

Policy and the Swing of the Negligence Pendulum

POLICY AND THE SWING OF THE NEGLIGENCE PENDULUM*[1] D A IPP[2] Précis

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The law of negligence is especially prone to influence by moral, social, economic and political values. As society becomes more complex and technologically advanced, novel circumstances giving rise to negligence claims arise. Policy then becomes determinative. It is this influence of policy that explains the uncertainty and changes to the law of negligence since 1932. However, judges are reluctant to confront the effect of policy on their decisions and to explain their reasons by reference to its influence. It is important that judicial reliance on policy be fully and transparently reasoned. There are two vexed questions inherent in the judicial application of policy; when are community values to be applied and how are they to be determined? This article discusses these issues, the changes that have been made and the capacity of the law to satisfy community needs as regards negligence and whether legislative change is appropriate.

Some principles of the law remain immutable, but not those that govern negligence. Although the common law of negligence had a long and uneventful childhood, adolescence brought about a personality change that led, in adulthood, to incipient signs of gross instability. If the modern era can be regarded as negligence's senior years, one can only note the erratic and unpredictable dementia that has required legislative repair.

What has brought about such change and uncertainty? And why do other branches of the common law remain fairly constant, undergoing only gradual and placid variation, far removed from the limelight and criticisms by politicians, the media and the general public?

It is true that the law of contract is being stifled by industrial law, contract review and trade practices statutes that cut across the binding effect of agreements. But, nevertheless, the long-standing principles of the common law of contract continue to exist in their familiar form. The bastions of equity are even stronger, protected as they are by the fierce guardians of its pristine purity. I speak of course of those ruthless equity cleansers in the High Court and (not without the opposition of some bold spirits)[3] in the higher courts of New South Wales.

The reason for public interest in the law of negligence is no mystery. Negligence, as a concept, is easy to comprehend. It does not require an understanding of arcane rules to grasp the issues involved in a particular case. Lay persons regard themselves as well-qualified to express opinions in the area, and many feel strongly about issues that are publicised. While reading a newspaper over the breakfast table, judgments can be made by ordinary citizens in the space of a few minutes. All negligence cases arise in the ordinary course of human endeavour and there is a general belief that the assessment of negligence is nothing more than common sense, an attribute that not a few members of the public think is lacking in several judgments of courts around the country.

While the common or garden qualities of negligence are the key to why it is such an easy and ready target, they do not explain the changes to both principle and judicial approach that have occurred over the last 75 years. The reasons for these oscillations have to be sought in the essential nature of the tort of negligence and stem, to a substantial extent, from Lord Atkin's famous neighbour test, whereby, in *Donoghue v Stevenson*,[4] he propounded the modern principles of this branch of the law. Since 1932, Lord Atkin's words have become required study by every succeeding generation of lawyers in the common law world. He said:[5]

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

While this test seems on its face to be simple and easy to apply, it contains within itself fundamental policy issues. Of paramount importance is that the determination of who is a "neighbour" according to Lord Atkin's formula is essentially a matter of policy. While foreseeability may only involve the exercise of judgment in assessing what should have been contemplated, the concept of "reasonably"

foreseeable requires issues of policy to be considered. Other elements of negligence, apart from whether a duty of care is owed to a particular person, are permeated by policy considerations. Proof that a duty has been breached may depend on economic issues and questions of social utility. Factors of this kind may have to be balanced in order to determine whether precautions should have been taken to avoid harm. Causation involves normative considerations.[6] Whether damages should be recoverable in a particular case may involve serious questions of moral, social, economic and other values.[7] Thus, for example, economic loss is actionable only under controlled conditions.[8] Policy lies at the root of several recognised defences to negligence claims. Liability may be denied where the plaintiff was acting illegally at the time the injuries were suffered.[9] Immunity on the grounds of public policy is granted in the conduct of prosecutions by the Crown Prosecution Service.[10] Arbitrators are protected against claims by disappointed litigants.[11] Public policy protects claims by students against examiners.[12] A duty of care does not arise in connection with combat operations against the enemy.[13] Barristers' immunity is well known.[14] A fire brigade is not under a common law duty to answer a call for help and is not under a duty to take care to do so.[15] The coastguard has no duty of care to respond to an emergency at sea or to respond reasonably.[16] Police officers do not owe a duty to individual members of the public who suffer injury through careless failure to apprehend a dangerous criminals;[17] in *Tame v New South Wales*[18] McHugh J said that it was "preposterous" to suggest that a police officer had a duty of care in recording and using statements of witnesses.[19]

Policy considerations lie, invisible, behind much judicial reasoning. Justice Oliver Wendell Holmes famously said:[20]

The life of the law has not been logic; it has been experience.

But the sentence immediately following this aphorism is equally illuminating:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a great deal more to do than the syllogism in determining the rules by which men should be governed.

The law of negligence is especially prone to influence by moral, social, economic and political values. This is well illustrated by Lord Wilberforce's comments:[21]

Though differing in expression, in the end, in my opinion, the two presentations rest upon a common principle, namely that, at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy. Whatever is the correct jurisprudential analysis, it does not make any essential difference whether one says, with Stephenson LJ, that there is a duty but, as a matter of policy, the consequences of breach of it ought to be limited at a certain point, or whether, with Griffiths LJ, one says that the fact that consequences may be foreseeable does not automatically impose a duty of care, does not do so in fact where policy indicates the contrary. This is an approach which one can see very clearly from the way in which Lord Atkin stated the neighbour principle in *Donoghue v Stevenson* [1932] AC 562, 580.

As society becomes more complex and technologically advanced, novel circumstances giving rise to negligence claims arise. Policy then becomes determinative. It is this influence of policy that explains the uncertainty and changes to the law of negligence in recent times.

Lord Atkin observed[22] that the law of negligence should be based on a general public sentiment of moral wrongdoing - a statement said by the Judicial Committee of the Privy Council in *The Wagon Mound*[23] to be the "sovereign principle" of negligence. Much as this concept is anathema to some, herein lies the heart of the law of negligence. Of course, "public sentiment" in this sense does not mean attitudes that change with the whim of fashion. It does not mean transient beliefs in some political platform, or media driven public anger or approval in regard to issues of the moment. Rather, public sentiment is a reflection of deep-seated moral, political, social and economic values; a reflection of the values of society itself.

Public sentiment in the Lord Atkin sense also does not mean a judge's subjective view of community values. Lord Steyn has stressed the need for objectivity, saying:[24]

[J]udges' sense of the moral answer to a question, or the justice of the case, has been one of the great shaping forces of the common law. What may count in a situation of difficulty and uncertainty is not the subjective view of the judge but what he reasonably believes that the ordinary citizen would regard as right.

In *Cattanach v Melchior*[25] McHugh and Gummow JJ quoted with approval the remarks of Lord Radcliffe made in the course of a lecture on the influence of policy in the law. Lord Radcliffe said:[26] Public policy suggests something inherently fluid, adjusted to the expediency of the day, the proper

subject of the minister or the member of the legislature. The considerations which we accept as likely to weigh with them are just not those which we expect to see governing the decisions of a court of law. On the contrary, we expect to find the law indifferent to them, speaking for a system of values at any rate less mutable than this.

