Story Behind the Judgments: The Influence of Judicial Personalities on Negligence Case Outcomes[1]

Speech Delivered by the Hon. Marilyn Warren
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Introduction

We are presently in an era of interesting change in negligence law. Several years ago, as you will all no doubt be aware, legislative reform occurred as a reaction to the perception that Australia was undergoing an insurance crisis, namely that insurance costs had consequently become 'unaffordable and unsustainable'.[2] In response to these public concerns, a panel headed by Justice David Ipp was established to inquire into the law of negligence and to develop a series of proposals for reform to be implemented by each State.[3] The Ipp Report in part inquired into the application, effectiveness and operation of the common law principles of negligence (such as causation and duty of care). It also proposed new limitation periods and made suggestions for caps and thresholds on damages awards. In Victoria, these

[1] The author acknowledges the assistance of her Research Associate, Ms Natalya Dingley.
[2] 'Terms of Reference: Principles Based Review of the Law of Negligence by a Panel of Eminent Persons' at http://revofneg.treasury.gov.au/content/termsofref.asp at 20 October, 2004.
[3] On 2 October 2002, the panel released their paper entitled *The Review of Negligence Final Report* (popularly known as the 'Ipp Report').

recommendations and more have been implemented into the *Wrongs Act* 1958 in the form of three legislative amendments.

The factors fuelling change at this time included the spectacular collapse of HIH; mass anxiety in world markets generated by the events of September 11 2001; and a series of highly publicised damages award cases, particularly in New South Wales. As well, at the time "the excesses of the Australian legal system"[4] was one of the major factors blamed for the spiralling price of premiums.

And yet, these negligence laws did not fall out of a vacuum; they were the result of 100 years of change and development in the courts. Just prior to the institution of the Ipp Reforms, people began to ask – especially those in the insurance industry – with some incredulity, just how did these negligence decisions come about? And just how on earth could they be *permitted* to come about?

It is sometimes necessary to explain how judges decide their cases and the stories that lie behind the decision-making process. A judge can never of course decide a case on mere inclination

[4] Chris Merritt, 'Insurance Crisis Not Lawyers' Fault: Report', *The Australian Financial Review*, Friday 22 October 2004 at 53.

alone; she or he is bound to the bedrock of both common law and statute – that is, the 'formal rules' of our legal system. They must moreover be impartial and unbiased. And in my experience, this is exactly what most judges in fact are. Hence, this discussion is not concerned with an examination of judicial bias, rather, considers the influence of personality and philosophy on judicial decision-making where legal arguments are indeterminate.

On a simple view of a judge's role within our legal system, one would say that they are required to investigate whether an alleged breach of duty has occurred or whether a certain claimed right is enforceable. They then establish the truth of the given facts of the case, 'analyse the law applicable to those facts', and, finally, 'make an order in accordance with the law as interpreted and applied to those facts as found'.[5] A judge's job, when presented in these terms, sounds rather straightforward. But it is a 'fairytale'.[6]

It is also a rather inhuman portrait of a judge's role in our society. Judicial candour even prompted one judge to say:

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[5] Justice Ray Finkelstein, 'Decision Making in a Vacuum' presented at the 2002 Costello Lecture, Monash Law Alumni Advisory Group (Ethics and Social Justice) on Thursday 31 October, 2002.
[6] I refer to the demise of the 'declaratory theory' of judicial decision making which encouraged the view that the personal input of judges was minimal. In a very widely quoted phrase, UK judge Lord Reid derided this theory as a mere 'fairytale'.

> *Much harm is done by the myth that, merely by putting on a… black robe and taking the oath of office as a judge, a man [sic] ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.*[7]

Thus, the 'fairytale' itself appears to ignore the extremely complex and difficult issues of how a judge carries out an investigation and the various factors which may influence a judge when examining the facts and making a decision based in law.[8] This is particularly the situation where the cases are 'hard' or, at least not straightforward. Judges in these instances will often be faced with several options when dealing with negligence law. Often that will be a choice between restating, pushing forward, abandoning a rule of the common law or 'passing the buck' to Parliament in order to effect change.[9] It has been suggested that subjective factors external to the law play a part in which approach a judge will favour.

