Judicial Use and Construction of Social Facts in Negligence Cases in the Australian High Court

Kylie Louise Burns
BA LLB (Hons) LLM

Griffith Law School
Arts, Education and Law
Griffith University

Submitted in fulfilment of the requirements of the degree of Doctor of Philosophy

November 2011
Abstract

Judicial Use and Construction of Social Facts in Negligence Cases in the Australian High Court

This study examines whether and how Australian High Court judges use social facts (‘SF’) in their reasoning in negligence cases, and what factors explain judicial use and construction of SF. SF are statements about society, the world, and the nature and behaviour of institutions (including legal institutions) and human beings. They are statements made as part of judicial development and general application of law, rather than as part of adjudicative fact finding. Negligence cases often contain statements about the world, human beings, and institutions. They are often intimately concerned with the behaviour of people and institutions, and the nature of the world and society. This is not a recent phenomenon. The earliest negligence judgments in the United States, the United Kingdom and in Australia included judicial SF statements. However, even in the earliest Australian negligence cases there were differing judicial approaches to the use and construction of SF.

Despite the apparent widespread judicial use of SF in negligence cases over many years and differing judicial approaches to SF, the role of SF in judicial reasoning in negligence cases has been subsumed into discussion of ‘policy’ factors and has been largely ignored by scholars. This study aims to fill that gap. Its primary objectives are to explore whether and how judges use and construct SF in Australian High Court negligence cases, what factors explain judicial use and construction of SF in negligence cases, and the wider implications of judicial SF use for understandings and accuracy of judicial reasoning in negligence cases. The study operates within an interpretative epistemological framework. It adopts a social constructionist approach to analyse how judicial knowledge of SF is ‘created, disseminated and entrenched’. The study uses a content analysis methodology to analyse negligence judgments of the High Court of Australia from 2001-2005 as relevant texts. Content analysis is an empirical method that involves the collection of a set of documents, reading the documents systematically, recording consistent features of

the documents and drawing inferences from the data recorded. The study also utilises the more traditional methods of literature review and legal analysis of cases and legislation.

Part 1 (Chapters 2 and 3) provides the background to the content analysis of High Court negligence cases from 2001-2005 undertaken in this study. Chapter 2 discusses the content analysis methodology adopted for the study. It focuses on the suitability of this method to address the research questions investigated in the study, and details the approach taken to the use of the method particularly details of coding. Chapter 3 reviews the existing scholarship on the meaning of the term SF, outlines the definition of SF used in this study, and drawing on data from the content analysis discusses the range of roles played by SF in judicial reasoning in negligence cases.

Part 2 (Chapters 4-6) outlines and analyses the results of the content analysis of High Court negligence judgments from 2001-2005. Chapter 4 outlines the general findings of the content analysis. Chapters 5 and 6 discuss the qualitative results of the content analysis. Part 2 argues that Australian High Court judges do use SF in their reasoning in negligence cases, and that SF play a range of roles in judicial reasoning in negligence cases. However, judicial use and construction of SF can result in judicial error, SF which conflict with empirical evidence, and judicial use of unreliable and inaccurate SF. It can also result in the exclusion from judicial reasons of SF which address those most marginalised by the law and SF which reflect less dominant cultural world views.

Part 3 (Chapters 7 and 8) proposes an explanatory framework for judicial use and construction of SF. It argues that there are complex inter-related and interdependent legal, institutional, individual, cognitive and cultural factors that explain how judges use and construct SF. Chapter 7 discusses the ‘external’ legal and institutional factors. These include the influence of law and Australian approaches to the use of policy in negligence law, the rules of evidence (including the doctrine of judicial notice), and the adversarial system and institutional nature of the Australian High Court. Chapter 8 discusses factors ‘internal’ to Australian High Court judges which may impact on the way those judges use and construct SF. These factors include the effects of Australian legal culture on judges,

the effects of individual characteristics and background of Australian High Court judges, the effects of cognitive factors including heuristics and biases and group determination on judicial reasoning, and the impact of cultural worldviews.

