The Judge as Law-maker[#]

The Hon. Sir Anthony Mason AC, KBE[*]

INTRODUCTION

There are two preliminary points that I should make about the title to this address. The first is that it assumes, without attempting to demonstrate, that judges do make law. Nothing is to be gained by my spending time in demonstrating what is obvious to everyone. Over 20 years ago, Lord Reid, one of England's greatest judges, debunked the notion that judges declare but do not make law by saying:

> Those with the 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'![1]

That was certainly not my experience when I was appointed as a judge of the NSW Court of Appeal in 1969. But then I did not believe in the fairy tale. As a student in the jurisprudence course taught by Professor Julius Stone at the Sydney University Law School, I had learned that judges do make law some 25 years before Lord Reid made his public statement in 1972. Of course, some judges had acknowledged as much before 1972. Viscount Radcliffe, another great English judge, had said as much in 1967, but he cautioned against letting the public in on the secret lest it harm public confidence in the law 'as a constant, safe in the hands of judges'.[2]

There were, of course, advantages in keeping the secret. It was less likely to lead to criticism of judicial decisions. If the judges were merely 'discovering' the law, then the public might be expected to respect the

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[#] The 1996 Mayo Lecture, James Cook University.

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[1] 'The Judge as Lawmaker', (1972) *The Journal of Public Teachers of Law* 22.

[2] Lord Radcliffe, 'The Lawyer and his Times', *Not in Feather Beds* (London: Hamish Hamilton, 1978), 271–3.

decisions of experts who, like Egyptian temple priests, were communicating the tenets of the faith to the faithful. So long as the secret was kept, the question of legitimacy would not arise. How come, in a democracy, non-elected judges come to make law? Should their appointment not be a public process much in the manner of the confirmation hearing conducted by the Senate Judiciary Committee in the United States of a candidate nominated for appointment to the Supreme Court of the United States? These questions are sometimes asked in Australia now that it is accepted that judges do make law.

The second preliminary point to be made is that the title may convey an impression that the judge's law-making activities occupy a greater proportion of his or her judicial time than is the case. I should correct such an impression if it exists. Judicial law-making is incidental to judicial adjudication and is no more than that. Judicial law-making obviously plays a larger part in the work of a justice of the High Court than it does in the case of a District Court judge, or even a Supreme Court judge sitting at first instance. In the case of a judge of an intermediate court of appeal, such as the Queensland Court of Appeal, or the Full Court of the Federal Court, law-making, though not as important as in the High Court, is nonetheless significant.

Some judges seem not to be aware that they make law. One judge was heard to say that he was not aware that he had ever made law. Almost certainly he made law without knowing it. The fact that he made law without knowing what he was doing might not inspire much confidence in his making good law, but that is another matter.

APPLYING AND FORMULATING GENERAL PRINCIPLES OF LAW

When I say that almost certainly the judge was making law without knowing it, I refer to the question which commonly arises: does an established principle apply to a particular set of facts when that question has not been previously considered or decided by a court? A decision on that question for the first time adds to our body of law because it provides authority for the proposition that the principle extends or does not extend to the particular facts. That is not a spectacular example of judicial law-making. It does not compare with *Mabo v Queensland (No. 2)*,[3] where the High Court held that the indigenous inhabitants of Australia held customary native title in their traditional lands in unalienated Crown land in Australia so long as it has not been validly extinguished by legislative or executive action, provided that they have not surrendered their title or lost their connection with the land. Nor does the example given compare

[3] (1992) 175 CLR 1.

with *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd*,[4] where the High Court held that a company named in an insurance policy as a person for whose benefit an insurance policy had been taken could sue the insurer on the policy, notwithstanding that the company was not a party to the policy and had not given consideration for it. Both *Mabo* and *Trident* were cases in which the court departed from settled principle or what was thought to be settled principle.

Why did the court take this course in the two cases? In *Mabo*, it was because the fiction that Australia was land belonging to no one at the time of European settlement — uninhabited land — was discriminatory and was at odds with the standards of international law recognised by instruments declaring universal human rights, the fundamental values of the common law and the contemporary values of the Australian people.[5] In *Trident*, it was principally because, in the insurance field, the old rule that a contract could only be enforced by a party to it from whom consideration moved, had been undermined by legislative developments.

