

## CASE NOTES AND COMMENT

### ***CATTANACH V MELCHIOR*:<sup>1</sup> PRINCIPLE, POLICY AND JUDICIAL ACTIVISM**

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In 1997 Greg Craven commented that ‘judicial activism’ had become a ‘more popular topic of conversation in Australia ... than at any time in its history’.<sup>2</sup> If anything, its popularity has increased since then, at least within the legal community.<sup>3</sup> *Cattanach v Melchior*, one of the lengthier and more controversial of the High Court’s recent decisions, will do nothing to stem the flow.<sup>4</sup> Not only did it present an issue of considerable novelty, the issue also carried strong moral

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<sup>1</sup> (2003) 215 CLR 1 (*‘Cattanach’*).

<sup>2</sup> Greg Craven ‘Reflections on Judicial Activism: More in Sorrow than in Anger’ (1997) 9 *Proceedings of the Samuel Griffith Society* 187. Clearly much of the interest then had been provoked by the High Court’s native title decisions in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1.

<sup>3</sup> Eg Frank Carrigan, ‘A Blast from the Past: The Resurgence of Legal Formalism’ (2003) 27 *Melbourne University Law Review* 163; John Gava, ‘Another Blast from the Past or Why the Left should Embrace Strict Legalism: A Reply to Frank Carrigan’ (2003) 27 *Melbourne University Law Review* 186; Justice Dyson Heydon, ‘Judicial activism and the death of the rule of law’ (2003) 23 *Australian Bar Review* 110; Allan C Hutchinson, ‘Heydon’ seek: Looking for law in all the wrong places’ (2003) 29 *Monash University Law Review* 85; Justice Michael Kirby ‘Judicial Activism? A riposte to the counter-reformation’ (2004) 24 *Australian Bar Review* 219.

<sup>4</sup> Kylie Burns describes the case as ‘perhaps one of the most dense examples of social fact use available in Australia’, where the term ‘social fact’ includes ‘positive statements of consequence framed in terms of “values”’ and ‘identification of policy assumptions underlying the law’: ‘The way the world is: Social facts in High Court negligence cases’ (2004) *Torts Law Journal* 215, 225, 220.

overtones. That a number of the justices took the opportunity to ‘strut their stuff’<sup>5</sup> may not have been unexpected. More surprising, however, is the authorship of some of the more flamboyant policy statements. Reputed legalists appear to have changed places with their supposedly more activist brethren.

In *Cattanach* the defendant doctor had performed a sterilisation procedure on the first plaintiff at Redland Hospital, the second defendant. He was negligent in failing to warn her that, given her medical history, further steps may be necessary to avoid pregnancy, and she did in fact fall pregnant. At trial and in the Queensland Court of Appeal she was awarded damages for the costs and pain and suffering associated with the pregnancy and the birth; her husband, the second plaintiff, was awarded damages for loss of consortium; and both plaintiffs obtained damages for the cost of raising the child to the age of 18. The defendants appealed to the High Court only in connection with the final head of damages, but the court dismissed the appeal by a 4:3 majority.<sup>6</sup>

While there was some divergence between the six High Court judgments, all acknowledged the novelty of the case.<sup>7</sup> Kirby J, part of the majority, indicated:<sup>8</sup>

There being no binding authority and the general principle being of limited guidance, it is necessary to have resort to the usual sources of the common law invoked by the courts in such circumstances. Those sources are: (1) the state of any legal authority that may be developed and applied by analogy to new circumstances; (2) any applicable considerations of relevant legal principle; and (3) any considerations of legal policy.

The other justices also found it necessary to consider principle and policy in addition to authority. The majority considered that principle dictated that the plaintiffs receive the award of damages

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<sup>5</sup> John Gava, ‘The Rise of the Hero Judge’ (2001) 24 *University of New South Wales Law Journal* 747, 757.

<sup>6</sup> McHugh, Gummow, Kirby and Callinan JJ; Gleeson CJ, Hayne and Heydon JJ dissenting. This has prompted legislative intervention restricting child-rearing damages: eg s 71 *Civil Liability Act 2002* (NSW); ss 49A-49B *Civil Liability Act 2003* (Qld); see Mark Lunney, ‘A Right Old Mess: *Rees v Darlington Health Authority* [2003] 3 WLR 1091’ (2004) 1 *University of New England Law Journal* 145, 155 fn 37.

