ARTICLES

The Honourable the Chief Justice,
*Justice JJ Doyle**

JUDICIAL LAW MAKING - IS HONESTY THE BEST POLICY?

INTRODUCTION

OUR conception of the function of judges is at the centre of our legal system. It is also, one would think, an important aspect of our conception of our society. The role of judges as deciders of disputes according to law is well known. What it involves is relatively well understood. A judge should be skilled in the law, should follow established legal procedures, should act fairly and must be impartial as between disputing individuals and as between individuals and the State. The independence which this requires for the judiciary is also well understood, although what that requires in particular situations is sometimes disputed.

Although it is clear that judges do make law in the course of deciding cases, their law making role is not as well known or understood, either by the general public, informed observers or lawyers.

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In Australia there is not a great deal of literature on the topic of judicial law making (as far as I am aware), although in recent years the topic has attracted some attention, particularly in the area of constitutional law. The position in England is much the same, although some attention has been given to the topic in the context of consideration of the doctrine of precedent. In the United States of America, on the other hand, judicial law making has been much discussed, and almost anyone who has an interest in the topic will have read Cardozo's influential work.[1]

This article will consider some of the issues which arise from the creative aspect of the legal process - the law making by the judge in the process of deciding a case. I will deal only with judicial law making in the course of applying the common law. The related issues which arise in the area of constitutional law and statutory interpretation are not considered. Although the issues with which it is proposed to deal are the same in all areas of the common law, I will draw in particular on cases and literature from the common law of tort.

I have selected the realm of tort law because it provides the clearest illustrations of points which I wish to highlight in the course of this paper. It is in tort law especially that developments take place at times with little or no consideration of the appropriateness of the development having regard to the judicial function. This might be because the concept of proximity has dominated consideration of whether a duty of care exists and, at times, seems to distract attention from judicial law making in an area where a consideration of the law making function would appear vital. The expansion of the tort of negligence makes it appropriate that the courts pay careful attention to proximity as one of its basic elements. But, I suggest, the question of the judicial role raises issues which are not aspects of proximity.

Developments in tort law are also at times handled in a rather simplistic fashion. Professor Fleming argues that the principal concern of the law of torts is with accidents or unintended harm, with the allocation of losses the by-product of modern living.[2] In this area, because it involves situations with which we are relatively familiar, lawyers tend to regard themselves as well able to make decisions based on practical considerations. Rather vague notions of deterrence, loss spreading and public policy prevail.

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1 Cardozo, *The Nature Of The Judicial Process* (Yale University Press, New Haven 1921); Cardozo, *The Growth of the Law* (Yale University Press, New Haven 1924).

2 Fleming, *The Law Of Torts* (Law Book Co, Sydney 8th ed 1992) pp2-3.

References to social policy and to policy issues are often quite vague, and are not supported by any detailed analysis. In addition, we all can second guess 'the reasonable person', and in doing so there is scope for some intuitive law making. The reasonable person is a seductively available means of getting to what is 'felt' to be the right decision. There is little close analysis of how the law making function is performed.

However, I will also range beyond the field of tort. The discussion will focus on the role of the High Court as the final court of appeal in Australia because it is in appellate courts, rather than trial courts, that most of the law making takes place. Even in intermediate appellate courts the occasions for law making are limited, because in Australia, all such courts are bound by any relevant decision of the High Court. This is not to suggest that the doctrine of precedent does not allow the making of creative choices. Quite the contrary. But the issues with which I am concerned emerge most clearly in the work of the High Court.

I will begin with a brief discussion of the fact that judges make law, and of the reasons why this fact has been denied. I do so because a belief that judges do not make law is still quite widespread, no doubt fostered by earlier judicial denials of a law making role, and by the fairly widespread acceptance of those denials until well into this century. Now that the courts are more open about their creative function, and more inclined (as I will argue) to exercise it, one encounters a predictable hostility by many to the profession of what had been denied in the past. It is incumbent upon judges and the legal profession to explain why and how judges make law, and to satisfy the critics that it is appropriately and properly done. If we fail to do so, there may be demands that this aspect of the judicial function be severely curtailed.

Perhaps even more important is the need, as a matter of judicial technique, for judges to explain clearly when and why they make law, and why a particular decision is made. Unconscious or intuitive law making is unlikely to produce the best results. As much attention should be given in reasons for judgment to the law making aspect as is given to the application of existing law.

Next I will consider the legitimacy, in a democracy, of judicial law making. The days when people would defer unquestioningly to judicial authority are long gone. More emphasis upon judicial law making provokes a call for its justification. In that context it is necessary to consider the differences between legislation and judicial law making, how

they differ, and where the lines are to be drawn. This point is of particular importance in Australia because, for the purposes of the Commonwealth, the Constitution vests legislative power in the Parliament and judicial power in the High Court. It is established that the High Court may not be given or exercise powers or functions which are not judicial.[3] It is necessary to distinguish between the two law making functions in some way to reflect the distinction drawn by the Commonwealth Constitution. At the State level the distinction between legislative power and judicial power is not entrenched by a constitution, but remains important to our understanding of State Constitutions.

Then I will turn to examine the sources upon which the courts draw in making law. What are the permissible sources? How does a court inform itself or receive information from these sources? A further issue is when a proper understanding of its role requires that a court should refrain from changing the law and to leave it to Parliament to make the change if there is to be one.

I will then consider a number of recent High Court judgments, with a view to identifying and commenting upon what the Justices of the High Court have said in recent years on the topic of judicial law making. Finally, I discuss the question of the implications of a proper understanding of judicial law making for the manner in which cases are argued before the High Court.

Underlying each part of this discussion is the issue of proper judicial technique. What are the criteria by which one determines whether a judge has acted properly in a particular instance of law making?

My conclusion is that the more one explores these issues, the more one becomes aware of the difficulties which judicial law making presents. Perhaps we were happier and better off when, in Lord Reid's picturesque words, we believed in fairytales and thought the common law lay hidden in Aladdin's cave, accessible to the judges who had the magic password.[4] However, there can be no turning back to an age of innocence. Law making is an inescapable part of the judicial function and our task is to

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3 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 (HC), (1957) 95 CLR 529 (PC). For a general discussion of this topic see Zines, *The High Court And The Constitution* (Butterworths, Sydney, 3rd ed 1992) Ch 10, p151.

4 Reid, "The Judge as Law Maker" (1972) 12 *J Soc Public TL* 22 at 22.

grapple with the issues which it raises. The answers are not going to be found at the first attempt.

JUDGES MAKE LAW

It is surprising that it was ever denied that judges make law. Today it is accepted by almost all judges and writers that judges do make law. As the change in attitude has been amply covered by others, there is no need for me to repeat it.[5]

There are two senses in which courts make law, although in the end both are examples of the same process.

Incremental Law Making

First, and more commonly, a court is confronted with a case which is not covered by existing binding precedent, but there are precedents capable of application by analogy so as to give or deny a remedy. In that situation the choice to apply a precedent is a creative one. It is not dictated by a process of logical reasoning. As Professor Cross points out, "the application of existing law to new circumstances can never be clearly distinguished from the creation of a new rule of law".[6]

Although, in the end, a choice is a choice, there are differences of degree in this area. In some cases the analogy provided by existing case law is strong, in others it is not and then the element of choice appears more clearly. But either way, the decision about similarities and differences as between the case in hand and available precedents is not dictated by logic, and sometimes involves a reference to social policy or some kind of standard external to the law.[7]

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5 For a thorough treatment from an Australian perspective see McHugh, "The Law Making Function of the Judicial Process" (1988) 62 *ALJ* 15, 116. A very thorough consideration of judicial law making, in the context of a critique of the doctrine of precedent, can be found in a paper by Thomas, "A Return To Principle In Judicial Reasoning and An Acclamation of Judicial Autonomy", (1993) 23 *Vict U Well L Rev* Monograph 5. Various aspects of judicial law making are considered by Davies in "The Judiciary - Maintaining The Balance" in Finn (ed), *Essays on Law and Government: Vol 1, Principles and Values* (Law Book Co, Sydney 1995) p267.

6 Cross, *Precedent In English Law* (Butterworths, London 3rd ed 1977) p27.

7 Stone, *Precedent and Law, Dynamics of Common Law Growth* (Butterworths, Sydney 1985) pp97-99.

The frequency with which such choices are made by judges has been much debated. It is trite to say that they are made less frequently in trial courts and more frequently in appellate courts. The debate about frequency does not seem important to me. Once it is acknowledged that a choice is made, the fundamental point is established. The fundamental point is that the judges make law by the making of choices open to them in a particular case.

During this century, lawyers have come to see this, although the common assumption was that such occasions arose relatively rarely and not a great deal of attention was paid to the manner in which judges made their choices. More recently, these matters were examined by Professor Julius Stone. His analysis of judicial reasoning is enlightening and persuasive. At the beginning of his book, *Precedent and Law*, he says, referring to his previous writings and to the subject of his book:

> I was concerned [in a previous book] to point to the semantic problems which usually ensure that judicial discourse, like other discourse, will bear many possible meanings. Therefore, it would be an extraordinary coincidence if these many possible meanings of each judgment came always to one single correct *ratio*.
>
> Yet to these leeways furnished by semantics have to be added, as is now here systematically shown, the leeways constantly furnished by the categories of illusory reference, including those within the *ratio* notion itself, and those arising from the multiple levels of generality at which predicated facts can be stated. I shall show that the attribution of meaning to earlier judges, through 'interpretation' of earlier judgments by later courts, far from being an occasional phenomenon, as Professor Cross seemed to say, is very common in appellate decision making on questions of disputed law.[8]

In short, Professor Stone argues that the making of choices is more common than lawyers realise. If this conclusion is accepted it follows, I suggest, that better decision making will be promoted by an awareness of this fact. Judicial technique must be adjusted to the function being performed.

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8 As above, p5.

It is not my intention in any way to minimise the importance of logic or systematic and rational analysis in legal reasoning. The most illuminating judgments are those which present clearly to the reader *both* the principles to be found in and the limits of the existing case law *and* the precise issue for decision in terms of legal doctrine *and* policy. In addition, it is inherent in the common law method that decisions result from the application of rules or principles which have a rational and coherent relationship to each other and to those which apply in related areas of the common law.

The danger which lies in a lack of awareness of a choice to be made is the converse, that the result of a case is wrongly thought to be dictated by a logic inherent in the rule applied or the concept under consideration. A decision reached in this way is likely to undervalue and give inadequate consideration to the relevant policy factors, rather than reflect a choice made in the light of them. The point is well expressed by Lloyd as follows:

> Once the meaning and scope of important concepts are crystallised within a legal system, especially in one which like the common law adheres to a strict system of precedent, this may result in courts deciding new cases on what they consider to be the logical nature and requirements of particular legal concepts. This may result in a sort of hardening of the arteries of the body of the law; an undue rigidity and inability to adapt to new social situations.[9]

Some may say that logic should prevail, and that what is stigmatised as error is not error. They would say that courts should decide cases in the manner described, and that it is for parliament to decide whether the resulting principles are satisfactory as a matter of social policy, and to change the law if they are not. Surely the response is that if the common law is a means to an end (justice and the good of society) then the relationship of a legal rule or principle to that end is of critical importance, and judges who develop the law cannot ignore that relationship.

