

THE JUDICIAL METHOD REVISITED¹

INTRODUCTION

In 1998, I gave a paper in London entitled *The Judicial Method*. This evening, I revisit that subject. However, the title of this evening's address is somewhat truncated. It is more properly entitled *The Judicial Method in Australia Revisited*. Much of what I said in London in 1998 finds a place in what I say this evening. However, the title to the speech does not imply that there is only one method of writing a judgment; nor is it concerned with the mechanics of writing a judgment. But it does assume that there is a common law judicial method that has certain identifiable characteristics and that, from time to time, a common law judge must deal with the difficult question whether precedents, rules or principles should be rejected, distinguished, modified or extended in the circumstances of a particular case and those like it. In short, whether the judge should make or develop new law.

Reasons are essential to the common law method of judging. As Professor Shapiro has argued ²:

“A requirement that judges give reasons for their decisions -- grounds of decision that can be debated, attacked and defended -- serves a vital function in constraining the judiciary's exercise of power.”

One of the principal criticisms of the US Supreme Court under Chief Justice Warren in the 1950s and 1960s was that it failed to give adequate reasons for its decisions.

¹ I remain indebted to James Stellios, then Senior Research Officer of the High Court Library for the research assistance he gave me in preparing the paper I gave in 1998.

² “In Defense of Judicial Candor” (1987) 100 *Harv L Rev* 731 at 737.

In 1957, the highly regarded academic lawyers, Alexander Bickel and Harry Wellington, criticised the Warren Court³ for its use of:

“the sweeping dogmatic statement, of the formulation of results accompanied by little or no effort to support them in reason, in sum, of opinions that do not opine and of per curiam orders that quite frankly fail to build the bridge between the authorities they cite and the results they decree”.

Socially desirable as many decisions of the Warren Court were, they may have polarized public opinion less and commanded public acceptance more if the Court had better explained its reasoning. Confidence in the judiciary is not enhanced by reasons that are little better than a collection of conclusory assertions.

When parties submit their disputes to a court for determination, they and the wider public assume that the dispute will be decided in accordance with principles or rules that exist independently of the personal beliefs of the judge or judges who sit in that court.⁴ They assume that, so far as the court can, it will ascertain the facts of the dispute and will determine the legal significance of those facts by reference to a rule or principle that is drawn from existing legal materials and not by reference to the idiosyncratic values and preferences of the judge. To give effect to these assumptions, a judicial decision must be a reasoned decision arrived at by finding the relevant facts and by applying the relevant legal rule or principle.

The articulation of reasons serves a separate, but related function. Although unelected, the judiciary remains accountable to the community for its decisions. The provision of written reasons facilitates that accountability. It provides practising and

³ “Legislative Purpose and the Judicial Process: The Lincoln Mills Case” (1957) 71 *Harv L Rev* 1 at 3.

⁴ Gewirtz, “On ‘I Know It When I See It’”, (1996) 105 *Yale Law Journal* 1023 at 1025.

academic lawyers, the media and other interested members of the public with an opportunity to engage in informed debate.

Moreover, if judicial reasons are to serve their object of maintaining confidence in the judiciary, they must be so structured that they serve at least three purposes. First, they must permit the parties to see the extent to which their arguments have been understood and accepted. Lord MacMillan thought that the main object of a reasoned judgment “is not only to do but to seem to do justice.”⁵

Second, they must be reasons that clearly explain the reasoning process and thereby further judicial accountability.⁶ Third, those reasons must declare and apply a principle or rule at a level of generality that transcends the facts of the case and enables other courts to decide other cases, identical in principle but not in detail, in the same way. It is necessary for a court to declare a rule or principle at this level of generality because, under the common law system of adjudication, courts not only resolve disputes but formulate rules and principles that can be used to decide comparable cases.

The history of the common law denies the belief that was widely held until well into the 20th century that judges merely apply and do not change or make the common law. As Judge Learned Hand said in reviewing Cardozo’s *The Nature of the Judicial Process*⁷:

“... the whole structure of the common law is an obvious denial of this theory; it stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.”

⁵ “The Writing of Judgments”, (1948) 26 *Canadian Bar Review* 491 at 491.

⁶ “In Defense of Judicial Candor”, (1987) 100 *Harv L Rev* 731 at 737.

⁷ (1922) 35 *Harv L Rev* 479.

However, the process by which the common law developed was slow and unscientific. Lord Wright said that the common law judges developed the law⁸:

“from case to case, like the ancient Mediterranean mariners, hugging the coast from point to point and avoiding the dangers of the open sea of system and science.”

That is to say, they developed the law pragmatically and that, I think, remains the common law method of judging.

Formulating the governing principle or rule in a case sometimes – particularly at the appellate level – involves a law-making function on the part of the judge, and it is often social and economic factors that stimulate or dictate the terms of this law-making function. Judicial law-making is a controversial subject, little understood – in Australia at least and I suspect elsewhere – by politicians and the general public. But in the long journey of the common law through the centuries, judicial law-making of some kind has been an essential element of the common law judicial method. How else could the common law have got where it is today from where it was nine centuries ago?