The problem is that judges differ in their identification and acceptance of these values, however "less mutable" they may be. The uncertainty to which this gives rise is aggravated by the many respects in which policy affects liability for negligence.

Another aggravating factor is that judges are reluctant to confront the effect of policy on their decisions and to explain their reasons by reference to its influence. Principle seems to be more certain than policy. That is why judges, as a rule, prefer to explain their decisions by reference to principle rather than policy. But principle often disguises policy, and policy often transmogrifies into principle. Public sentiment in the Lord Atkin sense does change, but it is very difficult to discern when that sentiment is sufficiently deep-rooted and broadly based to require a change in the law. Judges do not conduct market surveys. They do not take the pulse of constituents. They do not stand for election on a program of change. Furthermore, there is often a long time-lag before a court discerns a change in public sentiment and an even longer one before judges are prepared to depart from their own attitudes that have been entrenched over the years. In these circumstances it is important for judicial reliance on policy to be fully and transparently reasoned.

According to Professor Fleming:[27]

Lord Atkin's proximity has cast a baleful shadow over judicial ruminations on duty. Borrowed from the context of causation, where proximate cause and its mirror image remoteness had long served to identify the problem of limiting responsibility for consequential damage, it became a convenient screen for not disclosing any specific reasons behind a decision for or against a finding of duty. The judicial tendency to take refuge in seemingly bland, neutral concepts, like foreseeability and proximity, under the pretence that they represent 'principle' has its roots in the embarrassment with which the British conservative tradition has generally treated the role of policy in judicial making.

Professor Jane Stapelton points out that judges are inclined to use phrases which have become banal, which merely flag the existence of a particular gate through which the plaintiff must pass, and which do not reveal "what precise substantive issues will, in the relevant circumstances of a particular case, be regarded as relevant to whether the plaintiff is, respectively, owed a duty or can establish negligence-in-fact".[28] She comments:[29]

What is needed is the unmasking of whatever specific factors in each individual case weighed with the judges in their determination of duty. It is not acceptable merely for a judge baldly to assert that the plaintiff was proximate; or that a duty was justified because the parties were in a 'special relationship', or because the plaintiff had 'reasonably relied' on the defendant, or merely because it was 'fair, just and reasonable'. Without more, these are just labels.

The current formula employed in England for determining whether a duty of care exists involves foreseeability, proximity and what is fair and reasonable (*Peabody v Parkinson*).[30] Kirby J, alone of the High Court, has supported this concept in Australia. In *Sullivan v Moody*,[31] Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ rejected this approach, saying:[32]

Developments in the law of negligence over the last thirty or more years reveal the difficulty of identifying unifying principles that would allow a ready solution of novel problems. Nonetheless, that does not mean that novel cases are to be decided by reference only to some intuitive sense of what is 'fair' or 'unfair'.

Their Honours propounded the application of well-developed principles of the law of negligence, rather than broad concepts of fairness and reasonableness. It is, however, important to recognise to what extent those principles, themselves, are dependent on policy (and notions of fairness and reasonableness, in any event). An historical examination of the development of the law of negligence reveals the influence and importance of factors of this kind.

Negligence as a technical term began to crystallise in the early 19th century.[33] The earliest illustrations of tortious negligence were found in the liability of recognised categories of relationships, like occupiers of land and visitors, owners of goods and carriers, innkeepers and paying guests, and surgeon and patients. Gradually, with the industrial revolution, the concept of negligence as a separate basis of liability emerged. New inventions and the introduction of machinery, urbanisation and faster traffic along roads and railways created untold new sources of risk. Plaintiffs suffered

injuries never before experienced. "Public sentiment" in the form of considerations of social justice demanded that fundamental changes be made to the law of negligence.

Despite advancement in the rights of plaintiffs, the law was, at first, heavily weighted against them.

This is graphically illustrated by the remarks of Lord Abinger, whose views reflected the general attitudes of Victorian society. In 1839, in *Priestley v Fowler*,^[34] a butcher's servant sued his master who had allowed other servants to overload a van with goods. As a result the plaintiff was thrown out of the van, thereby fracturing his thigh. The Court of Exchequer was clearly startled by the novelty of the proceeding. Lord Abinger, speaking for the court, said:^[35]

If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent ... If the owner of the carriage is responsible for the sufficiency of this carriage to his servant, he is responsible for the negligence of his coach-maker or his harness-maker or his coachman.

He regarded such a prospect as too awful to contemplate.

Three years later, in 1842, Lord Abinger was again alarmed, this time in *Winterbottom v Wright*.^[36]

There, he held the repairer of a mail coach not to be liable to a coachman who had been injured by a defective axle. He was fearful of imposing tortious liability, believing that that would unjustly subject persons in the position of the repairer "to be ripped open by this action of tort".

As public sentiment changed, however, so, gradually, did the law. In 1883, by *Heaven v Pender*,^[37] the concept of "duty" was irrevocably established as an element of the tort of negligence. It was there accepted that, within the recognised categories, a person who caused injury to the person or property of another by failing to use ordinary care and skill would be liable for the damage caused.

In 1932, with *Donoghue v Stevenson*,^[38] came the metamorphosis. *Winterbottom v Wright* was overturned and the neighbour test accepted.^[39] So was established the modern generalised duty of care. A plaintiff no longer had to come within the pre-existing category of recognised factual situations to succeed. Lord Atkin laid down that foreseeability was a necessary element of the tort and, by use of the restricted notion of "neighbour", recognised that there would have to be some other limiting factor that would restrict liability.

But this change was a near-run thing. Lord Atkin's view prevailed only by a 3:2 margin. Lord Buckmaster and Lord Tomlin dissented. Lord Buckmaster said:^[40]

The law applicable is the common law, and, though its principles are capable of application to meet new conditions not contemplated when the law was laid down, these principles cannot be changed nor can additions be made to them because any particular meritorious case seems outside their ambit.

Now the common law must be sought in law books by writers of authority and in judgments of the judges entrusted with its administration.

Lord Buckmaster observed that the law books gave no assistance and no case directly involving principles of the kind pronounced by Lord Atkin had ever succeeded in the courts. He agreed with the emphatic statement of the Scottish judge who said that "it would seem little short of outrageous" to make the manufacturers of the ginger beer "responsible to members of the public for the condition of the contents of every bottle which issues from their works".^[41]

Lord Tomlin agreed with Lord Buckmaster and referred to the "alarming consequences" of accepting the validity of the proposition upheld by Lord Atkin. He said that "the reported cases - some directly, others impliedly - negative the existence as part of the common law of England of any principle affording support to the [view of the majority]".^[42]

Lord Atkin and the other two members of the majority did not expressly call upon policy to explain the change they favoured. They said merely that the judgments in cases such as *Winterbottom v Wright* erred.^[43] Lord Atkin said that the distinctions drawn in the earlier cases were "unnatural".^[44] He said that the proposition he was advancing was:^[45]

[One] which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense.