Part 4 (Chapter 9) summarises the findings of the study and suggests that judicial use and construction of SF is a ‘wicked’ problem. It argues that the findings of the study generate challenges for existing understandings of judicial reasoning in negligence cases, and for understandings of how legal, institutional, individual, cognitive and cultural factors affect judicial reasoning. The chapter suggests a range of options for reform for future consideration and research. Finally, the chapter notes a range of matters for future further research that emerge from the findings of the study.
Statement of Original Authorship

This work has not been previously submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Signed:--------------------------------------

Date:----------------------------------------
# TABLE OF CONTENTS

**ABSTRACT** .......................................................................................................................... iii  
**STATEMENT OF ORIGINAL AUTHORSHIP** ............................................................... vi  
**TABLE OF CONTENTS** ................................................................................................. vii  
**TABLE OF FIGURES** ......................................................................................................... x  
**ACKNOWLEDGEMENTS** ................................................................................................. xii  
**PRIOR PUBLICATIONS** ..................................................................................................... xiv  

**CHAPTER 1: INTRODUCTION: SOCIAL FACTS IN AUSTRALIAN HIGH COURT NEGLIGENCE CASES** ................................................................. 1  
  1. INTRODUCTION ............................................................................................................. 1  
  2. SIGNIFICANCE AND CONTRIBUTIONS OF THE STUDY .............................................. 7  
  3. KEY RESEARCH QUESTIONS ..................................................................................... 19  
  4. AN INTERPRETIVIST EPISTOMOLOGICAL FRAMEWORK AND SOCIAL CONSTRUCTIONIST APPROACH TO METHODOLOGY ......................................... 22  
  5. KEY ARGUMENTS AND THESIS STRUCTURE ...................................................... 29  

**CHAPTER 2: CONTENT ANALYSIS METHODOLOGY** ....................... 33  
  1. INTRODUCTION .......................................................................................................... 33  
  2. AN EMPIRICAL METHOD: CONTENT ANALYSIS OF CASE LAW .......................... 35  
  3. SELECTION OF CASES .............................................................................................. 40  
  4. CODING, RELIABILITY AND VALIDITY OF DATA ................................................. 48  
  5. CONTEXT OF THIS STUDY .......................................................................................... 56  
  6. CONCLUSION ............................................................................................................... 61  

**CHAPTER 3: WHAT ARE SOCIAL FACTS? WHAT ROLE DO SOCIAL FACTS PLAY IN JUDICIAL REASONING IN NEGLIGENCE CASES?** ........................................ 67  
  1. INTRODUCTION .......................................................................................................... 67  
  2. SOCIAL FACTS ARE NOT ADJUDICATIVE FACTS .................................................... 69  
  3. SF PLAY A RANGE OF ROLES IN JUDICIAL LAW-MAKING ..................................... 76  
  4. SF COME FROM A RANGE OF SOURCES ................................................................ 95  
  5. SF ARE A ‘MESSY BUSINESS’ .................................................................................. 97  
  6. CONCLUSION .............................................................................................................. 101  

**CHAPTER 4: CONTENT ANALYSIS OF SOCIAL FACTS IN AUSTRALIAN HIGH COURT NEGLIGENCE CASES** .......... 103  
  1. INTRODUCTION .......................................................................................................... 103  
  2. DOES THE AUSTRALIAN HIGH COURT USE SF IN NEGLIGENCE CASES? NUMBERS AND FREQUENCIES ................................................................. 105  
  3. INDIVIDUAL CASES AND SF .................................................................................... 108
CONCLUSION