Whether, and to what extent, the judges of a particular jurisdiction should engage in judicial lawmaking always depends on factors peculiar to that jurisdiction. Lord Diplock recognised this when giving the Advice of the Judicial Committee of the Privy Council in *Geelong Harbor Trust Commissioners v. Gibbs, Bright & Co.*⁹ and commenting on the lawmaking function of the High Court of Australia. Lord Diplock said that judge made changes in the law:

“... may be influenced by the federal or unitary nature of the constitution and whether it is written or unwritten, by the legislative procedure in Parliament, by the ease with which parliamentary time can be found to effect amendments in the law

⁸ “The Study of the Law” (1938) 54 *Law Quarterly Review* 185 at 186.

⁹ [1974] AC 810 at 820 – 821.

which concern only a small minority of citizens, by the extent to which Parliament has been in the habit of intervening to reverse judicial decisions by legislation; but most of all by the underlying political philosophy of the particular nation as to the appropriate limits of the lawmaking function of a non-elected judiciary.”

For many years now, judges and lawyers generally have understood that the common law is not a monolithic institution, uniform in every jurisdiction in which it reigns. They accept that the common law of each jurisdiction – although having a common origin – has developed differently in different jurisdictions because of social, economic and political factors particular to that jurisdiction. The point was recognised by Lord Lloyd of Berwick in giving the Advice of the Judicial Committee of the Privy Council in *Invercargill City Council v. Hamlin*¹⁰ in a New Zealand appeal. Lord Lloyd said:

“But in the present case the judges in the New Zealand Court of Appeal were consciously departing from English case law on the ground that conditions in New Zealand are different. Were they entitled to do so? The answer must surely be ‘Yes’. The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root, is not a weakness, but one of its great strengths. Were it not so, the common law would not have flourished as it has, with all the common law countries learning from each other.”

Lord Diplock had made a similar point in *Cassell & Co Ltd v. Broome*¹¹ in dealing with the question whether the House of Lords should develop the English common law in respect of punitive damages in a way different from that of other common law jurisdictions.

These statements bring out the point that the development of the common law in any particular jurisdiction necessarily depends on societal factors existing in that jurisdiction. Notwithstanding the sometimes formidable difficulties in determining

¹⁰ [1996] AC 627 at 640.

¹¹ [1972] AC 1027 at 1127.

whether the common law should be developed by the judges or left to the legislature, the judiciary has continually extended and modified the common law for 800 years.

Most common law judges today accept that it is an inevitable incident of the judicial process that, from time to time, a judge has to make, and not merely declare or restate, legal rules and principles. In the frequently cited words of Lord Reid speaking extra-judicially in 1972¹²:

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

Despite the fact, as Lord Reid’s paper emphasises, that judicial law-making is an inevitable incident of common law judging, judges must act cautiously and with restraint if they are to escape the charge that they have appropriated what is in truth legislative power to themselves. And judges such as myself who come into a jurisdiction from other common law jurisdictions have to be especially sensitive to local conditions. They cannot assume that the conditions of their own jurisdiction are the same as the jurisdiction where they come to sit.

Often the common law can be developed organically. The development of the common law by organic means was well described by my former colleague, Justice Gummow, in *Esanda Finance Corporation Ltd v. Peat Marwick Hungerfords*.¹³ His Honour noted that the very essence of accepted judicial method

¹² The Judge as Lawmaker, (1972) 12 *Journal of the Society of Public Teachers of Law* 22 at 22.

¹³ (1997) 188 CLR 241.

is the combined purposes of developing the law, maintaining its continuity and preserving its coherence. His Honour continued¹⁴:

“Accepted means of effecting those purposes include (i) extending the application of accepted principles to new cases, (ii) reasoning from the more fundamental of settled legal principles to new conclusions; and (iii) subsuming unforeseen instances under a category which, in reason, is not closed against them.”

His Honour went further in another High Court Case – *Wik Peoples v. Queensland*¹⁵. After referring to a statement by Lord Radcliffe in 1956 to the effect that the common law is a body of law which develops over time, his Honour said¹⁶:

“Here is a broad vision of gradual change by judicial decision, expressive of improvement by consensus, and of continuity rather than rupture... Movement also may plainly be perceptible, and there may be an explicit change of direction, where, in the perception of appellate courts, a previously understood principle of the common law has become ill adapted to modern circumstances ...”

These statements of Justice Gummow would, I think, have been generally accepted by all – certainly the great majority of – common law judges in the last 150 years with the exception of the statement that the judicial method may encompass “an explicit change of direction, where, in the perception of appellate courts, a previously understood principle of the common law has become ill adapted to modern circumstances”. Obviously, recognition that a principle has become ill adapted to modern circumstances involves judges making judgment about particular social and economic needs of the society. However, in Australia, New Zealand and the United Kingdom at least, it is now well accepted that, from time to time, common law judges must make such judgments if the law is to be responsive to the needs of their society. I have examined the historical path toward this recognition elsewhere¹⁷ and

¹⁴ at 298.