But it would have to be acknowledged that, frequently, reasoning that is unnatural to one judge, lawyer, or layman, is natural to another. Take the House of Lords in *Donoghue v Stevenson*. Three eminent Lords in Ordinary thought that the prevailing state of the law was unnatural. Two did not. The statement that the new, general rule avoided what was "unnatural" concealed the true reasoning

underlying the change, as did the statement that earlier judges had erred. The truth is that the majority's reasoning was based on policy, policy pure and simple.

Lord Atkin sought to justify the change he was proposing by saying that it reflected the opinion of everyone "in Scotland or England who [is] not a lawyer". It is not surprising that judges in negligence cases frequently pray in aid such lay spirits as the man on the Clapham omnibus, the traveller on the London Underground, or some inhabitant of Emu Plains. The problem, however, is that the supposed view of these notional lay members of the public depends on the subjective perception of the judge concerned. The conjuring up of Mr Everyman is a bid to invoke, in some intuitive way, Lord Atkin's public sentiment of moral wrongdoing.

It would be more in accord with the judicial function, however, if judges were rather to say: I think that a change to the law should be made; firstly, because of my perception of public sentiment (which is as follows); secondly, I think (for the following reasons) that the law should be changed to reflect that sentiment. Such reasons should include (if appropriate) why a change to the law is needed, a discussion of the merits of the sentiment and why the contemplated change is a natural development of the common law, or is consistent with its general trend.

Lord Atkin did not go into this kind of detail. Nevertheless, his reasoning was candid and transparent. Virtually all cases, both before and after *Donoghue v Stevenson*, where momentous changes have been made to the law, the reasoning of the judges concerned is laden with citations from prior cases from which the judges seek to draw support. This often conceals the true basis for the change in the law, namely, policy considerations. Lord Atkin, however, only cited the prior decisions for the purposes of making it clear that he was well aware of the existing law, but nevertheless thought that it was wrong.

The reasoning of the minority in *Donoghue v Stevenson* is revealing. Lord Buckmaster's agreement with the proposition that "it would seem little short of outrageous" to impose a generalised regime of product liability upon manufacturers tells us something about his temperament, but nothing about his reasoning. Lord Tomlin invoked Lord Abinger's spectre of prospective plaintiffs being ripped open^[46] (a declamatory statement also devoid of reasoning), but he did at least flick on the floodgates switch.^[47]

Following judges of the past and foreshadowing some judges of the future, Lord Buckmaster and Lord Tomlin resisted change by reference to existing authority. Their approach, as I have mentioned, was that, although the law may be changed gradually to meet new conditions, principles cannot be changed or additions made to them simply because of the merits of a particular case. One must seek the principles in "the reported cases". This, perhaps, is the first (although fairly rudimentary) articulation of incrementalism. It is also one of the last attempts to define the law of negligence by reference to existing authority, and not general principle. This approach was consigned to history by *Dorset Yacht Co Ltd v Home Office*.^[48]

Lord Reid gave a refreshing antidote to the anodyne invocation of existing authority, when he said:^[49]

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

Today, it would be difficult to find a judge who thinks that, if authority cannot be found in the cases, the law cannot be changed. But a view does exist that, if principles derived from established authority are capable of application to a novel case, they must, of necessity, apply to that case; on this view, established principles should not be nullified by policy. Thereby, without reference to broad policy implications, the law of negligence widens its reach to new and complex situations. This reluctance to apply policy to reject an extension of the tort of negligence conceals the application of a different kind of policy, namely, a policy of expansion, a policy that strengthens the law of negligence as "the last outpost of the welfare state".^[50]

Donoghue v Stevenson began a sharp swing of the pendulum in favour of plaintiffs. Claims of a kind never before brought before the courts made their appearance. Seven years later, in *Chester v Waverley Corporation*,^[51] Rich J complained about the attempts that had been made to extend the law of tort. He said that the developments seem to consist "in a departure from the settled standards for the purpose of giving to plaintiffs causes of action unbelievable to a previous generation of lawyers". He said "defendants appear to have fallen completely out of favour". Subsequent events proved him to be correct.

The next major change was introduced in 1963 by *Hedley Byrne and Co Ltd v Heller & Partners*

Ltd,[52] which held that a defendant could be liable for economic loss caused by negligent statement. Denning LJ in dissent in *Candler v Crane, Christmas and Company*[53] had earlier proposed such a rule. Asquith LJ, part of the majority in rejecting the rule in that case, justified his decision by pointing out that Lord Atkin's question "who then, in law, is my neighbour?" had never been applied where the damage complained of was not physical in its incidence to either person or property. Asquith LJ was applying established principles. Denning LJ, on the other hand, boldly asserted that *Le Lievre v Gould*[54] (the leading case that, in 1893, had laid down the contrary) was "infected by ... cardinal errors". The fact that that infection had persisted for some 60 years did not bother his Lordship. He referred to other seminal cases in the law of negligence where judges were divided in opinion and said:[55]

On the one side there were the timorous souls who were fearful of allowing a new cause of action. On the other side there were the bold spirits who were ready to allow it if justice so required. It was fortunate for the common law that the progressive view prevailed.

Denning LJ concluded that "a duty to use care in statement is recognised by English law".[56] He felt compelled to explain the new rule, which he himself said was novel, as being an existing principle of the common law. It had simply not been discerned previously; what had been said in *Le Lievre v Gould*, and in the cases that had followed it, was in error; the judges concerned had used the wrong password.

Hedley Byrne v Heller presaged an increase in the velocity of the pendulum as it moved in favour of plaintiffs. Arguments that would have failed 50 years before now began to succeed as a matter of course. Unsurprisingly, this swing coincided with a more liberal public sentiment that focused on individual rights (rather than on overall benefits to the community) and favoured plaintiffs above defendants. Compassion for the injured and desire to compensate fully those harmed by the negligence of others prevailed. Several changes were made to the law of negligence that were to the benefit of plaintiffs. Many were candidly justified on policy grounds.

For example, prior to *Griffiths v Kerkemeyer*,[57] it was the law that hospital, medical and nursing expenses could only be recovered if they were legally or at least morally incurred by the victim.

Griffiths v Kerkemeyer, however, held that a plaintiff could recover the value of those services even if he or she did not pay for them. Mason J said, baldly, that the old view was "no longer acceptable"[58] (plainly, for reasons of policy - albeit unstated).

In *Kars v Kars*,[59] the High Court extended the liability to pay damages for gratuitous future care to those instances where the tortfeasor, rather than a third party, provided the care. Previously, in 1984, Burt CJ, a judge with deep knowledge and understanding of the common law, said in *Snap v Reid*:[60]

It would, in my opinion, be against fundamental principle to allow a recovery in such a case.

Nevertheless, the High Court thought that recovery should be allowed. Toohey, McHugh, Gummow and Kirby JJ did so after a long discussion of policy considerations.

In *Hackshaw v Shaw*[61] Deane J,[62] in explaining why the separate measures of duty owed by occupiers of land to different categories of entrant should be abolished, relied on matters of social policy.