<sup>7</sup> (2003) 215 CLR 1, 19 (Gleeson CJ), 30 (McHugh and Gummow JJ), 42, 49 (Kirby J), 88 (Hayne J), 103-4 (Callinan J), 113-14 (Heydon J).

<sup>8</sup> *Ibid*, 42 (citations omitted).

for the loss caused by the defendants' negligence. The dissentients rejected damages on the basis that it would impinge upon policies such as the sanctity of life. The majority did not reject such policies out of hand, but were less certain as to how the law would best serve them. Overall, there was a marked divergence in the degree of wariness with which the majority and dissentients approached their law-making task.

## LEGAL AUTHORITY

The High Court had not previously considered the issue of awarding damages to parents for the costs of raising a child born as a result of a defendant's negligence. However, other courts had dealt with the issue.<sup>9</sup> There was only one reported appellate decision in Australia, *CES v Superclinics (Aust) Pty Ltd*,<sup>10</sup> which denied this head of damages, but the three judgments diverged significantly, providing no clear *ratio*.<sup>11</sup> The High Court looked closely at the recent House of Lords decision in *McFarlane v Tayside Health Board*,<sup>12</sup> in which this head of damages was also denied, but again the reasons were diverse, leaving the law unclear.<sup>13</sup> Over a series of English decisions in the 15 years preceding *McFarlane*, starting with *Emeh v Kensington and Chelsea and Westminster Area Health Authority*,<sup>14</sup> child-rearing damages had been allowed, and in some of the decisions subsequent to *McFarlane* it was distinguished.<sup>15</sup> The court also considered authorities from the United States, Canada, New Zealand, South Africa and from civil law countries, but as Kirby J noted, 'these decisions too have not spoken with a single voice'.<sup>16</sup> In the absence of a clear trend in the authorities, the justices of the High Court were required to have recourse to the other common law sources, principle and policy.

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<sup>9</sup> Ibid 42-53 (Kirby J).

<sup>10</sup> (1995) 38 NSWLR 47.

<sup>11</sup> (2003) 215 CLR 1, 44-46 (Kirby J).

<sup>12</sup> [2000] 2 AC 59 ('*McFarlane*').

<sup>13</sup> (2003) 215 CLR 1, 47 (Kirby J).

<sup>14</sup> [1985] QB 1012; see (2003) 215 CLR 1, 44 (Kirby J).

<sup>15</sup> Eg, *Rand v East Dorset Health Authority* [2000] Lloyds Rep Med 181; see (2003) 215 CLR 1, 49 (Kirby J). See now *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309.

<sup>16</sup> (2003) 215 CLR 1, 46.

## PRINCIPLE

Principle is closely related to authority, but is at a higher level of abstraction. A statement about legal principle is a generalised proposition about an area of law rather than a description of a single rule flowing from a single authority. An authority may be contrary to principle if it is out of step with the body of authority on similar and related points.

A number of the common law reforms made by the High Court over the previous fifteen or twenty years consisted of the overruling of torts authorities which were considered to be out of step with the broader principles of negligence law. Ad hoc torts and immunities were abolished, and the reach of negligence law was extended. In the most recent of these, *Brodie v Singleton Shire Council*,<sup>17</sup> the High Court abolished the non-feasance immunity of highway authorities, overruling two earlier High Court decisions, *Buckle v Bayswater Road Board*<sup>18</sup> and *Gorringe v Transport Commission (Tas)*.<sup>19</sup> At common law the activities of highway authorities are now to be governed by the general law of negligence.<sup>20</sup> In its expansion of negligence law and in other areas, the High Court under Mason CJ and then Brennan CJ, was more active in its reforms than at any other time in its history. Prior to his elevation the most recent appointment to the High

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<sup>17</sup> (2001) 206 CLR 512 ('*Brodie*'). In *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479, the body of principle governing occupiers' liability, which previously had an uncertain relationship with negligence law, was unambiguously subsumed by it. In *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, the High Court abolished the rule in *Rylands v Fletcher* (1868) LR 3 HL 330, a strict liability tort for the escape of dangerous substances from the defendant's property, on the basis that such circumstances should be covered by negligence law. In *Northern Territory of Australia v Mengel* (1995) 185 CLR 307, the High Court unanimously overruled *Beaudesert Shire Council v Smith* (1966) 120 CLR 145, which had held that a person should be entitled to compensation if they have suffered harm as the inevitable consequence of the unlawful, intentional and positive acts of another, even if that harm was not foreseeable; the *Beaudesert* rule was considered inconsistent with the broader principles of modern tort law which confine liability to injuries that are intentional or negligent. In *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 the High Court disapproved the immunity of landlords from liability arising out of some defect in the rented premises; landlords should be held liable for injuries flowing from their negligence.