¹⁵ (1996) 187 CLR 1.

¹⁶ 187 CLR 1 at 179.

¹⁷ McHugh, “The Law-making Function of the Judicial Process”, (1988) 62 *Australian Law Journal* 15 at 18-24.

it is unnecessary to re-trace it here. Still, judicial law making is a controversial issue even in jurisdictions where it is practised.

THE NEED FOR JUDICIAL LAW-MAKING

Lord Radcliffe pointed out in 1964 that there “was never a more sterile controversy than that upon the question whether a judge makes law. Of course he does. How can he help it?”¹⁸ Whether a judge is interpreting a Constitution or an ordinary statute, or resolving a common law or equity dispute, he or she is forced to make choices between two or more competing arguments.¹⁹ If no precedent binds, the judge’s decision – whatever it is – becomes a precedent which creates a new proposition of law and provides a foundation for further development of the law.²⁰ Whether a development is the result of an incremental change in the law or the sudden departure from a previously accepted direction in the law, the courts are usually exercising their law-making function in response to a change in the social context.

As Justice Brennan pointed out in *Gala v. Preston*²¹:

“The purpose of judicial development of legal principle is to keep the law in good repair as an instrument of resolving disputes according to justice as it is understood in contemporary society, subject to statute... In a society where values change and where the relationships affected by law become increasingly complex, judicial development of the law is a duty of the courts – more especially when legislative law reform languishes.”

¹⁸ Lord Radcliffe, “Law and Order”, (1964) 61 *Law Society’s Gazette* 820 at 821.

¹⁹ See the instructive discussion by Professor Julius Stone in *Precedent and Law*, (1985) (especially at 81-83, 111).

²⁰ *Lupton v. FA & AB Ltd* [1972] AC 634 at 658-659 per Lord Simon of Glaisdale.

²¹ (1991) 172 CLR 243 at 262.

Most modern Legislatures simply do not have the time to continually monitor and amend legal rules, particularly those rules dealing with the relationships between private citizens. Furthermore, legislators cannot foresee all the circumstances which may call for the application of a rule. Because that is so, they cannot formulate rules that are so exact and yet so comprehensive that they plainly cover every dispute that comes before the courts. If judges were to become reluctant to adapt the law to a changing society, public confidence in the rule of law would be seriously impaired because large areas of law would be out of touch with the needs of society. If the law did not remain the appropriate mechanism by which citizens regulate their affairs and resolve their disputes, it would become largely irrelevant.

As I said in a 1987 paper²², drawing on an analysis of Arthur T Von Mehren²³, there are four types of (sometimes overlapping) situations which constantly recur and place pressure on the courts to make law.

1. The relevant interests are accommodated by existing precepts, but the court disagrees on policy grounds

The first situation is where the court recognises that the interests pressing for recognition in a particular case are authoritatively accommodated by the existing body of precepts, but disagrees, on policy grounds, with the consequences of this accommodation.

²² McHugh, “The Law-making Function of the Judicial Process”, (1988) 62 *Australian Law Journal* 116 at 116.

²³ *The Civil Law System*, (1957) at 836.

2. The relevant interests are historically accommodated by precepts, but political and ethical ideas have changed

The second situation that places pressure on courts to make law is where the interests now pressing for recognition are covered by the existing body of precepts, but the court believes that social and ethical ideas about their proper accommodation have changed since these precepts were formulated. There is no better example than the decision of the High Court of Australia in *Mabo v. Queensland [No.2]*²⁴ where a majority of the Court held that indigenous title to land survived the colonisation of Australia by the Crown in 1788, notwithstanding that the Privy Council had not accepted that view a century earlier in *Cooper v. Stuart*²⁵. The majority in *Mabo* held that the extinguishment of indigenous rights and interests, based upon the doctrine of terra nullius, “was justified by a policy which has no place in the contemporary law of this country.” *Mabo v. Queensland [No.2]*²⁶

3. Interests similar to those involved in the case are accommodated by existing principles

The third situation that places pressure on courts to make law is where the interests recognised by the existing body of principles are similar to, but not identical with, the interests now before the Court.

4. No similar interests are accommodated by existing principles

The fourth situation that places pressure on courts to make law is where the interests before the court cannot fairly be considered similar to the interests already recognised by the existing body of principles. However, the

²⁴ (1992) 175 CLR 1.

²⁵ (1889) 14 App Cas 286.