There are other cases in which a principle is discarded because it is outmoded and unsuited to the conditions, circumstances or values of the day — as in *R v L*[6] where the High Court held, contrary to what had long been thought, that a husband could be guilty of rape of his wife. In other cases, the principle may be discarded because it should give way to a more unifying or general principle. *Australian Safeway Stores Pty Ltd v Zaluzna*[7] is an illustration. There the court collapsed the particular duties owed by the various categories of occupiers of premises to persons entering upon premises into the general duty of care imposed by the law of negligence. The court's treatment in *Burnie Port Authority v General Jones Pty Ltd*[8] of the rule in *Rylands v Fletcher*[9] is another illustration.

The rationalisation of general principle with a view to bringing more unity and symmetry to the general law has been a prominent feature of High Court decisions in recent years. The developments which have taken place in the law of estoppel in the past decade are a striking illustration of what has been happening. Here there has been an effort to develop over-arching general principles which mark a departure from the traditional common law approach of inching forward incrementally. The over-arching principles stand in marked contrast to the categories which were a feature of the traditional common law.

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4 (1988) 165 CLR 107.
5 (1992) 175 CLR 1, 41–43.
6 (1991) 174 CLR 379. The House of Lords in the very same year overturned the old rule: *R v R* [1991] 4 All ER 481, Lord Keith observing that the common law is capable 'of evolving in the light of changing social, economic and cultural developments'.
7 (1987) 162 CLR 479.
8 (1994) 179 CLR 520.
9 (1868) LR 3 HL 330.

STATUTORY INTERPRETATION

We sometimes tend to think of statutory interpretation and, to a lesser extent, constitutional interpretation as standing outside the realm of judicial law-making. That is because the very word 'interpretation' conveys the notion that all the judge does is reveal the legislative intention. That view is not unlike the judge revealing what lies in Aladdin's Cave of common law rules. The reality is that statutory interpretation is an exercise in which judges are creating law by placing a gloss on the words of the statute. That gloss, however much it may accord with the intention of the legislators as expressed in the words of the statute, adds to the words of the statute. What is more, despite all the comments in the judgments about the search for the legislative intention, that intention — on the relevant point — is very often quite elusive. In such cases, the judge is very often engaged in a creative exercise, spelling out a legislative intention on an issue to which the legislators did not direct their minds. The true nature of the judge's interpretive task has been obscured by traditional rules of interpretation which confined attention to the text of the statute and to 'plain meaning' without giving full scope to context and purpose.

CONSTITUTIONAL INTERPRETATION

The same can be said about Australian constitutional law, which essentially consists of the body of interpretive rulings given by the High Court on the provisions of the Australian Constitution. But the interpretive rulings on the Constitution given by the High Court have a special quality. Like the Constitution itself, they cannot be amended by statute. As they are interpretations of express provisions of the Constitution, they can be amended by resort to s. 128 of the Constitution which requires a referendum approved by a majority of voters and by a majority of voters in a majority of States. True it is that the High Court can alter an interpretive ruling previously given and in that way alter what was earlier thought to be a constitutional rule. But the High Court cannot amend the express provisions of the Constitution.

To illustrate what I have been saying, let us look at the High Court's decision on *Cole v Whitfield*[10] in 1987 on s. 92 of the Constitution. The section relevantly provides:

> ... trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The section did not specify from what, interstate trade, commerce and intercourse was to be free. The consequence was that a number of

[10] (1988) 165 CLR 360.

alternative meanings of the section were advanced over the years. They included free as at the frontier, free from pecuniary imposts, free from burdens imposed on elements or attributes of trade, commerce and intercourse, and free from discriminatory burdens of a protectionist kind. Although the meaning last-mentioned had not been adopted in the many earlier decisions on s. 92, *Cole v Whitfield* rejected other interpretations in favour of the view that s. 92 guaranteed freedom from discriminatory burdens of a protectionist kind. The point is that the court selected that meaning as the best interpretation from a number of alternative meanings some of which had been adopted by the court or justices in earlier cases.