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[7] *In Re J R Linehan* 138 F 2d 650 at 652-653 (1943), per Frank J; quoted in *Ibid.*
[8] Justice Ray Finkelstein, *op. cit.*
[9] Justice Michael Kirby AC CMG, 'Judging: Reflections on the Moment of Decision', Speech delivered at the Fifth National Conference on Reasoning and Decision-Making at Charles Sturt University on 04 December, 1998.

It must be kept in mind that aside from being bound to the 'formal rules' of precedent and statute, there is a complex matrix of external factors that effectively go towards influencing a judge towards a certain position in a given case. Such factors or 'influences' may be subtle or direct. These include personal factors (i.e. character, beliefs and background, including education); social values held (which may or may not be woven into character); policy issues; use of analogical reasoning; and the list goes on.

What we can say about these external factors or influences on judicial decision-making is that it is not possible to ascribe priority among them, as judges are permitted a certain flexibility in their choice of particular cases. Nevertheless, it should be remembered that all of these are restricted by judicial method which requires both a reasoned and public account of steps leading to judgment.[10] Judges are therefore never acting in the capacity of 'ad hoc' legislators,[11] they are constrained by the formal rules of the justice system and must apply them where appropriate - even if it clashes with their personal views.[12]

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[10] T Blackshield, M Coper & G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 198.
[11] Justice Ray Finkelstein, *op. cit.*
[12] *Ibid.*

To illustrate the influence of subjective factors (particularly personality and philosophy) on judicial decision-making in negligence cases, I have chosen to examine two past judicial figures: Sir Owen Dixon and Sir William Deane. The selection of Chief Justice Dixon and Justice Deane suits for present purposes merely because it presents an opportunity to contrast two very different judicial personalities. The comparison serves to demonstrate just how personal characteristics and beliefs can come through when judges make decisions.

Finally, I would like to emphasize that I recognise the use of stereotypes for judges as simplistic. I therefore attempt to avoid the use of such dichotomies as conservative/progressive, however, where these aspects manifest themselves clearly, they are necessarily stated for what they are.

Sir Owen Dixon

Sir Owen Dixon was, without doubt, a very great common law judge of the 20th century. One might even say that he was the

'Bradman' of the judiciary,[13] most likely unmatched in judicial genius in his own time or any time since. Dixon was, unlike many of the politically-interested High Court judges that went before him, a career lawyer when he was appointed[14] and for much of his life was very much dedicated to the pursuit of excellence in the law. During those years he was Chief Justice, from 1952 to 1964, the era known as the 'Dixon Court', there was only a very gradual expansion in the law of torts in general and it was by no means progressive by today's standards.

That may be partially because Dixon was generally considered rather conservative in most things. He was a lover of all things English, as history records well. He seems to have had a certain disdain for things American when they a were compared to the British tradition.[15] In 1959, (in writing to Sir John Young, later Chief Justice of the Supreme Court of Victoria) he expressed his concern about the direction of the Melbourne University Law

[13] Graham Fricke, *Judges of the High Court* (1986) at 122.
[14] Prior to his appointment to the High Court, in 1929 Dixon had been an acting judge for the Victorian Supreme Court. It would appear, however, he did not particularly enjoy the life of a trial judge and declined a permanent appointment when it was offered. See *Ibid.* at 115-116.
[15] Speech by the Hon. Chief Justice M. Warren, 'What Separation of Powers?' delivered at the Lucinda Lecture at Monash University, Melbourne on 21 September, 2004.

