'HARD' CASES, FLOODGATES AND THE NEW RHETORIC

by

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" Any law will give rise to 'hard cases' "†

INTRODUCTION

Sir Robert Megarry once declared that the most important person in a trial is the 'loser'.[1] It must be made evident to him that he lost for good reasons. Otherwise he will never again respect the law.

Why then do judges often (in effect) say to losers, 'Bad luck, old man, but hard cases make bad law . . .' Sometimes the remark is made almost with satisfaction. *Dura lex sed lex.* ' did justice according to law.' One often wonders whether that result was as unavoidable as it looked to that judge. Would the 'floodgates' have opened had he decided the other way ?

The classic example of this fear appears in the shocked responses of the Court of Exchequer in *Winterbottom* v. *Wright.*[2] The plaintiff, lamed for life by the negligence of the coach-maker defendant, was refused any remedy. Lord Abinger C.B. pronounced, in this 'action of the first impression . . . We ought not to permit a doubt to rest upon this subject, for our doing so might be the means of letting in upon us an infinity of actions . . .'[3] Alderson B. added:

> 'if we go one step beyond that, there is no reason why we should not go fifty;'[4] and Rolfe B. added his piece: 'it is no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law'.[5]

Lord Buckmaster, in *Donoghue* v. *Stevenson*[6] was vehement too:

> If such a duty exists, it seems to me it must cover the construction of every article, and I cannot see any reason why it should not apply to the construction of a house. If one step, why not fifty?[7]

This has become a slogan among lawyers. Sir Walter Raleigh, at his trial, asserted, 'The proof of the common law is by witness and jury.

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† Plato, *Sophistes* 294b-c.

1 R. Megarry, *A Second Miscellany-at-Law* (1973) at p. 168; (1980) 54 *A.L.J.* 61 at p. 64.

2 (1842) 10 M. & W. 109; 152 E.R. at p. 402.

3 Ibid at p. 113; at p. 404.

4 Ibid at p. 115; at p. 405.

5 Ibid at p. 116; at pp. 405-406.

6 [1932] A.C. 562.

7 Ibid at p. 577.

Call my accuser before my face, and I have done.' The prosecutor, Sir Edward Coke, replied, 'I marvel, Sir Walter, that you, being of such experience and wit, should stand on this point, for so many horse stealers may escape if they may not be condemned without witnesses!'[8]

Hard Cases are of two kinds. (1) 'hard', as different, novel, random 'borderline', 'troublesome'. (These we do not discuss). (2) 'hard', as being 'unjust' in one sense, but required, it is said, by 'the rules of the legal game'. Terms such as 'opening the floodgates', 'dangerous precedent', 'invitation to crime', 'the thin edge of the wedge', are typical maxims. (Often, of course, a case may be 'hard' in *both* senses: 'difficult to decide' and 'unfair that....') Other excuses are: 'there is no cause of action' or 'the law is settled'. Lord Raymond exclaimed in terror long ago: 'We must keep up the forms of action' otherwise he foresaw the gravest confusion.[9] Yet we have managed very well without them, and, as Lord Atkin told the House of Lords, one must now walk through these ghosts, ignoring their clanking chains.[10]

In recent years, legal theories have been created around 'Hard Cases'.[11] In spite of the fertile jurisprudential debate which has developed around Dworkin,[12] 'Hard Cases' have continued to arrive before the courts. The judges have had to decide these hard cases. In so doing their stated opinions as to how they perceive their function have shown a marked change in attitude. Today there is a greater awareness of their power of 'discretion' and a greater honesty in its application, with overt considerations of policy issues.

The purpose of this article is to examine:

(I) Past judicial fears in several areas.
(II) The changing judicial attitudes.
(III) The new terminology and techniques.

I WHY THE FEARS?

Why is a hard case 'bad' law? (a) Because it is evil, or contrary to principle? (That fear is excusable, though rare.) (b) Because many others might seek the remedy? (That is mere prophecy; courts can control rash extensions, 'draw lines' ...) (c) Because it leads to heavy expense or delay in the *administration* of justice? (A poorer reason today! That is not the problem of the courts today, as it once was.) (d) Because it is *novel*, and therefore disturbing to precedent and consistency?

As a response to some of these fears, legislatures have fixed the rules of many transactions so that there is less scope for courts to devise new standards. They need only *apply* them to facts as they arise. Parliament

8 (1603) 2 St. Tr. 1 at cols. 15-16.
9 *Reynolds* v. *Clarke* (1725) 1 Str. 634 at p. 635; 93 E.R. 747 at p. 748.
10 *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1 at p. 29.
11 R. Dworkin, *Taking Rights Seriously* (1977), especially chapter 4, entitled 'Hard Cases'.
12 *E.g.* the symposium in (1977) 11 *Georgia L. Rev.*

itself has destroyed many expectations, suddenly rejecting an old standard. The common fear that expectations will be upset is not so strange. The reluctance of the judges to disturb precedent is primarily to protect life, liberty, and *property* — basic rights — and they are right to be cautious. The Practice Statement of the House of Lords made the correct distinction between 'settled' and 'not settled' law as a major factor in deciding whether to overrule a doctrine.[13] Yet this caution has often been irrational and unfair to the loser.

Sometimes the sense of 'righteous justification' is striking. One critic perceives about some judges that

> they see positive virtue in regarding the law as a system that can, and indeed should, be valued quite apart from its social consequences. Judges emphasize the adage that kinds of hard luck cases make bad law but seem less concerned that bad law makes hard cases.[14]

Andrew Watson, an American psychologist, echoes this complaint from his experience:

> In Britain and for the most part in the United States, all depends on the skill of counsel in persuading a judge. Some counsel possess these skills, some do not. It is sheer chance if counsel possesses these skills. We cannot readily blame them, however, for there is nothing in the formal training of lawyers to develop their potential capacity to deal with the psychological aspects of law practice. While great lawyers have this skill to an impressive degree, the vast majority seem to lack even what might be called commonsense awareness of their clients' emotions. This I attribute to a negative effect of legal education, as well as partially to the personality traits in those who choose to practice law. Lawyers are taught and urged to distrust and to eliminate emotions from their work. As if this were possible! They might as well attempt to fly with their hands.[15]

Sometimes even kindly judges admit their helplessness. Lord Atkin said of the rule of common employment:

> At the present time this doctrine is looked at askance by judges and textbook writers. 'There are none to praise, and very few to love.' But it is too well established to be overthrown by judicial decision.[16]

Examples of Fear

(i) *Necessity*

Necessity is an old scarecrow, often useful, but 'it knows no law'. Sympathetic as the judges were to the starving seamen, when they murdered the cabin boy, Lord Coleridge C.J. felt obliged to declare: 'It is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime'.[17]

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13 [1966] 1 W.L.R. 1234.
14 M. Zander (ed.), *What's Wrong with the Law* (1970) at p. 5.
15 Ibid at p. 63.
16 *Radcliffe* v. *Ribble Motor Services Ltd.* [1939] A.C. 215 at p. 223.
17 *R.* v. *Dudley and Stephens* (1884) 14 Q.B.D. 273 at p. 288.

Glanville Williams objected later that often the necessity of a killing has been recognized: 'It is in reality a dispensing power exercised by the judges where they are brought to feel that obedience to the law would have endangered some higher value'.[18]

In *R.* v. *Bourne*,[19] Magnaghten J. did not specifically speak of necessity to justify the abortion of the young raped girl, but the courts really excused him on a ground very close to that. (He later regretted the resulting flood and battled to oppose any extension of abortions, when he saw what was happening in less tragic cases.) Necessity is a double-edged sword !

Opposing views are rife as to consequences being 'disastrous'. In *D.P.P.* v. *Smith*,[20] the House of Lords adopted an *objective* test of intention, 'the natural result of behaviour', because otherwise too many criminals would escape by pretexts. An outburst of criticism erupted. The Australian High Court, led by Dixon C.J. himself, refused to follow it. He said that the propositions laid down were misconceived and wrong.[21] Dixon C.J. did not refer directly to the injustice, but obviously believed the objective test was unjust. No harm would be caused if the accused were allowed to speak and tell the jury his reasons. If they disbelieved him, they would convict him.

Duress, as a type of necessity to save oneself, has caused strong debate, as criminal lawyers know to their cost.[22]

Again the House of Lords and the High Court of Australia expound contradictory doctrines. In *Lynch* v. *Director of Public Prosecutions for Northern Ireland*[23] Lord Salmon insisted that to excuse Lynch on the ground of duress, (he had driven the murderer's car in the Irish troubles), might 'be a charter for terrorists, gang leaders and others'. Others did not share his fears of:

> the destruction of a fundamental doctrine of law, which might well have far-reaching and disastrous consequences for public safety, to say nothing of the important social, ethical and maybe political implications.[24]

In *Abbott* v. *R.*[25] case the Privy Council were also divided as to how far duress was available when the accused had taken a more active part. A 'charter for wrongdoers' has to battle against the danger of 'asking too much of human frailty'; but it is easier to convict when he took a more active part in the murder as Abbott did.

Australian courts have differed from English courts about the defences of an, 'honest and reasonable belief' in facts in statutory crimes. English courts had clung to the criterion that a man could be found guilty of

18 G. Williams, *Criminal Law: The General Part* (2nd ed., 1961) Ch. 17.
19 [1939] 1 K.B. 687.
20 [1961] A.C. 290: *cf. R.* v. *O'Connor* (1980) 54 A.L.J.R. 349.
21 *Parker* v. *The Queen* (1965) 111 C.L.R. 610 especially at p. 632.
22 I. H. Dennis, 'Duress, Murder and Criminal Responsibility', (1980) 96 *L.Q.R.* 208.
23 [1975] A.C. 653.
24 Ibid at p. 767.
25 [1977] A.C. 755.

bigamy or other crimes, even though he had made a genuine and reasonable mistake as to his position. An absurd fear, later rejected.