Professor Stone's work accents the importance in the common law system of judicial law making by emphasising the frequency with which choices are made.

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9 Lloyd, *The Idea Of Law* (Penguin, England 1991) p295.

I said that there were differences of degree in this area. Some decisions make a modest change only to the existing law, and are very much based on the existence of a close analogy, or on the development of a rationalising principle which reorganises existing case law. *Donoghue v Stevenson*[10] might once have been regarded as a decision which merely rationalised past decisions. At an early stage of his famous speech Lord Atkin said: "It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty [to take care]".[11] He went on to identify his task as follows: "I content myself with pointing out that there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances."[12]

When we consider however what has flowed from that decision, namely the contemporary law of negligence, we can see how a single decision is the source of a significant principle of the common law which has developed and expanded steadily since 1932 and still does today. I make this point merely to emphasise that the true significance of a decision may only be appreciated over time. One could analyse *Donoghue v Stevenson* as a modest piece of law making, as having merely rationalised what was already decided and as having pointed up what was immanent in the common law, but this would be to miss its true significance.

The significance (legal or non-legal) of an act of judicial law making does not always emerge at the outset. And one of the features of the common law system of precedent is that the significance of a decision depends very much on its treatment by judges deciding later cases which involve the application of the decision.

If a choice is to be made, if the outcome of a case is not dictated by binding precedent, to what material does a judge refer in making the choice? This is a topic to which I will return, but I wish to touch on it here. It is important to appreciate from the outset that if the applicable outcome of a case is not found by identifying a pre-existing rule or principle in the existing case law, if even the formulation of a rule or principle based on that case law involves the making of a choice, then as Professor Stone argues, the judge's task "is a normative one, of

10 [1932] AC 562.
11 At 579.
12 At 580.

determining what the law *ought to be*".[13] He identifies two kinds or levels of data to which a judge refers when a choice cannot be avoided. The first is:

> that of values, of the competing ideals and criteria of justice, as they bear upon the law and upon the social, psychological and economic conditions to which the law must be adjusted.[14]

The second is: "the factual elements and contexts within which the values of justice and their legal outcomes have to be realised in the instant situation."[15]

The latter includes the factual effects of a choice and the potential effects of the law declared by the decision.

The point made here seems inescapable - that if the legal sources do not dictate the outcome, then even if the choice is between two existing legal rules or principles, that choice can only be made by reference to values and a consideration of the impact of the choice upon the parties and of the effect (according to some frame of reference) upon society of the new rule established by the making of the choice.

I turn now to the second sense in which courts make law.

Radical Law Making

On occasions a court is confronted by a case which may call for a complete change of direction. The issue is not whether it is desirable to extend an existing principle, but whether an existing principle should be abolished or a new principle should be established. In such situations existing case law is relevant not as a source of solutions but as an indication of the need for the suggested change. Two recent Australian cases which illustrate this, to which I will refer again later, are *R v L*[16] (doubting the existence of a common law rule denying the possibility of rape within marriage) and *Mabo v Queensland [No 2]*[17] (discarding the distinction between inhabited colonies that were *terra nullius* and those

13 Stone, *Precedent and Law, Dynamics of Common Law Growth* p92. Emphasis original.
14 As above.
15 At pp92-93.
16 (1992) 174 CLR 379.
17 (1992) 175 CLR 1.

which were not, and holding that native title to land survived the Crown's acquisition of sovereignty over Australia and radical title in Australian land). In these cases, there was a claim that (in the words used in *Mabo*) the common law should be "modified to bring it into conformity with contemporary notions of justice and human rights.[18]

Both decisions again represented a radical departure from existing doctrine. They were, of course, firmly supported by current conceptions both of justice and of fundamental human rights. But as examples of judicial law, they are radical in terms of doctrine and fundamental in terms of significance. Such cases are less common than the first type of law making which I identified, but in the end all judicial law making seems to me to be along a single continuum.

My argument is that judicial law making is a regular occurrence. Moreover, it is sometimes unrelated to the steady development of existing principle, and whether of the first or second kind, can have momentous effects on our society. In saying this I have not overlooked the scholarly debate about the nature of law and legal reasoning. In particular, I refer to Professor Dworkin's challenge to the existence of judicial law making. His theory, if I understand it, is that law comprises three elements: rules (which are more or less determinate or specific); principles, which are implicit in rules, are more general and must be weighed against each other when they seem to conflict; and, ultimately, a moral theory which explains the existing legal material and will, if necessary, guide one in the choice of principles. I realise that this compressed account of a complex theory does it scant justice.[19]

For present purposes, Professor Dworkin's theory has a double relevance. First, he denies that judges make law because in his view the rules, principles and theory which comprise the law are, when properly understood and applied, capable of supplying an answer to every legal problem. As to this, the point has been made that the element of choice or discretion in judicial decision making, and the way in which judges decide ground breaking cases, does not sit easily with the concept of discovering answers already present in the law. It may be that the real issue is whether

18 At 30.

19 For a discussion of Professor Dworkin's theory in the context of judicial law making, see McHugh, "The Law Making Function of the Judicial Process" (1988) 62 *ALJ* 15 at 24-30 and Thomas, "A Return To Principle In Judicial Reasoning and An Acclamation of Judicial Autonomy" (1993) 23 *VUWL Rev* Monograph 5 at 36-51.

we call choice law making; Dworkin's theory does seem to involve a substantial element of weighing and judgment in dealing with principles, a process which is very close to what I regard as choice.

Secondly, Dworkin's legal system appears to exclude 'policy' in the sense of "that kind of standard that sets out a good to be reached, generally an improvement in some economic, political or social feature of the community".[20] This point is more difficult to accommodate than the first. A concept of law which focuses so much on the principled resolution of a particular dispute, seemingly excluding reference to the values and needs of the community, is inconsistent with current judicial practice.

WHY WAS LAW MAKING DENIED?

It is not within the scope of this paper to conduct a thorough study of the reasons for the past refusal by judges to admit to their law making role. But identification of the reasons may tell us something about possible consequences of the frank acknowledgment of a law making role.

At one level the answer to the question posed is that legal authority held that the role of the common law judge was to make decisions which were merely the best evidence of the common law. This declaratory theory is often traced back to Hale and to Blackstone,[21] and over the centuries had plenty of judicial support. There were, however, dissentients. It is difficult to accept that lawyers such as Lord Mansfield and some of the other great shapers of the common law were unaware of their creative role.

To refer to the declaratory theory is just to point to the theoretical basis of the denial of judicial law making, not to explain it. Cross suggests three reasons for the persistence of the declaratory theory.[22]

The first is that the theory fitted the doctrine of the separation of powers. My impression is that such theories were not influential in the period when the declaratory theory took hold. Nevertheless, it may well be that this was a factor in the persistence of the declaratory theory. If so, it tells us that a theory of what the proper judicial role is can exert a powerful influence on the way judges understand what they are doing and on the

20 McHugh, "The Law Making Function of the Judicial Process" (1988) 62 *ALJ* 15 29-30; Thomas, "A Return To Principle In Judicial Reasoning and An Acclamation of Judicial Autonomy" (1993) 23 *VUWL Rev* Monograph 5 at 37.

21 Cross, *Precedent In English Law* p26.

22 At pp29-33.

way in which they act. One might surmise that if judges are trained to believe that they do not make real choices and do not make law, they will put great emphasis on logical and conceptual reasoning, and where this fails to bridge a gap they will tend to decide intuitively, without a careful weighing of the factors relevant to the choice to be made.

Conversely, judges trained to see themselves as creative law makers might begin to put too much emphasis on that role, and too little on the undoubted importance of stability, certainty and sound analysis. The lesson is that the fashions of the age can have a real influence on our patterns of thought and action.

The second reason which Cross identifies is that the declaratory theory concealed the retrospective nature of judicial law making. Retrospective laws are widely condemned and this may well have been a factor. But unless we assume a continuing conspiracy of silence, this really has to be seen as a rationalisation of what occurred. In a time in which more emphasis was placed on formal reasoning, the description of the process of law making as the correction of past error or the exposure of what was previously unseen may have carried more weight than it would today. But, as events proved, this rationalisation could not long survive scrutiny such as was applied by Bentham and others.

The third reason is the fact that the courts did consider a wider range of materials than binding precedents and statutes, including concepts of justice and public policy. So even traditional common law reasoning allowed scope for the development which undoubtedly explains the growth and longevity of the common law.

To my mind this third factor is really an aspect of the first. Judges trained to see their role as that of declaring law treated the power to be creative as simply part of the declaratory role - declaring what was *in fact* just and what was *in fact* contrary to public policy and so on. The weakness of technique was the failure to understand that they were making choices by applying particular values, and the failure to consider the appropriateness of those values. Changing social conditions, especially the rise of the industrial society, enable us today to see quite clearly that the values relied upon may clearly prefer one group at the expense of another. And a better understanding of how our society works enables us to see that the choice made may affect the workings or even development of our society in one direction or another.

These suggestions by Professor Cross find resonances in the writings of Dworkin, because he too seems to see the law as a complete system which involves exercises of judgment although not the making of choices, a system which is capable of providing from within the existing system an answer to every legal problem.

Another explanation for the declaratory theory is the way in which it fosters and preserves an image of neutrality about the law because it both minimises the element of choice and the reference to values outside the legal system. This in turn tends to insulate judges from public criticism over the content of the law, and enables them to escape accountability for the state of the law and the consequences of existing legal principles.[23] Yet another is that the declaratory theory supports belief in the ideal of a government of laws rather than of men, because if those laws are the work of judges making choices then the legal system begins to look like a government of men.[24]

From even this brief consideration, one can see under the shadow of the declaratory theory an understanding of law very different from ours today. For present purposes, the significance of the declaratory theory lies, I suggest, in the various ways in which it tended to insulate the law and judges from criticism of the law and their work by reference to its effects and the values which it embodied. In addition, error under the declaratory theory was a purely professional matter, able to be seen and corrected only by other members of the profession. So the control over the common law by the legal profession was almost complete, only they were trained to declare it and to pass upon the correctness of decisions doing so. Another aspect of the declaratory theory is, I suggest, an attitude of respect for the work of a profession, an attitude which has passed well and truly.

This in turn suggests that the more judges are seen as responsible for the content and effect of the common law, the more they will be called to account for those things: both the particular rule declared in a case and its effect in society as a general rule. It becomes impossible to shelter from criticism of a legal rule by saying that it may be unfortunate or unjust, but it is the law unless parliament decides otherwise. Today's Mr Bumble will transfer his ire from the law to the judge and say "the judge is an ass-a idiot".

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23 Bhagwati, "The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint" (1992) 18 *Commonwealth Law Bulletin* 1262.

24 Sawer, *Law in Society* (Oxford University Press 1965) p18.

A greater awareness of judicial law making leads to a greater awareness of the choices it involves and the control which judges have over the content of the law. Awareness of the effects in society of a given law in turn leads to scrutiny of judicial work in terms of its social effects and objectives, which leads or can lead to further questioning of the judicial input. I doubt whether, as a profession, we have yet experienced the full force of public scrutiny and criticism of our role in law making, but as that role is seen more clearly I believe that the criticism will be felt more strongly.