CHAPTER 9: WICKED PROBLEMS, WICKED SOLUTIONS: SUMMARY, IMPLICATIONS, REFORMS AND FURTHER RESEARCH

INTRODUCTION

1. SF ARE USED AND CONSTRUCTED BY HIGH COURT JUDGES IN NEGLIGENCE CASES

2. AN EXPLANATORY FRAMEWORK FOR JUDICIAL USE AND CONSTRUCTION OF SF IN THE HIGH COURT OF AUSTRALIA

3. NUDGING SF JUDGING: CAN THE ACCURACY AND LEGITIMACY OF SF BE IMPROVED?

4. RECONCEPTUALISING A ROLE FOR SF IN THEORIES ABOUT JUDICIAL REASONING IN NEGLIGENCE CASES

5. WHAT WE DON'T KNOW: AREAS FOR FURTHER RESEARCH

CONCLUSION

BIBLIOGRAPHY
# TABLE OF FIGURES

Table 1.1 Research Questions, Methodology and Chapter 26  
Table 2.1 High Court Judges, Appointment, Retirement, Gender 46  
Table 2.3 Categories of Social Facts in Australian Negligence Cases 54  
Appendix 2.1 High Court Negligence Cases in Content Analysis with Significance Code 63  
Table 3.1 Nature and Roles of SF in Judicial Reasoning 87  
Table 4.1 Number and Frequency of SF in Negligence Cases 2001-2005 106  
Table 4.2 Individual Cases and SF 110  
Graph 4.3 Average Number of SF /Case in each Category of Case Significance 113  
Chart 4.4 Percentage of Total SF by Case Significance 114  
Graph 4.5 Average Number of SF/Case and Number of Judgments in the Case 117  
Graph 4.6 Average Number of SF/Judgment Depending on Number of Judgments in Case 119  
Table 4.7 Sources of SF 121  
Chart 4.8 Percentage of Cases with SF Referenced or Sources Cited 122  
Table 4.9 Sources of Referenced SF 125  
Chart 4.10 Types of SF References 126  
Table 4.11 Individual Judges and SF 132  
Table 4.12 Individual Judges and Reference or Source for SF 135  
Table 4.13 Individual Judges and References or Source other than Case Law 137  
Table 4.14 SF in Joint Judgments and Single Judgments 139  
Graph 4.15 Joint Judgements, Single Judgments and SF 140  
Table 4.16 Dissent, Majority and SF 142
Graph 4.17 Average SF/Judgment Dissent Judgments and Majority Judgments 142
Table 4.18 Dissent, Single Judge and Joint Judge SF 144
Table 4.19 Majority, Single Judge and Joint Judge SF 144
Graph 4.20 Dissent Majority Single and Joint Judgments and SF 145
Figure 8.1 Cultural Worldviews 366
ACKNOWLEDGEMENTS

‘It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity.’
(Charles Dickens, *A Tale of Two Cities*)

This PhD has been a long journey for me undertaken during a time when I truly have experienced both the best and worst moments of my life. I hope that from this journey has emerged more ‘wisdom’ than ‘foolishness’, although at times I was incredulous as to when and if the journey would end. I could not have completed this journey alone and there are many people to thank who enabled me to come this far. I start with my husband David and daughters Caitlin and Sophia. They are the beginning and the end of all I do. You have sacrificed your share of my time and attention particularly in the last two years, supported and loved me, and reminded me always that there are more important things in life. Much love always. I also thank my parents Ian and Colleen McLennan, my parents-in-law Greg and Fay Burns, my Aunt Janice and my sisters and brothers Vanessa, Kristan, Paul, Clare, Leanne, and Bevan. Your love and emotional and practical support was much appreciated. You were my cheer squad! My mother Colleen also splendidly performed the onerous and pain-staking task of doing the final proofread for spelling, grammar and formatting—what a mother will do for a child!

The genesis of this study came from engagement with the work of a number of scholars who I consider as mentors and respect and admire. The work of Professor Harold Luntz, who I am now fortunate to have as a co-author, started me thinking about how negligence law engages with the ‘real’ world. The work of Professor Jane Stapleton (my external supervisor) lead me to think about the ‘factors’ that judges consider when they decide the question of duty of care and other elements of negligence law (and so much more). The work of Professor Peter Cane (also an external supervisor) was influential in many ways, but in particular it was Peter’s work that introduced me to the effects of cognitive factors on judicial reasoning about consequences.