Australian courts, after *Proudman* v. *Dayman*,[26] had adopted the milder view; ultimately the English courts came around to accept it.[27] Australian courts, led by Dixon C.J., are far more willing to trust the jury to assess the defendant's story; few guilty people escape on these grounds. There has been no deluge as a result The *hard case* doctrine has not been worked on as to provocation, or the duty to run away when attacked. Everyone remembers the famous aphorism of Holmes J. on the fear that too many killers would escape if the rule was rigidly applied:

> Detached reflection cannot be demanded in the presence of an uplifted knife.[28]

Many terrified people would be convicted because they had not fled. The rule must be modified. Necessity, in any form, is often in fact accepted as a legitimate defence and has not created chaos in criminal law when applied.

(ii) *Torts*

The fear in this area bears the mark of the terrifying unlimited liability. The law of torts has rested on two competing pillars. A typical floodgate action, the old *Case of Thorns* (1466)[29] shows the dilemma, where the defendant had gone on to the other party's land to gather up thorns that had fallen from his fence when he cut it back: The judges were divided:

> Littleton J.: 'And, Sir, if it were law that he could enter and take the thorns, by the same reasoning, if he cut a great tree, he could come with his carts and horses to carry off the tree, which is not reason, for peradventure he has corn or other crops growing etc. No more may he do it there, for the *law is all one* in great things and in small. . . .' But Choke C.J. replied: 'if the thorns or a great tree had fallen on the land by the blowing of the wind, in this case he might wish to take them, since the falling had not then been his act, but that of the wind'.[30]

The most common maxim, until fairly recently, is that, 'one must not use one's own rights or powers to do harm to another'. (*Sic utere tuo ut alienum non laedas.*)[31] The opposite is that every *moral* right ought not be turned into a *legal* right. American jurists find that this second maxim (*damnum absque injuria esse potest*)[32] has become now more powerful.

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26 (1941) 67 C.L.R. 536.

27 *R.* v. *Gould* [1980] Crim. L.R. 432.

28 *Brown* v. *United States* (1921) 256 U.S. 335 at p. 343.

29 Y.B. Mich. 6 Ed. 4, f. 7, pl. 18; cited in C. H. S. Fifoot, *History and Sources of the Common Law: Tort and Contract*, (1949) at p. 195.

30 *Op. cit.* at pp. 196-197.

31 *Fletcher* v. *Rylands* (1866) 4 H. & C. 263; aff. *sub. nom. Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330. See also *Broom's Legal Maxims*, 32, 248, 414, 669.

32 *Broom's Legal Maxims*, 13, 521, 1028.

As the law penetrates more and more, and people are more crowded together, it is far easier to cause damage to another by a trivial act or sheer forgetfulness. To penalize a negligent 'actor' for an enormous sum for a slight slip would be unfair. Some 'harms' one must put up with in real life. Nevertheless, the two maxims still do battle. Tort law is now recognizing rights it would have denied a hundred years ago on the grounds of the fear of 'quagmires' claims, where the law would be overwhelmed. Even today the system cannot afford to give legal status to all 'harms', e.g. competition in business.[33]

Harm done to third parties by careless manufacturers or casual advisers was recognized, but a remedy was a long time forthcoming. Two judges in *Candler* v. *Crane Christmas & Co.*[34] were terrified by the fear expressed by Cardozo J. that there was a danger of creating, '... liability in an indefinite amount, for an indeterminate time, to an indeterminate class'.[35] Asquith L.J. raised the spectre of a small error by a careless marine hydrographer which could result in the loss of the *Queen Mary*.[36] Was he to be liable for tens of millions of dollars? Only Denning L.J. saw that these dangers could be avoided by putting precise *limits* on the doctrine. It took thirteen years for the House of Lords to back him up — and no dreadful results have ensued from *Hedley Byrne & Co. Ltd.* v. *Heller Partners Ltd.*[37] The 19th century was ambiguous about the effect of new actions in conspiracy. The disputes in the 'conspiracy cases' raised issues which the courts feared would ruin employers. Confusion has lasted until today. This debate is based on fear of disaster — either to business or to unions.

The action for damages for nervous shock began with the Privy Council's strong warning:

> the difficulty of proving that alleged physical injuries were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.[38]

Psychologists would not be able to distinguish between true and faked claims. Fortunately, later courts were prepared to reject such an intransigent attitude: they moved cautiously to extend the range of claimants for some fifty years, although sometimes requiring a legislative prod.[39]

The dreadful case of *Chester* v. *Waverley Corporation*,[40] (the distraught mother, searching for her child and finding it in the unfenced trench), which inspired Evatt J. to make one of his most moving and brilliant judgments, when he asked the High Court to pity the mother, occurred as late as 1939. The others, though doubtless decent men who

33 *Mogul Steamship Co. Ltd.* v. *McGregor, Gow & Co.* [1892] A.C. 25 (H.L.).
34 [1951] 2 K.B. 164.
35 Cardozo C.J. in *Ultramares Corporation* v. *Touche* (1931) 174 N.E. 441 at p. 444.
36 [1951] 2 K.B. 164 at pp. 194-195.
37 [1964] A.C. 465 (H.L.).
38 *Victorian Railways Commissioners* v. *Coultas* (1888) 13 App. Cas. 222 at p. 226.
39 *E.g. Law Reform (Miscellaneous Provisions) Act*, 1944 (N.S.W.).
40 62 C.L.R. 1.

felt sympathy for her, regretted that since the Council owed her no legal duty; to open up a duty might lead to unhappy consequences. Not only in such a case as the present, but in every case where an accident caused by negligence had caused a serious nervous shock, there might be a claim for damages, on account of nervous injury. It was not until 1970 in Australia[41] and 1982 in England[42] that a reasonable foresight test was allowed a relatively unrestricted operation in the area of nervous shock as in other areas of personal injury.

The maxim works both ways. A curious disagreement about 'hardness' arose in *McHale* v. *Watson.*[43] The plaintiff, a boy of twelve years of age, threw a piece of steel which accidentally hit a girl of nine, a few feet away, in the eye. Kitto J. declared that the standard of care was that to be expected from a *boy of twelve.* That was *hard* on the plaintiff. 'Sympathy with the injured girl is inevitable; but children must put up with the *risks of life* . . . One such risk is that boys of twelve will behave as boys of twelve . . .'[44] Using the very opposite principle, Menzies J. stated the correct standard of care expected was that of a, '. . . *man* of ordinary prudence'. He too added that: 'it may be of course, objected that the adoption of a hard-and-fast rule to all cases will sometimes produce what appears to be a hardship but, if so, it should also be recalled that hard cases make bad law'.[45] Menzies J. admitted that, in the end, it was a matter of the judge's *impression* of who ought to suffer *unjustly.* Both judges agreed on the maxim but applied it to opposing parties ! That was as late as 1964; but one can understand the need to balance justice, though the results were different.

Contributory negligence only developed slowly even after statute gave it a start. It was used often to defeat the claims of victims. The courts have since used it to better advantage, yet have controlled it, in view of the apprehension that wrong-doers' duties might be too grossly limited. The *fellow servant* defence was justifiable in 1837 in the Victorian household and in the small factory, where people could easily leave if they found conditions too hazardous.[46] It became ridiculous in the large supermarket or massive industrial factory. Yet it was 'too settled' to change; for the judges were over-fearful of vast claims against employers by thousands of victims. The courts were timid, because the spectre of ruinous suits stood ever before them, especially since the judges were themselves middle class employers of servants.[47]

(iii) *Contracts*

No more fertile ground has existed for repudiating, 'frightening results' than contract. One could find dozens of examples of such severe

41 *Mount Isa Mines Ltd.* v. *Pusey* 125 C.L.R. 383 (H.C.). Cf. *Jaensch* v. *Coffey* (1984) 54 A.L.R. 417.
42 *McLoughlin* v. *O'Brian* [1983] 1 A.C. 410 (H.L.).
43 (1966) 115 C.L.R. 199.
44 Ibid at p. 216.
45 Ibid at p. 225.
46 *Priestley* v. *Fowler* 3 M. & W. 1; 150 E.R. 1030.
47 *The Judiciary,* The Report of a Justice Sub-Committee (1972) at pp. 79-81.

attitudes. Lord Mansfield had gallantly tried to make what seems now to be sound and slight changes to the doctrine of consideration. He allowed writing as a proof; but the House of Lords rejected it as a 'dangerous innovation'.[48] His second effort, to use moral reasons, was similarly overthrown. 'Indeed' Lord Denman announced placidly, 'the doctrine would annihilate the necessity for consideration at all'. Claims would multiply enormously.[49] A rare exception was the blunt retort of Lord Lindley in the case of *Carlill* v. *Carbolic Smokeball Co. Ltd.*,[50] when it was argued that it would be difficult to disprove a 'rogue's argument' that he had used the ball if a contract were recognized. His retort was, '... if they have been so unwary as to expose themselves to a great many actions, so much the worse for them.[51]

Privity of contract has not fully disappeared. The dread of a spate of vexatious suits by third parties — based perhaps on the notion that one ought not to be compelled to deal with a stranger with whom he would not deal if he were free — was strong. People could not protect themselves against such risks. In *Beswick's*[52] case the plaintiff won only because she was also the executrix; in *Coulls*[53] case because the promise had been made to joint parties and the principal promisee had died. Lord Scarman complained bitterly some years ago that Parliament was well aware of this anomaly yet, despite repeated pleas, had done nothing. He warned that if Parliament did not act, the House of Lords would.