School. At the time, a young Zelman Cowen was Dean.[16] Sir Owen wrote:

> *I have nothing to say whatever against a man who has time and money to do so spending years at Harvard. But no one who has seen the influence of Oxford on men could think that it is any substitute to go to Harvard.*[17]

Occasionally Dixon could be very witty. During his time as Australian Minister to the United States[18] (1942-1944) when World War II was in full swing, he was asked by one American journalist whether Australia, which had sent troops to Timor, also wanted Sumatra? Dixon is said to have replied: 'There's little interest in crooners in Australia'.[19]

His sense of humour occasionally shone through in court appearances as well. One judge, responding to a complaint from the opposing barrister that Dixon was laughing at his argument, warned: 'I will have you know, Mr Dixon, that laughter is no

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[16] *Ibid.*
[17] Graham Fricke, *Judges of the High Court* (1986) 270.
[18] At that point, only the UK envoy, as representative of the British Commonwealth, had the right to be called 'Ambassador'.
[19] Philip Ayres, *Owen Dixon* (2003) 146.

argument in my court'. 'I know, Your Honour' Dixon replied, still laughing, 'that's the trouble!'.[20]

Dixon was characteristically 'no-nonsense' though in his approach to court work. These traits are evident in his approach to judgment in the 1960 case *Commissioner for Railways (NSW) v Cardy*.[21]

In that case, a fourteen year old boy had entered property without the permission of the Railways and badly injured himself whilst on the premises. At the time the case was heard, the established principle as developed from the English law affirmed that children harmed on property while trespassing could be deemed 'licensees'. The effect was to place a far higher standard on the duty of care owed by the occupier. Despite his well-known respect for all things English, Dixon demonstrated that he was not averse to discarding English principle where, in his view, it breached the bounds of common sense. In the judgment he stated:

> *Whatever may be the outcome it involves a distinct point of departure from the law obtaining in Australia. Why should we here continue to explain the liability which that law appears*

[20] *Ibid.* at 26.
[21] *Commissioner for Railways (NSW) v Cardy* (1960) 104 CLR 274.

> *to impose in terms which can no longer command an intellectual assent and refuse to refer it to basal principle?*[22]

His great friend, US Supreme Court judge Felix Frankfurter was so impressed by the judgment in *Cardy*, he remarked to him in a letter:

> *You have done legal candor a great service in proving so persuasively that we can dispense with obfuscating fiction when it needlessly bedevils the law.*[23]

Interestingly enough, the Mason Court led by Chief Justice Mason followed on from his approach in *Cardy*, later abolishing all special categories of occupier's liability in *Australian Safeway Stores v Zaluzna*[24] and analysing all such cases in terms of a general duty of care. This fact just goes to show as I said earlier that it is overly simplistic to stereotype. Dixon may have been essentially conservative but he was a trailblazer in other ways and willing to break ground with the established orthodoxy in order to stay true to

[22] *Ibid.* at 285; as quoted in Philip Ayres, *Owen Dixon* (2003) at 272.
[23] *Ibid.* (Ayres) at 272.
[24] *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479.

legal principle. Here he is quite clearly abandoning an established common law rule, albeit on well-founded principle.

So what was Dixon's contribution to negligence in particular? He brought of course his strict 'legalism' with him, an approach that refused to accept legal fictions, even those which might follow precedent. In *Cardy*, he refused to recognise an old established principle which placed a higher duty of care on the occupier because he determined that it lacked coherence in legal terms. In that sense, Dixon did not allow any underlying humanitarian sympathies or adherence to community values interfere with his work whilst he sat on the Bench. His approach exhibited a strong influence on the practice of other judges of the High Court. In his era, there was only relatively gradual expansion in torts law, as opposed to the later atmosphere on the Bench which would be more conducive to creative approaches – notably, as was the case during the 1980s and 90s, the period of the Mason Court.

Sir William Deane

The Mason Court era was responsible for significant rationalisation and expansion of the law of torts in general.[25] A unifying theme of the Mason Court was a preference for solutions involving discretionary elements.[26] It represented the most progressive years on the High Court in the history of that characteristically conservative institution.