The question in *Cole v Whitfield* was whether Tasmanian regulations, prohibiting the possession of undersized crayfish, validly applied to undersized crayfish imported from South Australia. The court held that the regulation had neither a discriminatory purpose on its face nor a discriminatory effect. The burden which the regulation imposed on the interstate trade in crayfish did not go beyond the prescription of a reasonable standard to be observed in all crayfish trading, and the substantial effect of the regulation was not to disadvantage the interstate trade in crayfish. In any event, the extension of what was a primary prohibition against sale and possession of undersized Tasmanian crayfish was a necessary means of enforcing the prohibition against the catching of undersized crayfish in Tasmanian waters.

LAW AS A CONTINUUM

The common law has been in a state of continuing development or evolution for over 800 years. It has been growing and changing to meet the ever-changing needs and demands of society. From time to time, it has been codified, modified or displaced by statute. Yet vast areas of general law remain unregulated by statute — parts of the criminal law, the law of contracts, the law of torts and equity. In recent years, a relatively new branch of law has been elaborated by the judges — the law of restitution — though it consists in the main of principles long recognised in contract, quasi-contract and equity. But the point I wish to emphasise is that the common law, a term used to describe the rules of judge-made law, is a living organism which has managed, through the creativity and professionalism of the judges, to evolve so that it has met the needs and demands of society from medieval times to the present day.

We can view the Constitution in much the same way. We know from experience that it is inordinately difficult to amend the Australian Constitution. Though referenda under s. 128 have been submitted to the people, only 8 out of 42 put to the people have been carried by the requisite

[11] B. Galligan, *A Federal Republic: Australia's Constitutional System of Government*, (Cambridge: Cambridge University Press, 1995), 36.

majorities.[11] So, the Constitution 'can live only by judicial reinterpretation'.[12] It is an instrument of government which was intended by its founders to be enduring and to apply in changing conditions and circumstances which they could not foresee.

Here we strike a difficulty. There are those who join issue with what I have just said and maintain that the Constitution should be understood just as the founders understood it, with the particular applications that they knew and understood in their day. Commentators of that school assert that almost a century of interpretation of the Constitution has seen a steady growth in the power of the Commonwealth and a corresponding decrease in the power of the States. This is not the occasion to dwell on this controversy. It is enough to mention the external affairs power and the decisions on that power as an illustration and to reiterate my view that constitutional interpretation is as much a continuum as is the common law. The scope of the external affairs power has expanded; that expansion has mirrored the extraordinary development that has occurred in the making and adoption of international conventions and in the emergence of international tribunals.

Take the UN Human Rights Committee which has jurisdiction under the First Optional Protocol to the International Covenant on Civil and Political Rights to determine complaints that Australia has breached the provisions of the Covenant. The fact is that the content of international affairs and, consequently, 'external affairs', is very much greater than it was a century ago. What is more, international law, using that term in a very broad sense, now reaches extensively into our domestic affairs.

Judicial re-interpretation is not a substitute for s. 128. The High Court cannot amend the express provisions of the Constitution; for example, it could not abolish the Crown and transform Australia into a republic. That could only be achieved by recourse to s. 128. Judicial re-interpretation covers relatively small advances achieved, from time to time, as the interpretation of the Constitution gradually evolves, though there may be significant shifts in thinking every now and then, the decision in the *Engineers Case*[13] being one of them.

LAW-MAKING RESPONSIBILITY OF THE COURTS

Sometimes a judge, more likely a Chief Justice, will say that it is the responsibility of the courts to keep the common law up to date or in serviceable condition. That is true. But the statement tends to over-emphasise the role of the courts as law-making agencies. It almost pictures the courts as law reform agencies charged with the duty of overseeing the laws for want of modernity. The fact is that courts do not initiate cases; they exercise

[12] Lord Radcliffe, *supra* n. 2 at 272.