In *Tame v New South Wales*,[63] the High Court overruled *Chester v Waverley Corporation*[64] and did not follow the House of Lords in *White v Chief Constable of South Yorkshire Police*. [65] It refused to impose certain restrictions previously recognised in regard to claims for psychiatric damage (but retained those based on the requirement of normal fortitude and sustaining a recognised psychiatric injury).[66] The High Court held that the common law of Australia "should not, and does not" limit liability for damages for psychiatric injury to cases where the injury is caused by a sudden shock, or to cases where a plaintiff has directly perceived a distressing phenomenon or its immediate aftermath. Policy considerations were candidly discussed and the change of the law was motivated on those grounds. Gummow and Kirby JJ said that the approach they favoured "denies, for policy reasons, liability on the part of bearers of bad news without invoking requirements or distinctions which appear to have an insecure basis in contemporary psychiatry".[67]

Established principle was long to the effect that highway authorities were immune from claims arising out of their negligence in the exercise of their powers for the construction, maintenance and repair of public roads, including footpaths.[68] In *Brodie v Singleton Shire Council*,[69] however, the majority of the High Court abolished the immunity. Gaudron, McHugh and Gummow JJ set out the various considerations that led them to remove it.[70] These considerations included whether there were "sufficient reasons of public policy for denial of a remedy against the respondent Councils, if an action otherwise lies against them in negligence". Kirby J, as part of the majority, also took policy

considerations into account. The minority, Gleeson CJ, Hayne and Callinan JJ, considered aspects of policy, but came to the opposite conclusion.

Apart from making changes to the law that advantaged plaintiffs, courts in the last 30 years of the 20th century adopted a general adjudicatory approach that was sympathetic to plaintiffs. The concept of foreseeability became drained of meaning. The concept of reasonableness became less and less stringent. Duties of care were recognised in circumstances that today seem problematic.

In 1985, in *Bankstown Foundry Pty Limited v Braistina*,^[71] McHugh JA contrasted decisions (delivered some 20 years previously) on the application of the general principles of negligence with the then more recent decisions of the High Court. His Honour concluded that the standard of care required has "moved close to the border of strict liability".^[72] In the same year, Kirby P^[73] referred to other decisions of the High Court and other courts that further illustrated the point made by McHugh JA. Mason, Wilson and Dawson JJ, however, in the appeal from the New South Wales Court of Appeal in *Bankstown Foundry Pty Limited v Braistina*, resisted the proposition that the law had changed, as McHugh JA and Kirby P had observed. They said:^[74]

What must be asserted is that the law has not changed. It is as accurate today as it was thirty years ago to say that the duty 'is that of a reasonably prudent employer and it is a duty to take reasonable care to avoid exposing the employees to unnecessary risks of injury (*Hamilton v Nuroof (WA) Pty Limited* (1956) 96 CLR 18 at 25 per Dixon CJ and Kitto J).

Their Honours, nevertheless, accepted^[75] that:

[I]t is undoubtedly true, as McHugh said, that what reasonable care requires will vary with the advent of new methods and machines and with changing ideas of justice and increasing concern with safety in the community ... What is considered to be reasonable in the circumstances of the case must be influenced by current community standards.

Schiller v Mulgrave Shire Council^[76] is a good example of how, during this period, judges were quick to impose liability for negligence on defendants. The plaintiff was injured when a dead tree fell on him while he was walking along a track in a National Park. The council having the control and management of the Park was held liable by the High Court on the basis that it knew or should have known of the danger posed by dead trees. It was said that the Council should have taken steps to discover and take care of these trees.

This result would have seemed ludicrous 40 years before then by judges such as Lord Buckmaster. Today the result appears to be simply wrong. Recently, in *Secretary to the Department of Natural Resources and Energy v Harper*,^[77] the plaintiff was injured when she was struck by a falling tree while walking through a National Park in windy conditions. The Victorian Court of Appeal held that the Department had not breached its duty of care to the plaintiff by failing to erect a sign warning of the danger imposed by hazardous trees in high wind conditions. The risk created by dangerous trees was an obvious one. The burden of erecting signs would be disproportionate to the remote risk and would therefore be unreasonable.

In 1992, in *Hughes v Hunters Hill Municipal Council*,^[78] the plaintiff tripped on a footpath paver that had become dislodged as a result of the natural growth of a tree root. The plaintiff was actually aware of the dislodged paver and the possible danger it posed. Despite this, the New South Wales Court of Appeal held that the Council had been negligent in planting a tree when it was foreseeable that tree roots would, over time, dislodge footpath pavers. In recent years, however, the New South Wales Court of Appeal and other intermediate appellate courts, following *Ghantous v Hawkesbury Shire Council*^[79] where it was held that citizens were expected to look where they were going and to avoid obvious hazards in footpaths, have eschewed this approach and there have been a series of cases where defendants have successfully resisted the claims of pedestrians who have tripped on uneven footpaths.

In *Lowns v Woods*^[80] a general practitioner was at his surgery one morning when a young woman not known to him knocked on his door and asked him to examine her brother who was lying on the roadway some 300 metres away, in the throes of an epileptic seizure. The doctor refused to attend on the young man on the ground that he was not his patient, but was held liable for negligence; the doctor was said to owe a duty of care to this person with whom, previously, he had had no connection. This decision is to be contrasted with *In Re F*^[81] where Lord Goff held that a doctor was entitled to ignore a person who by chance encounters someone who is ill or has sustained injury. The approach in *Lowns v Woods* was a startling change from the attitude manifest in 1956 by Lord Denning when he wrote the foreword to *Professional Negligence*.^[82] His Lordship, a judge not known for conservatism, said:

One hundred years ago the courts said that a solicitor was not liable except for gross negligence. This

phrase has been discarded but the cases are treated much the same now as then. The courts hesitate long before holding that a solicitor is negligent. Likewise with doctors and hospitals.

Then there is *Nagle v Rottneest Island Authority*.^[83] A young man was injured when he dived into water at Rottneest Island and hit his head on a submerged rock. People had been diving from that rock for several years. It was a popular holiday spot. The majority of the High Court held that the diver's injury was caused by the Authority's failure to warn of the presence of the submerged rocks that were ordinarily plainly visible. This was so despite the acknowledged fact that diving at the site may have been "foolhardy or unlikely". This case has been explained by the notion that the rock was partially obscured from the diver's vision by the effect of reflective sunlight on the water's surface. This is one of those decisions that the traveller on the train to Fremantle has never been able to comprehend. *Lisle v Brice*^[84] cannot be left out of this list. A man committed suicide three years after a motor accident caused by the defendant's negligence. He suffered what Thomas JA described as "relatively minor injuries". He became depressed in consequence of the accident and this led to his suicide. The defendant motorist was held liable for loss of support to the deceased's children. Thomas JA expressed his misgivings with this result but thought he was compelled to arrive at it by reason of the existing state of the law of negligence. There is little doubt as to what the spectator at the Gabba would think of this decision.

Since *Nagle* public sentiment has turned. Unbridled recognition of liability coupled with overly large damages awards brought about strong public resentment. Judicial generosity with insurers' moneys had foreseeable consequences. Premiums rose exponentially, insurance cover became difficult to obtain. The fabric of society was damaged. Education, health care, sporting events, professional practice, business enterprise, charitable institutions, rural get togethers, all suffered. No wonder the public objected. The community had been harmed by blinkered application of the full compensation theory.