<sup>18</sup> (1936) 57 CLR 259.

<sup>19</sup> (1950) 80 CLR 357.

<sup>20</sup> Some jurisdictions reintroduced a version of the immunity. Eg, s 45 *Civil Liability Act 2002* (NSW).

Court, Justice Heydon, noted approvingly: ‘The court over which Gleeson CJ, who is not sympathetic to judicial activism, presides, is generally, but not always, contracting [negligence law].’<sup>21</sup> And yet the decision of the High Court in *Cattanach*, to which Gleeson CJ and Heydon J dissented, along with Hayne J, can be seen as following this same trend – the principled expansion of negligence law. The majority considered that liability flowed from the general principles of negligence law.<sup>22</sup> ‘Duty, breach and damage are all conceded.’<sup>23</sup> The majority were not prepared to recognise an immunity in favour of the defendants, contrary to existing principle.<sup>24</sup>

Despite his avowed aversion to judicial activism, Heydon J dissented primarily because, unlike the majority, he considered that existing principle should be overridden by his heartfelt policy concerns. To a slightly lesser extent this is true also of Gleeson CJ and Hayne J. However, the dissentients also disagreed with the majority on a couple of points of principle. Gleeson CJ stated that the case should be decided ‘by reference to general principles ... Those principles may allow for exceptions or qualifications, but such exceptions or qualifications themselves must be founded upon principle’.<sup>25</sup> Unlike the majority, however, he considered the case to fall into an established category for which damages are not generally available – pure economic loss.<sup>26</sup> On this view it was up to the plaintiffs to explain why the case should be viewed as an exception to principle. Only Callinan J agreed with this categorisation, and it does appear difficult to accept. The negligence resulted in conception, pregnancy, birth, and only then the costs of raising the child. As Hayne J pointed out: ‘The interest of the patient which is at stake in the events described is the patient’s interest in physical integrity ... [T]o describe the wife’s claim as one of economic loss caused by negligent advice would ignore the first consequence identified’.<sup>27</sup>

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<sup>21</sup> Heydon, above n 3, 123.

<sup>22</sup> (2003) 215 CLR 1, 27-8 (McHugh and Gummow JJ), 68 (Kirby J), 106 (Callinan J).

<sup>23</sup> Ibid 32 (McHugh and Gummow JJ).

<sup>24</sup> Eg, ibid 29 (McHugh and Gummow JJ), 106 (Callinan J).

<sup>25</sup> Ibid 8.

<sup>26</sup> Ibid 9, 15, 18; eg *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

<sup>27</sup> (2003) 215 CLR 1, 71; see also at 31, 33 (McHugh and Gummow JJ), 57 (Kirby J).

The other major point of principle on which there was a divergence between the majority and the dissentients was the possibility of offsetting the positive experiences of parenthood against child-rearing costs. The majority denied that offset should be allowed as any benefits would have a totally different character than the costs; to balance the two against each other would be in breach of the 'same interest' rule.<sup>28</sup> 'The reciprocal joy and affection of parenthood can have no financial equivalence to the costs of rearing him. One is no substitute for the other.'<sup>29</sup> The dissentients, however, considered it inappropriate to 'ignore some consequences of parenthood, such as the emotional and spiritual rewards it may bring'.<sup>30</sup> To a large extent it was their more holistic view of the dispute that raised for the dissentients their overriding policy concerns. Or perhaps the opposite may be more accurate: because of the grave policy implications of the plaintiffs' claim, the dissentients refused to apply the offset principle in a narrow or technical fashion.<sup>31</sup>

## POLICY

Policy is often in a causal relationship with authority and principle, influencing decisions, and shaping the structure of the law. The three will often be congruent. As McHugh and Gummow JJ commented in *Cattanach*, 'public policy "after all is the bedrock foundation on which the common law of torts stands"'.<sup>32</sup> But alignment is far from inevitable. A body of principle is internally coherent by definition, but policy is often outward-looking and reactive, and its expedience may, on occasion, produce authorities which do not 'fit'<sup>33</sup> and may even

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<sup>28</sup> Ibid 37-39 (McHugh and Gummow JJ), 66 (Kirby J).