[13] *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd* (1920) 28 CLR 129.

jurisdiction only when called upon to do so by a litigant and then they are required to adjudicate upon the litigant's claim. A court of first instance is bound by the decisions of the courts higher in the hierarchy, and those decisions or the provisions of the relevant statute will provide the determinative principles of law, except in a very rare case. The cases in which a court is called upon to determine whether a principle of law is appropriate to current conditions of society are relatively few. Generally they are High Court cases. So it is a serious misapprehension to think of the courts, even the High Court, as being engaged in some ongoing review of the common law for obsolescence, so to speak.

An appeal to the High Court requires the grant of special leave to appeal under the *Judiciary Act 1903* (Cth).[14] In deciding whether to grant or refuse special leave to appeal, the question whether the appeal raises a matter of public or general importance is a relevant and often a decisive consideration. That consideration is usually satisfied if the appeal, assuming it to be truly arguable, raises a question of general principle. Here a distinction is drawn between the existence of a question of general principle and the application of principle. The latter is not enough to attract a grant of special leave. The requirement for special leave therefore directs attention to the law-making role of the High Court and results in the hearing of those appeals which involve resolution or clarification of questions of general principle. Underlying the requirement for the grant of special leave as a qualification for an appeal is the need to filter the work coming to the High Court and the policy that one appeal, i.e. from a trial court to an intermediate court of appeal, is sufficient, unless the public interest justifies another appeal. That public interest is made out if there is a need to clarify principle or rectify a significant procedural irregularity, e.g. denial of natural justice.

CONSTRAINTS ON JUDICIAL LAW-MAKING

There are a number of constraints which inhibit judges from engaging in re-formulation of legal principle. First, there is the effect of precedents, or *stare decisis*. Adherence to existing decisions serves the important interests of consistency, certainty and predictability in the law. These interests are stronger in some fields than others. They have special force in matters of property and commerce. Our system of law is essentially a rule-based jurisprudence rather than a discretionary system. A rule-based system offers the three advantages I have mentioned. So, if a judge decides to change the rules, he or she must be satisfied that there are very strong arguments and advantages to be gained from changing the rules. Of course, if the judge is not bound to follow the earlier decision, he or she might conclude that it is clearly wrong and should not be followed.

[14] Sections 35 and 35A.

The critical tension between the interests of consistency, certainty and predictability on the one hand and the insistent demand to generate just outcomes, is a problem that confronts the judge from time to time. Just how that tension is to be resolved depends very much on the circumstances of the given case and the nature of the court in which it arises.

Courts may also exhibit some degree of reluctance to reconsider interpretation of statutes. The legislature can decide for itself whether the court's interpretation should be altered. A good example is the *Income Tax Assessment Act*. It is the subject of continuing attention and is amended by Parliament several times a year.

Another factor is the unsuitability of court procedures and techniques and the lack of facilities and resources appropriate for legislative and law reform activity. The courts not only hear and determine particular cases brought by the parties, but they do so on the evidence and arguments presented by them. Court procedures and techniques are not adapted to the making of surveys, investigations and reports which are part and parcel of law reform activities. So a court must be inhibited in venturing into fields in which procedures and techniques of this kind are required in order to determine what is the desirable approach to be taken in the public interest. It is instructive to compare the decision-making and reasoning processes of the courts with the techniques and reasoning employed by law reform commissions.

From time to time, you will see in judgments the inadequacy of court procedures, techniques and facilities advanced as a reason for not re-formulating a settled principle of law. A well-known instance is the High Court decision in *State Government Insurance Commission v Trigwell*,[15] where the High Court declined to disturb the old rule that an occupier of land is not liable for injuries caused to motorists by livestock which stray from his or her land on to an adjacent road. The court rejected an argument that the old rule should be displaced in favour of the general duty of care, conducting inquiries of the kind discussed.[16]

