

# DEAKIN LAW ORATION

## TOO MUCH LAW? RISK, REASONABLENESS AND THE JUDGE AS REGULATOR

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### I INTRODUCTION

In March 1902, as the first Attorney-General of the Commonwealth of Australia, Alfred Deakin moved the second reading of the Bill which became the *Judiciary Act 1903*. That was the Act which established the High Court of Australia. The new Parliament of the Commonwealth thereby gave effect to section 71 of the Constitution, which provided:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia ...

The Bill provided for five Justices. Deakin told the House that they would cost £3000 each per year, and the Court as a whole £30 000. Referring no doubt to the Boer War, Deakin asked rhetorically: ‘Can we afford three quarters of a million for war, and not £30 000 for justice?’<sup>1</sup>

In 1908, as Prime Minister, Alfred Deakin welcomed the Naval Fleet of the United States on its arrival in Melbourne. This visit had been arranged at Deakin’s personal invitation, and accepted by President Theodore Roosevelt himself. Deakin had quite deliberately refrained from consulting the Imperial

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\* President, Court of Appeal, Supreme Court of Victoria. This Deakin Law School Oration was delivered on 19 August 2009.

<sup>1</sup> Commonwealth, *Parliamentary Debates*, House of Representatives 18 March 1902, 10987.

Government about the plan, and the Colonial Office was furious when it learnt of ‘this diplomatic activity between Australia and a foreign power ... and even more so when a premature announcement made the plans public knowledge’.<sup>2</sup>

What, you might wonder, do these memorable events have to do with the subject of tonight’s lecture?

## II PHILIP HOWARD’S AMERICAN CRITIQUE

The title of this lecture is prompted by the writings of a contemporary American lawyer, Philip Howard. Howard is not an academic writer. He is a senior partner in the New York office of a large Washington-based law firm, Covington & Burling. His latest book is entitled *Life Without Lawyers: Liberating Americans from Too Much Law*.<sup>3</sup>

This is not a new theme for Philip Howard. The title of his first book, published in 1994, announced his stance with unmistakable clarity. It was entitled *The Death of Common Sense: How Law is Suffocating America*. He followed it up in 2001 with *The Collapse of the Common Good: How America’s Lawsuit Culture Undermines Our Freedom*.

I first heard of Philip Howard’s work when I was in San Francisco in January this year. My oldest and closest friend is, as it happens, a San Francisco-based partner in the same law firm. He gave me a copy of Howard’s 2001 book, *The Collapse of the Common Good*.

I was soon to hear more of Philip Howard, however. In April I read a review of his most recent book in the *New York Review of Books*. Then, on 7 July, just as I was starting to think about what to say tonight, I heard Philip Howard interviewed by Damien Carrick on the ABC’s *Law Report*.

I should say that I regard the *Law Report* as doing for thinking about the law what the *Science Show* does for thinking about science. The programme’s weekly investigation and analysis of current legal issues is without peer in this country. The interview with Philip Howard was a perfect example.

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<sup>2</sup> Marilyn Lake, “‘The Brightness of Eyes and Quiet Assurance Which Seems to Say American’ – Alfred Deakin’s Identification with Republican Manhood’ (2007) 38 *Australian Historical Studies* 32, 49.

<sup>3</sup> Philip K Howard, *Life Without Lawyers: Liberating Americans from Too Much Law* (2009).

Philip Howard's thesis is that the fear of being sued is crippling American society.

[W]hat's happened over the last 40 years slowly, but now pervasively, is that law is involved in people's daily choices. ... People are scared that any ordinary accident might be their ruin. ... Americans who deal with the public go through the day looking over their shoulder instead of looking where they want to go.<sup>4</sup>

Howard gives an example which, as we shall see, echoes views which have been expressed in Australia:

[T]here's nothing left in an American playground that would attract a kid over the age of four. There's no high slides, there's no jungle gyms, there are no climbing ropes, there are no see-saws, there are no merry-go-rounds – literally, because anything that's fun not only involves a risk, but the certainty that from time to time there'll be an accident.<sup>5</sup>

Asked to explain why he thought this litigation culture had developed, Howard said:

It's what happens when you develop a ... pathological distrust of authority ... [W]e woke up to these abuses in America: racism, gender discrimination, in the '60s, and one of the solutions was to say 'Well we won't have bad decisions by judges or officials if they no longer make decisions'. And so we got this idea that people had a right, this whole idea of individual ... rights - to sue for anything. Just make people prove that they made the right decision. ... [P]retty soon, justice is out of control and no-one trusts it any more. Because there's nobody enforcing the social norms of reasonableness.<sup>6</sup>

And the solution? Howard sees judges as the key:

Well you have to restore the red lights and green lights, and so judges should have the job of judging. Their job is not to avoid asserting values, their job is to assert values. So they need to reach inside themselves the whole day long and say, 'Is this within the bounds of what reasonable people would expect? Is this a claim that a society should permit?' Because if you allow the claim, that establishes the boundaries of everybody else's freedom. If you allow a claim when one out of a million kids falls off the see-saw and breaks his skull, then all the see-saws are going to disappear.