²⁶ (1992) 175 CLR 1 at 42 per Brennan J (with Mason CJ and McHugh J agreeing), at 109 per Deane and Gaudron JJ, at 182-184 per Toohey J.

formulation of those principles may be sufficiently flexible or abstract to allow an interest pressing for recognition to be accommodated. An Australian example of this kind of case is the High Court's decision in *Dietrich v. The Queen*²⁷ where the Court was able to apply the fair trial principle and declare that a trial court has power to stay criminal proceedings where lack of legal representation, through no fault of the accused, would lead to an unfair trial.

5. Rationalisation of existing principles

To these four categories I would add a fifth (although it is probably already encompassed to a large degree by the other categories), and that is the “rationalisation of general principle with a view to bringing more unity and symmetry to the general law”²⁸

The common denominator in the first four categories is social change²⁹. When legal rules and principles appear no longer efficient or able to meet social needs, most common law judges in the countries to which I have referred take the view that the relevant rules, principles and precedents must be carefully scrutinised and sometimes revised or extended. Law is a social instrument – a means, not an end. It inevitably changes as society changes. As Justice Cardozo recognised, law may well be influenced by logic, historical development, or tradition, but “[t]he end which the law serves will dominate them all.”³⁰ In Justice Cardozo's view, “[n]ot the origin, but the goal is the main thing.”³¹

²⁷ (1992) 177 CLR 292.

²⁸ Mason, “The Judge as Law-maker”, (1996) 3 *James Cook University Law Review* 1 at 3.

²⁹ See the discussion by Professor Julius Stone in *Precedent and Law* (1985) at 109-112.

³⁰ Cardozo, *The Nature of the Judicial Process*, (1921) at 66.

³¹ Cardozo, *The Nature of the Judicial Process*, (1921) at 102.

However, as I have maintained elsewhere, much evidence, analysis and argument is required before a court can determine whether changed social conditions justify the development of the law by the court.³² An assessment of the requisite level of information is in the hands of each judge, and views will inevitably differ as to whether that threshold has been crossed in individual cases. The existence of this level of discretion is one of the reasons why it is essential for the judiciary to identify the values which are being recognised in individual cases and to explain candidly why those values justify a development in the law.

PREVALENCE OF LAW-MAKING

To recognise that judges make law, however, is not to imply that most judges spend their time making law. Lord Devlin once expressed the view that 90 per cent of the time of English judges was spent in the “disinterested application of known law”.³³ That is almost certainly true of Australian judges and I assume that it is true of most Hong Kong judges. In the majority of cases that come before the courts, judges have no discretion to make law. This is especially so in trial courts where the judges are bound by precedent and have room to make law only in novel cases. The question for most trial and many intermediate appellate court judges is whether the facts of the case come within the ratio decidendi of a binding precedent. However, determining what is a binding rule is not always easy and is made more difficult in courts such as the House of Lords, the Supreme Court of Canada and the High Court of Australia where a number of individual speeches or judgments may be delivered.

³² See *Burnie Port Authority v. General Jones Pty Ltd* (1994) 179 CLR 520 at 594.

³³ “The Judge as Lawmaker” in *The Judge* (1979), Ch 1 at 3 citing Jaffe, *English And American Judges As Law-makers*, (1969) at 13.

In *Woolcock Street Investments Pty Ltd v. CDG Pty Ltd*³⁴, I sought to explain the distinction between the holding of a case, the rule of the case and its ratio decidendi.

I said³⁵:

“The common law distinguishes between the holding of a case, the rule of the case and its ratio decidendi. The holding of a case is the decision of the court on the precise point in issue – for the plaintiff or the defendant. The rule of the case is the principle for which the case stands -- although sometimes judges described the rule of the case as its holding. The ratio decidendi of the case is the general rule of law that the court propounded as its reason for the decision.

Under the common law system of adjudication, the ratio decidendi of the case binds courts that are lower in the judicial hierarchy than the court deciding the case. Moreover, even courts of co-ordinate authority or higher in the judicial hierarchy will ordinarily refuse to apply the ratio decidendi of the case only when they are convinced that it is wrong.

Prima facie, the ratio decidendi and the rule of the case are identical. However, if later courts read down the rule of the case, they made treat the proclaimed ratio decidendi as too broad, too narrow or inapplicable. Later courts may treat the material facts of the case as standing for a narrower or different rule from that formulated by the court that decided the case. Consequently, it may take a series of later cases before the rule of the particular case becomes settled.”

In *Behrens v. Bertram Mills Circus Ltd*³⁶, Devlin J said that the ratio decidendi of the case was that part of the reasons which the judge wishes to have the authority of precedent. But, as Sir Anthony Mason has pointed out³⁷ “the principle as expressed by the first judge is often so general that a selective approach must be made.” *Donoghue v. Stevenson*³⁸ illustrates the potential to read down the apparent ratio decidendi of a case. That case is now accepted as holding that the neighbour principle is its ratio decidendi and is applicable to all questions of duty of care concerning physical injury. But for some years after it was decided, courts and

³⁴ (2004) 216 CLR 515.

³⁵ at pp 542 – 543.

³⁶ [1957] 2 QB 1 at 24.