LEGITIMACY OF LAW MAKING

If one accepts that judges make law, one is immediately confronted by the issue of how, in a democracy, the making of law by unelected judges, who are (or should be) assured of independence, can be justified.

In Australia, we are governed under a system of representative government which, because those who exercise legislative power are chosen by an election in which most adults are eligible to vote, is also called representative democracy.[25] It is convenient simply to call this representative government.[26] This is true of State and Commonwealth Governments. The legitimacy of parliamentary law making is, as a matter of democratic theory, seen as resting on the fact that the people choose the law makers in a free and fair election. Dicey's analysis of our system has been highly influential. He considered parliament to be the legal sovereign, the people to be the political sovereign. This fits with the democratic theory just referred to.

The judges do not fit neatly into this. They are not chosen by the people, although they are appointed by the people's government. They are not accountable to the people or their government for the decisions which they make, except that they may be removed for misbehaviour. Indeed, judicial independence is a central feature of our system. Thus, in the case of judicial law makers the emphasis is upon independence, while in the case of legislative law makers, parliament and its members, the emphasis is upon accountability to the people. This is not to say that there are not

25 *Australian Capital Television Pty Ltd v Commonwealth* (hereafter "*ACTV*") (1992) 177 CLR 106 at 137-138 per Mason CJ; at 184-188 per Dawson J; at 210-212 per Gaudron J; at 228-231 per McHugh J. *Nationwide News Pty Ltd v Wills* (hereafter *NWN*) (1992) 177 CLR 1 at 46-50 per Brennan J; at 69-72 per Deane and Toohey JJ.

26 For a thorough discussion of the role of representative government in the High Court's reasoning see McDonald, "The Denizens of Democracy: The High Court and the 'Free Speech' Cases" (1994) 5 *Pub L R* 160.

significant constraints on judges that provide a form of accountability, for example, the duty to give reasons. Nor is it to assume that parliament and the executive are closely controlled by the people. But, as already said, the emphasis has been in opposite directions, although both judges and parliament make law.

As against this, the significant point which can be made is that judge made law is able to be changed by legislation so in that sense, the common law is subordinate to parliament. Common law is not delegated legislation. It is not made pursuant to a legislative grant of powers, nor is its scope or content controlled by empowering legislation. But it is subordinate, because it can be overridden by legislation. And, of course, judge made law is subject to any relevant restraints to be found in or implied from the Constitution.[27]

It can also be said that the judicial power exercised by the High Court is conferred by the Constitution. Although the Constitution is an Act of the United Kingdom Parliament, in the High Court, the preceding process of approval of the draft Constitution by referendum is receiving increasing prominence, going so far as a description of the whole process as culminating in a Constitution which is a federal compact or compact of the people.[28] So the ultimate judicial power in Australia can be seen as conferred by Parliament or by the people, depending upon one's stance on the status of the Constitution.

One can therefore say that in terms of democratic theory, and of the concept of the people as the ultimate sovereign, there is some awkwardness about judicial law making, but no fundamental opposition. Some recent views expressed by some High Court Justices may have the effect of emphasising what I have called an awkwardness, by placing renewed emphasis on the sovereignty of the people in the interpretation of the Constitution. In *Australian Capital Television Pty Ltd v Commonwealth,* Mason CJ said:

> The very concept of representative government and representative democracy signifies government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power

27 The place of constitutional implications and their nature is extensively discussed in *ACTV* and *NWN.*

28 See, eg, *Breavington v Godleman* (1987-1988) 169 CLR 41 at 123, per Deane J.

> which resides in the people is exercised on their behalf by their representatives.[29]

If such thinking becomes important in judicial reasoning, it will emphasise the contrasting basis upon which judicial law making operates. The same can be said of the remarks of Deane and Toohey JJ in *Nationwide News Pty Ltd v Wills* :

> In implementing the doctrine of representative government, the Constitution reserves to the people or the Commonwealth the ultimate power of governmental control.[30]

It does so by ensuring election of members of Parliament and by requiring approval by referendum of changes to the Constitution. So, in the end, the legitimacy of judicial law making from the point of view of democratic theory can be justified, but there is a significant difference in the relationship between the people and judicial law makers on the one hand and parliamentary law makers on the other hand.

I mention in passing, though, that if the courts were ever to re-assert the claim to invalidate legislation because it conflicts with certain fundamental common law principles or values, such as the right to life and liberty, the relationship of the common law and representative government would alter significantly.[31] The common law would then be superior to Parliament.[32] This possibility was alluded to but not dismissed out of hand by the High Court in *Union Steamship v King*.[33] This would be a significant change because no longer could the system be rationalised on the basis that common law is always subject to Parliament. It would be subject to Parliament only when the judges decided that it should be, because it would be for the judges to identify the fundamental common law principles which are beyond the reach of Parliament. Such a change

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29 (1992) 177 CLR 106 at 137. But note the reference by McHugh J to the sovereignty of the people to support legal controls over entrapment: *Ridgeway v R* (1995) 129 ALR 41 at 96.

30 (1992) 177 CLR 1 at 71.

31 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 687 per Toohey J.

32 For a brief discussion of this matter see Doyle & Wells, "How Far Can The Common Law Go Towards Protecting Human Rights" in Alston (ed) *Towards an Australian Bill of Rights* (Centre for International and Public Law, Canberra 1994) p107.

33 (1988) 166 CLR 1 at 10.

in the relationship would raise quite fundamental issues of democratic theory.[34]

There are pragmatic considerations which support the legitimacy of judicial law making. First, the common law is so pervasive in our legal system that the system could not continue without it, unless the system itself were first radically restructured. Secondly, it is difficult to conceive of our Parliaments having the time to give proper attention to the legislation which would be required if all areas of the law were to be governed substantially by legislation. As it is, legislative inactivity is often advanced as a reason for the courts to change the law. Thirdly, judge made law has certain advantages over legislation. It is at the one time more flexible, more concrete and more specific than legislation. It tends to move towards a general proposition only after experience with the application of more limited rules.[35]

In short, the effective working of our legal system requires that the legislature and the courts make law in partnership, with a correct appreciation of and deference to their respective roles.[36] Arriving at a correct appreciation of the judicial role is now the important task. It must be understood in terms of the relationship between courts and parliament in a democracy, *and* in terms of appropriate judicial technique within the area of judicial law making.

Some have made claims on behalf of the judges which raise questions about their relationship with parliament. Consider this passage from an article by Justice McHugh (written when he was a member of the New South Wales Court of Appeal):

> The courts can protect individuals and groups denied real access to the political process. Judges enjoy immunity from political pressures. The judge's commitment to procedural fairness also ensures that any party whose interest is affected has a fair opportunity to be heard. Judicial law making is surely not as undemocratic as legislative inaction which fails to meet the need for law reform ... The courts, as much as the legislatures, are in

34 See *NWN* at 44, per Brennan J.

35 See McHugh, "The Law Making Function of the Judicial Process" (1988) 62 *ALJ* 15 at 116.

36 See Thomas, "A Return To Principle In Judicial Reasoning and An Acclamation of Judicial Autonomy" (1993) 23 *VUWL Rev* Monograph 5 at pp17-20.

> continuous contact with the concrete needs of the community.[37]

I suggest that these propositions need to be applied with caution. The first point made is a claim that those who, for unspecified reasons cannot make their legitimate claims heard through the political process, can do so through the courts. The claim implies that for certain people or certain issues the courts rather than parliament or government are the appropriate forum because access to the latter is denied. It is true that certain issues are best resolved by judicial law making. But the notion that some parts of society must look primarily to the courts seems to me to require clarification which is not offered. Does it imply that a court should be more willing to make law when, in its judgment, it is dealing with persons "denied real access to the political process"? If that is not a factor which a court should consider, where does this point lead?

Moreover, the problem of access to justice is a real one. It is arguable that in the area of private law it is the privileged who have better access to the courts. There is a risk (I put it no higher than that) of the courts identifying more with the economically and socially powerful than with the powerless. Also, when it comes to law making, one of the problems confronting a judge is the inability of the adversarial process to allow a full consideration of the interests which might be affected by a new general principle declared by a court or implicit in its disposition of the particular case.

The point about legislative inaction as a reason for judicial law making is one commonly made and has some force. But it also has to be applied with care. It seems to imply a culpable or neglectful inaction. But what if the inaction of parliament reflects a choice not to alter the law? How does a judge decide whether parliament should by now have remedied a claimed defect in the law? It seems to me that the justification of judicial law making in particular cases cannot rest upon a conclusion that parliament should have acted on the matter. The inability of parliament to deal with every problem is, however, a good practical argument in support of judicial law making. The final point, relating to contact with community needs, is a crucial one which I will deal with a little later.

I content myself with the conclusion that judicial law making can be justified in terms of democratic theory and on pragmatic grounds, that in

37 McHugh, "The Law Making Function of the Judicial Process" (1988) 62 *ALJ* 15 and 116 at 123-124.

some respects it has attractions superior to those of legislation, but that it is ultimately subordinate to legislation and to the role of parliament. A proper understanding of the respective roles which the courts and parliament have in making law in a contemporary democracy is the important issue.

LEGISLATION AND JUDGE MADE LAW

In the light of what has gone before, is there any difference as a matter of analysis or as a matter of practice between legislation by parliament and judge made law? If not, then how do we reconcile judicial law making with the concept of separation of powers and with the division drawn by the Constitution between judicial power and, on the other hand, legislative and executive power? As a matter of pure analysis there seems to be no difference. Legislation and judicial law making both involve the determination of a new binding rule of law, capable of application thereafter to other cases falling within its terms.

There are, however, substantial differences in what can be done, in the output, and in the manner in which the courts and parliament make law such that one can say the two are different, although each is an act of law making. Parliament can make law on any subject within its legislative competence whenever it choses to do so. A court can make law only in the course of deciding a specific dispute which parties bring before it. In this sense, the law making is opportunistic. In addition, there are issues arising in our society which will either never present themselves to a court or which the courts lack the ability to deal with or would decline to deal with. The doctrine of precedent (including the concept of the ratio) controls the occasion for and the scope of any act of law making.

Judicial law making has no equivalent of the authoritative statutory text. The doctrine of precedent means that it is for subsequent courts to identify the binding ratio in a decision, not the court making the decision. Previous authoritative decisions can bind courts other than the High Court, and so limit their law making powers, although there is no such limit on the High Court.