The judiciary responded. It became less easy for plaintiffs to succeed. The concept of autonomy and responsibility for one's self began to be emphasised.^[85] In *Agar v Hyde*^[86] it was recognised that persons who participated in dangerous games could not hold those who make the laws for the games liable merely because they could have made the game less dangerous. Gaudron, McHugh, Gummow and Hayne JJ approved the following statement by Lord Hoffmann in *Reeves v Commissioner of Police of the Metropolis*:^[87]

... there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions. This philosophy expresses itself in the fact that duties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed.

A very clear policy manifesto.

In *Reynolds v Katoomba RSL All Services Club Limited*^[88] Spigelman CJ, in holding the law does not recognise a duty of care "to protect persons from economic loss, where the loss only occurs following a deliberate and voluntary act on the part of the person to be protected", said:^[89]

In many respects the tort of negligence is the last outpost of the welfare state. There have been changes over recent decades in the expectations within Australian society about persons accepting responsibility for their own actions. Such changes in social attitudes must be reflected in the identification of duty of care for purposes of the law of negligence. The recent authoritative statements in *Perre v Apand Pty Limited* and *Agar v Hyde* give greater emphasis, in the development of the law of negligence, to the acceptance by individuals of a personal responsibility for their own conduct, than may have been given in the past.

The Chief Justice here recognised the significance of public sentiment in the Lord Atkin sense.

Spigelman CJ returned to the topic in *Waverley Municipal Council v Swain* saying:^[90]

Bus v Sydney County Council (1989) 167 CLR 78 identified a change in the law, between *Sydney County Council v Dell'Oro* (1974) 132 CLR 97 and 1986 to the effect that the law has 'progressed' by giving greater weight to the possibility of inappropriate conduct on the part of others. It now appears possible to identify a change in the law in the other direction, ie greater weight is being given to the proposition that people will take reasonable care for their own safety.

In *Tomlinson v Congleton Borough Council* Lord Hoffmann stated his policy view in striking terms. He

said:[91]

My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them. I find it difficult to express with appropriate moderation my disagreement with the proposition of Sedley LJ (at para 45) that it is 'only where the risk is so obvious that the occupier can safely assume that nobody will take it that there will be no liability'. A duty to protect against obvious risks or self-inflicted harm exists only in cases in which there is no genuine and informed choice, as in the case of employees, or some lack of capacity, such as the inability of children to recognise danger (*British Railways Board v Herrington* [1972] AC 877) or the despair of prisoners which may lead them to inflict injury on themselves (*Reeves v Commissioner of Police* [2001] 1 AC 360).

This approach has been applied in several recent cases[92] and has given rise to a belief on the part of some that the pendulum has begun to reverse itself. This would surely be in accord with public sentiment, if public sentiment is to be regarded as providing the incentive to legislatures throughout the country to take steps to reduce the ease with which plaintiffs have been able to establish liability for negligence and recover overly large amounts of damages. The restrictive legislation in New South Wales embodied in the Civil Liability Act 2002 and the Civil Liability Amendment (Personal Responsibility) Act 2002 has either been duplicated in material respects or foreshadowed by virtually every State and Territory in the country.

Nevertheless, there have been at least three cases in recent times where the High Court has handed down decisions against the trend.

I have already mentioned *Tame* which removed several barriers against recovery for mental harm. The reach of *Tame* was broadened by *Gifford v Strang Patrick Stevedoring Pty Ltd*[93] which extended the right to claim for mental trauma to children of an employee who was killed in an accident in the course of his employment. The children suffered nervous shock upon being informed of their father's death later that day. Typical of the press comment on this decision was the headline, "Employers face lawsuit avalanche".[94]

I come now to *Cattanach & Anor v Melchior*. [95] The parents of a perfectly healthy and normal child, who was born in consequence of the negligent failure by a doctor to warn of certain consequences associated with a sterilization operation the mother was contemplating, were held entitled to recover from the doctor the costs of rearing the child.

Obviously, this case raised issues of fundamental social importance. Hayne J, in dissent, observed that the law should not admit the head of damage claimed "because it would be necessary to put a price on the value to the parent of the new life".[96] He said that "public policy forecloses that inquiry" and explained in detail why he came to that conclusion. Heydon J, also in dissent, based his decision on three powerfully articulated policy considerations, including the fact that what happened to the plaintiffs was incapable of characterisation as a loss. He said that the law assumes that human life has a unique value and brings into existence corresponding duties of a unique kind. Accordingly, the impact of a new life in a family is incapable of estimation in money terms. Gleeson CJ, who also disagreed with the majority, rested his decision on the fact that the plaintiff was claiming economic loss of a kind not recognised by the common law. This, too, was a decision based on policy grounds, albeit a different policy to that referred to by Hayne and Heydon JJ.

McHugh and Gummow JJ were prepared to allow that underlying values respecting the importance of human life, the stability of the family unit, and the nurture of infant children until their legal majority, were an essential aspect of the welfare of the community.[97] They then posed the question whether there was a general recognition in the community that there should be no award of damages for the cost to the parents of rearing and maintaining a child who would not have been born were it not for the negligent advice of a gynaecologist. They answered it in this way:[98]

[T]he answer to the second [question] must be that the courts can perceive no such general recognition that those in the position of Mr and Mrs Melchior should be denied the full remedies the common law of Australia otherwise affords them. It is a beguiling but misleading simplicity to invoke the broad values which few would deny and then glide to the conclusion that they operate to shield the appellants from the full consequences in law of Dr Cattanach's negligence.

McHugh and Gummow JJ gave several reasons for holding that the broad values of the importance of human life should not defeat the claim for the costs of bringing up the child.

Firstly, they distinguished between a broad policy, attributing proper regard to the importance of

human life, and a specific policy that would lead to the parents' claim being defeated because of the application of the broad policy. In essence, they were of the view that it was speculative to say that the specific policy was sufficiently accepted by the community to justify affording an immunity to the appellant.[99]

Their Honours gave no reasons for their view as to the lack of acceptance of the specific policy. Their decision in this respect would have been intuitive and based on subjective experience. In the same intuitive way, the High Court has regarded policy factors as being sufficiently accepted, and immutable, to cause them to change the law in cases such as *Griffiths v Kerkemeyer and Brodie*, and substantial reliance has been placed on policy factors in decisions such as *Crimmins v Stevedoring Committee*[100] and *New South Wales v Lepore*.[101] The decision not to apply the specific policy, when seen in this light, was itself a policy decision.

Secondly, McHugh and Gummow JJ said:[102]

The differential treatment of the worth of the lives of those with ill health or disabilities has been a mark of the societies and political regimes we least admire. To prevent recovery in respect of one class of child but not the other, by reference to a criterion of health, would be to discriminate by reference to a distinction irrelevant to the object sought to be achieved, the award of compensatory damages to the parents.

This is reasoning based squarely on moral values; that is, policy.