The High Court of Australia disagreed on another contract issue.[54] Where an agent sold a property to B, not knowing that A had taken over B's business, and the sale went through, A refused to pay the commission. Should a term should be implied? The majority thought that, in the interest of business stability, it was better that the existing rule should be retained, because there was not an actual sale *to A*. Stephen J. would like to have gone the other way but:

> one must guard against any tendency to strain the proper limits of construction and implication due to a feeling of apparent injustice ... the law has made earning a commission an all-or-nothing affair. ... To adopt unduly extended concepts of effecitve cause disregards the settled approach of the law in this field.[55]

The courts were slow to remedy the old hardship caused by the presumption that all parties are rational and competent businessmen. That was a legitimate excuse when freedom of contract was one of the main features, as Paul Johnson shows,[56] in creating an enormously higher standard of living in England, and raising that of the lowest classes far above that of the 18th century. Many suffered cruelly; but in the end

48 *Rann* v. *Hughes* (1778) 4 Bro. Parl. Cas. 27; 2 E.R. 18.
49 *Eastwood* v. *Kenyon* (1840) 11 Ad. & El. 438 at pp. 450-451; 113 E.R. 482 at pp. 486-487.
50 *Carlill* v. *Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256.
51 Ibid at p. 265.
52 *Beswick* v. *Beswick* [1968] A.C. 58.
53 *Coulls* v. *Bagot's Executor and Trustee Co. Ltd.* [1967] 40 A.L.J.R. 470.
54 *L. J. Hooker Ltd.* v. *W. J. Adams Estates Pty. Ltd.* (1977) 138 C.L.R. 52.
55 Ibid at p. 78.
56 P. Johnson, *Enemies of Society* (1977), esp. Ch. 5.

their descendants live at an extremely high standard compared with any labouring class in the past. Yet that did not justify unfairness. It was later seen as interfering with free will, if one party suffered through weak bargaining power or ignorance.

A particularly silly fear of the outcomes appeared in a pronouncement of Lord Ellenborough.[57] A ship's crew had been promised by the captain extra wages if they worked very hard to save the ship and they did so. The ship was saved; yet the owners refused to pay the extra wages. Lord Ellenborough was not impressed by their noble effort to save the owner's property. Their extra toil was not a true consideration, despite the captain's agreement, '... because,' said His Lordship astonishingly, 'they would in many cases suffer a ship to sink if they did not get a higher wage'. As late as 1902 Kekewich J. turned down unilateral mistake as a defence to a contract;[58] for this would lead to imaginary or false claims: 'We must not open the door to perjury and destroy the security of contracts'.[59]

Beresford v. *Royal Insurance Co.*[60] led to an obvious injustice. The Company had promised to pay the deceased's estate on its insurance policy if he did not commit suicide within two years. That period had elapsed before he took his life. The defendant Company, received the premiums, but refused to pay. The House of Lords had little hesitation in deciding that the contractual liability must come second to the principle of public policy that 'a man could not profit from his own wrong'. That is a sensible principle in itself (despite numerous exceptions such as adverse possession). The legalistic excuse was, however, that in this case suicide was still a criminal offence, although no longer regarded as a grave sin. There is, however, little legal analogy between felonies, like fraud, murder and assault or duress, and suicide. The felon in suicide harms only himself. What advantage then did the suicide get? What profit? The rather feeble excuse was that he had the satisfaction of knowing that his creditors, or his dependants, would profit from his gallant act! The House of Lords technically could say that this might open the way to criminals who gained real benefits. A poor example. Lord Atkin acknowledged that, if the suicide had assigned the policy before his death, then the assignee could have recovered, although he would really have profited. The decision was really *hard* on the beneficiaries, who had done no wrong. The fears of a terrifying precedent were groundless. How many insured persons would thus take their own lives? This showed logic taken to absurdity.

(iv) *Morality*

Over-rigid views used to end up in grim warnings. Morality was often a means to validate 'disaster talk'. Older lawyers will remember the famous case about Elinor Glyn's novel, *Three Weeks*. A film based on

57 *Stilk* v. *Myrick* (1809) 2 Camp. 317; 170 E.R. 1168.
58 *Van Pragh* v. *Everidge* [1902] 2 Ch. 266.
59 Ibid at p. 272.
60 *Beresford* v. *Royal Insurance Co. Ltd.* [1938] A.C. 586.

it was attacked as an infringement of copyright. Younger J. agreed that the film had not weakened the monetary value of the book; and there was no breach of copyright. However, he went on to declare in horror:

> The episode described in the plaintiff's novel, and which he alleges has been pirated by the defendants, is in my opinion, grossly immoral in its essence, in its treatment, and in its tendency. . . . Now it is clear law that copyright cannot exist in a work of a tendency so grossly immoral as this. A work which, apart from its other objectionable features, advocates free love and justifies adultery where the marriage tie has become really irksome. It may well be that the court in this matter is now less strict than it was in the days of Lord Eldon, . . . it is enough for me to say that to a book of such a cruelly destructive tendency no protection will be extended by a court of equity.[61]

People still disagree about judges' opinions about obscene literature, as they did then. Equity did not exist to enforce contracts which were immoral. Authors and some critics have complained when censorship of works of alleged literary merit are penalised as obscene in modern conditions. No satisfactory test has emerged. *Lady Chatterley's Lover* stressed a not too distant panic about literary works depraving the public, even if few ordinary folk happened to read it. The 'depraving and corrupting' effects of such works are humorously described by John Mortimer Q.C. in his autobiography.[62]

(v) *The Administration of Justice*

Less dramatic than the cry of 'necessity' or 'outrageous consequences' has been 'inconvenience to the administration of justice'. The House of Lords' typified that reason: the view that a barrister ought not to be liable in negligence for his behaviour in court. This reason aroused outraged feelings of people in other professions not thus exempt.[63] The courts rapidly cut down the barrister's exemption to work connected with or actually done in court.[64] One reason was the dislike of overburdening busy men by re-opening old cases.

(vi) *Cost*

The costs and delays of actions seemed grave problems in the past. It seemed a solid reason for Lord Halsbury to urge in 1898 that, the House of Lords could not overrule its own previous decisions.[65] He said:

> Of course I do not deny that cases of individual hardship may arise, and there may be a current of opinion in the profession that

61 *Glyn* v. *Western Feature Films Co.* [1916] 1 Ch. 261 at p. 265.
62 J. Mortimer, *Clinging to the Wreckage* (1983).
63 *Rondel* v. *Worsley* [1969] 1 A.C. 191.
64 *Saif Ali* v. *Sidney Mitchell & Co.* [1980] A.C. 198. A different explanation of overburdening the administration of justice can be found in the exchange of views in the Australian Law Journal between P. Robertshaw and Mr Justice Blackburn. See P. Robertshaw, 'Characteristics of the Judicial Group and their Relationship to Decision-Making' (1973) 47 *A.L.J.* 572-585; Mr Justice R. A. Blackburn, 'Plain Words on the Judicial Process', (1974) 48 *A.L.J.* 229-232; P. Robertshaw, 'New Perspectives on the Judicial Process', (1976) 50 *A.L.J.* 84-88.
65 *London Street Tramways* v. *London County Council* [1898] A.C. 375.

> such and such a judgment was erroneous; but what is that occasional interference with what is perhaps abstract justice, as compared with the inconvenience — the disastrous inconvenience — of having each question subject to being re-argued and the dealings of mankind rendered doubtful by reason of different decisions, so that in truth and in fact there would be no real final court of appeal. My lords, 'interest rei publicae' that there should be 'finis litium' sometime and there could be no 'finis litium' if it were possible to suggest in each case that it might be re-argued because it is 'not an ordinary case' whatever that may mean.[66]

He did not have enough faith in his fellow judges to realize that, once the House of Lords had spoken, few later Houses would challenge it. His was a dismal and unreal prophecy.

A more optimistic view had been the retort of Holt C.J., to the defence that a particular claim would strain the resources of courts and official behaviour. In his support of the voter's right to give his vote, he asserted boldly:

> And it is no objection to say that it will occasion a multiplicity of actions: for if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense . . .[67]
>
> To allow this action will make public officers more careful to observe the constitution of cities and boroughs and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief and tends to the prejudice of the peace of the nation.[68]

This argument was used by Buller J., no rigid legalist, and a long time associate of Lord Mansfield, in the opposite unhappy way:

> All arguments on the hardships of a case must be rejected when we are pronouncing what the law is, for such arguments are only quicksands in the law and, if indulged, will soon swallow up every principle of it.[69]

(vi) *Equity*

Equity was once a strong opponent of the *hard case* viewpoint. Its origin was specifically to protect those whom the common law saw as morally deserving, but outside its pewer to help. Later, equity often imposed a higher degree of care on a trustee than that one would use about one's own affairs, which can make life hard, but is justified in the interests of all beneficiaries. Even Lord Radcliffe declared as recently as 1962 that:

> 'Unconscionable' must not be taken to be a panacea for adjusting any control between competent persons when it shows a rough edge to one side or another . . .[70]

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66 Ibid at p. 380.

67 *Ashby* v. *White* (1704) 2 Ld. Raym. 938 at p. 955; 92 E.R. 126 at p. 137.

68 Ibid at p. 956; at p. 137.

69 *Yates* v. *Hall* (1785) 1 T.R. 73 at p. 81; 99 T.R. 979 at p. 983.

70 *Campbell Discount Ltd.* v. *Bridge* [1962] A.C. 600 at p. 626.

One cannot quarrel with this precaution as a *standard;* but there must have been many cases where the edge was especially rough.

The reproach about, 'the length of the Chancellor's foot' terrified later Equity Chancellors often into denying remedies lest they multiplied actions excessively. Their activity became limited; they, too, foresaw chaos, if every disappointed complainant came running to the Chancery and that this would make men afraid to become trustees liable to be penalised for some trumpery breach. Unhappily, it shut the gates on many fair claims.