³⁷ “Use and Abuse of Precedent”, (1988) 4 *Australian Bar Review* 93 at a 103.

³⁸ [1932] AC 532.

commentators debated whether, despite the width of Lord Atkin's reasons, its ratio decidendi was confined to manufacturers and consumers and that it held that a duty of care arose *only* if the product defect was hidden with no reasonable possibility of intermediate examination.

Ambiguities concerning the ratio decidendi of precedents, therefore, give even a judge bound by a precedent the opportunity to avoiding its binding effect. Despite these occasional opportunities, the work of most judges remains the "disinterested application of known law".

THE JUDICIAL DILEMMA

The spectre of the law's potential irrelevancy creates a dilemma for the judiciary of any society. If law is to remain relevant, social change pressures the courts, and the final appellate courts in particular, to develop the law to meet these changes. Yet if the courts develop the law, they are criticised for exceeding their role and usurping the role of the legislature.

My impression, as I have indicated, is that most Australian politicians and members of the public think that judges should only interpret the law. Paradoxically, they want results which accord with what Lord Devlin called "the *aequum et bono*"³⁹. If the community or an important section of it like a result, it will applaud a decision, no matter how far the law has been stretched to achieve that result. If it does not like the result, it will criticise the decision, no matter how impeccable the legal reasoning behind it. As more and more novel situations come before the courts, judges are

³⁹ "The Judge and the *Aequum et Bonum*" in *The Judge*, (1979) Ch 4 at 84.

forced to develop the law to an extent that was unthinkable even 30 years ago. Because many of these cases give rise to controversial issues, the development of the law has brought the courts under increasing political, media and academic criticism. The controversy surrounding the proper parameters of judicial law-making is not exclusive to Australian courts. The debate has raged in the United States since the creation of the Supreme Court and has recently ignited at the birthplace of the common law in the United Kingdom.

THE LIMITS OF THE LAW-MAKING FUNCTION

The law-making function of the judiciary is not unfettered. There is a real difference between judge-made law and the creation of law by a popularly elected legislature. Any encroachment into the legislative sphere is constitutionally impermissible and democratically unpalatable. Although this ideal is easy to state, the dividing line is not so easy to draw. That said, there is no doubt that “judicial law-making is of a different nature and order from legislative enactment. It occurs in different circumstances, in response to different stimuli, and is subject to restrictions that do not constrain the legislature's freedom of action”⁴⁰. Rather than a usurpation of the legislative role, the judiciary's law-making function should be seen as a complementary dimension to governmental law-making as a whole.

First, courts only make law in the context of determining a legal dispute which is initiated by the parties to the dispute. The courts resolve issues which litigants define. Second, the natural inclination of most judges is to place a premium on

⁴⁰ Davies, “The Judiciary-Maintaining the Balance”, in Finn (ed), *Essays on Law and Government Vol 1*, (1995) 267 at 278.

certainty and predictability which are important characteristics of a stable legal system. Stability instils confidence in the institution of the judiciary and in the law. Because judicial law-making operates retrospectively, the rule of law would be seriously threatened if law-making was a routine function of courts. Third, in most cases, judges make law only when changes in society require the law to be developed to meet the consequences of those changes. The exception arises where the incoherent or unsatisfactory state of a legal doctrine requires a rationalisation which often results in an extension or modification of the reach of the doctrine. Cases may also come before the court arising out of conditions that have not been the subject of prior legislative or judicial determination forcing the court to make a decision which creates a new legal rule irrespective of which party is successful.

Unlike political parties, judges have no agenda to be implemented. Moreover, judges know that it is no easy task to identify and measure social change or to assess the effect of an alteration of the law which responds to that change. The courts are largely dependent on litigants, interveners and *amici curiae* to provide relevant information for the determination of the issues in dispute. Additionally, it is the appellate courts that are the principal judicial law-makers and their procedures are not geared towards the elaboration of relevant non-legal material. Awareness of these difficulties naturally makes the judiciary develop the law cautiously and only when it is clear that the needs of society demand it or the state of the law requires that the existing rules or principles be rationalised.

It was awareness of these difficulties that led me in *Burnie Port Authority v. General Jones Pty Ltd*⁴¹ to caution against a too ready willingness to depart from the settled rules of common law. After referring to Justice Mason's comments in *State*

⁴¹ (1994) 179 CLR 520.