A court is limited to the material put before it by the parties and any interveners. The court cannot conduct its own inquiry into the matters which might be relevant to formulating a rule best calculated to advance a particular policy. It must hear the parties in accordance with established procedures. Its law making function is confined to what is part of its

dispute resolving function. These limits on judicial law making are self-imposed but fundamental.[38]

Other limits are perhaps aspects of judicial technique, but are still important. Even though judicial law may constitute a radical change of direction (see the discussion of *R v L* and *Mabo v Commonwealth* above), it is accepted that it must be integrated into and coherent with existing legal principles. In addition, while, as will be shown later, courts can and do refer to values and non-legal sources, courts do not regard it as legitimate to promote a policy or concept of the public interest espoused by the judge, as distinct from reflecting values held by society. (But we shall see that this is a hazy line). There is a real difference here, although it is not marked by a clear line, which is I think a matter of judicial restraint, between parliament's ability to adopt and implement by its law any policy it chooses (subject to political constraints) and the ability of the courts to make the law reflect desirable values or policies already accepted by society. There is a line here which, as we have already seen, Dworkin regards as fundamental. In his view, law does not and cannot be rested on arguments of political policy, arguments "showing that the decision advances or protects some collective good of the community as a whole".[39] The line identified by Dworkin is difficult to draw, and does not seem to me to accord with judicial practice. But Dworkin has, in my opinion, identified an area in which the judicial role is more confined than, although not different in nature from, that of parliament.[40]

Another relevant difference is the use of precedents in judicial reasoning, the prevalence of reasoning by analogy and the incremental nature of the growth in the common law, but I have already pointed out there can be sharp changes of direction despite all this.

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38 The differences between legislation and judicial law making are discussed in more detail by McHugh,"The Law Making Function of the Judicial Process" (1988) 62 *ALJ* 15 at 118-122; by Davies "The Judiciary - Maintaining The Balance" in Finn (ed) *Essays on Law and Government: Vol 1, Principles and Values* (Law Book Co, Sydney 1995) pp275-278; and by Stephen, "Judicial Independence - A Fragile Bastion" (1981) 13 *MULR* 334 at 341-342.

39 See McHugh, "The Law Making Function of the Judicial Process" (1988) 62 *ALJ* 15 at 28-29; Thomas, "A Return To Principle In Judicial Reasoning and An Acclamation of Judicial Autonomy" (1993) 23 *VUWL Rev* Monograph 5 at 42-49.

40 On this point, see also the discussion in Allan, *Law, Liberty and Justice* (Clarendon Press, Oxford 1993) pp54-58 and pp100-101.

Again, courts are required to justify their decisions by exposing their reasoning in detail, and courts other than the High Court are subject to correction on appeal. What this shows, I suggest, is that judicial law making is the same as legislation to the extent that it is the exercise of a power to determine for the first time that a legal rule exists. But the judicial exercise of the power is confined in a significant manner by:

- a common law rule that legislation prevails over the common law;

- a common law rule that a judge may make law only in the course of and to the extent necessary to decide a dispute which falls for decision, which rule also means that there is no authoritative text;

- accepted judicial technique which limits the scope and pace of change, the information given to a court and the values which may be implemented and the extent to which values may be used;

- a constitutional principle (I am not sure what else to call it) which restrains the courts from involving themselves in many aspects of society which parliament can regulate, and from doing many things which parliament can do by law (to a large extent this principle flows from the fact that courts decide disputes, but that fact may not fully explain it).

It is striking that the differences between legislation and judicial law making mainly flow from common law rules and aspects of accepted judicial technique (some of which seem to be the product of rules of law, but some of which seem not to be rules of law or the results of rules). It is tempting to call the first two items *fundamental* common law rules, because they are so basic to our system, but the common law has only one category - all of its rules are in theory equally susceptible to judicial change.

Perhaps the first item is a rule of a different quality. It is part of what would be regarded as 'the constitution', although not explicit in Australia's Constitution. It is, however, implicit in covering clause 5 of the Constitution, which provides that all laws made by the Parliament shall be

binding on the courts. But this merely takes us back to the murky issue of the relationship between the common law and the Constitution.[41]

So we are left with the result that the difference between judicial law making and legislation is a difference expressed by the manner in which the power to make law is used, and the result that the judicial function is more confined mainly because of self-imposed restraint.

Once again the message is that the line between the two is not a clear or rigid one. There is a need to appreciate that an important constitutional line may be crossed if judicial attitudes to the use of the law making power change. This is not an argument against the use of the power. It will become apparent that I favour its use. But it is important to remember that like other features of the constitutional system derived from Britain, convention or something very like it underpins fundamental features.

It follows equally that the difference between 'activists' and 'conservatives' lies only in the degree of willingness to change the law and in the sorts of choices made. Both make law, but how often and when and why they make law in a given case are points of contention. Respect for precedent and caution in the area of implementing current values are likely to be basic issues on which the two camps will divide.

The differences may also suggest that the notion of the separation of powers is rooted in practices rather than in theory, and that the distinction between legislative and judicial power in the Australian Constitution rests upon the fact that judicial law making is a kind of legislative power but one which is confined both as to occasion for and manner of exercise by what is required to settle a dispute or issue between parties.

Finally, I should repeat that I have not overlooked the exclusive capacity of parliament to do certain things by law such as raise taxes, appropriate public revenue, confer benefits and so on. These are subject matters which are largely beyond the reach of judicial law making, but even such subject matters are often infiltrated by common law rules, and if parliament legislates on them, the common law will often supplement or affect the operation of that legislation.

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41 See Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *ALJ* 240, reprinted in *Jesting Pilate* (Law Book Co, Melbourne 1965) p203.

THE SOURCES FOR JUDICIAL LAW MAKING

The argument so far is that judges often make law, that the difference from the exercise of legislative power is largely one of practice and convention, and that judges do refer to sources outside the law itself when they have to make a choice and so make law. It is therefore critical to identify the sources to which judges may refer, and to consider how they make use of their sources. A lot has been written on this, and there is a fair degree of consensus on the issue of sources. But what we find, I suggest, is that the sources judges refer to are described fairly generally, are not capable of precise identification, and are such as to raise real issues about how they are used.

Once we accept that the system of legal rules is not complete, and that creative choices have to be made on occasions to provide an answer to a legal issue, it seems obvious that values of some sort must be used, at the least to weigh up the more general legal principles or values implicit in our legal system which can be drawn upon to solve a new problem and, as I would argue, to provide an independent basis for decision making. By that I mean that a decision may be reached because it advances a value from outside the law - preventing accidents, advancing commercial certainty, and so on.

In the first edition of his influential book, *Jurisprudence*, published in 1902, Sir John Salmond referred to the sources of judicial principles in terms which probably would have been acceptable even to judges who denied they made law. He said judges make law not by formulating and declaring it, that being the function of the legislature, but by applying it in the absence of authoritative precedent. He then wrote:

> Whence then do the courts derive those new principles, or *rationes decidendi*, by which they supplement the existing law? They are in truth nothing else than the principles of natural justice, practical expediency, and common sense.
>
> It is surprising how seldom we find in judicial utterances any explicit recognition of the fact that in deciding questions on principle, the courts are in reality searching out the rules and requirements of natural justice and public policy.[42]

42 Salmond, *Jurisprudence* (Stevens & Haynes, London, 1st ed 1902) pp178-179.

While Salmond clearly recognised the creative aspect of judicial work, his description implied it was a modest one, and the sources referred to by him had a comforting air of certainty and objectivity. His approach is echoed by the words of Lord Reid to the effect that when there was a choice a judge had regard to "common sense, legal principle and public policy in that order".[43] But, as Justice McHugh points out, common sense is in fact a value - it really means what the judge thinks is the community consensus on the subject.[44]

The factors which contribute to judicial law making were discussed at length by Cardozo in his famous lectures, referred to above. In *The Nature Of The Judicial Process*, he summarised the position in words often quoted, but worth repeating. He focussed on the stage at which the existing legal principles found in case law have been accurately stated, and the issue is the development of those principles in their application to the case in hand. He said:

> Let us assume, ... that the precedent is known as it really is. Let us assume too that the principle, latent within it, has been skilfully extracted and accurately stated. Only half or less than half of the work has yet been done. The problem remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.
>
> The directive force of a principle may be exerted along the line of logical progression; this I will call the rule of analogy or the method of philosophy; along the line of historical development; this I will call the method of evolution; along the line of the customs of the community; this I will call the method of tradition; along the lines of justice, morals and social welfare, the *mores* of the day; and this I will call the method of sociology.[45]

Of these four, the most important in his opinion was the method of sociology. While logic, history and custom had their place, the object of law was the welfare of society and a rule of law which missed its aim

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43 Reid, "The Judge as Law Maker" (1972) 12 *J Soc Public TL* 22 at 25-29.

44 McHugh, "The Law Making Function of the Judicial Process" (1988) 62 *ALJ* 15 at 17.

45 Cardozo, *The Nature Of The Judicial Process* (Yale University Press, New Haven 1921) pp30-31.

could not justify its existence. Logic, history and custom could shape the law, but "the end which the law serves will dominate them all".[46]

This statement of the position discloses more clearly both the importance of values in the shaping of judge made law, but also the wide range of the potential influences on its content, because what could be wider than the welfare of society? Moreover, not much reflection is required to realise that what will advance the welfare of society is a changing concept, open to debate, not always easily identified and influenced by one's premises about society.

Presumably, by the "welfare of society", Cardozo intended to refer to a charter somewhat more restricted than the words used are capable of suggesting. Judges are not appointed to implement a program for the betterment of society. But reflection on his words indicates the uncertainty in their meaning. Current Australian practice, alluded to already, is to talk of reflecting the values of society. This seems a more limited notion, but still lacks precision. The idea of *reflecting* values suggests a process of discovering something already there. *Values* suggests legal notions such as justice, fairness, equality and so forth, rather than more contentious notions like allocation of losses, welfare of society and so forth.

I do not think it is necessary to go beyond Cardozo's words for illustrations of the nature and difficulties of judicial law making. The basic point is that the common law is shaped by the needs of the community it serves and the judges must discern those needs and reflect them in the common law. The problem is: how wide a charter is this?

One can immediately see further issues which arise. How does a judge identify community needs? How does a judge distinguish between the judge's own understanding of the community and its needs and the identified community and its actual needs? What limits are there on the ability of judges to shape the law to the needs of the community? These are important issues.

Before turning to them I want to make a few general points, to say something about strict legalism and to refer also to what the High Court has said on the matter.

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46 As above at p66.

It seems to be widely accepted that our society is becoming more complex and diverse, and that within the community it is becoming more difficult to identify generally accepted values. There undoubtedly remain a significant number of general principles on which we all agree, but there is often significant diversity of opinion in their application to particular situations. We might find general agreement on most of the Articles in the *Universal Declaration of Human Rights*, but vigorous disagreement about their proper application to a specific situation. Australian society accommodates a range of cultures and, in today's multi-cultural society, there is acceptance (within limits) of many differing values. So whether we are thinking about major issues of policy or relatively specific clashes of values, it is going to be difficult to identify confidently a consensus of opinion. If that is what a judge must do, then in today's pluralistic society the task is a daunting one.

On the other hand, a judge cannot simply impose an individual policy for society or point of view upon the litigants before the court and upon society. Cardozo's approach implies a relationship between the law and the welfare of society, not between the law and the judge's preference for the shape of society. A politician is perfectly entitled to offer an individual belief, personal conviction or preferred policy for electoral endorsement. A judge cannot do so, and all would agree should not use a judgment to implement any such thing. Judges are not appointed to reshape society according to some preferred policy. They are not appointed to impose their own values on individuals or on society. But how do they ensure that they keep the law in tune with society's needs, without doing either of the things just referred to?