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<sup>4</sup> ABC Radio National, 'Litigation American Style', *The Law Report*, 7 July 2009 <<http://www.abc.net.au/rn/lawreport/stories/2009/2606115.htm>> at 30 September 2009.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

So someone has to make a judgment about whether that's a reasonable risk or not as a matter of law. ... [Judges] have to understand that they're representing all of society, they're not just a referee in some skirmish between two parties.<sup>7</sup>

Howard believes that it would

dramatically ... turn down the heat of the fear of litigation in America, if judges would simply start acting as gatekeepers, and just affirmatively and aggressively keep claims and defences reasonable.<sup>8</sup>

Hence my title: 'Risk, Reasonableness and the Judge as Regulator'. At a time when there is a national debate about whether it is appropriate for judges to adjudicate on human rights questions, it is important to reflect on the high reliance we already place on judges.

Before I explore that further, however, I want to say something more about Alfred Deakin and two related topics – his admiration and affection for all things American, and the high expectations of judges which he espoused.

### III DEAKIN AND AMERICA

In welcoming the US Naval Fleet to Melbourne, Deakin said:

Realising the riches of national relationships, we look, instinctively, first and most confidently, to you Americans, nearest to us in blood, in character, and in purpose. It is in this spirit, and in this hope, that Australia welcomes with open hands and heart the coming of your sailors, and of the flag, which, like our own, shelters a new world under the control of its vital union.

May the present accord between English speaking peoples beget a perpetual concord of brotherhood between us.<sup>9</sup>

I was first alerted to Deakin's bond with America in 2005, when I heard Professor Marilyn Lake of La Trobe University speaking about a chapter she was writing for a book called *What If? Australian History as it Might Have Been*.<sup>10</sup> The book was published in 2006 and her chapter is entitled 'What if

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Lake, above n 2, 35.

<sup>10</sup> S Macintyre and S Scalmer (eds) (2006).

Alfred Deakin had made a declaration of Australian independence?’<sup>11</sup> Thanks to the great assistance of Sarah Dillon, a researcher at the Court of Appeal and a first class honours graduate of this Law School, I have now been able to read a 2007 article by Professor Lake which explores in some detail what she calls ‘Alfred Deakin’s Identification with Republican Manhood’.<sup>12</sup> What follows is largely taken from Professor Lake’s fascinating article.<sup>13</sup>

Deakin’s love affair with America began in 1885 when, at the age of 28, he sailed to the United States. He travelled first to California, in his official capacity as Victorian Minister of Public Works and Water Supply to investigate irrigation schemes. As I discovered when I went to Mildura on a Court of Appeal circuit in May of this year, what Deakin learned about irrigation, and the contacts he made with the Chaffey brothers, led in due course to the development of Mildura as the centre of an irrigation district.

According to Professor Lake, Deakin was most impressed with what he found in the United States. Arriving in the ‘great city’ of San Francisco on 29 January 1885, he wrote that it seemed ‘busier and brighter than Melbourne’.<sup>14</sup> The energy of the people, their racial mixture and the splendid buildings all impressed the young visitor. He was particularly struck by the men:

The men dress well and nearly all shave. Chief distinguishing feature [is] the brightness of eyes and quiet assurance which seem to say American.<sup>15</sup>

Professor Lake’s article explores Deakin’s ‘American identifications through his passionate pursuit of three exemplars of Republican manhood: the writer Ralph Waldo Emerson, the philosopher Josiah Royce and the president Theodore Roosevelt’.<sup>16</sup> It is touching to read of the week which Deakin spent with Royce in the Blue Mountains in 1888, ‘each the pupil in turn as their conversation ranged over philosophy, religion, history and politics’.<sup>17</sup>

According to Lake, Deakin missed Royce enormously when he left Australia, and wrote him ‘beseeching letters’.<sup>18</sup> These are now held in the Royce collection at Harvard but were not photocopied for the Deakin collection at the National Library of Australia as was the rest of Deakin’s correspondence.

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<sup>11</sup> Ibid 29.

<sup>12</sup> (2007) 38 (12a) *Australian Historical Studies* 32.

<sup>13</sup> I wish also to thank Brad Barr, also a Court of Appeal researcher, for his research assistance.

<sup>14</sup> Lake, above n 2, 32-3.

<sup>15</sup> Ibid 33.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid 34.

<sup>18</sup> Ibid.