*Government Insurance Commission (SA) v. Trigwell*⁴² to the effect that the Court is neither a legislature nor a law reform agency, I said:

“No doubt courts in general, and this Court in particular, are more ready to alter the rules of the common law and equity than they were in 1979 when *Trigwell* was decided. But the law-making function of a court is different from that of a legislature. It is merely an incident of the duty to adjudicate disputes between litigants. It arises from the necessity to do justice between the parties and those who stand in similar situations. A judge-made rule is legitimate only when it can be effectively integrated into the mass of principles, rules and standards which constitute the common law and equity. A rule which will not ‘fit’ into the general body of the established law cannot be the subject of judge-made law.”⁴³

JUDICIAL METHODOLOGY

However, it is methodology that really distinguishes judicial law-making from that of law-making by the legislature or the executive government when it implements subordinate legislation. The difference in approach is so great that judicial law-making belongs to a separate genus of law-making, notwithstanding that ultimate appellate courts in Australia, New Zealand and the United Kingdom no longer act as if the law is an autonomous discipline. When judges regarded the common law as an autonomous discipline, unaffected by social conditions, they assumed that the rule that decided a case was the last link in a logical legal chain made up of precedents, legal principles, concepts, rules or other authoritative legal texts or writings. That thinking required law-making to have a strictly legal pedigree, a line of reasoning colorfully illustrated by the statement of Bagnall J in *Cowcher v. Cowcher*⁴⁴ “that equity is [not] past childbearing; simply that its progeny must be legitimate – by precedent out of principle.”

⁴² (1979) 142 CLR 617 at 633.

⁴³ *Burnie Port Authority v. General Jones Pty Ltd* (1994) 179 CLR 520 at 593; see also my remarks in *Hill v. Van Erp* (1997) 188 CLR 159.

⁴⁴ [1972] 1 WLR 425 at 430.

Although induction and deduction from established precedents and principles are involved in much judicial law-making – in probably all cases where the courts create a new or extend an old rule – induction and deduction only explain part of the law-making function of the judicial process. That function is not mechanical. In novel cases, the precedents will usually yield competing premises. The competing arguments, drawn from those premises, may be supported by the processes of deduction and induction. The choice between those arguments can only be made, however, by applying a theory, principle or value, representing some policy, which persuades the reader that one choice is better than other. Logic may take a judge a long way in determining a novel case. But usually it cannot take him or her all the way. Lord Buckmaster’s dissenting speech in *Donoghue v. Stevenson*⁴⁵ was as much a logical deduction from the precedents as was Lord Atkin’s majority speech. Lord Atkin said that there must be some general principle of negligence that explained the cases. But why? Lord Buckmaster’s dissent showed that the cases were logically explicable without a general principle of negligence. Lord Atkin’s decision was based on what he thought justice required, not logical compulsion. It was his sense of justice and not logic that gave rise to the general principle that has dominated the law of negligence since 1932.

Neither can reasoning by analogy, a form of logical reasoning much used in legal argument, take a judge all the way in a novel case. A judge who reasons by analogy has to have an organising theory that explains why the facts of the instant case are similar or dissimilar to the facts of the precedent cases. The choice of that theory will seldom depend on induction or deduction; more often as not it will depend on some policy that promotes or protects some goal, interest or value external to the precedents.

⁴⁵ [1932] AC 562.

Few lawyers today doubt the truth of the statement of Oliver Wendell Holmes Jr that the “life of the law has not been logic: it has been experience.”⁴⁶ Lord Reid said that, when a judge has “some freedom to go in one or other direction”, he or she should have regard to “common sense, legal principle and public policy in that order.”⁴⁷ This was a candid admission by one of the greatest judges of the 20th century that legal materials will carry the judge only part of the way in the novel case. Commonsense is a value which reflects the community’s current thinking on a subject. It has nothing to do with legal doctrine. Moreover, commonsense views change as the community’s knowledge and understanding of a subject change.

When judges extend the scope of a legal rule, change its content, or reject it altogether, more often than not, they rely, sometimes unconsciously, on values or practical considerations outside the legal system. Numerous illustrations can be given of the effect of external influences on the content of legal rules and principles. *Mabo [No.2]*⁴⁸ is the classic Australian example. But the influence of values outside the legal system occurs in all areas of the law. Neither logic nor reasoning by analogy from decided cases is the only factor in judicial law-making. The process is much more pragmatic. Values and the practical working of legal rules have as much a part to play in creating, extending or modifying a legal rule as logic does. No doubt many of the values invoked to develop or modify the law derive from the legal system itself. Values such as freedom of the individual, equality before the law, certainty and predictability, unconscionability, good faith, reasonableness and, in recent years, fairness permeate the legal system. They shape judicial law-making.

⁴⁶ *The Common Law*, (1881) at 1.

⁴⁷ “The Judge as Lawmaker”, (1972) 12 *Journal of the Society of Public Teachers of Law* 22 at 25-29.

⁴⁸ (1992) 175 CLR 1.

But these legal values do not exhaust the materials which judges use when making law.

Extrinsic values and practical experience derived from democracy, economics, science, social and political forces, public morality and contemporary conceptions of justice are often relevant factors in shaping the development of the law. Tort, contract and administrative law, for example, are frequently developed and modified by practical considerations rather than values.⁴⁹ In *Esanda Finance Corporation Ltd v. Peat Marwick Hungerfords*⁵⁰, for example, in rejecting a claim that auditors should be liable to third parties whom they could reasonably foresee might rely on the auditor's accounts, I considered such factors as the problematic nature of such claims, the withdrawal of insurance protection for auditors, the potential decline in the availability of audit services, the capacity of plaintiffs in the likely class to protect themselves and the effect of long trials on the justice system.