The difficulties of all this make it tempting to retreat to a formal and conceptual approach to legal thinking, but we know that the problems of choice cannot be escaped. We also know that judges are not capable of determining community attitudes on every issue and do not act as if that is their function.

Likewise, Cardozo's method of sociology cannot escape a subjective aspect. I am incapable of divorcing myself from the values implicit in the part of society of which I am typical (even that is difficult to define). My view of the appropriate balance between commercial certainty and fairness is likely to differ from the view of a trader or of a consumer of goods and services, and my view of what is for the welfare of society will be influenced by my personal view, although not determined by it.[47] If the

47 Lloyd, *The Idea Of Law* , pp262-263.

role of the judge is that of "developing and moulding the law so as to make it accord with the needs of the community and promote human rights",[48] then there is the further problem in Australia of identifying those human rights upon which our society generally agrees.

It is hardly surprising that judges have tended to minimise the element of conscious choice in decision making and have not said a lot (or, at least, anything very precise) about the sources which influence them when they make a choice. Perhaps it is a case of the less said the better.

It seems to me that this is an area in which judges and lawyers are going to have to be more open, and are going to have to speak clearly about the role of values in legal reasoning and how they are discerned. I think that we will have to admit to an element of subjectivity and intuition, and we will have to address the issue of how we accommodate them.

Does the answer to all this lie in a return to the method of strict legalism advocated by Sir Owen Dixon, one of Australia's greatest and most influential judges? On the occasion of his swearing in, he said: "There is no safer guide to judicial decisions in great conflict than a strict and complete legalism."[49]

What did he mean by legalism? The answer appears in an address, "Concerning Judicial Method", delivered at Yale University in 1955.[50] He observed that "the strict logic and the high technique of the common law" had fallen into disfavour. He referred to the "basal" assumption of judges "that the law provides a body of doctrine which governs the decision of a given case" and to an "external standard of legal correctness".[51] This is an approach which minimises the scope of choice and emphasises the number of cases in which legal rules applied "according to a standard of legal reasoning" govern the outcome. He did not deny that judges develop the law, but it was by a process which emphasised logic:

> It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new

48 Bhagwati, "The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint" (1992) 18 *Commonwealth Law Bulletin* 1262 at 1263.

49 (1952) 85 CLR xi at xiv.

50 (1956) 26 *ALJ* 468.

51 At 469-470.

> conclusions or to decide that a category is not closed against unforeseen instances which might be subsumed thereunder.

But it was wrong for a judge:

> who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience.[52]

This was the case although courts "have listened, perhaps with profit, to the teachings concerning the social ends to which legal development is or ought to be directed".[53]

The common law technique could

> meet the demands which changing conceptions of justice and convenience make ... They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice.[54]

It needs to be said that his approach was not one which denied a creative judicial function. He argued that the courts were creative, but the *preferable method* was the one which he described. That method, he acknowledged, might be criticised "as a judicial method which responds insufficiently or perhaps not at all to the actual or supposed demands of an ever-changing social order".[55] Despite this, it was, he argued, how the common law proceeded. The point of departure was, for him, the decision which is based on justice or social necessity or social convenience, rather than close legal reasoning.

The difficulty with his approach is, I suggest, not just its rather formal nature and its conservativism. His approach leaves one unsure how and where to draw the line. Is a decision such as *R v L*[56] wrong because it departs from a common law principle on the basis of current views about

52 At 472.
53 As above.
54 At 476.
55 At 471.
56 (1992) 174 CLR 379.

the status of women, or right because it applies settled and fundamental common law principles of equality and fairness to reach new conclusions?

In making this point, one must acknowledge the same essential problem in Cardozo's approach or the approach which holds that the common law should reflect current community values. Now a number of critical problems arise: How does one identify current community values? What are the restraints upon such an approach? When does the judge say that a change is sufficiently controversial or momentous to require that it be left to parliament?

Sir Owen Dixon does not argue that his is the only method, but that his method is the 'safer guide'. But if, truly applied, it must involve conscious abstention from decisions based on the welfare of society, then, as he appears to accept, it chooses the safety of constancy above the risks inherent in constructive change. This approach, I suggest, downplays the potential problems of conservative constancy in a changing society, a society which is increasingly critical (in the true sense) of the work of lawyers and judges. Is it right to say that the problems inherent in choices by reference to values make it preferable to abstain from such decision making altogether? Is that the approach which will best maintain community confidence in the courts and in the law? In today's society I think that both questions must be answered in the negative.

Sir Owen Dixon's description of judicial method is a caution against losing sight of traditional legal method. But it is unsatisfying as a description of the work of an ultimate court of appeal confronted by a situation which might call for a new principle. There is a comforting certainty about it, but no guidance, I suggest, for the making of choices, be they little or big ones, which have to be made if the common law is to be kept in good condition by the courts, rather than by Parliament.

There are similarities in Sir Owen Dixon's approach and Dworkin's approach and, I suggest, similar difficulties.[57] Sir Owen Dixon's description seems to me to divert attention from the choices which are an important part of the judicial process, and offers no guidance on the making of those choices. Certainty and continuity and objectivity are

57 Dawson, *Do Judges Make Law? Too Much?* (address delivered at the University of Adelaide, 22 August 1994) pp3-9. For a further comment on this see Dawson and Nicholls, "Sir Owen Dixon And Judicial Method" (1986) 15 *MULR* 543.

emphasised at the expense of grappling with the manner in which courts do make choices and the problems which flow from the fact.

The former Chief Justice of the High Court, Sir Anthony Mason, has criticised the 'formalism' in Sir Owen Dixon's approach, and has said that it is an approach which the current High Court has been less inclined to pursue.[58] He argues that the role of values in decision making should be acknowledged, and that they should be "accepted community values".[59] If this is not done, legalism may be the cloak for the use of undisclosed and unidentified values or policies.

On the other hand, Sir Daryl Dawson has defended Sir Owen Dixon's concept of legalism which he recognises can be creative. He emphasises the recognition of accepted legal principles and adherence to the doctrine of precedent. He distinguishes between permissible law making and impermissible "judicial legislation". The line between the two is, in his opinion, best illustrated by practice. The majority and minority views in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[60] on a partial abrogation of the doctrine of consideration illustrate the divide.

Sir Daryl Dawson's line seems to depend upon the degree of change, its relationship to existing principle, whether it is a change which requires justification by reference to inquiries a court could not make, and whether the change could satisfactorily be implemented only by legislation.[61]

It is no criticism of this view to repeat that the line is not a conceptual one, but involves an exercise of judgement. If I am correct in this it merely highlights a point already made - judicial law making and legislation each lie along the one continuum. Where and how the line is drawn between the two is reflected by the willingness of a judge to change the common law and the extent of the reliance placed on non-legal factors, rather than by the ability to do these things.

The difficulty of drawing the line as a matter of theory or technique, despite Sir Owen Dixon's arguments, and the difficulties of drawing the line in specific cases between appropriate techniques and inappropriate

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58 Mason, "The Role Of A Constitutional Court In A Federation" (1986) 16 *Fed L Rev* 1 at 4-5; Mason "Future Directions In Australian Law" (1987) 13 *Mon LR* 149 at 155-158.

59 (1986) 16 FLR 1 at 4-5.

60 (1988) 165 CLR 107.

61 Dawson, *Do Judges Make Law? Too Much?* pp3-16.

'judicial legislation', is demonstrated in an article by Professor Lane, "Neutral Principles on the High Court".[62] Neutral principles are those which mean "the High Court remains inactive whereas a party, an exegete or a law reformer would like to see creativity".[63]

He describes the principles as follows:

> that the balancing of competitive interest groups should be left to the legislature which is responsible to those interests; that the creation and specifications of a new rule in a contentious area should be left to a law reform agency; that the Court should leave law-making in the community to the legislature answerable to the electorate; that the virtues of certainty and stability in the law should not be lightly tarnished; that the Court should not appear partisan in conflicts; that the Court should not have regard to political, economic or social policy; that the Court should adhere to the strict letter of the law, finding in the law its legal operation, nothing else.[64]

Some of these principles are clearly sound - for example, that the Court should not appear partisan, that the virtue of certainty should not be lightly tarnished. Others seem question begging - that the Court should leave law making to the legislature answerable to the electorate - because if the Court makes law, the problem is when it should do so. Others seem unacceptable - that the Court should not have regard to social policy - unless given a very limited meaning. And when one considers the illustrations which Professor Lane provides from recent case law one finds, as he observes, some inconsistencies between neutral principles and practice.

By way of conclusion on the point I suggest that the line between Dixonian legalism and the approach suggested by Sir Anthony Mason is not a conceptual or theoretical one, but one which reflects no more than the emphasis to be given in a specific situation to principles or methods which are adhered to by those in both camps.

The task now is to advance the debate by clarifying the issues which lie behind the differences of emphasis.

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62 Lane, "Neutral Principles on the High Court" (1981) 55 *ALJ* 737.
63 As above at 737.
64 As above.

RECENT HIGH COURT JUDGMENTS

Recent High Court judgments indicate that a number of the Justices share Sir Anthony Mason's view, although there has not been much sustained discussion of the problems which the reference to values produces. I will refer to just a few decisions because what is in them fairly represents the trend. I have paid particular attention to cases in which the existence of a duty of care is approached through discussion of the concept of proximity, and have concentrated on judicial references to values and the needs of society.

Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"[65] established a novel duty of care in relation to negligently caused economic loss. The judgment of Stephen J is interesting because it not only adverts to policy values, but lays down principles as to how such policy values are to be used.

His Honour referred to the need to consider policy factors in situations where a novel duty is in question, saying that

> policy considerations must no doubt play a very significant part in any judicial definition of liability and entitlement in new areas of the law ... and to seek to conceal these considerations may be undesirable.[66]

However, he rejected an approach previously suggested by Lord Denning,[67] that the existence of a duty of care in any particular relationship would be a matter for a court to decide upon in each case on policy grounds. Stephen J considered that such an approach would lead to a lack of certainty and the creation of judicial diversity.[68] Rather, Stephen J would use policy factors in the formulation of general rules:

> That process [of considering policy factors] 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.[69]

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65 (1976) 136 CLR 529.
66 (1976) 136 CLR 529 at 567.
67 *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] 1 QB 27.
68 *The "Willemstad"* at 567.
69 As above.

This statement is interesting, in the light of the result eventually reached by his Honour. An examination of policy factors in combination with conceptual considerations led Stephen J to the conclusion that there was a need for a "control mechanism based upon notions of proximity".[70] However, Stephen J abstained from laying down a general rule which related to rights and duties of parties,[71] but instead pointed only to "salient features" of the case which justified the imposition of liability, commenting that the general rule must develop through the accumulation of a body of precedent. One might be excused for asking what difference exists between this approach and that of the case-by-case policy approach advocated by Lord Denning. Presumably, Lord Denning never intended to advocate a complete abandonment of analogical reasoning from decided cases.