The older view had been accepted reluctantly even by Bowen L.J.:

> Feeling no confidence at all myself that this presumption, when applied to this particular case, may not be absolutely leading us away from the true wish of the testator, yet it seems to me it would be wrong to break through precedent, and I record my judgment accordingly in favour of the appeal as a sacrifice made upon the altar of authority.[71]

Lord Evershed, no harsh judge, refused to help a plaintiff who had a claim in equity, but who had certainly neglected his own affairs:

> Extravagant liberality and immoderate folly do not of themselves provide a passport to equitable relief. A man who is so foolish as not to take normal steps to protect his own interests deserves to lose. Otherwise there would be great injustice to those who have been competent.[72]

This doctrine favours what Holmes called the 'bad man', who looks only to his own selfish interests and makes sure that he acts, 'within the law' in all affairs, against the 'good man', who through lack of knowledge or ability, makes some silly error. How far equity ought to protect the ignorant, the stupid and the foolish, is of course a matter of *degree.* It once used to be generous to them. Later, it relied on the sad social consequences which the courts foresaw as following any change. It is not always equitable to be 'hard' on the foolish — deceived by a smarter party.

A Summary of Fears

Three ideas seem to emerge as justifying the fear of courts in extending their consideration of certain areas of human activity.

(a) The floodgates argument, in its simplest form, rejects meritorious cases because of the fear of proliferation or other inconveniences in the administration of justice. Part of the answer to this is an increase in manpower. The twentieth century has seen an increase in court personnel and a proliferation of other adjudicative bodies. Moreover, as will be seen, such fears, when ignored by the courts, have proved to be groundless.

(b) Another aspect of the fear relates to actions which are seen as meritorious in themselves but arise in relationships not suited to

71 *Montague* v. *The Earl of Sandwich* (1886) 32 Ch.D. 525 at p. 544.
72 *Tufton* v. *Sperni* [1952] 2 T.L.R. 516 at p. 519.

judicial intervention. When a woman tried to enforce a husband's promise of a sum of money, Atkin L.J. said:

> All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations.[73]

Changing social attitudes towards marriage have brought about a genuine flood in relation to family relationships which are now the subject of prolific litigation. They often lead to the most alarming bitterness, as recent events surrounding the Family Court disclose.

(c) Floodgates arguments have been used to defeat causes of action which turn on *subjective* intention or appreciation, and thereby lend themselves too easily to abuse or evasion. Here the courts are often too denigrating of their own ability to assess the rogue. As will be seen, such a fear appears to be groundless and, whilst not without its difficulties especially in the area of criminal law, subjective criteria have not proved greater engines for fraud than other legal criteria of a more objective nature.

2. THE CHANGED JUDICIAL ATTITUDE TODAY

The atmosphere has improved in many areas. How has this come about? Cassandras are fewer and quieter. Disorder or chaos, no longer raise the ghosts of the past so quickly.

(i) *Contract*

There are times when consequences are genuinely important. Thus Lord Herschell was rightly worried about invitations to treat as constituting a promise. He said, reasonably enough, about the rule that a bookseller's catalogue of his current list of books for sale was not permanently binding:

> If it were not made, the merchant who had issued a price list of wines does not undertake to supply an unlimited quantity of the wine described at the price named, so that as soon as an order is given there is a binding contract to supply that quantity. If it were not so, the merchant might find himself involved in any number of contractual obligations to supply wine of a particular description which he would be quite unable to carry out, his stock of wine of that description being necessarily limited.[74]

A few illustrations illustrate the new approach. Where a woman had renounced a claim on being promised that action would not be taken against her, most of the High Court thought that she had not made a true promise, because she had no legal claim, and therefore her promise was not real.[75] However, Dixon C.J., with his customary sense of fairness, dissented: while she had not suffered a clear *financial* loss, she had 'saved trouble' of various kinds, including a threat of actions, and that was sufficient consideration. He did not fear a multiplicity of actions.

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73 *Balfour* v. *Balfour* [1919] 2 K.B. 571 at p. 579.
74 *Grainger & Sons* v. *Gough* [1896] A.C. 325 at p. 333.
75 *Ballantyne* v. *Phillott* [1961] St. R. Qd. 562.

Again, where vendors and purchasers had agreed that a vital certificate should be given by the Chief Engineer of Railways, that document was held to be conclusive and final.[76] The Railways Commissioners were judges in their own cause: the Court nevertheless said, with some regret, that this could not be avoided and that the persons who entered into the contract well knew what they were letting themselves in for. Menzies J. agreed that it was an obscure and oppressive contract, on its face. Nevertheless, he looked at the balance of justice involved. The contract was

> so outrageous that it is surprising that any contractor would undertake work on its terms. Such a contract tempts judges to go outside their function and attempt to relieve against the harshness of what has been agreed.[77]

There had been no improper conduct by the Chief Engineer and therefore the losing party should accept the result, which was not unjust, though unusual. In another case, the High Court split as to whether one party who undertook to supply certain parts for helicopters was legally liable because the parts were defective.[78] Both sides knew the parts were manufactured in America and that the Australian agent had no chance of inspection. The user had suffered a loss thereby. Should a term be implied that the supplier be excused? Barwick C.J. said, 'No. This was not such a suitable situation.' Others agreed. Jacobs J., however, said that, 'the implication of warranties... is based on what judges representing the community of which they are part say is a fair and reasonable interpretation of what the parties themselves would have stated if they had turned their minds to the question'. That test was draconian! Menzies J. also dissented: the parties knowingly relied on the manufacturer, who could not be sued; therefore, since the fault was the manufacturer's, the Australian agent should not be responsible. Once again it was difficult to know which was the lesser injustice; but the High Court made *justice* its test and not fear of future consequences.

(ii) *Tort*

Lord Morris of Borth-y-Gest confirmed the new approach in tort:

> If the test as to whether in some particular situation a duty of care arises may in some cases have to be whether it is *fair and reasonable* that it should so arise, the court must not shrink from being the arbiter.[79]

Despite fears that professional men and experts everywhere would be in grave danger if they opened their mouths, the High Court of Australia had no compunction about imposing heavy responsibility on careless advisers.[80]

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76 *South Australian Railway Commissioners* v. *Egan* (1973) 130 C.L.R. 506.
77 Ibid at p. 512.
78 *Helicopter Sales (Australia) Pty. Ltd.* v. *Rotor-Work Pty. Ltd.* (1974) 132 C.L.R. 1.
79 *Home Office* v. *Dorset Yacht Co. Ltd.* [1970] A.C. 1004 at p. 1039, authors' italics.
80 *L. Shaddock & Associates Pty. Ltd.* v. *Parramatta City Council* (1981) 36 A.L.R. 385.

There may be an injustice to *either party*. Thus Denning L.J. said, where a doctor, who had given an injection of a substance which turned out to be highly dangerous, but whose defects were not obvious at the time, was sued for negligence to the unhappy plaintiffs:

> These two men have suffered such terrible consequences that there is a natural feeling that they should be compensated, but we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. The doctors would be led to think more of their own safety than of the good of their patients.[81]

Later judgments have modified this broad dictum. Here the balance came down in favour of the hospital, where quick decisions have to be made by overworked staff (if there has been negligence hospitals can insure). On the other hand, exceptions to Lord Denning's wide excuse have been made to equalise justice to patients.

In his history of the common law, Milsom points out that the more perceptive judges have always managed to avoid injustice where some existing canon stood in the way. They proceeded by trial and error; they took to new routes to avoid injustice.[82] In the context of the tort of negligence Milsom has said that, 'To hold that there is a duty of care in a new kind of situation is the modern equivalent of sanctioning a new writ'.[83] To put it briefly, our legal history shows that when debt or covenant did not lead to a fair result, contract (assumpsit) was tried and it worked. If the way was barred in contract, *e.g.* as to third parties injured by negligence, litigants tried arguing their cases in torts, and after a while, the courts tended to accept these arguments. It is a matter of labels.

(iii) *Criminal Law*

Many modern judges dislike the maxim. Lord Devlin was most emphatic about the inequity of using hard cases as an excuse. He insisted that the proverb that hard cases make bad law is quite unacceptable. 'You cannot tell a man who has *not* behaved badly that he must stay in prison because he is a "hard case".' This is indeed true — the decision was wrong in itself. Here justice must be done even though the guilty escape! This *proverb* — like all proverbs — meets an *opposite one*. 'Hard cases make bad law', is balanced by 'Let justice be done even though the heavens fall'. Just as 'Too many cooks spoil the broth' is opposed by, 'In the multitude of counsel there is wisdom'.

The historical process, until the 19th century, was like de Bonos' lateral thinking technique: if the wall is too high to knock down and too high to jump, then you *go around* until you find an open gate — and

81 *Roe* v. *Minister of Health* [1954] 2 Q.B. 66 at pp. 86-87.

82 S. F. C. Milsom, *Historical Foundations of the Common Law* (1st edition, 1969) at pp. xi-xii.

83 S. F. C. Milsom, 'The Development of the Common Law' (1965) 81 *L.Q.R.* 496 at p. 516.

then resume your journey. Milsom calls it the *re-classifying* process, without which the common law would long ago have perished and been replaced by a Code. This explains the use of judicial fictions, implied clauses, constructive trusts, things 'deemed' to be something they are not.

(iv) *The New Morality*

The courts now show greater tenderness to child trespassers than a hundred, or even fifty, years ago. *Herrington*[84] and High Court decisions (in cases like *Thompson*,[85] and the Privy Council decision in *Southern Portland Cement*),[86] disclose a new tolerance of child trespassers, even if they are foolish, when they are exposed to dangers they cannot anticipate. The notion of *humanity* in *Herrington* has not caused a landslide: the House of Lords restricted it to actual conditions and the resources of the occupier (especially Lord Reid). Morality today obliges the occupier to take reasonable precautions, whereas the morality in *Addie*[87] favoured the sanctity of property.