Contrast two other cases. The first is a case I have already mentioned, *Trident General Insurance Co. Ltd v McNiece Bros Pty Ltd*, the case concerning the unenforceability by a stranger to the contract of an insurance policy. There the court relied on statutory developments in various Australian jurisdictions which had undermined the old rule at least in its application of insurance contracts. In addition, the court had the benefit of reports on the subject by the Australian Law Reform Commission and other law reform agencies. Another case is *Environment Protection Authority v Caltex Oil Refining Co. Pty Ltd*,[17] where the High Court held that the privilege against self-incrimination did not apply to a corporation. Here the court was not confronted by a contrary previous decision of the court itself. The applicability of the privilege to corporations had been discussed

[15] (1979) 142 CLR 617.
[16] *Id.* 633 per Mason J.
[17] (1993) 178 CLR 477.

in decisions of the United States Supreme Court, so that the arguments for and against the retention of the privilege were well-known.

A third reason sometimes advanced by the High Court, perhaps more frequently by the House of Lords, is that to abandon or alter a settled rule is tantamount to acting as a legislature. There is no doubt that there is a marked reluctance on the part of courts to discard or alter a settled rule. That reluctance was expressed in my judgment in *Trigwell*[18] and perhaps more strongly in the celebrated judgment of Brennan J in *Mabo (No. 2)*,[19] where his Honour referred to the importance of maintaining 'the skeleton of principle'. Even so, it seems to me that there will be exceptional cases where an ultimate court of appeal will find it necessary to overturn a settled principle. *R v L* is an illustration, though there was some uncertainty as to the status of the old view that a husband was entitled to the sexual services of his wife. If we assume that it was a rule, and it seems to have been viewed as such by the learned writers in earlier times, then clearly enough the court was prepared to overrule it.

To say then that, in particular circumstances, the court will stand by an existing principle and will not act as a legislature, is not a statement based upon a firm principle. Rather, it is a statement reflecting a value judgment made by the court to the effect that the change, if it is to be made, is one that should be made by the legislature. That may be because the suggested change in the law is radical or because the making of the change is better handled by the political process than by the judicial process. It may be that the question calls for the employment of law reform agency techniques. Indeed, sometimes the court will say that the question of reform is best left to the legislature. That is what the High Court said in a recent decision, *Craig v South Australia*.[20] There the court considered that the question whether *certiorari* for error of law on the face of the record should extend to error of law disclosed in the reasons for judgment or the transcript of proceedings was a matter best left to the legislature.

In *Woolwich Equitable Building Society v Commissioners of Inland Revenue*,[21] Lord Goff admitted that he was never quite sure where to locate the boundary between legitimate judicial development of the law and legislation. His Lordship pointed out that, if the boundary were to be too firmly and tightly drawn, *Donoghue v Stevenson*, modern judicial review and *Mareva* injunctions would not have taken place as they did.

Professor Ronald Dworkin has drawn a distinction between questions of principle and questions of policy as a means of distinguishing between legitimate judicial reasoning and the legislative or political process. By 'principle', Professor Dworkin refers to 'the competing rights of individuals and groups'; by 'policy' he means 'the competing views of the collective

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[18] (1979) 142 CLR 617, 633.
[19] (1992) 175 CLR 1, 29.
[20] (1995) 184 CLR 163.
[21] [1993] AC 70, 173.

good of the community as a whole'.[22] The difficulty with that suggested approach is that there are a number of decisions in which courts take into account policy, including policy in the sense in which Professor Dworkin uses that term.

A related but different approach was suggested by Deane, Dawson and Gaudron JJ in the case I referred to earlier, *Environment Protection Authority v Caltex Oil Refining Pty Ltd*. They said[23] that the arguments in favour of holding that the privilege against self-incrimination should not apply to a corporation called for a 'pragmatic' judgment. The difficulty with that approach is that the same adjective could be applied to a number of cases in which the court has held that a particular proposition is not suited or adapted to community conditions or circumstances.

Although it is not possible to state a bright line which identifies what is legitimate judicial reform from what is not, courts are influenced by the doctrine of separation of powers. Judges recognise that courts are not legislatures and that it is undesirable that judges should be regarded as legislators. There is a difference between the judicial process and the legislative process, and the judiciary cannot set itself up as a rival of the legislature. The fact that the judiciary is not elected naturally precludes any such development. The doctrine of the separation of powers, which is an element in the Australian Constitution, plays a significant part in informing this approach.