Justice William Deane was a leading member of the Mason Court. He is renowned for almost single-handedly transforming the law of negligence through the introduction of his concept of proximity, a notion with which we will deal with shortly. He was born in Melbourne in 1931 and was known to be a staunch defender of human rights.[27] He was a somewhat 'unpredictable' mix for the High Court in that he was at times a quiet conservative and yet at other times, could be quite radical in his views.[28]

Certainly, when it comes to negligence law, it is for his creativity for which he will be remembered rather than the formulation of accurate principle. I say this because I note that there are at least

[25] T Blackshield, M Coper & G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001).
[26] High Court of Australia, Oxford Companion.
[27] *Ibid.*, 195.
[28] *Ibid.*

two significant negligence law principles Justice Deane formulated whilst he was on the Bench but which were later overturned as wrong in law.

Firstly, the concept of proximity.

At the time Justice Deane was appointed to the High Court Bench in 1982, the question of when to impose a duty of care had become a 'vexed' and difficult issue, notably in relation to claims for pure economic loss and nervous shock (otherwise known as psychiatric injury).[29] For the insurance industry, the uncertainty over criteria to be applied for liability was doubtless unsettling. Whilst some said that 'reasonable foreseeability' of shock for instance was adequate, [30] others called for a further limitation, as it had become (amongst other things) a far too undemanding concept. Plaintiff access to the courts in these sorts of cases was in this way considered by many as far too easy. Thus, there was a call from the Bench for some sort of 'control mechanism' to qualify the concept of 'reasonable foreseeability' that was based upon

[29] *Ibid.*, 195.

[30] For instance, at that time, in the context of nervous shock some judges in the common law world saw 'reasonable foreseeability' of shock as the sole determinant of duty of care. See the judgments of *The Wagon Mound (No 1)* [1961] AC 388, 426; *King v Phillips* [1953] 1 QB 429 at 441; and *McLoughlin v O'Brian* [1983] 1 AC 410 for some examples.

'notions of proximity between a tortious act and resultant detriment' (Stephen J in *Caltex Oil v the Dredge 'Willemstad'*).[31] The call went largely unanswered until Deane J's famous response in the 1984 nervous shock case, *Jaensch v Coffey*.[32]

Justice Deane's creativity is on full display in this case. In *Coffey*, he pointed out that in *Donoghue v Stevenson* Lord Atkin had qualified the concept of reasonable foreseeability with the concept of 'proximity'. He goes on to say that whilst such a control or limitation is unnecessary in what he called the 'more settled areas of the law of negligence involving ordinary physical injury or damage caused by the direct impact of positive act' (i.e. where foreseeability will ordinarily suffice), the extra control or limitation *is* needed for cases such as those involving pure economic loss, nervous shock, omissions and liability of statutory authorities.[33] The 'extra control' he advocated was that of 'proximity'.

Justice Deane unlike the other presiding members of the High Court, continued to build on the concept, even seeing it as the

[31] *Caltex Oil v the Dredge 'Willemstad'* (1976) 136 CLR 529.
[32] *Jaensch v Coffey* (1984) 155 CLR 549.
[33] *Ibid.*

'touchstone' or 'unifying rationale' for liability in negligence.[34] His rationale was accepted for the time he remained a member of the Court, notably in cases such as *Burnie Port Authority v General Jones*[35] and *Bryan v Maloney*.[36]

However, following Justice Deane's resignation from the Bench in 1995, reaction to the law of proximity began to set in.[37] Several years later, the High Court was handing down judgments that were critical of the concept. In the end, the Court finally flagged the utility of the concept as a reminder that foreseeability is not always enough, however, stated that it gave 'little practical guidance' where the question in issue was 'whether a duty of care exists in cases that are not analogous to cases in which a duty has been established'.[38] These judgments more or less signalled proximity's abandonment.

In *Hawkins v Clayton*,[39] Deane displayed his personal creative streak once more. The concept he was responsible for formulating this time was that of 'concurrent liability' in contract and tort of

[34] See for instance *Burnie Port Authority v General Jones* (1994) 179 CLR 520.
[35] *Ibid.*
[36] *Bryan v Maloney* (1995) 182 CLR 609.
[37] Notably in *Hill v Van Erp* (1997) 188 CLR 159.
[38] *Sullivan v Moody* (2001) 207 CLR 562. See also *Perre v Apand* (1999) 198 CLR 180 at 210 [76], per McHugh J.
[39] *Hawkins v Clayton* (1988) 164 CLR 539.

professional people, for example solicitors. A glance at the historical case law reveals that solicitors were once only liable in contract,[40] however the development of the law of negligent misstatement opened the door to the possibility of liability in both. This gave rise to several opinions; where the plaintiff was awarded damages, would contract and tort principles remain separate? Or would they merge? Obviously, this legal point was a matter of some importance for those in the business of insuring professionals.