<sup>29</sup> Ibid 107 (Callinan J).

<sup>30</sup> Ibid 91 (Hayne J), see also at 24 (Gleeson CJ).

<sup>31</sup> This difference may also be attributable to the artificially narrow point on which the case reached the High Court. While the High Court appeal concerned only damages for child-rearing costs, as noted at the beginning of this note, the lower courts allowed damages for pain and suffering associated with the first plaintiff's pregnancy and the birth, and loss of consortium for the second plaintiff. Focusing on the High Court appeal, the majority's narrow application of the offset principle appears more appropriate, while the dissentients' approach may be more justified having regard to the plaintiffs' overall claim.

<sup>32</sup> Ibid 30, quoting from *Smith v Jenkins* (1970) 119 CLR 397, 418 (Windeyer J).

<sup>33</sup> *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ).

‘fracture the skeleton of principle’.<sup>34</sup> Conversely principle may dictate that a case is decided a certain way despite the existence of countervailing policies.<sup>35</sup>

As noted in the previous section, in *Cattanach* Hayne and Heydon JJ dissented primarily because the application of principle in this case impinged upon certain policy concerns.<sup>36</sup> Gleeson CJ, having categorised the case as one of pure economic loss, indicated that policy considerations argued against the exceptional awarding of damages.<sup>37</sup> The policies that were considered to conflict with an award of child-rearing damages were variously expressed, but:

all relate to the worth that is to be ascribed to the life of an individual, and the worth that can be found in establishing and maintaining a good and healthy relationship between parent and child’.<sup>38</sup> An award of damages would ‘commodify’ the child.<sup>39</sup> It would be to ‘regard a normal, healthy baby as more trouble and expense than it is worth’ which is ‘morally offensive’.<sup>40</sup> The child would also be exposed to a considerable risk of harm if it was later to learn that it was an “emotional bastard” ... that its parents did not

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<sup>34</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 29-30.

<sup>35</sup> The terms ‘principle’ and ‘policy’ can be used in various ways. My usage, for example, is not identical to that of Ronald Dworkin, for whom policies are directed to social goals, and principles reflect moral standards: *Taking Rights Seriously* (7<sup>th</sup> impression, 1994), 22, 82. Many of the policies that arose in *Cattanach* reflected moral standards, and yet I would not call them ‘principles’ as they appeared to conflict with the existing structure of negligence law. Jane Stapleton recently indicated that she ‘has yet to hear a compelling account of the difference between principle and policy’: ‘The golden thread at the heart of tort law: Protection of the vulnerable’ (2003) 24 *Australian Bar Review* 135. She suggests that we ‘ditch’ these terms, replacing them both with the single ‘neutral’ expression ‘legal concerns’: at 137. I disagree, and I see some value in the definitions proffered by unnamed High Court justices which she rejects: at 135-6. Obviously there is an overlap between policy and principle, and I acknowledge that one’s choice of terminology may be governed by tactical considerations: at 136. Nevertheless, if treated cautiously, the distinction remains useful, and we would be conceptually impoverished without it.

<sup>36</sup> Eg (2003) 215 CLR 1, 89 (Hayne J), 117 (Heydon J).

<sup>37</sup> *Ibid* 19-24.

<sup>38</sup> *Ibid* 89 (Hayne J).

<sup>39</sup> *Ibid* 22 (Gleeson CJ), 90, 93 (Hayne J), 129 (Heydon J).

<sup>40</sup> *Ibid* 229 (Heydon J), quoting from *McFarlane* [2000] 2 AC 59, 114 (Lord Millett).

want it and, in fact, went to court to force someone else to pay for its raising.<sup>41</sup>

It is at this point that the policy issues interact with the offset principle. On the majority view an award of damages simply would not carry the implications that the dissentients would seek to impose upon it. As McHugh and Gummow JJ point out, ‘the relevant damage suffered by the Melchiors is the expenditure that they have incurred or will incur in the future, not the creation or existence of the parent-child relationship’.<sup>42</sup> In opening up these side issues, the dissentients could be accused of, as Kirby J put it, ‘overwhelming legal analysis with emotion’.<sup>43</sup> On the other hand, the majority approach might be viewed as unfeasibly abstracted from reality. As Gleeson CJ suggested, ‘it is unlikely that the parties to the relationship, or the community, would regard it as being primarily financial in nature. It is a human relationship ... fundamental to society’.<sup>44</sup>