(v) *Equity Today*

It has often been stated that Equity is 'past childbearing'.[88] If not dead, it could not be used to invent new standards. In 1964 the House of Lords supported this view by refusing an equity to a deserted wife in the home.[89] Parliament was obliged later to protect the wife. Equity is often given a far greater scope, particularly where Parliament often now simply lays down general principles, and tells the courts to apply them, 'according to justice and equity'.[90] In *Westbourne Galleries* v. *Ebrahami*[91] the House of Lords ordered the 'oppressive' directors of a company to treat a minority director as a 'partner'. In *Re Vandervells Trusts (No. 2)*[92] Lord Denning had used the idea of 'equitable estoppel' which, though it scared some critics in the *High Trees*[93] case, has now been accepted, even been extended, though again within limits. Lord Denning complained that counsel for the executors well knew that the claim of the executors here had no merit whatsoever. Referring to counsel's argument he answered it thus:

> He started off by reminding us that 'hard cases make bad law'. He repeated it time after time. He treated it as if it was an ultimate truth. But it is a maxim which is quite misleading. It should be deleted from our vocabulary. It comes to this: 'unjust decisions make good law', whereas they do nothing of the kind. Every unjust decision is a reproach to the law or to the judge who ad-

84 *British Railways Board* v. *Herrington* [1972] A.C. 877.
85 *Thompson* v. *The Municipality of Bankstown* (1953) 87 C.L.R. 619.
86 *Southern Portland Cement Ltd.* v. *Cooper* [1974] A.C. 623.
87 *Robert Addie & Sons (Collieries) Ltd.* v. *Dumbreck* [1929] A.C. 358.
88 R. E. Megarry, *Miscellany-at-Law* (1955) at pp. 141-142. R. E. Megarry, *A Second Miscellany-at-Law* (1973) at pp. 293-294.
89 *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1178.
90 Browne, 'Judicial Reflections' (1982) 35 *C.L.P.* 1 at pp. 7-10.
91 *Ebrahimi* v. *Westbourne Galleries* [1973] A.C. 360.
92 [1974] Ch. 269.
93 *Central London Property Trust* v. *High Trees House* [1947] K.B. 130.

> ministers it. If the law should be in danger of doing injustice then equity should be called in to remedy it. Equity was introduced to mitigate the rigour of the law... I am glad to find we can overcome this most unjust result.[94]

3. NEW TERMINOLOGY: NEW TECHNIQUES

What can the courts do to nullify the *disastrous consequences* argument?

1. *Statutory Interpretation*

Lord Edmund Davies stated that, '... dislike of the effect of a statute has never been an accepted reason for departing from its plain language'.[95] The *Rossminster* taxation case[96] is also clear evidence that this practice is not dead. In this case the House of Lords' approach, contrary to that of the Court of Appeal, employed the same literal strictness because the conditions in the Act were legally observed.

On the other hand, there are many recent examples where Parliament is supposed not to have meant what it said, because of the obvious inconvenience or absurdity of the plain interpretation. James L.J., dealing with the subsequent legitimation of children, said of an Act whose words were unclear as to their application to the facts.

> it appears to me that it would require a great deal of argument based from legal principles of great weight of authority clear and distinct to justify us in holding that our country should in this respect stand aloof in *barbarous insularity, from the rest of the civilised world.*[97]

The House of Lords disposed of an ancient doctrine that money only referred to cash when used in a will. It justified its change by the argument that 'No civilised modern country' would accept such a foolish view.[98] Courts are in a double bind. They will not defy Parliament openly. On the other hand, they often assert that Parliament does not intend to be unjust. Lord Reid denied that one act could not possibly have meant what it appeared to say.[99] They maintain a balance. Lord Wilberforce asserted recently, that always the judges would protect major liberties:

> I believe that most judges in common law jurisdictions regard it as a vital part of their role to stand between the State and citizen and to maintain certain strong and historical principles.

He added:

> After all judges have been able to stand up for these values over the years in the face of sometimes most exclusive statutory language — tighter and tighter language — ... think how by the use

94 [1974] Ch. 269 at p. 322.
95 *Stock* v. *Frank Jones (Tipton) Ltd.* [1978] 1 W.L.R. 231 at p. 238.
96 *R.* v. *I.R.C. ex p. Rossminster* [1980] 2 W.L.R. 1.
97 Authors' italics.
98 *Perrin* v. *Morgan* [1943] A.C. 399.
99 *Sweet* v. *Parsley* [1969] 2 W.L.R. 470 at p. 475.

> of absurdity which appears in the golden rule they have been able, with what are frankly subjective views as to policy, to get around, or out of the legislators' clear language.[100]

Lord Devlin preferred to say that courts, will *try* to refuse to allow hardship whenever they can. They find it distasteful when justice clashes with the law.[101] Judges now take advantage of any genuine loophole. They can use four devices, at least in civil matters: (1) 'stretching the law', (2) directing the jury, (3) using discretion, (4) distinguishing the facts. Surprisingly, for he did not believe in *direct creation* of law or 'going beyond the consensus', he admitted:

> Stretching the law or moulding the facts to fit the law is the time-honoured method by which the judge consciously or unconsciously — probably half-consciously, and not permitting himself too acute an analysis — makes room for the aequum et bonum.[102]

The 'supremacy of the law' could not be defied blatantly:

> So the judge cannot openly dispense. But he can stealthily stretch or mould ... Once a judge has formed a view of the justice of the case, those *facts which agree with it* will seem to him more significant than those which do not ... At all judicial levels and in all systems the law is sometimes stretched, a little shamefacedly perhaps. When that happens the case is described from the bench as very exceptional.[103]

(This is an old technique.)

> I daresay that medieval judges gave as much thought to squeezing old cases into new precedents, broadening the precedents but never bursting out of them, as medieval clerks did in trying to squeeze new causes of actions into old writs.

The English have a great respect for the Rule of Law as a sign of *order*, so that people know their roles. Nevertheless, the judges use more discretion. '... If the map is quite unrouted, there is an absolute discretion; if there are some guidelines, there is a limited discretion. Absolute discretions are few, limited discretions are many'.[104]. This is true mainly of the higher courts: it is not so easy for the single judge. However, the general trend has lately been that of, '... the English judge's unwelcoming attitude to technicalities and his willingness, whether or not he knows it himself, to stretch law or fact on occasions'.[105] Equity, too, of late has relied more on looking to substance rather than form and modifying a piece of legislation that favours unconscionable behaviour. Lord Scarman declared recently that no one in England now clings strongly to the literal rule.

The House of Lords, in recent years, though having to find for one party, where the Statute left no choice, has implored Parliament to act.[106]

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100 A-G.'s Dept., *Symposium on Statutory Interpretation* (1983) at p. 7.
101 P. Devlin, *The Judge* (1979) Ch. 4.
102 *Op. cit.* at p. 90.
103 *Op. cit.* at p. 91. Authors' italics.
104 *Op. cit.* at p. 102.
105 *Op. cit.* at p. 109.
106 *Cartledge* v. *E. Jopling & Sons Ltd.* [1963] A.C. 758.

Occasionally Parliament has responded. Therefore, to cite Lord Wilberforce again, '... there will always, let us frankly recognize, be a kind of *tension, a healthy tension — between Parliament and the judges*'.[107] This idea of self-restraint on both sides, a kind of partnership, represents the new approach in place of the older experience in the early part of the century and of distrust, before 1920 or so, to all legislation.[108]

2. *Balancing Interests*

There is more candid talk of balancing interests and rights, not only on purely legal grounds, but looking also at justice, morality and social consequences.[109] These considerations earlier courts tried not to disclose. As Sir Harry Gibbs pointed out in 1981[110] upper courts hear only the cases in which 'something has gone wrong'. The pathology of the law is revealed in these situations. Whatever the courts wish, they may have to impose hardship on one party on consequential grounds. Nevertheless, the 'competition of values' sometimes qualifies some hardship once accepted. Remember Lord Denning's example as to busy doctors. Even in *Winterbottom*,[111] to penalise the coachmaker then would have been unfair; he, — perhaps a small operator — could have been faced with paying enormous damages to any person who used his carriage for the next twenty years ! At that time there had recently been several serious railway accidents in which scores of people have been gravely injured. Lacking insurance, the coach maker or a struggling Company could have been ruined.

In the *Caltex Case*,[112] the High Court made what seemed an innovationary exception about 'pure economic loss', on a narrow 'proximity' test, where the other party knew, or ought to have known, there was real danger, if they were careless. The proximity was close and the victim could recover. The High Court balanced the two interests neatly. The danger that a mass of exceptions will 'eat up the rule', as in *Rylands*,[113] was seen as rare. *Rylands* was an exceptional case. In the nineteenth century masses of people were living close together in large metropolitan areas where they needed protection from extra hazardous uses of nearby land. Now there are fewer reasons for penalising owners from whose premises 'dangerous things' escape. In all those examples, the courts

107 A-G.'s Dept., *Symposium on Statutory Interpretation* (1983) p. 7. Authors' italics. See also F. K. H. Maher, 'Words, Words, Words'. 14 M.U.L.R. 468-510.

108 Pollock stated that there was an underlying assumption that all parliamentary interference was evil *per se*. *Essays in Jurisprudence and Ethics*, 25, cited (xi) in G. W. Paton, *A Text Book of Jurisprudence* (1946) at p. 188.

109 *E.g. Miller* v. *Jackson* [1977] Q.B. 966. (Balancing the interest of neighbours in the use of their properties.)

110 Sir H. Gibbs. 'The State of the Australian Judicature', (1981) 55 *A.L.J.* 677-684.

111 *Winterbottom* v. *Wright* (1842) 10 M. & W. 149; 152 E.R. 402.

112 *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge "Willestad"* (1976) 136 C.L.R. 529.

