women are joining the Bar in far greater numbers. Generally, new barristers are now recruited from a far wider range of universities and schools and new recruits come from a far wider range of socio-economic backgrounds. The Bar is no longer the last preserve of the well-connected.

In consequence the membership of the Bar has become more diverse and the loose consensus that once existed among barristers has largely broken down. But the nostalgia for the narrow non-professional solidarity that the Bar afforded in the past should not obscure the moral and broadening gain that the increase in openness represents.

Then the actual practice of the law has changed so much. In a lecture delivered in Oxford I believe some 30/40 years ago, Patrick Atiyah, the well-known academic, said

"The judicial process in modern times lavishes a care and time on fact finding which would have been inconceivable 150 years ago. Time taken by a trial in the High Court was multiplied many times over during this period. Where Lord Ellenborough in the first decades of the 19th century used to try an

average of 20 cases a day, Lord Abinger 20 to 30 years later was depressed at his inability to get through more than six or seven. A modern judge would think himself fortunate if he completed two cases in a day" [8].

Two cases a day? These days the average Supreme Court case takes between 3 and 5 days to complete and the average District Court case around 3 days. The length and complexity of cases require a different kind of advocacy. Case management has also brought vast changes to advocacy. Much more importance is accorded to written material and brevity and succinctness are very much appreciated by judges. Barristers have to work more quickly and this does not suit everyone. But changes of this kind do nothing to affect the fabric of the Bar. True it is that styles of advocacy change. The florid melodrama of Marshall Hall would fall flat in the modern Court of Appeal. But it is the essence of a good advocate that he or she will adapt to circumstances. Moreover, the basic elements of great advocacy are universal.

Practice at the Bar breeds an independence of mind and attitude. Sub-consciously, barristers are trained to think for themselves, to be sceptical and critical, not to owe overriding allegiance to an institution or political party, and to resent and combat injustice. The Bar hones the legal mind to these ends.

What you may ask is the legal mind? The best illustration I know is that given by Lord Bowen, who told the story of his 7 year old grandson, who was sitting on his grandmother's knee when she explained to him that the Lord created the world in 6 days and rested on the seventh. The child was silent for some time and then asked: "What has He being doing since then?" Lord Bowen, who was obviously world weary and somewhat cynical, when told about this suggested that the answer was "having his portrait painted". But the boy's inquiry reveals a mind well-suited to a barrister. Taking nothing for granted, questioning everything.

It is this sceptical, inquiring mind, together with a resentment towards injustice, that leads the Bar, generally, to oppose movements to do away with the basic rights of individuals.

There is a long tradition of this kind of behaviour. Outside the forbidding prison in Paris, where Marie Antoinette and Louis XIV were incarcerated, there is a statue of the lawyer who defended the queen at her trial. He was warned that, should he proceed to represent her, he too would meet the guillotine. Notwithstanding this threat he did so and was shortly thereafter executed. You may think that this is an extreme example of the cab rank rule. It was a demonstration of great courage and self-sacrifice. One that some may find difficult to comprehend.

The illustrious Erskine, in his first decent brief, destroyed the reputation of the corrupt Earl of Sandwich, a powerful cabinet minister. Had he failed to reveal Sandwich's corrupt practices then, merely because he had acted against Sandwich, Erskine would probably have received no more briefs and his incipient career would have come to an end. This did not deter him. On the contrary, he launched a dramatic attack on Sandwich and concluded by declaring him "a shameless oppressor, a disgrace to his rank and a traitor to his trust." Needless to say Erskine succeeded and went on to become one of the greatest advocates ever. The Bar has changed a great deal since the time of Erskine, but there have always been barristers who have been cast in the same mould. In this country men like Evatt and Byers, to name but a few, are shining examples.

In the worst periods of the apartheid regime in South Africa the Bar and sections of the Church and the press were the only institutions that maintained a practical and public opposition to the injustices that were perpetrated on a daily basis. The Bar made its major contribution by arranging for the pro bono defence of defendants who were charged with political offences. Many of the defendants faced the death penalty for charges of terrorism or sabotage. Others were teenagers who faced mandatory sentences for burning schools or government buildings of a minimum of 15 years imprisonment. In the climate of the day, the establishment was inimical to the defendants, and believed that the government was justified in its laws and prosecutions as the defendants were threatening the very existence of their way of life. Those who objected were regarded almost as traitors and subversives, themselves. Nevertheless, at most Bars in the country, there was a large core of barristers who were ready to defend these persons, largely because of a belief that they were the subject of appalling injustice.