This study is the result of a very generous and dedicated group of supervisors. Professor Richard Johnstone has been my main and only internal supervisor during the majority of the writing of this thesis. Richard has been an exemplary supervisor, friend and colleague—highly professional, extremely supportive, and absolutely generous with his
time and reading of many drafts. He encouraged me to pursue high standards in my research and writing. My colleague and friend Professor Jeff Giddings joined us as an associate supervisor for the last six months during the final draft of the thesis. It was invaluable to have Jeff as a ‘fresh’ reader and he was generous with his time when he had many other things to do. Jeff was a fellow traveller on the PhD journey for many years, and his own graduation earlier this year inspired me. Most importantly, both Richard and Jeff reminded me always I could finish and we would get there, particularly when I had doubts. I also thank Professor John Dewar, Professor Rosemary Hunter and Professor Sandra Berns who were supervisors at varying times during the earlier stages of the PhD and assisted me particularly in preparation for confirmation, research design and drafting of early chapters which I greatly appreciated. As indicated above, Professor Jane Stapleton and Professor Peter Cane have been external supervisors of this PhD for many years. Their work inspired me and conversations with them both (particularly on visits to Canberra) shaped the direction of the research. I have always appreciated their on-going interest in me and my work. I have often recalled Jane saying to me a long time ago that she was confident I could finish this PhD. This recollection has sustained me when I was not confident it could be done and when unexpected roadblocks slowed my PhD progress.

I thank my friends and colleagues (past and present) at Griffith Law School, and my friends and extended family for their encouragement and support of my work. I mention in particular my close friends (and current and previous colleagues) Professor Mary Keyes, Dr Therese Wilson and Dr Lillian Corbin. I have been so grateful to work with you all and admire you as colleagues but more importantly as kind and thoughtful people. The executive members of the Griffith Law School at varying times during this research have also been very supportive of my work and I thank them all.
PRIOR PUBLICATIONS


Judges sometimes make assumptions about current conditions and modern society as bases for their decisions. Great care is required when this is done. An assumption of such a kind may be unsafe because the judge making it is necessarily making an earlier assumption that he or she is sufficiently informed, or exposed to the subject matter in question, to enable an assumption to be made about it.¹

The rule under consideration would encourage parents both to exaggerate and to denigrate their children's aptitudes. The rule would encourage parents to search for characteristics of the children which might call for future expenditures with a view to recovering monetary compensation to meet those possible expenditures. The rule would encourage parents to describe personal ambitions for their children and family hopes of a kind which could sound in money but may not be advantageous to the children because the testimony postulates career paths which the children may be incapable of pursuing. The rule would mandate parents to assert their own economic interests to the maximum by exaggerating their duties to the child in the light of possible features of the child's future life.²

INTRODUCTION

This study examines whether and how Australian High Court judges use and construct social facts (‘SF’³) in their reasoning in negligence⁴ cases, and what factors explain judicial

---

² Cattanach v Melchior (2003) 215 CLR 1, 136 [371] (Heydon J). This statement was made by Heydon J as part of his reasoning rejecting the liability of a medical practitioner for the costs of raising a child born following a failed sterilisation.
³ SF refers to both the plural ‘social facts’ and the singular ‘social fact’ as used in this study. As discussed below and in Chapter 3, the meaning of the term SF in this study differs in some ways from the use of the term ‘social fact’ by others including Mullane (see below n 41) and Monahan and Walker (see below n 73).
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

use and construction of SF. SF are statements about society, the world and the nature and behaviour of institutions (including legal institutions) and human beings. They are statements made as part of judicial development and general application of law. This study focuses only on ‘explicit’ judicial SF statements. Of course, judges may also implicitly draw upon a range of unstated SF understandings as part of their reasoning. Explicit judicial SF statements are the ‘tip of the iceberg’ which represents overall judicial use of SF understandings.

Negligence cases are often intimately concerned with the behaviour of people and institutions and the nature of the world and society. For example, cases which consider negligence liability in the context of alcohol consumption discuss how people act when they drink alcohol. Cases concerning sport discuss the nature of sport and why people play sport. Cases concerning children discuss how children act and behave.

---

4 A case that deals with an element of a negligence cause of action—duty, breach, causation, defences, damages. The parameters of this term as used in this study are discussed further in Chapter 2.
5 Chapter 3 discusses this aspect of the definition of SF further, and distinguishes between adjudicative facts (facts relevant only to the parties to a particular dispute) and SF.
6 Malbon refers to unarticulated ‘judicial values’ as the ‘dark matter of judgments’. They form a critical part of the substance of the law, yet ‘they can not be seen or clearly defined’. See Justin Malbon, ‘Extra-Legal Reasoning’ in Ian Freckleton and Hugh Selby (eds), Appealing to the Future: Michael Kirby and His Legacy (2009) 579, 581.
8 For example see Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460; Agar v Hyde (2000) 201 CLR 552.
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

involving accidents on Australian beaches and in Australian water courses discuss the nature and risks of swimming, water sports and Australian beach life. The multitudes of other negligence cases in the Australian High Court discuss the nature of the places where accidents happen in Australia and how people act in those places. This includes accidents from the home to the supermarket, from the prison to the hospital, from the school to the highway, and from the Court to the Australian outback.