JUDICIAL DETERMINATION OF CONTROVERSIAL ISSUES WHICH RAISE MORAL AND ETHICAL VALUES

A recent phenomenon in Australia and England, which has raised in acute form the lack of clear demarcation between the judicial and legislative roles, is the emergence of cases in which the courts are called upon to determine difficult and fundamental moral and ethical issues. Three examples come to mind: *Re Marion*,[24] *Airedale N.H.S. Trust v Bland*[25] and *Brown v R.*[26] In *Re Marion*, the High Court held that sterilisation of a profoundly intellectually handicapped female unable to care for herself could not be undertaken without court approval. In *Airedale*, the House of Lords decided that when consent to further treatment is withdrawn, a doctor could withhold care and treatment from an insensate patient who had no hope of recovery but was bound to die if care and treatment was withheld. In *Brown*, the House of Lords held that consent is not a defence to assault occasioning actual bodily harm and wounding by acts done in

[22] *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press, 1977), 82–90.
[23] (1993) 178 CLR 477, 534.
[24] (1992) 175 CLR 218.
[25] [1993] AC 789.
[26] [1994] 1 AC 212.

private in sado-masochistic homosexual activity. That case is now being taken to the European Court of Human Rights on the ground that the English common law infringes the right of privacy guaranteed by Art. 8 of the European Convention on Human Rights.

The three cases demonstrate that when Parliament fails to consider and to determine important social, economic and political questions, as is frequently the case — as it was in *Mabo* — the courts will be called upon to resolve them in the form of legal issues.

In *Marion*, Brennan J, who dissented, observed:[27]

> Although the issues ... relate to the law's protection of the physical integrity of a person suffering from an intellectual disability, there is no clear community consensus on these issues which the courts or the legislature can translate into law.

His Honour's conclusion that the matter was one for the decision of the child's parents clearly reflected his concern that the courts should not become 'an imperial judiciary'.[28]

In *Bland*, though the House of Lords resolved the issue in the way I have described, the Law Lords were much concerned about judicial determination of such issues. Lord Browne-Wilkinson said:[29]

> Where a case raises wholly new moral and social issues, in my judgment it is not for the judges to seek to develop new, all-embracing, principles of law in a way which reflects the individual judge's moral stance when society as a whole is substantially divided on the relevant moral issues. ... The judges' function in this area of the law should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society. If Parliament fails to act, then judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises. But in my judgment that is not the best way to proceed.

On the other hand, in jurisdictions such as the United States and Europe, where there are constitutionally entrenched provisions dealing with the right to life, privacy and human dignity, the courts regularly determine issues of this kind. In doing so, they have developed a coherent body of legal principles. However, in Australia and the United Kingdom, which have no Bill of Rights, similar issues of a fundamental kind do arise for judicial decision.

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[27] (1992) 175 CLR 218, 264.
[28] *Id.* 283.
[29] [1993] AC 789, 880.

THE RELEVANCE OF VALUES

Recognition of the law-making role of judges has brought the 'values' into the spotlight. What part do values play in the judicial process? What are the subjective values of individual judges? The criticism of some judges some years ago on the ground that they were insensitive to gender issues gave added prominence to the debate about values and the law.

That values do play a part in the judicial process is well accepted. As Stephen J said in *Onus v Alcoa of Australia Pty Ltd*:[30] 'Courts necessarily reflect community values and beliefs.' The principal problem in discussing values and the law is that the term 'values' is a rag-bag expression which is used to embrace a number of different ideas — moral and ethical values, standards, policy considerations (which vary greatly) and attitudes. Another major problem arises from the uses to which these ideas may be put in circumstances which may differ quite radically.