It was not an easy task. Firstly, the big commercial clients were uneasy about being represented by barristers who represented people accused of being communists or terrorists. The barristers were identified by some as having the same views as the defendants, or at least being sympathetic to them, and the clients felt that they would in turn be identified with the barristers. Some barristers found that after a couple of political trials their commercial practices went into sharp decline.

Then the cases themselves would be really unpleasant. The judge would be hand picked, as would the prosecutor. They would be extraordinarily hostile in every respect throughout the trial to counsel for the defendants. The security police would be strongly in evidence, doing their best to intimidate. The court would be packed with black people who would provide a very hostile counter-balancing force. But perhaps the most difficult aspect was the client, usually a 16 year old kid who had tried to burn down a school and who faced a mandatory 15 years in jail, with the onus of proof switched by legislation. These boys were inevitably themselves hostile to the white defence counsel. Once one told me that I need not think that defending him would get me into credit when the regime changed, I

would still be punished like the other whites. If defence counsel were particularly unlucky they would receive anonymous phone calls telling them the route their children went to school and informing them that if they continued representing the accused, they would be fortunate to see their children again. And all this for \$20 per day, day after day.

But many members of the Bar responded to the need, leading silks and busy juniors. This contributed to the consequence that, when the regime changed, very few alterations were made to the legal system. It was felt that it had reasonably attended to the needs of the oppressed.

Curiously, the same response was not shown generally by solicitors, at least not to the same degree. They were far too much under the influence of their commercial clients and their allegiances to political points of view were too strong. The very large majority could not bring themselves to act for people whose views and interests were so much opposed to their own.

Nothing in what I have said is intended to convey that I think that barristers are better people than solicitors or that they show more courage under crisis. All I mean to say is that the institution of the Bar is such that by the nature of its structures it develops an independence of mind, an integrity and spirit that becomes second nature. Its members are trained and become accustomed to guard against injustice, to question authority and to speak up for the disadvantaged. This is truly a wonderful thing for a democratic country, and it is a pity that it is not more widely recognised and understood. But these matters underpin the need to maintain and preserve those structures.

My last point is the need to be vigilant to ensure that there is continuance of the structures and attitudes that I have described. In this context I wish to say something about the technological developments that have brought a major change to the practice of the law. To my mind, the greatest challenge that these represent is the tendency they have to allow the places of work of barristers to become more spread out. This effect is exacerbated by the huge increase in the numbers of barristers which has caused a loss of collegiality in the Bar as a whole.

One of the foundations of the Bar is the strong discipline that convention exercises over the behaviour of its members. Critical to this is that wrongdoing by a member should become known early and by many. I think I still suffer withdrawal symptoms from not having the daily injection of malice I used to receive from the daily visit to the Bar common room. This important feature of Bar life will be lost if technology and size result in large numbers of barristers working at home or in disparate and scattered venues.

In conclusion, I have noticed that many in this country take our way of life and our rights and freedoms for granted. I have personally, in my lifetime, seen rights of this kind be eroded gradually but fundamentally. It is the task of the Bar to guard against this happening in Australia. It is necessary to guard the ramparts well.

1 Address to dinner for pupils of NSW Bar in May 2001

2 Dining at the Ritz: Visions of Justice for the Individual in the Changing Adversarial System, Galanter, Beyond the Adversarial System, eds, Stacy, Lavarch

3 "...while bar heavyweights command up to 2 m a year" The Lawyer 26 June 2000

4 Quoted in Large Law Firms and Professional Responsibility, Galanter and Palay, Legal Ethics and Professional Responsibility, ed Cranston.

5 Quoted in Large Law Firms and Professional Responsibility, Galanter and Palay, Legal Ethics and Professional Responsibility, ed Cranston.

6 English and Colonial Bars in the Nineteenth Century, Shetreet

7 Quoted in Large Law Firms and Professional Responsibility, Galanter and Palay, Legal Ethics and Professional Responsibility, ed Cranston.

8 Quoted in Beaumont B.A "Legal Change and the Courts" Keynote Address to Australasian Law Teachers Association July 2000