Professor Lake wonders aloud whether ‘their pleading tone was considered unbecoming to a future prime minister’.<sup>19</sup>

She records that Deakin

confided to Royce that when he was in Sydney again for the first Constitutional Convention in 1891, his mind was often elsewhere and he took the opportunity to slip away to their old haunts: ‘I ran up to the Blue Mountains & took my Easter by myself in the same hotel & in the same haunts as those in which we passed hours that were among the pleasantest I have ever spent.’<sup>20</sup>

Deakin’s enthusiasm for America was to be contrasted with his ‘profound ambivalence’<sup>21</sup> towards Britain. Deakin’s experience of colonial subjection was, by his own account, demeaning and humiliating. He was wholly unimpressed by what he saw as English presumption and pretension. His first visit to London was in 1887, when he represented Victoria at the first Colonial Conference. Time does not permit me to recount Deakin’s scathing criticisms of Britain’s political and intellectual leaders. They can be found in Professor Lake’s article. But I cannot resist a brief reference to a debate, which took place at a closed session of the conference, about the future of New Caledonia.

The French were evidently anxious to persuade Britain to agree to abandon the hitherto agreed position of neutrality, and to agree that the islands be ceded to the French. The Australian States were opposed to this. The British Prime Minister, Lord Salisbury, tried to explain to the Australians the inappropriateness of their stance on the Pacific. Writing in his *Federal Story* (contemporaneously written but not published until 1944),<sup>22</sup> Deakin described his Lordship in these terms:

His tone breathed the aristocratic condescension of a Minister addressing a deputation of visitors from the antipodes whom it became his duty to instruct in current foreign politics for their own sakes.<sup>23</sup>

According to Deakin, the New South Wales delegate responded with ‘whispering humbleness’.<sup>24</sup> He himself spoke ‘almost last’.<sup>25</sup> Speaking of himself in the third person, he wrote:

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<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 50.

<sup>22</sup> See now, *And Be One People: Alfred Deakin’s Federal Story* (1995).

<sup>23</sup> Ibid 21.

He broke quite new ground not only with unrestrained vigour and enthusiasm on the general question as his colleagues had before him, but because he did so in a more spirited manner, challenging Lord Salisbury's arguments one by one and mercilessly analysing the inconsistencies of his speech.<sup>26</sup>

Tonight's topic is prompted by what Alfred Deakin would no doubt have regarded as typical of the plain-speaking, intellectually challenging views of an American. That is certainly my view. As a post-graduate student in England in the late 1970s, I found that the greatest intellectual stimulus came from the North Americans: from the academics – Ronald Dworkin, then Professor of Jurisprudence, Charles Taylor, then Professor of Social and Political Theory, and Bill Weinstein, a lecturer in politics – and from the American post-graduate students I encountered. Their articulateness and enthusiasm for intellectual engagement was, quite simply, irresistible.

It is beyond the scope of this lecture, but a very important question nonetheless, to ask why it is that in our legal discourse we still draw so little on American common law precedent. In a case to which I will refer in due course, I referred to an American line of authority in tort. But that is a rare occurrence. The High Court is, as far as I am aware, the only Australian court which refers to American authority with any frequency. I do not recall any American authority being cited in argument in my four years in the Court of Appeal.

If there is truth in what Deakin felt, and in what I have experienced – that Australians have a stronger and more natural intellectual connection with North Americans than with our English colleagues – then surely we should be looking to enrich our legal culture with more of what the United States has to offer.

#### **IV ALFRED DEAKIN AND JUDGES**

Alfred Deakin's Second Reading Speech for the Judiciary Bill was a tour de force. It takes up 27 pages of Hansard, in two columns, closely typed. It is a speech which repays reading,<sup>27</sup> a formidable exposition of the importance of

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<sup>24</sup> Ibid 21-2.

<sup>25</sup> Ibid 22.

<sup>26</sup> Ibid.

<sup>27</sup> I was first alerted to this remarkable speech when Justice Susan Crennan quoted from it at her welcome to the High Court in November 2005.

having a supreme court as the guardian and interpreter of the Constitution in a federal system.

Deakin said that the High Court was ‘an absolutely essential portion of the Constitution under which we live ... charged with the highest responsibilities to the people of this continent ... [It was] ... a structural creation which is the necessary and essential complement of a federal Constitution’.<sup>28</sup> He continued:

Its first and highest functions as an Australian court – not its first in point of time, but its first in point of importance – will be exercised in unfolding the Constitution itself. That Constitution was drawn, and inevitably so, on large and simple lines, and its provisions were embodied in general language, because it was felt to be an instrument not to be lightly altered, and indeed incapable of being readily altered; and, at the same time, was designed to remain in force for more years than any of us can foretell, and to apply under circumstances probably differing most widely from the expectations now cherished by any of us. Consequently, drawn as it of necessity was on simple and large lines, it opens an immense field for exact definition and interpretation. Our Constitution must depend largely for the exact form and shape which it will hereafter take upon the interpretations accorded to its various provisions. This court is created to undertake that interpretation.<sup>29</sup>

I remember thinking, when I first heard that passage, how visionary it was, and how clearly it precluded any ‘originalist’ approach to constitutional interpretation in Australia.