The reference to 'contemporary values' in the judgment of Brennan J in *Mabo (No. 2)* shows that values are taken into account in the development of legal principle. In that context, as Brennan J subsequently explained in *Dietrich v R*,[31] the reference is to 'the relatively permanent values of the Australian community' or, as I would put it, to values of an enduring kind. It is not a reference to the current attitudes of society on particular questions which may generate transient attitudes. Plainly enough, it is not the responsibility of the judges to give effect to popular attitudes of that kind. Let us suppose that the community favours harsh and repressive sentences to combat violent crime or that it welcomes measures which smack of racial discrimination. It would not be for the judges to give effect to those irrational or irresponsible attitudes. Indeed, it is the responsibility of the judges to ignore attitudes of that kind, whether transient or not. Of course, if those attitudes are taken up and validly enacted as statute law, then the courts must give effect to the statute.

In the sentencing of offenders, judges must give effect to established legal principle so that the punishment imposed is proportionate to the seriousness of the offence. That is not to say that the seriousness of a particular class of offence remains static forever. Over time, an offence might be regarded as more or less serious than it had been regarded in the past and, on that account, it would be dealt with differently. Today we are horrified at the severity of punishment imposed in 18th century England. Our ancestors were sentenced to transportation to New South Wales and Van Diemen's Land for offences which seem to us today to be quite trivial and therefore attract less severe penalties.

The point I make is that the courts, in shaping fundamental legal principle, are not looking to transient community attitudes; rather, they are looking to more enduring values — many of them values which have

[30] (1981) 149 CLR 2, 42.
[31] (1992) 177 CLR 292, 319.

been traditionally recognised by the common law. Take, for example, personal liberty, freedom of expression, the inviolability of the person. Non-discrimination, the *Mabo* value, does not perhaps have such a long provenance, but it is a value of an enduring kind acknowledged and mandated by international instruments. International conventions which have been ratified by Australia and many other countries are a source of identifiable values of an enduring kind.

An instance of a principle informed by a value is the 'neighbour' principle — one's duty to take reasonable care to avoid foreseeable injury or damage to another resulting from one's act or omission — affirmed in *Donoghue v Stevenson*,[32] the famous case concerning the snail in the bottle of soft-drink. The concept of the neighbour principle rests upon a sentiment of a moral kind. We speak of a breach of the duty as being a wrong. It is a legal wrong if it occasions damage because it is then actionable. But it rests on a sense of moral wrongdoing for which the defendant must pay.[33] That 'value' has no doubt existed for a very long time. So why was its recognition so long delayed as a matter of legal principle? It would be true to say that the common law was evolving over a long period of time towards recognition of the principle. Delayed recognition of the principle might be attributed to a number of factors of which one was the slow and tortuous evolution of legal doctrine in negligence cases. Another factor may have been a gradual decline in the strength of community sentiment supporting the notion of self-reliance. Whatever the reasons for the delay, the principle is based on an enduring value of a moral kind, the merit or virtue of which is such that the principle commanded acceptance in 1932 and thereafter.

Policy considerations are to be distinguished from enduring values. Policy considerations are often based in economic thought and they range from the very general to the particular. Freedom of competition is a very general policy consideration. Indeed, one is almost tempted to think of it as an enduring value, such is the reverence accorded to it today. Freedom of competition has played a prominent part in the formation of general legal principle. I recall with nostalgia the old cases[34] dealing with covenants in restraint of trade exacted by employers from employees and purchasers of businesses from vendors.

Generally, however, policy considerations are more specific. They feature in the modern cases on the recovery of damages in negligence for economic loss, both in Australia and Canada. One such case was *Bryan v Maloney*.[35] In that case, the High Court held that a professional builder who constructed a dwelling-house for a landowner was liable to a

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[32] [1932] AC 562, 580 per Lord Atkin.

[33] *Ibid.*; but cf *Jaensch v Coffey* (1984) 155 CLR 549, 579 per Deane J.

[34] *Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co.* [1894] AC 535; *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688; *Peters American Delicacy Co. Ltd v Patricia's Chocolates & Candies Pty Ltd* (1947) 77 CLR 574.