Once again in response to legal uncertainty, Deane formulated his own principle. This is where his concept of concurrent liability in contract and tort for professionals comes in. In *Hawkins v Clayton*, Deane J held that where a person was liable for negligent misstatement, there was in fact no reason to imply a term in the contract, preferring liability as expressed in tort law and not contract. Sitting behind this decision was said to be Deane's personal leaning toward the community values expressed in tort as opposed to the individualist values of contract law.[41]

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[40] *Groom v Crocker* [1938] 2 All ER 394.
[41] T Blackshield, M Coper & G Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) at 195.

In this way, we are able to see just how Deane's individual preferences and personal leanings were able to influence the outcome of not just this case but also this entire area of the negligence law up until the concept of concurrent liability was overturned in Australia in the 1999 case of *Astley v Austrust*.[42]

Although Justice Deane was at times also a marked conservative, what we can say is that his creativity, his very willingness to innovate, is quite unusual in the history of the High Court. Compared to Dixon, he was indeed legally radical at times and it can be readily contemplated that Dixon would not have approved of his approach. That said, the prospect of debate between the two influential legal minds would have been stimulating.

In these examples, Deane is not just advancing old common law principles, but literally leaping 'ten steps forward'. That is the essential difference in his approach to Dixon. In our example above (in *Cardy*), Dixon decided to abandon a common law rule for the simple reason that it did not make sense; Deane takes on the law in the sense that he uses it to weave new concepts out of old.

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[42] *Astley v Austrust* (1999) 197 CLR 1.

Conclusion: Do Judges Go Too Far?

Whilst a judge should not resort to personal beliefs or allow character to sway or be otherwise instrumental in the determination of cases, personality or philosophy may play an inevitable role particularly where the legal arguments are indeterminate; that is, in the 'hard' cases. In such a situation, it is the judge's 'informed and critical development' of his or her views (or the motivations which sit behind these views) which are in fact a prerequisite to the intelligent resolution of a case (i.e. take for example Dixon's approach in *Cardy*, without which, we may still have the historical fiction of a higher standard of owner liability in certain situations).

So have judges gone 'too far' in allowing subjective factors influence the outcome of a case? On a cynical view, one could answer that that depends on one's interest in the outcome of the case! And it is true that no matter which way it decides in a given case, the High Court will be criticized by somebody.[43] Such was the case several years ago for insurers during the pre-Ipp Reform

[43] Michael Lavarch, 'Have the Judges Gone Too Far?' presented at the Judicial Conference of Australia – Colloquium in Launceston (Tasmania), 27 April 2002.

era (and now there are signs that it is the turn of defendant litigant groups to vocalize their concerns). It is difficult to conclude that judges go 'too far' without an appropriate understanding of the contribution of the judge's personal influences in a case. Such influences are more often than not far too subtle to detect.

What we can conclude is that in less straightforward cases, judges are sometimes faced with a choice, albeit within narrow bounds. This is where subjective factors, whether conscious or not, can come into play. Therefore, there is a need for all sorts of personalities on the Bench. For this reason also, it is desirable that judges be selected from a broad range of social and cultural backgrounds, subject of course to the ultimate criterion of intellectual merit.

And finally, lest judges attract too much criticism, it should be remembered that without this ability to choose, laws would very quickly become static and cease to reflect changing communal attitudes and values. It should be no surprise then that on the Bench there is a place for both the conservatism of the Dixons in our courts – but also, no doubt, a place for the occasional creativity

of the Deanes. This of course remains the challenge for the lawyers, and, also, the insurer providing the instructions.