Deakin drew on the example of the United States Supreme Court:

[T]he Americans have found themselves with a Constitution which might have been a dead letter, and must have been a heavy burden, but for the fact that they had created a Supreme Court capable of interpreting it, a court which had the courage to take that instrument, drawn in the eighteenth century, and read it in the light of the nineteenth century, so as to relieve the intolerable pressure that was being put upon it by the changed circumstances of the time. It is not too much to say that, but for the work done in this direction by the Supreme Court of the United States, we might not to-day see it as it is, still the revered bond of union of 70,000,000 or 80,000,000 of free people.<sup>30</sup>

The parallel with Australia was direct and exact:

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<sup>28</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10963.

<sup>29</sup> *Ibid* 10965.

<sup>30</sup> *Ibid* 10967.

Precisely the same situation must arise in Australia, for although it be much easier to amend our Constitution, it is yet a comparatively costly and difficult task and one which will be attempted only in grave emergencies. In the meantime, the statute stands and will stand on the statute-book just as in the hour in which it was assented to. But the nation lives, grows, and expands. Its circumstances change, its needs alter, and its problems present themselves with new faces. The organ of the national life which preserving the union is yet able from time to time to transfuse into it the fresh blood of the living present, is the Judiciary – the High Court of Australia or Supreme Court in the United States. It is as one of the organs of Government which enables the Constitution to grow and to be adapted to the changeful necessities and circumstances of generation after generation that the High Court operates. Amendments achieve direct and sweeping changes, but the court moves by gradual, often indirect, cautious, well considered steps, that enable the past to join the future, without undue collision and strife in the present.<sup>31</sup>

Deakin, himself a barrister through much of his early political career, had the utmost faith in the capability of judges. Asked by an interjector how the Constitution could deal with matters for which no express provision was made, he answered:

Because the law, when in the hands of men like [Chief Justice] Marshall or those trained in his school, or of the great jurists of the mother country, becomes no longer a dead weight. Its script is read with the full intelligence of the time, and interpreted in accordance with the needs of the time. That task, of course, can be undertaken only by men of profound ability and long training. It is to secure such men that we desire the establishment of a High Court in Australia.<sup>32</sup>

And Deakin had great faith in the ameliorating force of law:

The reign of law, though invisible, really surrounds us at every stage in our lives, from the cradle to the grave. Without it no such development, no such progress as we have witnessed in social life would have been possible. ...

It is not for men of knowledge, or of our country, to look with a slighting and indifferent regard upon proposals to extend the area within which law operates. The fundamental choice still remains between war and law, between violence and reason, between force and justice. ... The liberal party all the world over are [sic] being helped to a better realization of the possibilities of peaceful advance, which are afforded by the statute-book,

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<sup>31</sup> Ibid 10967-8.

<sup>32</sup> Ibid 10968.

and the necessary concomitant of the statute-book – courts capable of interpreting it – and seeing that its behests are enforced.<sup>33</sup>

## V THE JUDGE AS GATEKEEPER: THE GUARDIAN OF REASONABLENESS

And so to my topic! Do we expect Australian judges to perform the role of gatekeeper, to be guardians of the limits of reasonableness? Do judges see themselves as cast in that role? The most obvious area for investigation – and the one most relevant to Philip Howard's concerns – lies in the law of negligence. Risk and reasonableness are, of course, central to that field of jurisprudence.

In *Donoghue v Stevenson*,<sup>34</sup> Lord Atkin famously said that 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour'.<sup>35</sup> Seventy years later, in *Tame v New South Wales*,<sup>36</sup> Gummow and Kirby JJ again emphasised that

the tort of negligence requires no more than reasonable care to avert reasonably foreseeable risks. Breach will not be established if a reasonable person in the defendant's position would not have acted differently. The touchstone of liability remains reasonableness of conduct.<sup>37</sup>

In *Donoghue v Stevenson*, Lord MacMillan recognised that the reasonableness of a defendant's conduct would have to be assessed in the light of changing community values and circumstances. His Lordship said:

In the daily contacts of social and business life human beings are thrown into, or place themselves in, an infinite variety of relations with their fellows; and the law can refer only to the standards of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and

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<sup>33</sup> Ibid 10988.

<sup>34</sup> [1932] AC 562.

<sup>35</sup> Ibid 580.

<sup>36</sup> (2002) 211 CLR 317.