113 *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330.

have balanced the doctrine of liability for escape against the interests of society in accepting the incidents of escape, including the social outcomes.[114]

(a) *Administrative Torts*

One of the most dramatic changes has occurred in this area. Between 1920 and 1960 the courts seemed quite subservient to the grant of statutory powers, giving little aid to the oppressed citizen and not fettering the activity of public officials. Lord Denning considered the balancing required in *Dutton* v. *Bognor Regis U.D.C.*[115]:

> If we permit this new action are we opening the door too much? Will it lead to a flood of cases which neither the counsel nor the court will be able to handle? Such considerations have sometimes in the past led the courts to reject novel claims.[116]

He saw that there was 'no danger here'. The House of Lords agreed that public officials must perform their duties if their failure harms citizens, because today public officials are in a better position to bear the loss than the individual.[117] As to unreasonable decisions, the line has been drawn that a decision is not unreasonable, '. . . unless it is so unreasonable that no reasonable body of men could have reached it'. Moreover, the courts will only intervene on rather narrow grounds. In a recent case, the duty was extended to a failure by a municipal council officer to fill in the answer to a question, which failure induced a purchaser to buy land destined to be used as a freeway. The High Court in *Shaddock*[118] drew careful lines. On the particular facts the official had acted unreasonably to that enquirer. In other circumstances the duty did not exist, *e.g.* where it was ufinreasonable for the citizen to rely on a phone call answer. Councils now can safeguard themselves and need fear no spate of claims. Courts will still prevent frivolous actions by irrational citizens who act foolishly.

(b) *Locus Standi*

The greater ease with which the courts will now grant *standing* removes much unfairness. Lord Denning listened to the litigious Mr Blackburn, concerned with the 'common interest', even though his personal interest was no greater than anyone else's.[119] Standing is still rather messy. It has been described, in one of the leading textboks, as a 'can of worms'.[120] Recently in *Koowarta*[121] we saw the signs of the times. Brett and Hogg

114 See F.K.H. Maher, L. Waller, D. Derham, *Cases and Materials on the Legal Process* (4th ed., eds. K. S. Pose and M. D. H. Smith) (1984) Ch. 10.
115 [1972] 1 Q.B. 373.
116 Ibid at p. 398.
117 *Anns* v. *Merton London Borough Council* [1978] A.C. 728. Cf. *Sutherland Shire Council* v. *Heyman* (1985) 60 A.L.R. 1.
118 *L. Shaddock & Associates Pty. Ltd.* v. *Parramatta City Council* (1981) 36 A.L.R. 385.
119 *Blackburn* v. *Attorney-General* [1971] 1 W.L.R. 1037.
120 P. Brett & P. W. Hogg, *Cases and Materials on Administrative Law* (3rd ed., eds. R. R. S. Tracey and E. I. Sykes, 1975) at p. 209.
121 *Koowarta* v. *Bjelke-Petersen* (1982) 56 A.L.J.R. 625.

realised that the courts' attitude to the standing of private individuals seeking declarations, seems on the whole to be more liberal than the attitude to the standing of private individuals seeking injunctions. In *Onus* v. *Alcoa of Australia Ltd.*[122] where a hearing was granted, there was a real advance, not revolutionary, but in a willingness to hear a genuine grievance of a disadvantaged though vague group. Fifty years ago, it would not have been listened to, because of the fear of a mass of unmeritorious claims taking up the High Court's valuable time. Some relaxation is evident, although cases like those of the failure of small traders in London to get a hearing about taxation grievances throws doubts as to how far courts will listen to those not *directly* affected — as in the *Fleet Street Irregulars Case.*[123] The over-technical 'special interest test' is being reformulated, especially where there is a question of enforcing a public duty. There is now much more flexibility especially where an individual is protecting society at large. The courts want to avoid wasting their time yet will hear those who deserve it, while ignoring the *vexatious litigant* or the *officious bystander.*

Nevertheless, the grounds as to *locus standi* are still confused, and affected by the 'pressure on the courts'. The test properly is that of a *real* grievance which is 'measurable' and widespread but not petty.

3. *Morality*

Some judges properly fear the element of morality as a factor in a decision. Many have proclaimed that, in effect, 'This is a court of law and not of morals'. Fullagar J. recently stressed this aspect, when deciding that it is for the judge, and not the jury, to decide what is 'dishonesty' under the *Theft Act.*[124] The English Court of Appeal had declared that that word was for the ordinary man on the jury to decide on particular facts.[125] The majority in *Salvo's* case held it was for the judge and in applying it, he should rely on moral standards already embodied in the law. Fullagar J. reinforced his belief in these words:

> Feelings and intuitions as to what constitutes dishonesty, and even as to what dishonesty means, must vary greatly from jury to jury and from judge to judge and from magistrate to magistrate. In *National Insurance Co. of New Zealand Ltd.* v. *Espagne* (1961) 105, C.L.R. 569, at p. 572, Dixon, C.J. said: 'Intuitive feelings for justice seem a poor substitute for a rule antecedently known, *more particularly where all do not have the same intuitions.*'
>
> In my opinion, once the courts of law, properly so called, begin to decide cases, especially criminal cases, according to the judge's own view of abstract justice or of current standards of honesty or morality, respect of the courts will be calculated to decline, *with dire consequences of a most fundamental character.* Justice would

122 (1981) 55 A.L.J.R. 631.

123 *R.* v. *I.R.C. ex p. National Federation of Self-Employed and Small Businesses Ltd.* [1980] 2 All E.R. 378.

124 *R.* v. *Salvo* [1980] V.R. 401.

125 *R.* v. *Feely* [1973] Q.B. 530.

> no longer be seen to be done, and a judge would be no better qualified than anyone else to decide the cases.
>
> It is for reasons of this kind that the courts of law have consistently refused, wherever possible, to accept from the hands of the legislature any powers of deciding cases upon bases of morality.[126]

His Honour is correct in the sense in which he used morality as a species of intuition or 'feeling'. It may, however, be different if one considers a different rational view of 'morals': that is, using reasonable arguments in practical situations in order to further the general good. This approach can also eliminate personal prejudices or feelings. So, if a jury is directed to put aside exotic views and apply rational tests, the apprehensions will not be fulfilled, as the English judges believed. 'Morality' in legal issues is a matter of what any man of good sense would regard as normal, honest behaviour.

4. *Consequentialism*

We realise that, while consequences are important, courts must avoid 'Consequentialism'. The argument, so popular in the Utilitarian philosophy of the last centure, was that it was permissible to do an injustice *now*, provided that, eventually, the benefits to the whole community would be greater. Utilitarian philosophy has been so grossly misused by dictators and Utopian governments that it is now generally quite unpopular with philosophers. One must not allow remote consequences to *decide* the instant decision. Obvious effects may, as MacCormack says, tip the scales when the balance is equal.[127] The problem is, as Finnis and others have pointed out, that it is impossible to construct a *calculus of desirable objectives so that one can clearly* see *when one 'good' outweighs another.*[128] Therefore, Brett used to assert, it is really not right to declare to a person: 'We are unjustly punishing you *now* lest we should have to deny justice to somebody else later on'. By commonsense, a desire for balanced justice, a care not to pronounce on contentious matters before they arise, courts have escaped the worst kinds of consequentialism.

One area in which consequences ought to have been attended to, and were not, is Australian constitutional law. The *Engineers' Case* ignored the obvious effects on the federal system, although the Judges well knew them.[129] Some judges ignored possible outcomes in the *Franklin River Dam Case.*[130] So did they in the *Boilermakers Case,*[131] obvious as they were, probably because they were not harmful, or unfair to individuals.

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126 *R.* v. *Salvo* [1980] V.R. 401 at p. 430. Authors' emphasis.
127 N. MacCormick, *Legal Reasoning and Legal Theory* (1978) Ch. 6.
128 J. Finnis, *Natural Rights and Natural Law* (1980). The author produces a devastating attack on consequentialism and utilitarianism in general.
129 *Amalgamated Society of Engineers* v. *The Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129.
130 *Commonwealth* v. *Tasmania* (1983) 57 A.L.J.R. 450.
131 *Kirby* v. *R. ex p. The Boilermakers' Society of Australia* (1957) 95 C.L.R. 529.

One eminent Australian lawyer, Stoljar, is sceptical of the whole notion: 'Hard cases do not make bad law. They make untidy law'.[132] 'Untidiness' does appear disconcerting at first; but novel decisions, '... become established, even orthodox, law in their turn'. They can often lead to experiments being made which lead to legal development. The law has to be a little untidy. We remember the famous epigram of Diplock L.J.: '[T]hat is the beauty of the common law: it is a maze, not a motorway'.[133] The judges know their way through the maze; and can take turnings which others would find blocked, provided they wish to do so, with excellent results in the novel case or where values are equally balanced.

Judicial statements are now more constructive in this way: 'The common law evolves not merely by breeding new principles but also, when they are fully grown, by burying their progenitors'.[131] In our paternalistic age, where the State has come to the rescue of the courts, and provided remedies where they could not, the hard case doctrine has become far less available, though sometimes an Act creates new hard cases. The now disliked slogan represents a doctrine, based on a series of reasons which once seemed justified, but which today are often only memorable as past relics and which ought not to be a major consideration today.

Any purely legalistic justification for treating an individual unfairly is seen now as feeble. Paterson, in his discussions with some fifteen active members of the House of Lords, found that almost all of them agreed that the common law must adapt itself to modern life and needs.[135]

5. *Principles Limit Each Other — Justice To All*

This anxiety to do practical justice is traditional. Maitland rejoiced that:

> our old lawyers were fond of declaring that the law will suffer a mischief rather than an inconvenience, by which they meant that it will suffer a practical hardship rather than an inconsistency or logical flaw. But it is an excellent feature of these Year Books that the unsuccessful argument is as well represented as the successful. We are forcibly told where the mischief lies, where the shoe pinches, even when we are also told that the nonconformist foot that will not fit a shoe is a bad foot and should be pinched.[136]

In one early case, Thirning C.J. declared, when meeting an argument that a man ought not be liable for the accidental escape of fire: 'What is that to us ? It is better that he be utterly undone than that the law

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132 S. J. Stoljar, *Moral and Legal Reasoning* (1980) at p. 135.

133 *Morris* v. *C. W. Martin & Sons Ltd.* [1966] 1 Q.B. 716 at p. 730.

134 *Hongkong Fir Shipping Co. Ltd.* v. *Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26 at p. 71 *per* Diplock L.J.