Thirdly, they said:[103]

To suggest that the birth of a child is always a blessing, and that the benefits to be derived therefrom always outweigh the burdens, denies [the mother's claim for pain and suffering in respect of pregnancy and birth, the effect on her health, lost earning capacity, medical and related costs, and other expenses].

The view that this category of damages should be recognised, despite the receipt of the benefit resulting from the birth of the child, involves balancing a view of human life and family values against the full compensation theory; it is a policy decision.[104]

Fourthly, they said that the appellant's argument denies "the widespread use of contraception by persons such as the Melchioris to avoid just such an event".[105] Again, a policy factor is involved, namely, an assessment of the social utility and value to be attributed to the steps taken to avoid the birth of the child when balanced against the benefits received from the birth.

Fifthly, they said that the perceived disruption to familial relationships by the child becoming aware of the litigation was speculative. This reasoning was akin to that which led their Honours to the view that the specific policy was not sufficiently accepted by the community to be applied; as I have noted, that was a policy-based decision.

Sixthly, McHugh and Gummow JJ considered it to be contrary to principle to set off the benefits of having a child against the costs of maintaining a child, as the benefits received fell under a different head of damage. It was open to their Honours to resolve the different heads of damage issue by applying policy considerations of the kind relied on by the minority (this has been the approach of many other courts faced with the same problem in different parts of the common law world). Their decision not to do so was accordingly one based on policy.

McHugh and Gummow JJ went on to apply the ordinary principles of negligence in upholding the parents' claim. They did so, however, for reasons of policy that led them to reject the specific policy considerations relied on by the minority. As Kirby J, in effect, pointed out, their reasoning bears a striking resemblance to subjective considerations of fairness and reasonableness (the approach rejected in *Sullivan v Moody*[106]).

Kirby J acknowledged[107] that:

[It is] self-evident that courts take such policy considerations into account in deciding novel questions of this kind.

His Honour, however, rejected the public policy arguments of the minority, saying,[108] amongst other things, that, if the application of ordinary legal principles is to be denied on the basis of public policy, it is desirable that such policy be founded on empirical evidence, not mere judicial assertion.

With great respect to his Honour, it is, I think, fair to observe that, while it may be desirable for policy considerations to be founded on empirical evidence and not mere judicial assertion, that practice, in the past, has rarely, if ever, been utilised. There was no empirical evidence, for example, in *Tame*, *Brodie*, *Griffiths v Kerkemeyer*, *Kars v Kars*, nor was there in *Donoghue v Stevenson* and *Hedley Byrne v Heller*. It is difficult to imagine the kind of evidence that would be admissible or available (or remotely reliable) to prove such matters as the value of human life to the community, the community

attitude to whether a parent should recover the costs of rearing an initially unwanted new child, and the community attitude to whether the benefits of having a new child should be set off against the cost of rearing the child.

Kirby J, in detailed reasons, discussed the issues under headings entitled, "The competing choices", "Option 1: No damages", "Option 2: Limiting compensation to immediate damage", "Option 3: Extra costs of disabled births", "Option 4: Compensation with discount for joys and benefits" and "Option 5, Compensation to include foreseeable costs of child-rearing". As the headings indicate, these issues cannot be divorced from policy values of a social and moral nature.

In substance, Kirby J, for countervailing policy reasons, did not approve of the policy considerations that underlay the judgment of the minority.

Callinan J said:[109]

I cannot help observing that the repeated disavowal in the cases of recourse to public policy is not always convincing.

But he nevertheless concluded[110] that "no identifiable, universal principle of public policy dictates any different result".

As Professor Peter Cane[111] remarks:[112]

Whatever one thinks of the result in *Cattanach v Melchior*, the judgments make for fascinating, if exhausting, reading. One thing they demonstrate beyond a shadow of doubt is that there are strong arguments on both sides of the issue. However, they also show that strong answers are available to all of the arguments in both directions. The fact of the matter is that each of the Justices ultimately had to make a judgment-call based on a personal value-laden assessment of the relative weight of the competing arguments.

In summary, although the majority's final disposition of the appeal was explained in terms of established legal principles, their essential reasoning in recognising the parents' claim was as much based on policy as that of the minority. As Professor Cane observes,[113] "legal principle" cannot tell us whether Dr Cattanach should have been held responsible for the cost of rearing Jordan Melchior. *Cattanach v Melchior* raises the vexed questions inherent in judicial application of policy: When are community values to be applied and how are they to be determined?

In *Woods v Multi-Sport Holdings Pty Limited*,[114] Callinan J said:[115]

Contrary to the suggestion of the learned current author of *Cross on Evidence*, judges are not free to apply their own views and to make their own inquiries of social ethics, psychology, politics and history without requiring evidence or other proof ... Two reasons why this is so are immediately apparent. The first is that the parties must be given an opportunity to deal with all matters which the court regards as material. The second reason is that rarely is there any universal acceptance of what are true history, politics and social ethics.

The remarks of Kirby J in *Cattanach*[116] are consistent with this approach.

In *Woods*, McHugh J appeared to be of a different opinion. He said:[117]

In *R v Henry*, (1999) 46 NSWLR 346 at 362, Spigelman CJ said that the means of acquiring information 'for the purposes of policy development should not be confined by the rules of evidence developed for fact finding with respect to matters that only concern the parties to a particular case'. As a result, as the learned author of *Cross on Evidence* has pointed out, '[i]t is clear from the cases that judges have felt themselves relatively free to apply their own views and to make their own enquiries of social ethics, psychology, politics and history where relevant without requiring evidence or other proof' (*Heydon, Cross on Evidence*, 6th Aust Ed (2000), p 122 [3010]).

The views of McHugh J (and Spigelman CJ in *R v Henry*) reflect the traditional approach manifest in the statement of Justice Cardozo[118] that a judge "must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself". This has long been accepted. In the great cases where major changes to the law have been made, courts have explained and justified those changes by reference to policy factors and values that were not established by evidence. The courts took judicial notice of these matters, having derived the requisite knowledge about them from the sources identified by Justice Cardozo.

Of course, judges are not free to apply policy considerations without restriction. Were this to be the case, there would be rule by judges - not rule by law. Stephen J emphasised the caution needed in applying policy factors when he said:[119]

Policy considerations must no doubt play a very significant part in any judicial definition of liability and entitlement in new areas of the law; the policy considerations to which their Lordships paid regard in Hedley Byrne are an instance of just such a process and to seek to conceal those considerations may be undesirable. That process should however result in some definition of rights and duties, which can then be applied to the case in hand, and to subsequent cases, with relative certainty. To apply generalised policy considerations directly, in each case, instead of formulating principles from policy and applying those principles, derived from policy, to the case in hand, is, in my view, to invite uncertainty and judicial diversity.

It is again worth repeating Justice Cardozo's observations on this issue:[120]

[R]estrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.