<sup>37</sup> Ibid 383.

standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life.<sup>38</sup>

Much has been written about the way in which Australian judges have developed this conception of legal responsibility for injury caused to others. I refer, for example, to the seminal article in 2002 by Chief Justice Spigelman, entitled 'Negligence: the Last Outpost of the Welfare State'.<sup>39</sup>

His Honour described the expansion of the reach of the law of negligence in the second half of the 20<sup>th</sup> century:

Over a few decades – roughly from the sixties to the nineties – the circumstances in which negligence would be found to have occurred and the scope of damages recoverable if such a finding were made, appeared to expand considerably. Professor Atiyah referred to this long-term historical trend as 'stretching the law'. There may be an equivalent parallel trend, perhaps of even greater practical significance, of 'stretching the facts'.<sup>40</sup>

In his Honour's view, the limits of community acceptance had been reached – perhaps even passed:

The traditional function of the law of negligence, reinforced as this function is in almost all cases by insurance, of distributing losses that are an inevitable by-product of modern living (the theme of Fleming's *Law of Torts* on which many of us were weaned) appears to have reached definite limits as to what society is prepared to bear. Furthermore, there is a substantial body of anecdotal evidence of undesirable side effects of the present system: rural general practitioners who have ceased doing obstetrics; councils that have removed such lethal instruments as swings and seesaws from children's playgrounds; charitable fundraising events that have been cancelled. The only reason why all our rock ledges and cliff tops are not festooned with signs is that nobody believes that they would actually affect the outcome of litigation and would probably make things worse.<sup>41</sup>

By the time he was writing in April 2002, however, Spigelman CJ considered that 'the long-term trend [had] been reversed'.<sup>42</sup> A year earlier, Professor Luntz had written of what he pithily described as the 'Torts Turnaround Down Under'.<sup>43</sup> He pointed out that the High Court had delivered 96 tort judgments

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<sup>38</sup> *Donoghue v Stevenson* [1932] AC 562, 619.

<sup>39</sup> (2002) 76 ALJ 432.

<sup>40</sup> *Ibid* 433.

<sup>41</sup> *Ibid* 434.

<sup>42</sup> *Ibid*.

<sup>43</sup> (2001) 1 *Oxford University Commonwealth Law Journal* (Part 1) 95.

over the period 1987-99, of which two thirds were ‘pro-plaintiff’. In 2000, by contrast, nine personal injury appeals were decided, of which only 22 per cent were pro-plaintiff. Professor Luntz described this as ‘a remarkable turnaround’.<sup>44</sup>

It is beyond the scope of this lecture to explore the reasons for the change. What is quite clear is that, at every stage in the development of the law of negligence, judges have been asking and answering the question: what are the reasonable limits of legal liability? Self-evidently, that is a question about values, and different judges will give different answers.

In 1939, in *Chester v Waverley Corporation*,<sup>45</sup> the High Court was required to define the scope of the defendant council’s duty of care, the claim being for damages for nervous shock. Rich J said:

The law must fix a point where its remedies stop short of complete reparation for the world at large, which might appear just to a logician who neglected all the social consequences which ought to be weighed on the other side.<sup>46</sup>

In 2002, the High Court in *Tame v New South Wales*<sup>47</sup> again considered the issue of liability for the negligent infliction of pure mental harm. The plaintiff had suffered psychiatric injury after being told that there was a statement in a police report to the effect that she had been driving under the influence of alcohol. The statement was false, and was very soon after corrected. She brought proceedings against the State, claiming that it was vicariously liable for the negligent conduct of the police officer who had made the error in the accident report.

The High Court held that the police officer did not owe a duty of care to the plaintiff to avoid causing her psychiatric injury. It was not reasonably foreseeable that a person in her position would suffer psychiatric injury or illness as a result of a mistake being made about her blood alcohol level in a police report. In explaining their conclusion, the members of the Court applied the criterion of reasonableness to the asserted duty of care.

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<sup>44</sup> See also P Vines, ‘Schools’ Responsibility for Teachers’ Sexual Assault: Non-Delegable Duty and Vicarious Liability’ (2003) 27 MULR 612, 624-5.

<sup>45</sup> (1939) 62 CLR 1.

<sup>46</sup> *Ibid* 11.

<sup>47</sup> (2002) 211 CLR 317.

Gleeson CJ said:

Requiring a person, when engaged in a certain kind of activity, to have in contemplation a certain kind of risk to others, may be extremely onerous, especially if predictability of harm were the only basis upon which such a requirement is imposed. Consider, for example, an occupier of land on which there is a dwelling house. It is clear that there is a duty of care to people who enter lawfully upon the land. But the content of the duty is not such as to require the occupier to compile a list of every potential source of danger in and around the house, and post the list at every possible point of entry to the land. People do not conduct their lives in that way, and it would not be reasonable to require them to do so. When regard is had to forms of possible harm other than physical injury to person or property, the consequences of a general requirement to be concerned about the welfare of others can become even more extreme. A case such as that of *Mrs Tame* explains the increasing awareness, both in the medical profession and in the community generally, of the emotional fragility of some people, and the incidence of clinical depression resulting from emotional disturbance. *What would be the consequence, for the way in which people conduct their lives, of imposing upon them a legal responsibility to have in contemplation, and guard against, emotional disturbance to others? Considerations of that kind are not 'floodgates arguments'. They go directly to the question of reasonableness, which is at the heart of the law of negligence. Reasonableness is judged in the light of current community standards. As Lord Macmillan said in Donoghue v Stevenson, 'conception[s] of legal responsibility ... adap[t] to ... social conditions and standards'.*<sup>48</sup>