135 A. Paterson, *The Law Lords* (1982).

136 Vol. 17 Selden Society, pp. xvii-xviii.

be changed for him'.[137] That sounds draconian, but is not excessively unjust. Fire is so terrible a menace to one's neighbours that it is reasonable to impose strict liability on occupiers to their neighbours. The present law on liability for fire escaping has a much more balancing approach between the interests involved and the legal principles which have evolved since 1401. Liability might still be seen as strict.[138]

(a) *Nervous Shock*

In *McLoughlin's Case*[139] the trial judge found that the shock to the mother was outside the physical and time limits which had previously been set. The mother, or the rescuer, or workmate, must have either seen or heard the accident, or else it must have occurred as a part of the *immediate aftermath* (as Lush J. put it in *Benson* v. *Lee*).[140] Here the mother did not arrive at the hospital until two hours later; she had neither seen nor heard the accident; she only saw her family later at the hospital. The shock was not so sudden. Nevertheless the House of Lords, overruling the lower courts, said that it was not afraid of having '. . . crossed the line which separated' the manageable from the non-manageable effects. Their Lordships all realized that extensions might lead to a proliferation of claims, perhaps fraudulent ones, and to the activities of a group of lawyers who found pretexts to bring doubtful claims for enormous damages, as has happened in the United States. Also, that cases would take longer, as counsel would use more detailed evidence, especially psychiatric. It was, they replied, for Parliament to prevent such potentially dangerous effects. This particular extension presented no danger. Lord Scarman believed *principle* still justified this extension: 'It has beckoned the judges on in this area'. The court cannot draw a fixed line as a matter of *policy*, for it is for Parliament to say when the growth should finally stop. The extension was within the original principle. Their language was most emphatic that floods of actions did not prevent them having sympathy for the mother. That did not worry Lord Devlin as to negligent statements:

> My Lords, it is true that this principle of law has not yet been clearly applied to a case where the service which the defendant undertakes to perform is or includes the imparting of information. But I cannot see why it should not be.[141]

Any liability was strictly confined to a limited duty in certain situations — mainly in business or professional circles; the main effect has been to increase insurance business.

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137 *Beaulieu* v. *Finglam* (1401) Y.B. 2 Hen. 4, f. 18, pl. 6; cited in C. H. S. Fifoot, *History and Sources of the Common Law: Tort and Contract*, Stevens & Sons, London, 1949, at pp. 166-167.

138 *Infra.*

139 [1982] 2 W.L.R. 982. [1983] A.C. 410; *Jaensch* v. *Coffey* (1984) 54 A.L.R. 417.

140 [1972] V.R. 879.

141 *Hedley Byrne & Co. Ltd.* v. *Heller & Partners* [1964] A.C. 465 at p. 528.

(b) *Contract*

In contract there is now far less talk of utter confusion. On the whole, in contract law, promises made 'at arms length' are rational and voluntary. Both parties know that, if things do not turn out as they hope, they can not expect to escape the result. In the past, in smaller deals, affecting the very poor, (servants of a household, poorer factory workers) the victims rarely came before the King's Courts. Lacking the money, they had no incentive to sue an employer. Therefore, the older central courts could do little. Most agreements for decision then were made by businessmen, well aware they were taking risks. Fraud, duress, undue influence, prevented the worst hardships in commercial ventures.

In the 19th century, therefore, the upper courts could do very little about cases of inequality. They had no machinery to investigate the relative degree of power. Today the law is more paternal. Government departments can afford to pay inspectors to enforce regulations requiring fair agreements. Unions are available to protect the weaker. The courts used various theories which they hoped would lead to greater fairness and convenience, as Atiyah[142] shows: the notions of the 'meeting of minds' (or 'wills'), the 'bargain', 'fairness', gave some aid to weaker parties. Business deals are usually a kind of game, in which both sides know the rules before they begin. There are hard cases in all games, as in cricket, tennis or football, where the umpire has to decide whether one person of two persons has incurred a penalty, or whether a rule should be enforced or ignored. The parties know in advance that umpires will err, if in a hurry, but they continue to accept their rulings. The law has moved to a more paternalistic role, now that we are richer and have the machinery to protect the disadvantaged by various devices, (company law, laws against crooked behaviour in selling cars, door to door salesmen, deceptive advertising, unfair rates of interest on loans, etc.).

The courts have always tried to be even-handed. The rich man too has to keep his promises. Judges have inherited the Jewish Christian ideas that promises are sacred and that the promise-breaker was a major 'sinner'. Until 1600, the Courts at Westminster needed to do little, because the Church courts had much more effective methods — confession and penance. These provided effective and easily operated controls. In addition, the Guilds preserved, until later, the ideals of a fair wage, a fair price and high quality of goods.

Only in the 19th century, under the influence of a more materialist outlook, did the courts find themselves unable to protect the poor by this religious and commonsense view. Atiyah emphasizes, as to consideration, that the Royal Courts nearly always recognized a consideration *if they thought that it was just.*[143] There was, and is, no structured 'doctrine of consideration'. The courts used Maitland's types of 'tricks'

142 P. S. Atiyah, *An Introduction to the Law of Contract* (3rd ed., 1981).
143 Ibid.

to make sure that the shoe did not pinch. Now statutes can assist the judges by providing remedies not available in the traditional court framework for lack of resources.

Attacks on *laissez-faire*, as modern historians understand well, disguise the bald facts that even this system did lead to an extraordinarily higher standard of living of the poor after 1800, as compared to the lot of the farm worker previously. The rich got richer; so did the poor. Marx himself acknowledged that the bourgeois had increased production and wealth remarkably; he only erred in believing that ultimately the gap would widen; the poor would get poorer as the rich began to use Monopolies and evil political power. He did not foresee the rise of the New Middle Class of professionals. Adam Smith was not wrong in believing that during that century the *invisible hand* idea did work. Self-interest, if enlightened, did produce greater wealth all round; and there was in the end a larger cake to be shared. The evils now stand out like sore thumbs. Privity of contract was increasingly disliked, by courts, by entrepreneurs themselves, and slowly whittled down. Excessive growths are possible, potent and dangerous, but one cannot think of many frightening results. Workers' Compensation legislation is one of the few examples of enormous growth — and few would object to that feature. (Even murder has been rightly regarded as an 'accident' for the purposes of the Act.)

6. *Rules Are Rules*

Nothing we have said contradicts the fact that the individual must often suffer minor hardship where reason and commonsense require him to subordinate his freedom to the general good. In not driving through a red light he is hindered, but not unjustly. To take out a licence to practice his occupation, to pay fair taxes, to make a will in due form, to get permission to build a house is not a hardship — everyone else also is similarly obliged. The same goes for obeying statutes and reasonable regulations, even if one suffers more than some others. To have to put a memorandum in writing for the sale of land protects all buyers — as does a fairly strict application of time limits.

Obviously, in a multitude of situations, to allow *any* breach of the law would be, indeed, the thin edge of the wedge. What is essential is that no *basic right may be denied*, whatever the results appear to be. No law can allow exceptions to murder, stealing, fraud, tax evasion, drunken driving leading to injury to others, invading private property (with some exceptions) reducing the rights of parents in their own children's upbringing, the killing of the innocent (even by doctors) the denial of normal rights of association. In all these matters, enormous and terrifying outcomes do follow. The test in lesser disputes is that of justice and the common good — not that of emotional prophecies of social cataclysm.[144]

Aristotle realised that, in any group of people living or working together, there must be rules which must be enforced vigorously, and

144 *Supra.*

against all alike. This is true of a family, a school, an army, a public or private organisation, even a parliament. In all these communities to allow one person to break an essential rule without penalty would be such a 'thin edge'. Any breach could plainly lead to disorder, inefficiency and unfairness to the others. In these situations one can indeed speak of 'evil consequences. ... If A can get away with it, so will everyone else.' That is especially true when the act is bad in itself — (*mala per se*), not just disallowed for convenient reasons (*mala prohibita*) and not merely by useful rules to meet a valid contemporary need.

Moreover, there are some rules, especially statutory ones, which necessarily impose fiixed methods — such as rates, percentages, distances, limits or times, which have to be adhered to strictly — even if some one ignorant of the rule has to suffer. Again, officials ought to be given some discretion in some cases where a rigid observance is not vital.

In the case of the law relating to animals the reluctance to change had long remained.[145] Not until 1971 did the British Parliament pass the *Animals Act* to cover this type of accident. Not many judges had the courage to say, as Diplock L.J. did later, 'I venture to say that the law, even as to cattle would hardly be as silly as that'.[146] Fleming rightly regards *Searle* v. *Wallbank* as a singular example of doctrinaire conservatism.[147] It seemed to him a clear case where Australian courts should disregard decisions of the House of Lords, as Canada had done, since social conditions had so vastly changed, and Parliament had ignored the change to protect landowners from the effects of their carelessness. The vague threat of numerous claims on all kinds of situations deterred the judges in both courts. It was too hard a task, however, the High Court thought in *Trigwell*,[148] to estimate the relative costs and hardships to all concerned. Parliament must be left to investigate the whole matter — otherwise the court might set in train a series of very unfair results.

7. *Proportion*

Of course, any rule must be both necessary and fair. Therefore, if circumstances require that a breach be forgiven, then fairness ought to allow the exception. To govern *exclusively* by the book will create a resentment entirely natural and harmful to the spirit which holds the group together. This differs utterly from the sort of 'Hard Case', where to penalise a person because it suits some officials, is unreal and a denial of civil rights. Those two principles, and the distinction between them, are clear. Boys will say of a teacher — with a reluctant approval — 'He is a beast, but a just beast'. A sensible discretion ought to be exercised by officials and tribunals unless the future effects are obvious, grave and uncontrollable.

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145 *Searle* v. *Wallbank* [1947] A.C. 341.
146 *Fitzgerald* v. *E. D. and A. D. Cooke Bourne (Farms) Ltd.* [1964] 1 Q.B. 249 at p. 270.
147 J. G. Fleming, *The Law of Torts* (6th ed., 1983) at p. 335. See Ch. 17 for discussion of liability for animals.
148 *State Government Insurance Office* v. *Trigwell* (1979) 142 C.L.R. 617.