But the majority questioned whether the policies identified by the dissentients were of sufficient importance to override established principle. McHugh and Gummow JJ described it as ‘a beguiling but misleading simplicity to invoke the broad values which few would deny and then to glide to the conclusion that they operate to shield the appellants from the full consequences in law of Dr Cattanach’s negligence’.<sup>45</sup> They indicated that ‘the general considerations advanced by the appellants have not ... matured into a coherent body of legal doctrine’.<sup>46</sup> Kirby J pointed out that a majority of the High Court had consistently rejected the ‘explicit reference to policy ... in resolving novel questions of negligence liability’,<sup>47</sup> an approach that he had previously championed.<sup>48</sup> For the majority, the policies were not sufficiently compelling and had not received the requisite imprimatur to

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<sup>41</sup> (2003) 215 CLR 1, 137 (Heydon J).

<sup>42</sup> Ibid 32.

<sup>43</sup> Ibid 59.

<sup>44</sup> Ibid 24. And yet, Gleeson CJ considered the claim to be one for *pure economic* loss: above n 26.

<sup>45</sup> Ibid 35.

<sup>46</sup> Ibid 30.

<sup>47</sup> Ibid 38-9, see also 108-9 (Callinan J). This explicitly policy-based approach is sometimes described as the *Caparo* test, after *Caparo Industries Plc v Dickman* [1990] 2 AC 605.

<sup>48</sup> Eg *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 80-6. See (2003) 215 CLR 1, 38 fnn 176-7 (Kirby J).



overcome the ‘judicial aversion to the enjoyment of special privilege or advantage in litigation’.<sup>49</sup>

## JUDICIAL ACTIVISM

Orthodoxy has it that judges are appointed due to their knowledge of existing authority and principle and their ability to relate it to the disputes that come before them. Some commentators have contrasted these inherently judicial functions with the more creative and political function of developing new law in the pursuit of certain policy objectives, and have questioned whether it is legitimate or sensible for judges to take on the latter function.<sup>50</sup> How well placed are judges to determine which policies are worthy of pursuit? Are the ‘policies’ anything more than the individual judge’s personal values in disguise? How well qualified are judges to determine exactly which new laws would effectively further nominated policy goals without undesired side effects? Law creation is the task of the legislature and executive government which have both a democratic mandate and the resources to carry out the necessary consultation, investigation and analysis.<sup>51</sup>

The majority in *Cattanach* presented themselves as being less creative and legislative than the dissentients. Whereas the majority were obedient to the principles of negligence law, the dissentients instead sought to create an unprincipled exception by reference to policies. Kirby J pointedly suggested:<sup>52</sup>

Judges ... have no authority to adopt arbitrary departures from basic doctrine. Least of all may they do so, in our secular society, on the footing of their personal religious beliefs or ‘moral’ assessments concealed in an inarticulate premise dressed up, and described, as legal principle or legal policy.

Heydon J denied that his ostensibly pro-family policies reflected the values of ‘particular moralities’, instead claiming that they

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<sup>49</sup> (2003) 215 CLR 1, 29 (McHugh and Gummow JJ), citing 106 (Callinan J).

<sup>50</sup> Heydon, above n 3; Gava, above n 5; Craven, above n 2; Ian Callinan, ‘An Over-Mighty Court?’ (1994) 4 *Proceedings of The Samuel Griffith Society* 81.

<sup>51</sup> *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 633 (Mason J).

<sup>52</sup> (2003) 215 CLR 1, 53.

‘underpinned much of the common law’.<sup>53</sup> However, as Kirby J pointed out, the family values being promulgated privileged a particular notion of the family – the procreating heterosexual family. This vision appeared to Kirby J to have been ‘formed in the far-off days of judicial youth, 30 or more years earlier, when social facts were significantly different’.<sup>54</sup>

Such thinking ... bears little relationship to reality in contemporary Australia. That reality includes non-married, serial and older sexual relationships, widespread use of contraception, same-sex relationships with and without children, procedures for ‘artificial’ conception and widespread parental election to postpone or avoid children.<sup>55</sup>