If there is a lack of clarity here as to the use of policy factors, there is also a reluctance to use such factors beyond certain limits. Stephen J stated that he had avoided referring to two policy factors, namely the role of insurance and the aims of 'loss spreading'. This was explained on the basis that:

> The task of the courts remains that of loss fixing rather than loss spreading and if this is to be altered it is, in my view, a matter for direct legislative action rather than for the courts. It should be undertaken, if at all, openly and after adequate public inquiry and parliamentary debate and not worked towards covertly, in the course of judicial decision, by policy factors which assume its desirability as a goal and operate to further its attainment.[72]

Whether one agrees or disagrees with this sentiment, it must be admitted that it is an extraordinary statement to find at the conclusion of a judgment which has imposed liability for economic loss in an unprecedented situation and in a manner explicitly guided by policy factors. One might ask whether the policy factors which were relied upon by Stephen J had been in any way more openly canvassed (whether in Parliament or otherwise) or objectively shown to be desirable, than the policy factors which he excluded. In fact, it seems that the implicit distinction between permissible policy factors and impermissible ones is a matter of degree: it

70 At 574.

71 As to the lack of any general principle in this judgment, see *Candlewood Navigation Co Ltd v Mitsui O S K Lines Ltd* [1986] AC 1 at 24.

72 *The "Willemstad"* at 580.

is possible to refer to factors that would suggest reformulation of principles of liability to a certain extent, but not factors which would suggest a reformulation of the whole purpose of the law of negligence. Such an approach may perhaps be seen as foreshadowing the distinction made by Brennan J (as he then was) in *Mabo v Queensland (No 2)*[73] between change which would merely be in line with community values, and that which would damage a "skeletal" principle of the common law.[74]

Hence, the judgment, although expressing a willingness to look at policy factors, exhibits some confusion as to how these factors are to be used in the process of legal reasoning. Further, although the judgment indicates that there are some purposes for which it is not permissible to rely on policy factors (in this case, for a fundamental change in the direction of the law of negligence), it is not made clear where the dividing line is meant to be drawn between acceptable reformulation and an unacceptable taking over of the role of the legislature.

The judgment of Deane J in *Jaensch v Coffey*[75] has often been cited for its treatment of the way in which a court decides if a duty of care exists. In this case, the High Court reconsidered the principles governing recovery for nervous shock. Deane J said:

> In any field of law, however, there may arise the rare 'landmark' case in which a court, usually a final appellate court, concludes that the circumstances are such as to entitle and oblige it to reassess the content of some rule or set of rules in the context of current social conditions, standards and demands and to change or reverse the direction of the development of the law.[76]

He said that this might impinge in a subordinate way on the role of Parliament, but it was a role which must be performed. It was to be carried out with due regard to existing authority and established principle. It was arguable, he said, that the present case was such a case.[77]

But there is little subsequent discussion of the part played by the judicial assessment of current 'social conditions, standards and demands' although

73 (1992) 175 CLR 1.
74 At 43.
75 (1984) 155 CLR 549.
76 At 599-600.
77 At 600.

careful attention is paid to advances in the understanding of the causes of nervous shock.[78] Deane J concludes that because of the uncertainty about the nature and causes of nervous shock, it is not possible to define with precision the practical impact of allowing recovery whenever nervous shock is foreseeable.[79] He then said that "neither principle nor considerations of public policy require or justify" the abrogation of the requirement of something more than foreseeability before a duty of care in respect of nervous shock is found to exist.[80]

The judgment gives no real guidance on the more general issues alluded to above. My point is not to criticise the outcome. I merely make the point that, if current values played a part in the decision, it is not clear what part they played. It could be said that Deane J was content to see nervous shock treated differently from other types of personal injury without considering whether current values called for it to be treated in the same way as other injuries. My impression is that his approach was that neither principle (methods of legal reasoning) nor policy (an assessment of the likely impact of the change) necessitated the adoption of an approach based solely upon reasonable foreseeability. Current values are probably embraced by his reference to policy, although his focus seems to be mainly upon costs and benefits for defendants and plaintiffs.

This is a pattern that one finds recurring frequently in judgments in which there is obviously a strong element of law-making. There is a reference to the need to take into account 'community attitudes' or 'policy factors', or even what is 'fair and reasonable', but little discussion of how one is informed of these values once they are admitted to be of relevance.

In relation to the concept of proximity, one might refer to *Sutherland Shire Council v Heyman*,[81] a case where Deane J considered that there are "considerations of public policy which underlie and enlighten the existence and the content of the requirement [of proximity]"[82] without then going on to discuss obviously pertinent matters such as loss shifting, the ability to bear losses, the availability of insurance, community expectations of local government authorities and so on. One might also

78 At 600-602.
79 At 601.
80 At 603.
81 (1985) 157 CLR 424.
82 At 498.

mention *Cook v Cook*,[83] where the Court grappled with the duty of care owed by an inexperienced driver, and considered that:

> it is for the legislature, and not the courts, to decide whether considerations of social policy make it desirable that the traditional standards of the law of negligence should be abandoned in favour of a system of liability without fault.[84]

The Court here deferred to the legislature on grounds which I am inclined to accept as correct, but nevertheless gives no guidance as to how that conclusion was reached. It is not immediately clear why reliance upon the prevalence of insurance is inappropriate in formulating a duty of care for motorists. Was this because of the policy behind the rule, because of the impact of a change on insurers or because it would be unjust to do change?

Beyond tort, one might refer to cases such as *R v L*,[85] where the majority was prepared to reject any common law rule of irrevocable consent to sexual intercourse because it was "so out of keeping with the view society now takes of the relationship between the parties to a marriage".[86]

Here we see the court entering into a more controversial aspect of attitudes and values in society. The controversy over legislative change in the area of rape in marriage suggests that part of society would not agree with the court, although I suspect that the clear majority would. But who really knows? Many would say that the court should give a lead and reject a rule which is contrary to the rights of women. When, then, is it right for the court to take a lead? Is the court then reflecting values, or shaping them, or dealing with a previously undiscovered conflict between values underlying specific legal rules? And why is it appropriate to do so? Brennan J exhibited a traditional concern about extending the criminal law, while Dawson J reasoned in a way which was consistent with the methods of legalism. One senses that behind decisions like this lie unexposed problems relating to the ascertainment of values and the role of the courts in relation to issues on which a value judgment is at the heart of the decision. Once again, I emphasize that this is not a criticism of the outcome, I merely make the point that, probably because the conclusion seems an obvious one, the Court has not examined the issues of technique

83 (1986) 162 CLR 376.
84 At 385-386.
85 (1991) 174 CLR 379.
86 At 390.

which arise. It is worth mentioning that the same comment can be made about the House of Lords' decision on the same point.[87]

Other decisions do attempt to articulate a dividing line between permissible and impermissible law-making, but, I would suggest, without getting to grips in any detailed way with the techniques which are to be used to inform law-making. Two examples are *Mabo v Queensland [No 2]*[88] and *Dietrich v R*.[89]

In the former decision, which was of great political and economic importance to Australia and a departure from long-settled doctrine, Brennan J first adverted to the obvious injustice wrought by the original rule and its discriminatory nature. In support of change he referred to the "expectations of the international community", to "the contemporary values of the Australian people" and to "the fundamental values of our common law".[90] However, he would not have been prepared to overrule existing case law if that would "fracture a skeletal principle of our legal system".[91] The dissenting approach of Dawson J emerges from the following passage:

> The policy which lay behind the legal regime was determined politically and, however insensitive the politics may now seem to have been, a change in view does not of itself mean a change in the law. It requires the implementation of a new policy to do that and that is a matter for government rather than the courts. In the meantime it would be wrong to attempt to revise history or to fail to recognise its legal impact, however unpalatable it may now seem. To do so would be to impugn the foundations of the very legal system under which this case must be decided.[92]

It is notable that the majority did not give any real attention to either the consequence for Australian society of the radical change caused by this case or to the question of whether its contentious nature (for that cannot be denied) or the practical impact of the change were such that it was a

87 *Reg v R* [1992] 1 AC 599 esp at 609-611.
88 (1992) 175 CLR 1.
89 (1992) 177 CLR 292.
90 *Mabo* at 42.
91 At 43.
92 At 145.

change to be made by legislation, if at all. Nor is there any detailed discussion of the values which the decision implements, or the issue of whether the Court is implementing a specific value or attitude (land rights) held by the community or a more general value (equality) which the Court considers should be implemented whether or not the community agrees on its specific application in the instant case. Perhaps the demands of justice were so insistent that it was appropriate to give way to them. Perhaps the prospect of Parliament acting was sufficiently remote for the Justices to think that they must act. But none of this is given explicit consideration. Nor is it easy to be certain that most Australians would support the decision. They would, I believe, agree that an injustice had been done, that the common law was discriminatory. However, many would have said that it was too late to change or that Parliament should do it. On the other hand, Dawson J seems to take as obvious the fact that this *was* a case for judicial abstention, but to me that is also not obvious. I cannot accept, as a general proposition, that "implementation of a new policy" is always and obviously "a matter for government rather than the courts".[93]

Therefore, this truly landmark case leaves unanswered (except by implication) some fundamental questions of technique. I suspect that the injustice of the former law, and its disconformity with international standards, were the critical factors. I also suspect that history will say the decision was right according to Cardozo's sociological method. But we are left pondering what the decision means for judicial law making. Dawson J's judgment aptly illustrates the gap between the approach of the majority and minority, which gap was not fully explored by either.

In *Dietrich v R*[94] the High Court decided that a court could stay the trial of a serious criminal offence if an indigent accused, through no fault of his own, was unable to obtain legal representation. The decision is significant because it means that unless the executive funds representation, the trial cannot proceed. It was a clear departure from or development of existing law. The majority drew heavily on notions of fairness in the criminal law and placed some reliance upon international standards. Deane J referred to his remarks quoted above from *Jaensch v Coffey*[95] relating to the judicial obligation to reassess rules in the context of current conditions to ensure that the law does "not lose contact with the social needs which justify its existence and which it exists to serve".[96]

93 As above.
94 (1992) 177 CLR 292.
95 (1984) 155 CLR 549.
96 (1992) 177 CLR 292 at 329.

Brennan J dissented. He acknowledged the duty of the Court to mould the law according to "the relatively permanent values of the Australian community".[97] The perception of contemporary values might be coloured by the judge's own opinions, but judicial experience and the "coincidence of judicial opinions in appellate courts" gave some assurance of correctness.[98] There were limits on the Court's power to change the law which limits were attributable to the notion of separation of powers, the doctrine of precedent and judicial technique.[99] In the area of judicial technique, while contemporary values were important, so too were internal consistency of principle and appropriate respect for certainty through the doctrine of precedent.[100] He concluded that to accord the postulated right was to break with principle because a trial without representation did not necessarily mean a miscarriage of justice. The analogy with existing rules about unfairness broke down. Sir Owen Dixon's method of legalism did not support the change.[101] In addition, it was an unwarranted intrusion on legislative and executive power to require, in effect, the provision of public funds for legal aid.[102] So, in the end, contemporary standards of fairness had to yield to the limits of the judicial function.[103]

His judgment contains a valuable discussion of the judicial role. It is a little surprising that more of this is not found in *Mabo*. Dawson J dissented. Although he did not address the judicial role, his reasoning was consistent with that of Brennan J. The suggested change in the law, in his view, was "a fundamental change".[104]

This decision is significant in terms of policy, giving priority to the interests of the accused, and raises issues of resources, bearing in mind the limited legal aid funds available. It is one on which, I suggest, community opinion would be divided. But it is difficult to identify the factors that made the difference, particularly in the light of the dissenting judgments.