McHugh J said:

I think that the time has come when this Court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall — perhaps it already has fallen — into public disrepute if it produces results that ordinary members of the public regard as unreasonable. Lord Reid himself once said '[t]he common law ought never to produce a wholly unreasonable result'. And probably only some plaintiffs and their lawyers would now assert that the law of negligence in its present state does not produce unreasonable results.<sup>49</sup>

His Honour proceeded to illustrate how the concept of reasonable foreseeability required judges to make value judgments:

When it is necessary to determine foreseeability in the duty context, the development of the law of negligence as a socially useful instrument now

<sup>48</sup> Ibid 332 (emphasis added)(citations omitted).

<sup>49</sup> Ibid 354 (emphasis added)(citations omitted).

requires the rejection of the attenuated test of foreseeability propounded in *The Wagon Mound [No 2]* and adopted by this Court in *Shirt*. We should return to Lord Atkin's test that:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.

This statement should not be seen as laying down a simple factual issue, as it often is. Lord Wilberforce in *Anns v Merton London Borough Council* and Deane J in *Jaensch*, for example, seem to have regarded reasonable foreseeability as raising a mere factual issue. Lord Wilberforce thought that reasonable foreseeability was the equivalent of proximity and would create a duty unless negated by policy factors. That proposition assumes that policy factors have no part to play in reasonable foreseeability. Deane J thought that both reasonable foreseeability and proximity were necessary to establish a duty of care. But I think it is arguable that the notion of reasonable foresight in Lord Atkin's speech in *Donoghue v Stevenson* is, and was intended to be, a compound conception of fact and value. What is foreseeable is a question of fact — prediction, if you like. But *reasonableness is a value*. At least in some situations, *policy issues may be relevant to the issue of reasonable foresight because reasonableness requires a value judgment*. ...

Because reasonable foreseeability is a compound conception of fact and value, policy considerations affecting the defendant or persons in similar situations arguably enter into the determination of whether the defendant ought reasonably to have foreseen that his or her acts or omissions were 'likely to injure your neighbour'.<sup>50</sup>

His Honour then considered the ramifications of a finding that a duty of care was owed (and breached) in this case:

To insist that the duty of reasonable care in pure psychiatric illness cases be anchored by reference to the most vulnerable person in the community — by reference to the most fragile psyche in the community — would place an undue burden on social action and communication. *To require each actor in Australian society to examine whether his or her actions or statements might damage the most psychiatrically vulnerable person within the zone of action or communication would seriously interfere with the individual's freedom of action and communication. To go further and require the actor to take steps to avoid potential damage to the peculiarly vulnerable would impose an intolerable burden on the autonomy of individuals*. Ordinary people are entitled to act on the basis that there will be a normal reaction to their conduct. It is no answer to say that the defendant ought to be liable to peculiarly vulnerable persons because the defendant is guilty of careless

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<sup>50</sup> Ibid 355–6 (citations omitted)(emphasis added).

conduct. The common law of negligence does not brand a person as careless unless the law has imposed a duty on that person to avoid carelessly injuring others.<sup>51</sup>

Gummow and Kirby JJ said:

A fundamental objective of the law of negligence is the promotion of reasonable conduct that averts foreseeable harm. In part, this explains why a significant measure of control in the legal or practical sense over the relevant risk is important in identifying cases where a duty of care arises. Further, it is the assessment, necessarily fluid, respecting reasonableness of conduct that reconciles the plaintiff's interest in protection from harm with the defendant's interest in freedom of action. So it is that the plaintiff's integrity of person is denied protection if the defendant has acted reasonably. However, protection of that integrity expands commensurately with medical understanding of the threats to it. Protection of mental integrity from the unreasonable infliction of serious harm, unlike protection from transient distress, answers the 'general public sentiment' underlying the tort of negligence that, in the particular case, there has been a wrongdoing for which, in justice, the offender must pay. Moreover, *the assessment of reasonableness, which informs each element of the cause of action, is inherently adapted to the vindication of meritorious claims in a tort whose hallmark is flexibility of application.* Artificial constrictions on the assessment of reasonableness tend, over time, to have the opposite effect.<sup>52</sup>

Noting that 'reasonableness of conduct' remained 'the touchstone of liability' in negligence, their Honours commented:

The asserted grounds for treating psychiatric harm as distinctly different from physical injury do not provide a cogent basis for the erection of exclusionary rules that operate in respect of the former but not the latter. To the extent that any of these concerns are not adequately met in particular categories of case by the operation of the ordinary principles of negligence, they may be accommodated, in the manner explained later in these reasons, by *defining the scope of the duty of care with reference to values which the law protects.*<sup>53</sup>

They continued:

Analysis by the courts may assist in assessing the reasonable foreseeability of the relevant risk. The criterion is one of *reasonable* foreseeability. Liability is imposed for consequences which the defendant, judged by the

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<sup>51</sup> Ibid 357(emphasis added).