And while ostensibly seeking to foster the parent-child relationship, the dissentients all but ignored the question of the reproductive autonomy of parents.<sup>56</sup> While not explicitly addressed, it seems clear that the dissentients did not consider a woman’s right to choose not to have children worthy of protection. Infringement of this right was not viewed as a legal harm. Indeed, on the dissentients’ reasoning it is questionable whether the woman or parents have a ‘right to choose’ at all. According to Gleeson CJ, parents have something less – ‘the freedom to make such a choice’.<sup>57</sup>

Further doubts can be raised about the alignment between the rule proposed by the dissentients, and the policies that supposedly underlie it. Is it really the case that an award of child-rearing damages would threaten the family unit and desacrilize the child’s life more than the denial of this head of damages? McHugh and Gummow JJ described such claims of the dissentients as ‘at best speculative’<sup>58</sup> while Kirby J described them as ‘unconvincing’ and, in some respects, ‘sheer judicial

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<sup>53</sup> Ibid 130.

<sup>54</sup> Ibid 64.

<sup>55</sup> Ibid.

<sup>56</sup> Ben Golder, ‘From *McFarlane* to *Melchior* and beyond: Love, sex, money and commodification in the Anglo-Australian law of torts’ (2004) 12 *Torts Law Journal* 128, 149-154; Burns, above n 4, 234-5.

<sup>57</sup> (2003) 215 CLR 1, 16. Of course, it would be possible to recognise that the parents’ reproductive autonomy has been infringed with a conventional award of damages or solatium, while still denying child-rearing damages: eg *McFarlane* [2000] 2 AC 59; *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309.

<sup>58</sup> (2003) 215 CLR 1.

fantasy'.<sup>59</sup> Any policy-based exceptions to principle should be based on 'empirical evidence, not mere judicial assertion. Yet this was not attempted'.<sup>60</sup> To grant the tortfeasor immunity, while perhaps avoiding the 'odious spectacle'<sup>61</sup> of the legal action, would do nothing to help the family cope with the pressures and conflicts, both financial and emotional, flowing from its unplanned expansion.<sup>62</sup> The dissentients appear more concerned with the 'social *ideal* of the family' than with '*real* families'.<sup>63</sup>

## CHANGING PLACES

The foregoing analysis suggests that the majority in *Cattanach* toed the line of principle, while the dissentients paid greater obedience to their policy preferences. Such a split between a principled majority and a policy-oriented minority may not be uncommon, however, the personnel on either side in *Cattanach* may be less expected.<sup>64</sup>

While declining to depart from principle in *Cattanach*, Justice McHugh has on another occasion acknowledged that the common law must develop in response to societal values:

When legal rules and principles are no longer efficient or do not meet social needs, they must be reviewed and sometimes revised or extended. The law is a social instrument – a means, not an end. It changes as society changes.<sup>65</sup>

Similarly, Gummow J has described the common law as 'a body of law which develops in process of time in response to the developments of the society in which it rules.'<sup>66</sup> And Justice Kirby has referred to 'the great tradition of the common law –

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<sup>59</sup> Ibid 56.

<sup>60</sup> Ibid 66 (Kirby J).

<sup>61</sup> Ibid 126 (Heydon J).

<sup>62</sup> See also Golder, above n 56, 145; Burns, above n 4, at 234-7.

<sup>63</sup> Golder, above n 56, 149.

<sup>64</sup> But compare Hutchinson's analysis of *Brodie* (2001) 206 CLR 512, above n 3, 92-93.

<sup>65</sup> Justice Michael McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37.

<sup>66</sup> *Wik Peoples v Queensland* (1996) 187 CLR 1 at 179; quoting from *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555, 591-592 (Lord Radcliffe).

adapting and updating the law for a time of rapid social change'.<sup>67</sup>

Although in this case he gave weight to policy considerations, Chief Justice Gleeson is better known for his legal conservatism:

The expertise which the members of the court are required to bring to bear on that function is their expertise as lawyers ... The quality which sustains judicial legitimacy is not bravery, or creativity, but fidelity.<sup>68</sup>

Justice Hayne has expressed a similarly modest view of the judicial role, describing 'judicial reticence ... as a fundamental informing principle for every judge at every level in the judicial system'.<sup>69</sup> More stridently, Justice Heydon has spoken out against 'judicial activism' and its 'illegitimate' use of judicial power to further 'some political, moral or social programme'.<sup>70</sup> He has gone so far as to equate 'judicial activism' with the 'death of the rule of law'.