[35] (1995) 182 CLR 609.

subsequent purchaser in damages for an amount equal to the decrease in the value of the house caused by the fact that it had been built with inadequate footings. The majority considered that, in deciding whether sufficient proximity existed to found a duty of care, it was relevant to take into account policy considerations and that the policy considerations to be taken into account in a *novel category* 'will be influenced by the courts' assessment of *community standards*'.[36] The majority then identified two relevant considerations: (1) the law's concern to avoid the imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class; and (2) the perception that, in a competitive world where one person's economic gain is commonly another's loss, a duty to take reasonable care to avoid causing mere economic loss to another may be inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage. This led the majority to conclude that, commonly, the effect of the two policy considerations is that the categories of case involving sufficient proximity with respect to mere economic loss will involve an element of known reliance (or dependence) or the assumption of responsibility or a combination of the two.[37]

You will notice from what I have just said that the court's assessment of community standards may be relevant in deciding what policy considerations will be taken into account. Courts draw upon their perceptions of community standards for various purposes in judicial decision-making. Judges take community standards into account in determining whether a testator has made adequate provision for a widow or child.[38] Indeed, in a case of that kind, the High Court decided that it would be wrong to limit an order in favour of a widow to a provision confined to continuance of widowhood. I took that view, having regard to my perception of community standards.[39]

And the standard of care, in particular situations, with which the reasonable person is to comply in the context of negligence 'must be influenced by current community standards' and 'community expectations'.[40] Judges, like juries, when sitting as tribunals of fact, are often required to apply their own knowledge as to community standards.

Judicial use of and reference to community values and standards has raised questions about how judges ascertain and identify community values and standards. In some respects, evidence may be given of standards — for example, evidence of safety standards practised by employers. However, generally speaking, judges draw upon their own knowledge, in identifying community standards, particularly in relation to such

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[36] *Id.* 618 per Mason CJ, Deane and Gaudron JJ.
[37] *Id.* 618–19.
[38] *White v Barron* (1980) 144 CLR 431, 440 per Stephen J, and 444–5 per Mason J.
[39] *Id.* 444–5 per Mason J.
[40] *Bankstown Foundry Pty Ltd v Braistina* (1986) 65 ALR 1, 7 per Mason, Wilson and Dawson JJ.

matters as honesty, reasonableness and obscenity.[41] Historically, juries decided issues of fact in the light of their knowledge of their community and that is what judges do.

To the suggestion that judges may not be in touch with community standards, my response is that judges, as a result of their participation on a daily basis in the conduct of cases, have a unique window on their community. The evidence in the cases in which they participate equips them with knowledge and understanding of the way in which people behave. And judges are engaged essentially in an adjudicative function which calls for pragmatism and common sense.

However, I do not suggest that it is enough for the judge to rely on his or her own experience and common sense. When it comes to the shaping of important legal principles, the judge, more particularly the appellate judge, must take advantage of the learning and the techniques of other disciplines, including philosophy, history, economics and social science. These disciplines must supplement the basic foundation which the law (not excluding comparative law) itself provides.

CONCLUSION

In conclusion, I make three points. For my part, I doubt that the judicial identification of values and standards is as much of a difficulty as it is sometimes represented as being. It is, of course, much more difficult to determine whether there is a community consensus about a value or standard. Very often the community will be divided and the court may have no option to proceed on the footing that the community is divided on the relevant issue. Second, the major difficulty for judges rather lies in the weight and the significance to be given to particular values and policy considerations when, as is often the case, they are pulling in different directions.

And, finally, I should say that it is impractical to think of drawing a line between those activities which are judicial law-making and those which are not, with a view to treating them in different ways. The two are inextricably interwoven, and judicial law-making calls for a profound knowledge of the existing body of legal principle and how it can be applied. Judicial law-making is a natural incident of the continuum of which I spoke earlier which enables us to see the common law — again using that expression in a very broad sense — as a living organism, an organism capable of adjusting and adapting to the needs of society as they gradually, at times almost imperceptibly, unfold over time.

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[41] *Crowe v Graham* (1968) 121 CLR 375, 399; *Director of Public Prosecutions v United Telecasters Sydney Ltd* (1990) 168 CLR 594, 607 per Toohey and McHugh JJ.