The difficulties which are raised by the lack of explicit techniques for discovering and utilising policy values are illustrated by a pair of recent tort cases. In *Burnie Port Authority v General Jones Pty Ltd,*[105] a majority

97 At 319.
98 As above.
99 At 320.
100 As above.
101 At 321-323.
102 At 322-323.
103 At 324.
104 At 349.
105 (1994) 179 CLR 520.

of the High Court held that the rule in *Rylands v Fletcher*[106] should be absorbed into the principles of the law of negligence. The tenor of the majority judgment[107] was that the difficulties inherent in the rule, and the ability of the concept of proximity to give rise to an appropriate duty of care, meant that the decision was no more than an exercise in rationalisation of the law. Brennan J dealt with the rule in *Rylands v Fletcher* without considering whether it should be disposed of.[108] McHugh J held that the majority's approach was impermissible. He so held because a rule of strict liability was not inappropriate, because of the unquantifiable effect of the change on pending or existing causes of action and because consideration of the rule by law reform bodies had not demonstrated the superiority in such cases of a rule based on negligence to one based on strict liability.[109] Here we find a majority judgment based mainly on legal technique, and a dissenting judgment addressing policy aspects which seem relevant but are not addressed explicitly by the majority. Of course, there is almost inevitably a difference of opinion on the bench as to the significance of various factors in a particular case, but one might question a difference in technique which is such that it is possible for a majority judgment to fail to address matters of policy which form the core of the judgment of the dissentient. This betrays, perhaps, the absence of a systematic approach to the incorporation of such policy factors in judgments. The case therefore illustrates the lack of a clear framework to guide judges as to when it is appropriate to engage in an evaluation of policy factors and when to employ more traditional reasoning. Further examples of this appear in those cases where the High Court has, without dissent, rationalised or reorganised the grounds of tortious liability by reference to traditional legal technique, most recently in *Australian Safeway Stores Pty Ltd v Zaluzna*[110] (where the Court disposed of the special duties previously imposed on occupiers by incorporating them into the general law of negligence) and *Northern Territory of Australia v Mengel*[111] (where the High Court unanimously overruled its earlier well known but seemingly stillborn decision in *Beaudesert Shire Council v Smith).*[112]

106 (1866) LR 1 Ex 265.
107 Mason CJ, Deane, Dawson, Toohey & Gaudron JJ.
108 (1994) 179 CLR 520 at 567-574.
109 At 592-594.
110 (1987) 162 CLR 479.
111 (1995) 69 ALJR 527.
112 (1966) 120 CLR 145.

Similar is *Bryan v Maloney,*[113] which dealt with the liability in negligence of the builder of a house to a subsequent purchaser for cracking due to the builder's negligence. The majority applied the concept of proximity,[114] "policy considerations" being relevant and "influenced by the courts' assessment of community standards and demands".[115]

The majority referred to a concern to avoid the imposition of liability "in an indeterminate amount for an indeterminate time to an indeterminate class" and to "community standards in relation to what is ordinarily legitimate in pursuit of personal advantage".[116] These considerations indicated that cases in which proximity was made out were in this area "to be seen as special".[117] Thereafter, the majority analysed the case closely in terms of similarities and dissimilarities between the case in question and the case of a builder and first owner, to whom a duty of care was owed. Toohey J also reasoned in terms of proximity and policy considerations relevant to the recovery of pure economic loss.[118] The majority and Toohey J decided that a duty of care was owed.

Brennan J dissented. He also recognised that claims for the recovery of pure economic loss involved factors which required careful consideration.[119] His closely reasoned judgment covers much of the ground that the other judgments cover. But he seems to have considered a wider range of policy issues, and they clearly influenced his ultimate conclusion. First,

> whether the law should enforce, in favour of a remote purchaser, a duty on a builder or manufacturer to build buildings or manufacture chattels of a certain quality when the building or chattel will be sold in an open market in which price reflects, or may be negotiated to reflect, the quality of the thing to be sold.[120]

113 (1995) 69 ALJR 375.
114 At 377, per Mason CJ, Deane & Gaudron JJ.
115 As above.
116 As above.
117 As above.
118 At 400-402.
119 At 385.
120 At 389.

Secondly,

> The social question whether building costs should be inflated to cover the builder's obligation under such a transmissible warranty is an appropriate question for parliaments to consider but, in the absence of compelling legal principle or considerations of justice reflecting the enduring values of the community, the courts should not decide to extend remedies not hitherto available ... without considering the cost to builders and the economic effects of such an extension. Those are questions which the courts are not suited to consider.[121]

The different approaches are interesting, and the contrast is illuminating.

The majority rely mainly upon the close similarity between the position of builder and first owner (where a duty is owed) and builder and subsequent owner. This is classical legal reasoning, and cautious if you like. But Brennan J identifies some wider issues which might suggest that reasoning by analogy is not sufficient, and that issues beyond judicial competence arise as an obstacle to making the change in the law which the majority made.

This highlights the difficulty which confronts reforming judges. The analogy which the majority drew is a powerful one, and one might think that the factors which favour imposing a duty in favour of a first owner apply equally to a subsequent owner. If society copes in one situation, it should be able to cope in the other. It might be said that this is the answer to Brennan J's arguments, and that whenever courts impose a new duty of care, they must be able to rely on the comfort of a close analogy to deal with such issues, otherwise they might never be able to act. But Brennan J's broader concerns were not addressed explicitly. Therefore, one finds that, even where there is a consensus that the Court must pay some attention in the particular case to the requirements of public policy, there is a division upon the aspects of public policy to be addressed. The difference in judicial technique is such that the principles which are the core of the judgment of Brennan J are not adverted to by the majority.

121 At 391-392.

WHAT DOES THIS MATERIAL TELL US ABOUT JUDICIAL LAW MAKING IN THE HIGH COURT?

First of all, that it is being done differently today from the way in which it was done when legalism was the dominant approach. Today the following passage in relation to the law of negligence in sport, would be considered controversial:

> when one approaches a proposed new field of liability in negligence perhaps the most important feature in the designing of the rule of law appropriate to that field of liability is the consequence in society of the proposed rule.[122]

In 1967, this rather innocent remark drew a rebuke from Kitto J in the High Court:

> I think it is a mistake to suppose that the case is concerned with 'changing social needs' or with 'a proposed new field of liability in negligence', or that it is to be decided by 'designing' a rule. And, if I may be pardoned for saying so, to discuss the case in terms of 'judicial policy' and 'social expediency' is to introduce deleterious foreign matter into the water of the common law - in which, after all, we have no more than riparian rights.[123]

The Court today is clearly applying Cardozo's sociological method from time to time. To avoid misunderstanding, I must repeat that close legal reasoning of the type advocated by Sir Owen Dixon has not been abandoned. But when a choice is to be made, that fact is often openly acknowledged and when relevant the social end of the law is considered.

Secondly, the Justices do not appear to lack confidence in their ability to identify the relatively permanent values which are (presumably) widely accepted in our community, or to assess what is required of the law in the light of current social conditions and standards. Again, this is not to suggest that they claim omniscience and infallibility, or the ability to do this in relation to every legal issue. But some of the cases referred to involve cases in which it could be said that identifying a community consensus is not so easy, at least if one distinguishes between underlying

122 *Rootes v Shelton* (1966) 86 WN NSW (Pt1) 94 at 101-102, per Jacobs JA.
123 *Rootes v Shelton* (1967) 116 CLR 383 at 386-387.

general values (on which there may be agreement) and their application to a specific situation. The Justices speak as if their task in this respect is not too difficult.

Thirdly, there is little reference to the impact of the judge's personal views and beliefs, and how the filter they impose is passed. Earlier views of the neutrality of the law have been soundly criticised. Some feminist critiques of the law have shown how the law can be seen as gender-biased. And further critiques have suggested that the perspectives of those who are well educated and better off than most of the community carry greater weight in the courts. The judge must acknowledge the effect of personal views as well as any inbuilt bias or orientation in the system. But there is little discussion of this problem.

Fourthly, the attention given to the likely social or economic consequences of a decision is rather variable. *Mabo* and *R v L* are each decisions which have significant ramifications: *Mabo* for the economy and relations between Aborigines and other Australians; *R v L* for the institution of marriage. In the area of tort law, judicial attention to the results of the risk or loss allocation which flow from decisions on the duty of care tends to be rather fleeting, and is necessarily inexpert and based on limited information. Issues of this type which seem significant to some Justices are at times given scant attention by others.

Fifthly, it is not clear how one predicts when and to what extent values and policies and other non-legal factors will be relevant to a decision. There are obviously significantly different approaches in that respect.

Sixthly, there is little clarity in the line which marks the boundaries of proper judicial law making and parliamentary legislation. It seems as if the strength (as perceived by the Judge) of the demands of justice and fairness and the impact of contemporary values are what is decisive, and if they are strong enough, then the Court will make almost any change - witness the decision in *Mabo*. On the other hand, when their demand is less insistent, and issues of loss allocation or other more mundane and value free issues predominate, the courts are more deferential towards Parliament. Illustrations are the quite timid approach in three cases decided not long before those with which I have dealt: *Dugan v Mirror Newspapers Ltd*[124] refusing to overturn the ancient doctrine of attainder; *State Government Insurance Commission v Trigwell*[125] refusing to change

124 (1979) 142 CLR 583.
125 (1979) 142 CLR 617.

the rule in *Searle v Wallbank*;[126] and *Australian Conservation Foundation v Commonwealth*[127] refusing to change the rules relating to standing.[128]

In such cases, one finds allusions to the unelected and unrepresentative nature of judges, the limited means of information at their command and so on. But there is not much explanation of why, in those cases, that meant that there should be no change. Either the approach has shifted since those cases, or the drawing of the line is a very intuitive process.

In *Dugan*, for instance, the majority approached the case as a matter of historical survey and the application of general principles as to the importation into colonial law of English law, together with the interpretation of statues which may have modified the common law rule. Barwick CJ rejected an argument that the Court might consider the common law rule inappropriate to modern conditions and over-rule it.

> The Court can, of course, decide what the common law always has been: and, if earlier judicial decision is not to that effect, overrule or depart from such a decision: and the Court can, as it were, extend the principles of the common law to cover situations not previously encountered, or not as yet the subject of binding precedent. ... [But] there is no authority in the Court to change that law as inappropriate in the opinion of the Court to more recent times ... it is clearly a question for the legislature whether a change should be made in the law: such a change cannot properly be effected by the Court.[129]

As well as showing the deference (sometimes) extended to Parliament, this passage also illustrates the difficulty referred to earlier in relation to Sir Owen Dixon's conception of legalism: how is one to tell whether a judicial decision expounds the law correctly and as it 'always has been', when it might be in line with a common law principle as to attainder, but incompatible with fundamental principles of fairness and justice?