<sup>52</sup> Ibid 379 (emphasis added)(citations omitted).

<sup>53</sup> Ibid 383(emphasis added).

standard of the reasonable person, ought to have foreseen. Of course, this can sometimes lead to sharply divided views in assessing the evidence. The application of that criterion by this Court in *Bunyan v Jordan* and *Chester v Waverley Corporation* led in each case to a denial of recovery for ‘nervous shock’. *The result in Chester, looked at today, perhaps shows that the determination of what ought reasonably to have been foreseen may differ from one age to the next.* However, because the criterion is an objective one, what is postulated is a general (and contemporary) standard of susceptibility. It is in that context that references in judgments of this Court to hypothetical ‘ordinary’ or ‘reasonable’ standards of susceptibility to psychiatric harm are to be understood.<sup>54</sup>

Hayne J similarly referred to the ‘touchstone’ of reasonableness: The conclusion that no duty was owed

give[s] effect to the sometimes overlooked touchstone, of reasonableness, in examining and judging a defendant’s notional or actual expectations, knowledge and conduct. The criticisms so persuasively made in this case by McHugh J of the departures, in recent years by courts from the touchstone of reasonableness, and the realities of ordinary life, should in future be heeded by all courts.<sup>55</sup>

## VI THE INSURANCE ‘CRISIS’ OF 2002

In May 2002, a Ministerial Meeting on Public Liability Insurance (comprising Commonwealth, State and Territory Ministers) established a panel to review the law of negligence. The Ministers said:

Unpredictability in the interpretation of the law of negligence is a factor driving up [insurance] premiums.<sup>56</sup>

The Terms of Reference for the Review Panel opened with this statement:

The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the

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<sup>54</sup> Ibid 384-5 (citations omitted) (emphasis added).

<sup>55</sup> Ibid 429 (citations omitted).

<sup>56</sup> Ministerial Meeting on Public Liability Insurance, *Communiqué*, 3 June 2002, <[http://www.adventurepro.com.au/news/index.pl?action=details&id=communique\\_mays\\_pli\\_ministerial\\_meeting](http://www.adventurepro.com.au/news/index.pl?action=details&id=communique_mays_pli_ministerial_meeting)> at 2 October 2009.

reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death.<sup>57</sup>

In its September 2002 report, the Panel said that its starting point was the proposition that:

[P]ersonal injury law comprises a set of rules and principles of personal responsibility. The Panel sees its task as being to recommend changes that impose a reasonable burden of responsibility on individuals to take care of others and to take care of themselves, consistently with the assumption inherent in the first paragraph of the Terms of Reference *that the present state of the law imposes on people too great a burden to take care of others and not enough of a burden to take care of themselves*.<sup>58</sup>

It need hardly be pointed out that any such conclusion – about the extent to which we should be legally obliged to take care of others, and of ourselves – involves a fundamental moral and political judgment about the kind of society we want.

In language strikingly similar to Philip Howard's, the Panel noted the flow-on effect that the state of the law of negligence was perceived as having on the general community:

[E]vidence has been provided to the Panel that throughout the country absence of insurance or the availability of insurance only at unaffordable rates has adversely affected many aspects of community life. Results have included the cancellation of community festivals, carnivals, art shows, agricultural shows, sporting events of all kinds, country fetes, music concerts, Christmas carols, street parades, theatre performances, community halls, and every manner of outdoor event. The Panel has been informed that some schools and kindergartens are not able to offer the facilities they would wish and some have had to close. Hospitals have experienced difficulties and the problems faced by members of the medical and other professions are well-attested. These are merely some examples of the way in which the fabric of everyday life has been harmed.<sup>59</sup>

The Panel reported

a widely held view in the Australian community that there are problems with the law stemming from perceptions that:

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<sup>57</sup> Commonwealth of Australia, *Review of the Law of Negligence*, Final Report, (2002) 25 [1.3] <[http://revofneg.treasury.gov.au/content/Report2/PDF/Law\\_Neg\\_Final.pdf](http://revofneg.treasury.gov.au/content/Report2/PDF/Law_Neg_Final.pdf)> at 2 October 2009.

<sup>58</sup> Ibid 29 [1.24] (emphasis added).

<sup>59</sup> Ibid 31 [1.34].