Only Callinan J's judgment may be viewed as true to type. Before joining the High Court he was critical of the view that a court should 'look to and adopt its own view of contemporary community perceptions and values'.<sup>71</sup> In *Cattanach* he declined to follow this practice:

The fact that I might as a judge find it personally distasteful to be required to assess damages of the kind claimed, can however provide no reason to refuse to award them if the application of legal principle requires me to do so.<sup>72</sup>

But what to make of the other judgments, with activists and legalists seemingly changing places? One view is that the more activist judges may have been reacting to criticism of the High Court's expansive decisions, such as *Mabo v Queensland (No 2)*,<sup>73</sup> *Wik Peoples v Queensland*,<sup>74</sup> and in the negligence arena,

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<sup>67</sup> Kirby, above n 3, 228.

<sup>68</sup> Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4, 11.

<sup>69</sup> Justice Kenneth Hayne, 'Letting Justice Be Done Without the Heavens Falling' (2001) 27 *Monash University Law Review* 12, 15.

<sup>70</sup> Heydon, above n 3, 113.

<sup>71</sup> Callinan, above n 50, 96.

<sup>72</sup> (2003) 215 CLR 1, 106-7.

<sup>73</sup> (1992) 175 CLR 1.

<sup>74</sup> (1996) 187 CLR 1.

*Nagle v Rottnest Island Authority*<sup>75</sup> and *Brodie*.<sup>76</sup> Peter Cane suggests the majority judgments may be viewed as an ‘attempt ... to reassert [the court’s] role as a forum of legal principle, above the political fray’.<sup>77</sup> There may be some truth to this.<sup>78</sup> While the dissentients were fairly unrestrained in their reference to policy, most notably Heydon J, the policy was conservative, and the effect was to contract the law’s reach.

But a further lesson of the case is that the dichotomy between legalism and activism can be overly simplistic. ‘There is much in between.’<sup>79</sup> Justice Kirby has indicated that the focus should be on the ‘middle ground ... in which *real* judges perform their duties: neither wholly mechanical nor excessively creative’.<sup>80</sup> As Allan Hutchinson has commented: ‘Whereas even the most reactionary theorist admits to some need for change, the most radical critic concedes that a degree of stability is desirable.’<sup>81</sup> While characterised contrastingly above, the Chief Justice, in his discussion of ‘Judicial Legitimacy’, expressed his unqualified agreement with Justice McHugh’s analysis of ‘The Judicial Method’.<sup>82</sup>

It is implausible to suggest that the majority in *Cattanach* were blinkered in their approach, ignoring the policy arguments entirely, and considering only established principle. What is more likely is that the majority saw problems with the dissentients’ policy arguments, and, on this occasion, considered them insufficient to displace existing principle – principle which may have advanced other policy interests with which they had

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<sup>75</sup> (1993) 177 CLR 423.

<sup>76</sup> (2001) 206 CLR 512.

<sup>77</sup> Peter Cane ‘The Doctor, the Stork and the Court: A Modern Morality Play’ (2004) 120 *Law Quarterly Review* 23, 25, referring in particular to (2003) 215 CLR 1, 53 (Kirby J); see also at 34 (McHugh and Gummow JJ).

<sup>78</sup> As Cane notes, with *Brodie* (2001) 206 CLR 512 as a notable exception, there has been a discernible trend in High Court judgments favouring defendants; see also Harold Luntz, ‘Torts Turnaround Downunder’ [2001] *Oxford University Commonwealth Law Journal* 95: Cane, above n 77, 125. In *Brodie*, as in *Cattanach*, the extension of the law was justified on grounds of principle: see above n 17.

<sup>79</sup> Bryan Horrigan, ‘The High Court must address public misgivings about judicial activism’, 8 October 2003, <onlineopinion.com.au> at 23 December 2004.

<sup>80</sup> Kirby, above n 3, 231 (emphasis in original).

<sup>81</sup> Hutchinson, above n 3, 97.

<sup>82</sup> Gleeson, above n 68, 7, adopting McHugh, above n 65.

greater affinity. *Cattanach* demonstrates that no judge is totally immune from the influence of their policy preferences and values. Claims to the contrary are not only incorrect, but have the appearance of being ideologically motivated and disingenuous.<sup>83</sup>

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<sup>83</sup> Hutchinson, above n 3, 90, criticising Heydon, above n 3; see also Cane, above n 77, 26, criticising the majority in *Cattanach*.