However, I suspect that in the future extra-legal values will have only a small role in Australian judicial law-making. Australia is a multi-cultural society, which is constantly undergoing rapid social and economic change. It is extremely difficult for present day judges to know what are the permanent or enduring values in contemporary Australian society. Bedrock values of the nation have been overturned in recent years. It is likely that what will drive judicial law-making in the future are the legal values that inhere in the common law and to which I have referred and practical considerations based on a cost/benefit analysis. Indeed, I suspect that what has been called community values has usually been a reference to values such as

⁴⁹ of the discussion in Finn, "Of Power and the People: Ends and Methods in Australian Judge-Made Law", (1994) 1 *Judicial Review* 255 at 275 concerning "values", "standards", "circumstances" and "needs" of "the community".

⁵⁰ (1997) 188 CLR 241.

freedom, equality before the law, good faith and reasonableness which already inhere in the legal system. Whether that be true or not, however, if the extra-legal values of the community are clear and the issues are “relatively discrete and manageable”, there is no reason to disregard them as legitimate sources of the judicial law-making function.

However, judges have no authority to change the law merely because they find the precedents of earlier generations unpalatable. The praiseworthy object of ensuring that legal rules and principles are efficient and meet social needs does not mean that courts, including ultimate appellate courts, which have the power to overrule a relevant, but now outmoded, precedent should always do so. Judges are not in the business of repudiating the past, although sometimes, as *Mabo [No.2]*⁵¹ shows, they must repudiate rules developed in earlier times when those rules have become out of touch with contemporary notions of justice. In *Dietrich v. The Queen*⁵², Justice Brennan said that the Court is under a “responsibility for keeping the common law consonant with contemporary values”⁵³. However, he pointed out that this does not mean that “the courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values”.

Judicial law-making is not legitimate unless it can be connected to existing doctrines. For that reason, as Lord Diplock once pointed out⁵⁴, common law judges could not “have created the welfare State”. In *Breen v. Williams*⁵⁵, the High Court of Australia refused to recognise a patient’s entitlement to inspect or obtain his or her

⁵¹ (1992) 175 CLR 1.

⁵² (1992) 177 CLR 292.

⁵³ *Dietrich v. The Queen* (1992) 177 CLR 292 at 319.

⁵⁴ (1978) *The Lawyer and Justice* at 279.

⁵⁵ (1996) 186 CLR 71.

medical records. Justice Gaudron and I emphasised that judicial law-making must be tied to existing doctrines. We said ⁵⁶:

“Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must ‘fit’ within the body of accepted rules and principles. The judges of Australia cannot, so to speak, ‘make it up’ as they go along. It is a serious constitutional mistake to think that the common law courts have authority to ‘provide a solvent’ *Tucker v. US Department of Commerce* (1992) 958 F 2d 1411 at 1413 for every social, political or economic problem. The role of the common law courts is a far more modest one.”

In *Northern Territory of Australia v. Mengel* ⁵⁷, Mason CJ, Dawson, Toohey, Gaudron JJ and I said that the development of the common law needs to proceed “on the basis of the identification and enunciation of principles that unify and explain earlier decisions” ⁵⁸.

The judicial law-making function arises from the necessity to do justice between the parties who have brought a dispute before the court and between those who stand in similar situations. In discharging that duty, it is the web of established legal principle which provides the first point of reference for a judge. By reference to established principles, concepts and precedents and authoritative texts, the judge may be able to reason by induction and deduction to determine the issue in dispute. However, the use of strictly legal materials will often be insufficient to achieve the result which the needs of society require. In that event, the judge is entitled to refer to non-legal materials to determine whether that result can be achieved in a manner that is compatible with the exercise of judicial power.

⁵⁶ (1996) 186 CLR 71 at 115.

⁵⁷ (1995) 185 CLR 307.

⁵⁸ (1995) 185 CLR 307 at 339.

If contemporary social justice requires that a doctrine be overturned, it may be incumbent upon the court do so. If the social or economic consequences of extending or modifying liability are problematic, however, the extension or modification should not be made. Courts are not law reform commissions. They cannot “provide a solvent” for every social or economic problem.⁵⁹ They do not have the resources to undertake a comprehensive survey of social values or the social or economic ramifications of judicial changes to the law and, even if they did, that exercise is incompatible with their constitutional function.

JUDICIAL METHOD IN CASES CALLING FOR THE LAW-MAKING FUNCTION

Law-making then is primarily the function of the legislature. It is legitimate for the judiciary to make law only in the limited circumstances to which I have referred. What then does judicial method require the judge to do when faced with the novel case or an argument that a particular rule or principle is out of touch with society’s needs? In my 1998 paper, I referred to many of the responses required.