- (a) The law of negligence as it is applied in the courts is unclear and unpredictable.
- (b) In recent times it has become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants.
- (c) Damages awards in personal injuries cases are frequently too high.<sup>60</sup>

The Panel commented:

Irrespective of whether these perceptions are correct, they are serious matters for the country because they may detract from the regard in which people hold the law and, therefore, from the very rule of law itself.<sup>61</sup>

Like other States and Territories, Victoria legislated in 2003 to implement the recommendations of the Panel's Report. The result was a series of quite dramatic amendments to the *Wrongs Act 1958*. Section 48 now sets out what are described as 'General principles' regarding duty of care, as follows:

- (1) A person is not negligent in failing to take precautions against a risk of harm unless—
  - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
  - (b) the risk was not insignificant; and
  - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things)—
  - (a) the probability that the harm would occur if care were not taken;
  - (b) the likely seriousness of the harm;
  - (c) the burden of taking precautions to avoid the risk of harm;
  - (d) the social utility of the activity that creates the risk of harm.

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<sup>60</sup> Ibid 25 [1.4].

<sup>61</sup> Ibid 26 [1.5].

- (3) For the purposes of subsection (1)(b)—
- (a) **insignificant risks** include, but are not limited to, risks that are far-fetched or fanciful; and
  - (b) risks that are **not insignificant** are all risks other than insignificant risks and include, but are not limited to, significant risks.<sup>62</sup>

Likewise, section 51 now sets out ‘General principles’ of causation, as follows:

- (1) A determination that negligence caused particular harm comprises the following elements—
  - (a) that the negligence was a necessary condition of the occurrence of the harm (**factual causation**); and
  - (b) that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (**scope of liability**).
- (2) In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
- ...
- (4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.<sup>63</sup>

I draw attention, in particular, to section 51(1)(b). Parliament here makes quite explicit that, in reaching a conclusion about causation, the judge is making an assessment of the *appropriateness* of imposing liability on the negligent person. To put matters beyond doubt, subsection (4) requires the court to ask itself *why* responsibility for the harm *should be* imposed on the negligent party. These are large, normative, questions.

A Supreme Court colleague of mine, with long experience in personal injuries litigation, tells me that these provisions have in fact made little difference in

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<sup>62</sup> Emphasis in original.

<sup>63</sup> Emphasis in original.

practice – and are rarely mentioned in court. That appears also to be the case in New South Wales, as the Court of Appeal pointed out recently.<sup>64</sup> Why that is so is a topic for another day.

## VII CONCLUSION

Plainly enough, judges do assume – and the community expects judges to assume – the role of gatekeeper. Both at common law and now by statute, judges are entrusted with the function of assessing the reasonableness of the conduct of defendants and the appropriate scope of liability in negligence.

As we have seen, Parliaments can and do intervene if the development of the common law by judges is perceived – in one way or another – to be contrary to the public interest. But, for the most part, the responsibility rests with judges. And the nature of the trust which the community reposes in judges can hardly be overstated. In the area of tort law, judges will continue to have to decide what is fair, just and reasonable.<sup>65</sup> And these will inevitably be matters about which judges will disagree.

Contrary to the arguments advanced in some quarters, there is nothing new or dangerous about giving judges the function of adjudicating on questions of human rights. As this investigation has demonstrated, judges are already entrusted with the responsibility of adjudicating upon dealings between citizen and citizen, and between citizen and government, by reference to normative standards of reasonableness. Judges are, in this important sense, already the custodians of community values. The sentencing function is another important example of the same phenomenon.

Not only is human rights jurisprudence familiar to judges, especially in the areas of criminal law and in statutory interpretation, but it owes its very existence to the development of the common law. As Alfred Deakin said in his 1902 Second Reading Speech, ‘many of our most fundamental principles and liberties are founded directly upon judicial decisions’.

I turn finally to my invocation of American authority. A case before the Court of Appeal concerned a claim for damages for intentional infliction of

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<sup>64</sup> *Dominic v Riz* [2009] NSWCA 216 [99]; see also *Finch v Rogers* [2004] NSWSC 39 [146]; *Ruddock v Taylor* [2003] NSWCA 262 [89].

<sup>65</sup> See GAA Nettle (now a member of the Victorian Court of Appeal), ‘Commentary on ‘Restricting Litigiousness’’ (2004) 78 ALJ 389, 394-5. His Honour was responding to a paper presented by Hayne J of the High Court at the 13th Commonwealth Law Conference in Melbourne in April 2003: ‘Restricting Litigiousness’ (2004) 78 ALJ 381.

emotional distress. Following a relationship breakdown, one partner distributed videos of their sexual activities with the intention of causing his former partner humiliation and distress. Proceeding cautiously and incrementally, as a judge of an intermediate court of appeal must always do, I concluded that such a claim was cognisable in law. Sadly, I was in a minority of one on this issue. I pointed out that American courts had for many years recognised such claims – but even that was not enough!<sup>66</sup>

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<sup>66</sup> *Giller v Procopets* [2008] VSCA 236 [37].