Professor Stone[121] noted that the legal system contained within itself several checks on arbitrariness (described by him as "steadying factors") in the application of value factors. No right-thinking person would condone a system where the subjective intuitions, feelings and prejudices of judges are given free rein (even when couched in terms of objective community values). Arbitrariness and uncertainty would prevail if unbridled application of policy values were to be allowed. This lies at the heart of the cautionary admonitions so often expressed against reasoning based on presumed moral, social, economic or political values. Nevertheless, by its inherent nature, policy factors inevitably play a crucial part in the application of the law of negligence. The principles governing such application have yet to be worked out properly and expressed in a coherent, systematic, form. It may well be that the issue, by its very nature, is not capable of being resolved by clear and certain rules.

Nevertheless, at this stage of the law's development, public confidence in the law of negligence requires frank recognition of the process involved. Moreover, the requirement that policy factors be spelt out when they inform judicial decision-making is a fundamentally important part of the restrictive forces that confine the application of policy within acceptable limits.

Judicial candour has not always met with approval. Lord Radcliffe said:[122]

We cannot run the risk of finding the archetypal image of the judge confused in men's minds with the very different image of the legislator.

and:[123]

I think that the judges will serve the public interest better if they keep quiet about their legislator function.

Lord Devlin, according to Professor Peter Birks,[124] "professed a preference for an undercover, benevolently dishonest approach to judicial law-making." Professor Birks was referring to Lord Devlin's remarks in his book *The Judge*: [125]

It is facile to think that it is always better to throw off disguises. The need for disguise hampers activity and so restricts power. Paddling across the Rubicon by individuals in disguise who will be sent back if they proclaim themselves is very different from the bridging of the river by an army in uniform and with bands playing.

Nowadays, however, the current attitude, at least in Australia, is that expressed by Sir Anthony Mason:[126]

The importance of public confidence in the administration of justice makes it all the more important that courts should be concerned to render decisions that are both legally sound and just, and that judges should identify and justify the standards, values and policy considerations on which they rely. The requirements of accountability, openness and transparency reinforce the necessity for this approach.

And:[127]

[T]he duty of the judge is to reveal fully the reasons for the decision. That duty is a legal duty which is reinforced by the modern emphasis on judicial accountability, transparency and openness. In the long run, full exhibition of the process of reasoning that leads to a judicial decision is likely to promote

public confidence in the system, even if it does reveal steps and value judgments which are debatable and may be criticised. Likewise, full exhibition of the reasoning may lead to judgments that are comprehensible because they relate doctrine to its underlying foundations rather than simply discuss complex doctrinal issues without reference to those foundations.

It goes without saying that this approach is required, not only where, for policy reasons, courts propound new principles of negligence, but where courts, for policy reasons, apply established principles of negligence to novel situations, thereby establishing the potential for liability for negligence in circumstances where, in the past, liability has not previously been recognised. There is another aspect of *Cattanach v Melchior* that warrants comment. The decision occupies 124 printed pages of reasoning and citation of authority. The question in issue, however, was not particularly complex. It was dealt with succinctly in newspaper coverage and the essence of the problem was thereby exposed to the lay reader. It evoked considerable controversy in the media, where it attracted much criticism and some support. The Queensland and New South Wales governments have foreshadowed legislation to reverse this decision. It remains to be seen whether this will occur.

Whether parliament should legislate in regard to the principles of negligence has evoked different opinions amongst the judiciary.

Kirby J in *Cattanach* referred to the recent spate of legislation involving the law of negligence and said:[128]

The setting of such bounds by legislatures can be arbitrary and dogmatic. Subject to any constitutional restrictions, parliaments, motivated by political considerations and sometimes responding to the 'echo-chamber inhabited by journalists and public moralists' may impose exclusions, abolish common law rules, adopt 'caps' on recovery and otherwise act in a decisive and semi-arbitrary way.

His Honour observed that judges, in contra-distinction, "have no authority to adopt arbitrary departures from basic doctrine".

Hayne J, in discussing[129] the legislation in question, has expressed a different viewpoint, namely: All aspects of the debates that I have identified generated political controversy. Lawyers, and organisations of lawyers, made their contributions to the debates. All this being so, why should a judge now venture upon this subject of 'Restricting Litigiousness'? Is this not a matter now for the legislative branch rather than the judicial branch?

There are many aspects of the debate which are matters for the legislative branch. They include both questions of policy and questions about how a chosen policy is to be effected. Whether some rights of action should be curtailed or abolished is, in the end, a matter to be determined by the legislature. If some rights of action are to be curtailed, it will be for the legislature to choose how that is to be effected. It would be wholly wrong for me to venture into that territory and I will not do so.

Spigelman CJ anticipated legislation in his influential article, *Negligence: The Last Outpost of the Welfare State*. [130] Although his Honour suggested that legislation be enacted after invoking the resources of all of the law reform commissions, government regarded the need for change as too urgent to undertake that process.

My own opinion on the merits of legislative interference will not come as a surprise. For my part, I do not see parliamentary alteration of the law as being necessarily any less desirable than changes effected by the courts.

It is open to serious question whether courts always make changes consistent with the existing authorities. History shows that public policy considerations have caused courts to move in directions diametrically opposed to the leading decisions of the past.

In addition, courts have not always been consistent and changes based on policy have not always been successful. For example, in *Grincelis v House*[131] Kirby J said:

Having, in *Griffiths v Kerkemeyer*, embraced the principle that an injured plaintiff is entitled to recover damages for his or her needs met by the provisions of gratuitous services by family or friends, this court was set upon a path that has repeatedly demonstrated the 'anomalies', 'artificiality' and even 'absurdities' of the 'novel legal doctrine' which it adopted in substitution for its own earlier stated opinion.

Callinan J was also critical of *Griffiths v Kerkemeyer*. [132]

Moreover, changes made by courts on policy grounds have not necessarily resulted in consistency or certainty within the common law world. Three members of the High Court, the House of Lords,^[133] and other courts of high authority in other countries have come to a conclusion different to that of the majority in *Cattanach*. In *Tame*, policy considerations caused the High Court to extend liability for negligence, thereby applying a different rule to the House of Lords in *White v Chief Constable of South Yorkshire Police*.^[134] Differences on many issues, based on policy considerations, abound between courts of the highest authority in Australia, England, New Zealand, Canada and the USA. Does this mean that the public sentiment in these countries differs? Or does it mean, perhaps, that judges simply have idiosyncratic, subjectively intuitive views as to the relevant policy factors? As I have attempted to demonstrate, judges have long been instrumental in changing the law of negligence on policy grounds. Shifts in policy have caused judges to swing the negligence pendulum, gradually at first, then violently, then erratically. Policy factors have often not been acknowledged, although they have been ever-present and significantly influential. Issues that will in the future come before the courts will be more and more complex. One only has to think of the startling developments in genetics and information technology. It is undeniably the case that the courts now face a challenge, involving the application of policy considerations, to adapt and apply the tort of negligence so that it meets the needs of society. If this challenge is not properly met, courts will no longer be regarded as being able, reliably and efficiently, to transform Lord Atkin's public sentiment into new law. Changes will be made by other means.