The starting point is to determine as precisely as possible what is the present state of the law. Next, the judge will have to evaluate the alleged need for change. He or she will have to make at least a preliminary assessment as to whether there is a social need for change and whether the proposed change in the law is likely to meet that need. At this stage, the judge may be convinced that an extension or modification of the law is out of the question for any one of a number of reasons. The proposed change may not fit with existing doctrine or may be contrary to a statutory command

⁵⁹ *Breen v. Williams* (1996) 186 CLR 71 at 115 per Gaudron and McHugh JJ quoting from *Tucker v. US Department of Commerce* (1992) 958 F 2d 1411 at 1413.

or policy or it may have become apparent that it is problematic whether the alleged social need exists or whether the proposed change in the law would alleviate it. In the case of the lower courts, it may become apparent that the proposed change is precluded by binding precedent.

If the judge concludes that the argument in favour of change raises “a serious issue to be tried”, to use the language of the Chancery lawyer, the judge will probably need to examine arguably relevant legal material outside the area of immediate legal concern. Statutes and cases in allied areas of law and general legal principles and jurisprudential concepts may give valuable guidance as to general legal policies or experience in other fields that ought to be taken into account. Finally, the social and economic consequences of the proposed change and its alternatives will need to be examined. It is at this juncture that the judicial law-maker is most likely to fall into error.

Even in the case of courts with power to overrule the precedent in question, sound reasons may often exist for refusing to overrule precedents or make legal changes that seem necessary if law is to achieve social justice. The precedent may have existed and been frequently acted upon for a long period. To overrule it may defeat the expectations of those who have relied on it. This is a factor of considerable importance in the case of precedents affecting commercial affairs.

The judicial law maker must also look to the consequences of a change in the law. Over 80 years ago, the philosopher, John Dewey, argued that what the judicial method needed was “a logic *relative to consequences rather than to antecedents*.”⁶⁰ The great advantage of looking at the consequences rather than simply determining

⁶⁰ “Logical Method and Law,” (1924) 10 Cornell L Q 17 at 26 (emphasis in original).

that the change is a desirable consequence of a current rule is that it forces the judge to analyse and evaluate the various interests that will be affected by the rule change. And by interests, I mean more than the interests of the parties. Rule changes have consequences for all those in a similar position. They may even have consequences for the rule of law or the administration of justice, as when a radical change or series of changes undermines confidence in the impartiality of the courts or in law as an instrument upon which persons can rely in ordering their affairs. Most areas of law – even statute law – are the subject of judicial decisions, and, in ordering their affairs, members of the public rely, through their legal advisers, on judicial decisions to expound the law. The “effectiveness of law as a social instrument is seriously diminished when practitioners believe they cannot confidently advise what the law is or how it applies to the diverse situations of every day life”.⁶¹ Even in the area of tort law where considerations of corrective justice often loom large, judges need to be wary of making sudden or radical changes in legal rules. Judicial law-making, unlike most legislative law-making, operates retrospectively. A change in tort law that may seem necessary if one of the parties – usually the plaintiff – is to receive social justice may have dire consequences for defendants and potential defendants who have not, or are under, insured in respect of the relevant risk. A change in a tort rule may affect the premiums payable by the relevant section of the public affected, the profits of insurance companies who had set premiums on the basis that the risk of legal liability did not exist and the budgets of public authorities who now find themselves legally liable for a risk that they thought did not exist and in respect of which they have not made provision.

Whether or not the judge decides to extend, modify or reformulate the law, his or her decision should be the result of examining and weighing the effect of the present law

⁶¹ *Perre v. Apand* (1999) 198 CLR 180 at 215.

and its proposed change on many interests, values and factors, some of which will point in different directions. They will include the need to maintain the historical continuity and coherence of legal doctrine, the need for a stable and predictable legal system, the extent to which change will affect existing rights and liabilities, the need to maintain the rule of law, the social and economic costs and benefits of the current rule and its change, the impact of change on the efficient administration of justice and the fairness of results under the present and proposed rule according to contemporary notions of justice. Other interests and factors will also be relevant, depending on the circumstances of the particular case.

There is no scale upon which the relevant factors can be weighed. In the end, the judge can do no more than make a judgment as to which of the policies underlying the present rule and its proposed change will best serve the public interest in having a stable and predictable legal system which is nevertheless responsive to social needs. That is the way that the common law has developed over the last 800 years. As Oliver Wendell Holmes Jr pointed out over 100 years ago, the life of the law has not been logic but experience. Because the law was developed pragmatically – even in the days when judges denied that they made law – the common law of countries like Australia, New Zealand and the United Kingdom remains relevant even in this age of statutes. If it is to continue to remain relevant in countries whose political philosophy permits the judiciary as well as the legislature to make law, judges must continue to develop the law pragmatically in response to social needs. To those who crave for certainty in the law, that will not seem very satisfactory. But the alternative of always leaving the law to the legislature to reform is even less satisfactory.