The judgment of Murphy J takes a radically different approach. After establishing the inconsistency of the common law doctrine with norms of

126 [1945] AC 341.
127 (1980) 146 CLR 493.
128 The relevant dicta are collected in McHugh, "The Law Making Function of the Judicial Process" (1988) 62 *ALJ* 15 at 21-23.
129 (1978) 142 CLR at 586, per Barwick CJ.

justice and human rights, Murphy J attacked the declaratory theory of law and with it the claim that judges do not create the common law. His Honour stated broad principles as to the need to "evolve the common law so that it will be as rational, humane and just as judges can make it".[130] In this way, Murphy J clearly places more emphasis on "fundamental principles" than Barwick CJ. This is buttressed by a rejection of the argument that the legislature is the appropriate and capable body to make changes in the law.

The approach of Murphy J at least has the virtue of explicit reference to motivating values and the way these values guide reform. If one is to change the law in some cases, it merely dodges the issue to refer, in others, to the failure of Parliament to act.

Seventh, there is little if any consideration of the extent to which the court may properly move ahead of community attitudes to reach decisions which apply basic and accepted values but which might, as concrete decisions, provoke considerable opposition. *Mabo* and *R v L* are, I suggest, examples of this. I do not think it feasible to argue that the Court can only reflect community attitudes. At the least, in applying basic values inherent in justice, it may at times legitimately reach decisions which upset much of the community. If we accept that, it seems equally legitimate for it to lead, to some extent, in the development of those values. All the more so if we accept that it is the Court's function actively to promote human rights. But, as I have remarked, nothing much is said about that. The judgments are written as if the Court's role in relation to values is reflective and not formative. It is an important issue which may be summed up by asking whether the Court merely reflects what the community accepts, or plays a part in leading and shaping community attitudes.

Finally, the discussion of the non-legal factors is often quite brief and general, and tends to be in the form of fairly firm statements, rather than a careful and detailed consideration of sources and materials, with close attention to their role in the reaching of a decision.

To my mind, all of these are real issues lurking behind the pages of the law reports, issues on which the Court has yet to make its technique clear. There is good reason to think that they will receive more attention.

130 At 609, per Murphy J.

WHEN SHOULD LAW MAKING BE LEFT TO PARLIAMENT?

I have already touched on this issue. I have suggested that the approach of the Court makes it difficult to draw a line. One might surmise that the Court will defer to Parliament: on a highly contentious issue, although *Mabo* casts some doubt on that; perhaps also when the consequences of a decision are unpredictable and potentially far reaching, and when the subject matter clearly calls for investigations which the Court cannot make. Again, there are areas of the law where common law has always played little part, or statute has gradually taken over. In such areas, the courts will probably be less active. There is traditional caution about extending the reach of the criminal law by judicial decision, although *R v L* shows that at times the court will do so.

The separation of powers provides another obvious basis for judicial abstention. There are some things the courts cannot interfere with, and others where they are reluctant, but *Dietrich* shows that the courts will intrude on executive decision making.

It seems to me that there are no definite principles here. It is a balance of the nature of the issue, limits on the judicial technique, the past role of the courts in the relevant area and so on. In the end it is another judgment which a court must make, and as *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[131] illustrates, even in areas of traditional common law dominance, judges can differ sharply over the legitimacy of particular acts of judicial law making.

Once again, all we can expect is a clear explanation of the reason for a decision to make law or not to do so and by reference to relevant and specific criteria relevant to the particular issue. In particular, to say that judges are not elected or that courts are not law reform agencies or that legislation is for parliament is to do no more than circle the issue which has to be addressed, but often the discussion does not move much beyond that.

IMPLICATIONS FOR PRESENTATION OF CASES

It seems to follow from all this that courts like the High Court need to be given the material which will guide them when they make decisions by

131 (1988) 165 CLR 107. For a criticism of the majority approach see Dawson, "Do Judges Make Law? Too Much?" pp11-15.

reference to the sort of criteria under consideration. But this is easier said than done.

In few cases, if any, will the relevant material have been addressed in evidence or otherwise presented to the trial court. The rules of evidence make it difficult to do so and it is often not foreseeable that a case will finish up in the High Court raising a point of principle. Economy of effort often argues against the presentation of such material in lower courts. It will not be open to the trial judge to make use of it because at the trial level the scope for changing the law is limited. The case therefore comes to the High Court with little material of the required type and not much prior consideration of the non-legal issues.

The submission of potentially large amounts of new material at the final appellate stage presents its own difficulties. There are the obvious ones of finding and assembling the material. Then there is the problem of agreement on supplementation of the record or the prospect of a further argument over this before a busy court which expects quite difficult cases to be argued in a day or less. There is the problem of time within the hearing for a proper consideration of the material which is presented. This is further complicated by the fact that a proper assessment of it is likely to require an expertise which counsel lack. The material, having never been adduced as evidence at trial, is presented to the High Court undigested, as it were, and not through the medium of an expert witness.

In my own experience the result of this is that whether or not relevant material is provided to the High Court is a hit and miss affair, depending on the predilections and interests of the counsel and solicitors involved. Certainly there is no protocol or systematic approach governing the matter. What is presented is quite selective, and it often receives little attention in submissions. Counsel are often, for various reasons, quite diffident about the use of such non-legal material.

The truth of the matter is that we still rely largely on the Justices' own attitudes and knowledge of society and such private research as they may think it appropriate to make. This is probably something with which judges and counsel feel more comfortable but, increasingly, it appears inadequate. The patchy approach to informing the Court on non-legal matters casts a shadow over the Court's claim to discern and interpret the values and social interests involved.

Four possible solutions are canvassed by Justice Davies in his paper "The Judiciary - Maintaining The Balance".[132] The first is for the Court to maintain its own research facility, a report being provided to the Court. This is a possibility but issues apart from cost would need to be addressed. To ensure that the researchers focussed their efforts on the correct issues, the parties would have to provide an appropriate indication of the direction of their contentions and the issues which they raised. There would have to be some protocol governing the scope of the research undertaken and the sources to be utilised. The parties would want the opportunity to make submissions on the report. If the traditional single hearing of an appeal is retained, all preparatory work and the report would have to be completed well ahead of the hearing to enable the parties to deal with the report in their submissions. The appeal process would obviously have to be altered quite significantly to accommodate all this.

The second is the more liberal use of the interveners to put relevant points of view. This also is possible but might be difficult to control. Hearings might become much longer. Interveners would tend to be representatives of the financially powerful and of those with access to government funding, the traditional lobby groups. There is a risk of the hearing turning into a kind of inquiry dominated by interveners rather than the immediate parties.

The third is the use of the Brandeis brief, a suggestion often made.[133] I have never seen one of these, and have no knowledge of their working. If it is provided by the parties, then my comment is that the parties are already at liberty to do so (subject to the rules of evidence and procedural arguments). If it is provided by someone else, then my question is by whom and on what basis? The Brandeis brief seems to add nothing other than another form of intervention.

The fourth suggestion is that the Court should have power to appoint an inquirer to inquire and report on its behalf. This seems to me to be essentially the same as the first, and to raise similar issues.

Each suggestion warrants consideration despite the difficulties alluded to. As far as I am aware, not much consideration of them has occurred in

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132 Davies, "The Judiciary - Maintaining The Balance" in Finn (ed), *Essays on Law and Government: Vol 1, Principles and Values* (Law Book Co, Sydney 1995).

133 For a brief discussion of the nature and uses of the Brandeis brief, see Zines, *The High Court And The Constitution* , pp390-392.

Australia. But there are some important underlying issues which have to be addressed.

If the High Court is going to be more activist, more inclined to attune the common law to the needs and values of society (and I think it should and will be) the part played by its own perception of society's needs and values will become more obvious.

First, will it continue to be accepted for the Court to rely largely on its own perceptions, supplemented rather haphazardly by what the immediate parties choose to provide?

Secondly, should the Court develop a process or protocol by which the parties are required to identify in advance issues on which non-legal material is relevant and proceed under a regime which regulates its preparation and provision to the court?

Thirdly, if any of Justice Davies' suggestions are adopted, what do we do about the added cost inflicted on the appellant and respondent, who would have this extra material intruded into their cases? Also, how do we avoid turning the appeal into an inquiry?

Fourthly, if we leave things as they are, do we need to reassess the judicial role and restrain the scope of judicial creativity on the grounds that necessary material is often not before the Court and it should adjust its technique accordingly? But if that is the answer, how do we identify the point of restraint? And, do we accept the converse, that more reform will be left to Parliament?

My own conclusion is the conservative one that the appeal process should remain essentially what it is, a contest between the parties in dispute. I think that the Court will, at the cost of extra time and with some added burden for the parties, have to face the prospect of identifying matters on which non-legal material is appropriate and should be provided by the parties. I also favour a very cautious encouragement of intervention, but in my opinion this should usually be confined to governments who (this may sound optimistic) should be expected to provide material relevant to the general community interest. I believe that if the process of informing the Court becomes an adversarial one (beyond the appellant and respondent) it is likely to get out of control.

Finally, I think that the Justices have to articulate more clearly and more rigorously than they currently do the role of non-legal factors in their

reasoning. The passages cited demonstrate, I suggest, that important conclusions are supported by quite brief and impressionistic references to society's values and interests. We can expect that with more explication will come more criticism, but that will have to be borne.

In the end my approach puts the emphasis back on proper judicial technique. This is where it has been, and I believe that it has worked satisfactorily. Differences will remain as the critique by Justice Dawson shows.[134] Individual temperament and inclinations will continue to play a part, but that is unavoidable in a system operated by men and women. Perhaps in times of more rapid social change, and in a more diverse and assertive and critical society, my approach will be found wanting. But I think that caution is required here.

This also raises questions as to whether we can continue, if it is essential to ensure that the common law is not just technically sound but is also meeting society's needs, to rely upon technical legal training for our lawyers coupled with what they learn about society from experience in their time between University and appointment to the bench. I do not attempt to answer that here, as it raises many other issues of appointment to the bench.

WHERE TO FROM HERE?

Judicial law making raises inescapable issues both for judges and lawyers. There is a lot of work still to be done in resolving those issues.

At the risk of over-simplification I suggest that the central issue is for the Court to articulate clearly the method which it now uses in preference to Sir Owen Dixon's approach of strict legalism. I have attempted to show that the new method raises difficulties. A clear articulation will be difficult, and will attract renewed critical scrutiny of the Court's role. But honesty is the best policy, and I suggest that this is where the future of a healthy common law lies.

The critical scrutiny is likely to focus on the use of non-legal sources and the social objectives and consequences of judicial law making. As law is seen more clearly as a means to an end, and the judges as the shapers of the law to some end, the end they choose and how and why will have to be justified.

134 Dawson, *Do Judges Make Law? Too Much?* pp3-9

Again at the risk of over-simplification, I suggest that the more discussion of judicial law making leads to an increased awareness of it, the more important will be the issue of its legitimacy, in the sense of the line between the courts and Parliament.