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- 1 Edited version of a paper delivered on 15 September 2003 at Government Risk Management Conference, Perth
- 2 Judge of Appeal, Court of Appeal, Supreme Court of New South Wales
- 3 See for example *Harris v Digital Pulse Pty Ltd* (2003) 197 ALR 626
- 4 [1932] AC 562
- 5 at 580
- 6 Stapelton, 'Cause-in-Fact and the Scope Of Liability for Consequences' (2003) 119 LQR 388; *Chester v Afshar* [2002] 3 WLR 1195
- 7 *Cattanach v Melchior* (2003) 199 ALR 131
- 8 *Perre v Apand Pty Limited* (1999) 198 CLR 180 particularly Gleeson CJ at 192 and Gaudron J at 199 to 200
- 9 *Trindade & Cane, The Law of Torts in Australia* (3rd ed) at 578 to 580.
- 10 *Elgouzouli-Daf v Commissioner of Police* [1995] QB 335
- 11 *Sutcliffe v Thackrah* [1974] AC 727
- 12 *Thorne v University of London* [1966] 2 QB 337
- 13 *Shaw, Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 361
- 14 *Giannarelli v Wraith* (1988) 165 CLR 543
- 15 *Capital and Counties Plc v Hampshire City Council* [1997] QB 1004
- 16 *OLL Ltd v Secretary of State for Transport* [1997] 3 All ER 897
- 17 *Hill v Chief Constable of West Yorkshire* [1989] 1 AC 53
- 18 (2002) 191 ALR 449
- 19 at 479
- 20 O W Holmes, *The Common Law*, (1881) at 1
- 21 *McLoughlin v O'Brian* [1983] 1 AC 410 at 420
- 22 *Donoghue v Stevenson* [1932] AC 562 at 580
- 23 [1961] AC 388 at 426
- 24 In *McFarlane v Tayside Health Board* [2000] 2 AC 59 at 82
- 25 (2003) 199 ALR 131 at 153
- 26 Radcliffe, *The Law & Its Compass* (1960) at 43 to 44
- 27 Fleming, *The Law of Torts*, 9th ed, (1998) at 153
- 28 Stapelton, 'Duty of Care Factors: A selection from the judicial menus', (1998) *The Law of*

Obligations: Essays in celebration of John Fleming (Cane and Stapleton eds) at 62
29 at 62
30 [1985] AC 210 at 240 per Lord Keith
31 (2001) 207 CLR 562
32 at 580
33 Winfield, 'The History of Negligence in the Law of Torts' (1926) 42 LQR 184
34 (1837) 3 M & W 1
35 at 5
36 (1842) 10 M & W 109
37 (1883) 11 QBD 503
38 [1932] AC 562
39 at 580
40 at 567
41 at 578
42 at 600 to 601
43 at 594
44 at 595
45 at 599
46 at 599
47 at 600
48 [1970] AC 1004 at 1026 to 1027
49 Lord Reid, 'The Judge as Lawmaker' (1972) 12 JSPTL 22
50 The Honourable J J Spigelman CJ, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 ALJ 432
51 (1939) 62 CLR 1 at 12 to 13
52 [1964] AC 465
53 [1951] 2 KB 164
54 [1893] 1 QB 491
55 at 178
56 at 184
57 (1977) 139 CLR 161
58 at 193
59 (1996) 187 CLR 354
60 (1984) Aust Tort Reports 80-620
61 (1984) 155 CLR 614
62 at 659
63 (2002) 191 ALR 449
64 (1939) 62 CLR 1
65 [1999] 2 AC 455
66 I participated in the decision of the Full Court in *Annetts v Australian Stations Pty Ltd* (2000) 23 WAR 35 that was overturned by *Tame*.
67 at 500 (emphasis added)
68 *Buckle v Bayswater Road Board* (1936) 57 CLR 259; *Gorringe v Transport Commission (Tas)* (1950) 80 CLR 357
69 (2001) 206 CLR 512
70 at 557
71 (1985) Aust Torts Reports 80-713 referred to with approval in *Mihaljevic v Longyear (Aust) Pty Limited* (1985) 3 NSWLR 1 at 9
72 His Honour compared *Turner v South Australia* (1982) 56 ALJR 839; 42 ALR 669 with *Skinner v Barac* (1961) 35 ALJR 124 and *Commissioner for Railways (NSW) v O'Brien* (1958) 100 CLR 211
73 In *Mihaljevic v Longyear (Aust) Pty Limited* (1985) 3 NSWLR 1 at 9
74 (1986) 160 CLR 301 at 307

75 at 308 to 309
76 (1972) 129 CLR 116
77 (2000) 1 VR 133
78 (1992) 29 NSWLR 232
79 (2001) 206 CLR 512
80 (1996) Aust Torts Reports 81-376
81 [1990] 2 AC 1
82 J P Eddy (1956)
83 (1993) 177 CLR 423
84 [2001] QCA 271
85 See *Perre v Apand* (1999) 198 CLR 180 at 223
86 (2000) 201 CLR 552
87 [2000] 1 AC 360 at 368
88 (2001) 53 NSWLR 43
89 at 48
90 (2003) Aust Torts Reports 81-694 at 63,778
91 [2003] UKHL 47
92 See the cases discussed in Fitzgerald and Harrison, 'Law of the Surf', (2003) 77 ALJ 109
93 (2003) 198 ALR 100 (I participated in the decision of the Court of Appeal that was overturned by Gifford)
94 Sunday Times (Perth), 27 July 2003
95 (2003) 199 ALR 131
96 at 200
97 at 153
98 at 153 to 154
99 *ibid*
100 (1999) 200 CLR 1
101 (2003) 195 ALR 412
102 at 154
103 at 154
104 compare *De Sales v Ingrilli* (2002) 193 ALR 130 where it was said at 144: "It was stressed by this Court in *Carroll v Purcell* (1961) 107 CLR 73 at 79 that the balance of gains and losses for which compensation is to be paid must be struck by reference to the gains and losses which must result from the death in question".
105 at 154
106 (2001) 207 CLR 562
107 at 164
108 at 173
109 at 209
110 at 212
111 Head, Law Program, Research School of Social Sciences, Australian National University
112 In (2003) LQR (forthcoming)
113 *op cit*
114 (2002) 208 CLR 460
115 at 511
116 at 173
117 at 479
118 *The Nature of the Judicial Process*, (1921) at 113
119 In *Caltex Oil (Australia) Pty Limited v The Dredge "Willemstad"* (1975) 136 CLR 529 at 567
120 *Op cit* at 114
121 *Precedent and Law*, (1985) at 88
122 'The Lawyer and his Times' in *Not in Feather Beds. Some Connected Papers*, (1968) at 271

123 at 273

124 'Fictions, Ancient and Modern', *The Legal Mind*, (MacCormick & Birks eds) at 100

125 (1979) at 12

126 *The Nature of the Judicial Process and Judicial Decision-Making, A Matter of Judgment*, Judicial Commission of New South Wales, (2003) at 14

127 *Op cit* at 14

128 at 167

129 *Restricting Litigiousness*, 13th Commonwealth Law Conference 2003, Melbourne

130 (2002) 76 ALJ 432

131 (2000) 201 CLR 321 at 332

132 at 341

133 *In McFarlane v Tayside Health Board* [2000] 2 AC 59

134 [1999] 2 AC 455