Much depends on the *proportion* between the seriousness of the breach and the seriousness of the penalty. A trifling unfairness is tolerated in law as in life — *de minimis* is a factor we all admit as a useful guide — a small penalty (or none) for a trivial breach.

8. *Changing Course*

A major change in course was established with the abolition of the forms of action. Lord Atkin observed, 'When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the judge to pass through them undeterred'.[149]

Another remarkable direction has been followed in the law of negligence. Since contract did not work, as with harm done by carelessly manufactured goods, then the *neighbour* idea was called on successfully. However it is hard to think of any novel approach which, in fact, did lead to permanent disaster. The older judges were aware of the folly of reducing a rule by logic to absurdity, because for every proposition or principle *there is an opposing proposition or principle.* One finds two principles competing for the court's weighing process. Its decision shows that, in case A, principle P overcomes principle Q, and in case B, principle P overcomes principle Q. But both principles remain, each acting as a brake upon the over-extension of the other. There is always a weighing, which the upper courts use fully. The acceptance of policy attitudes, following the influence of American upper courts, has led them to talk more openly of adjusting competing interests with the least friction. Now they acknowledge the balancing notion, as the House of Lords and the High Court increasingly have done in the last fifteen years. The danger of a one-sided view has receded. The previous suspicion of trade unions based on a dread of abuse of union power has been reduced by the recognition that unions are a responsible part of our society, which counterbalance the power of large organisations of employers and governments.

As to taking risks, Lord Denning's use of the previous promise in the *High Trees Case*[150] seemed risky at the time as opening up a high road to massive disturbances of contracts, but no great evils have resulted. And even making an occasional mistake can lead to a fuller grasp of the truth.

In the *Caltex Case*,[151] where the High Court made an exception to the apparently entrenched view that there could be no recovery of purely economic loss, Stephen J. pointed out that the interest in *property* historically founded the action.[152] There had been a valid argument, and there still was, of the spectre of Cardozo's famous exclamation about '... liability in an indefinite amount for an indefinite time to an in-

149 *United Australia Ltd.* v. *Barclays Bank Ltd.* [1941] A.C. 1 at p. 29.

150 *Central London Property Trust* v. *High Trees House* [1947] K.B. 130.

151 *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge Willemstad* (1976) 136 C.L.R. 529.

152 Ibid at p. 568.

definite class'.[153] Reviewing the cases up to *Spartan Steel*, he explained why the prior harshness to some victims needed to be rectified:

> ... however, to counter this spectre by rejecting all recovery for economic loss unless accompanied by and directly consequential upon such physical injury is Draconic; it operates to confer upon such physical injury a special status unexplained either by logic or common experience.[154]

He added that:

> it is not unimportant to note that in the circumstances of the present case even the exclusory rule would operate to confer a complete right of recovery upon Caltex for its claimed economic loss had the processing agreement contained a clause granting it some possessory right in the pipeline during the currency of the agreement.[155]

The result was *hard* on the dredge owners; but the circumstances were quite exceptional. Thus they should bear the whole economic loss, because of those unprecedented facts.

That entrenched notion now seemed too high a price for protecting the 'aggressor' against excessive extension of the plaintiffs' loss. It was odd that property itself should be *always* a condition; Stephen J. thought it seemed 'neither just nor expedient'. There must be an exception where the:

> economic loss is reasonably foreseeable and where a close degree of *proximity* exists if the defendant knows that the lorry, like the pipelines in the present case, is and can be employed for no other purpose than the carriage of goods to the plaintiff's premises.[156]

Justice demanded that the tortfeasor should bear the consequences. The task of the courts, 'remains that of loss fixing rather than loss spreading'.[157] Mason J. pointed out that the foreseeability test alone was not sufficient, though helpful. He also balanced the justice element:

> There is no sound reason for accepting the traditional rule that only financial loss, which is consequential upon property damage can be recovered.

Therefore, the principle of no liability for economic loss was balanced by the principle of *Hedley Byrne* that people are to be responsible for loss caused by defective or careless statements.[158]

Another remarkable repudiation of the floodgates defence occurred recently. The House of Lords heard a dispute where contractors (or sub-contractors) had laid a concrete floor which turned out to be defective.[159] The delay in repair meant a genuine consequential economic loss. No person suffered any *physical* injury, nor was there any

153 *Ultramares Corporation* v. *Touche* (1931) 174 N.E. 441 at p. 444.
154 *Caltex Oil (Australia) Pty. Ltd.* v. *The Dredge Willemstad* (1976) 136 C.L.R. 529 at p. 568.
155 Ibid at p. 569.
156 Ibid at p. 580.
157 Ibid.
158 Ibid at p. 591.
159 *Junior Books Ltd.* v. *Veitch Co. Ltd.* [1982] 3 All E.R. 201.

property *damage*. Cardozo's fear was again brought forward. Lord Fraser of Tullybelton was caustic about this exaggeration of results:

> This is the floodgates argument, if I may use the expression as a convenient description, and not in any dismissive or questioning sense. The argument appears to me unattractive, especially if it leads, as I think it would in this case, to drawing an *arbitrary and illogical line just because a line has to be drawn somewhere.* ... The floodgates argument was much discussed by the High Court of Australia in *Caltex Oil Australia Pty. Ltd.* v. *The Dredge Willemstad* (1976) where the majority of the Court held that there was sufficient proximity between the parties to justify a claim for economic loss because the defendant knew that a particular person, not merely as a member of an unascertained class would be likely to suffer economic loss as a consequence of his negligence.[160]

Lord Roskill added his condemnation:

> The floodgates argument is very familiar. It may still on occasion have its proper place but, if principle suggests that the law should develop along a particular route and if the adoption of that particular route will accord a remedy where that remedy has hitherto been denied, I see no reason why, *if it be just* that the law should henceforth accord that remedy, that remedy should be denied simply because it will, in consequence of this particular development, become available to *many rather than to few.*[161]

Only Lord Brandon dissented, and not on the grounds that the courts would be flooded.

ADMINISTRATION

'The courts would be overwhelmed ...' This argument made some sense when there were only fifteen or so judges in the last century in England in the higher courts. Now that there are scores of judges it has lost this justification. If there is, Holt C.J. pointed out, a large number of grievances which the law should redress, then it is not for the judges to refuse justice on those grounds, but for the legislature to provide a more efficient administration. If it were not that a high proportion of cases are settled before they reach court the administration of justice would soon grind to a halt; the courts would be overwhelmed by the volume of litigation. A rule that is certain; although 'hard' to some, is that people can be advised that they would waste time going to court or that they are sure to win. Even Lord Simmonds, disposing of an argument that a decision would place too heavy a burden on the public service, was not moved:

> We were warned by learned counsel for respondents that to allow this appeal would open the flood-gate to appeals against the decisions of the General Commissioners up and down the country. That would cause me no alarm if decisions such as we have spent some time in reviewing were common up and down the country.[162]

They did not prove common; officials have learnt to be cautious, because they know their legal position. Deane J., in the Federal Court,

160 Ibid at p. 204. Authors' italics.
161 Ibid at p. 209. Authors' italics.
162 *Edwards (Inspector of Taxes)* v. *Bairstow* [1956] A.C. 14 at p. 32.

dealt briskly with a similar contention as to creating a new crime:

> The argument that, to give the words which Parliament has used their ordinary meaning would, to use a popular phrase, open the flood-gates of litigation, strikes me as irrelevant and somewhat unreal.[163]

Justice according to law means *just* as according both to the *existing* rule and the rule as a *developing* instrument. Individual judges ought not to innovate, each using his own hunches, lacking impartiality, predicting consequences over which they have little knowledge. Their progress must be at the pace of the main body. This metaphor of Windeyer J. is both dramatic and useful, put in terms of an army on the move.

Today we feel less sympathy for the Administration. The State is wealthier; there are more judges and more adjudicative tribunals. To the judges up till 1880 there had been a truly frightening dread of multiplicity. The few judges and courts at high levels could not have coped with many more disputes: so the 'Hard Case' was readily disposed of on practical grounds then.

THE FUTURE

Will the courts continue to be sceptical of 'awful effects'. Lord Atkin said in *Donoghue,* as we all know, that there must be 'a legal remedy where there is so obviously a social wrong'. That is very wide — based on 'the ordinary needs of civilised society and the ordinary claims of its members... No-one who was not a lawyer would for one minute doubt' its fairness.

Lewis Carroll, one remembers, has the Red Queen saying to Alice, 'It takes all the running you can do to keep in the same place...' Sir Patrick Browne has echoed this thought after years on the Court of Appeal:

> It has often been said that hard cases make bad law... but whether this is true or not I have no doubt that *bad law makes hard cases.* I have enough faith in the justice of the law to look with suspicion on any proposition of law which seems to me to produce injustice in a particular case.[164]

The law must keep on the move if it is to keep up with the requirements of this Age of Discontinuity. One such criterion is the willingness to admit a novel claim, despite the 'Hard Case' slogan. Now that we have accepted the Declaration of Human Rights, many moral claims must receive legal recognition, whatever the cost — but not all.

This brief study discloses some vital changes that have emerged in judges' ideas of their function, especially where they have a clear discretion. The floodgates argument is now clearly unacceptable to most courts. In hard cases the courts are more prepared to balance interests and to achieve a just result, so that, in the words of Wickham J.:

> Nevertheless a hard case should not be allowed to make bad law.[165]

163 *Phelps* v. *Western Mining Corporation Ltd.* (1978) 33 F.L.R. 327 at p. 333.
164 *Lattimer* v. *Shafran* [1983] W.A.R. 273 at p. 275.
165 P. Browne, 'Judicial Reflections' (1982) 35 *C.L.P.* 1 at p. 19.