Negligence cases are determined against the back-drop of judicial assumptions about the nature of modern Australian society—the nature of family life, the nature of marriage, the nature of commercial and government enterprise, the nature of Australian values and how society cares for the young and for the old.

---

10 This term is used broadly to cover incidents which result in personal injuries, property damage and economic loss.


12 For example see Neindorf v Junkovic (2005) 222 ALR 631; Northern Sandblasting v Harris (1997) 188 CLR 313.

13 For example see Australian Safeway Stores Pty Ltd v Zaleznia (1987) 162 CLR 479.


19 For example see Tame v New South Wales (2002) 211 CLR 317 (the facts of the Annett case); Commissioner of Main Roads v Jones (2005) 215 ALR 418.


Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

Judicial use of SF in negligence cases is not a recent phenomenon. The earliest negligence judgments in the United States, the United Kingdom, and in Australia included judicial SF statements. In 1916 in *MacPherson v. Buick Motor Co*, a case concerning a defective motor vehicle, Cardozo J commented on the nature of dangerous products, societal views of dangerous products and on changing social conditions:

> A large coffee urn . . . may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction. What is true of the coffee urn is equally true of bottles of aerated water... It is possible to use almost anything in a way that will make it dangerous if defective... Precedents drawn from the days of travel by stage coach do not fit the conditions of travel today. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be. (SF in italics)

In 1932 in *Donoghue v Stevenson*, Lord Atkin discussed the nature of consumer goods, who they were used by, and what the ‘ordinary needs’ of society were:

> There are other instances than of articles of food and drink where goods are sold intended to be used immediately by the consumer, such as many forms of goods sold for cleaning purposes... I confine myself to articles of common household use, where every one, including the manufacturer, knows that the articles will be used by other persons than the actual ultimate purchaser—namely, by members of his family and his servants, and in some cases his guests. I do not think so ill of our jurisprudence as to suppose that its principles are so remote from the ordinary needs of civilized society and the ordinary claims it makes upon its members as to deny a legal remedy where there is so obviously a social wrong. (SF in italics)

---

25 Ibid, 387 (citations omitted).
26 Ibid, 389.
27 Ibid, 391.
28 *Donoghue v Stevenson* [1932] AC 562.
29 Ibid, 583.
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

In 1933 in the Australian High Court case *Australian Knitting Mills Ltd v Grant*, Starke J discussed Australian use of woollen undergarments and the nature of the risks of industrial processes. "Woollen undergarments are commonly used, in Australia and elsewhere." But untoward results or accidents cannot, with the greatest of care, be wholly eliminated, in any industrial process. (SF in italics)

From the earliest Australian negligence cases, there were also apparent differing judicial approaches to the use and construction of SF. For example, in 1939 in one of the earliest nervous shock cases in the High Court, *Chester v The Council of the Municipality of Waverley*, Evatt J (in dissent, upholding the claim of a bereaved mother) poignantly described the ‘agony’ suffered by the parent of a missing child:

The Australian novelist, Tom Collins, in *Such is Life*, has also described the agony of fearfulness caused by the search for a lost child:—

‘Longest night I ever passed, though it was one of the shortest in the year. Eyes burning for want of sleep, and couldn’t bear to lie down for a minute. Wandering about for miles; listening; hearing something in the scrub, and finding it was only one of the other chaps, or some sheep. Thunder and lightning, on and off, all night; even two or three drops of rain, towards morning. Once I heard the howl of a dingo, and I thought of the little girl; lying worn-out, half-asleep and half-fainting—far more helpless than a sheep.’

At a later point, in the same novel:—

‘There was a pause, broken by Stevenson, in a voice which brought constraint on us all. Bad enough to lose a youngster for a day or two, and find him alive and well; worse, beyond comparison, when he’s found dead; but the most fearful thing of all is for a youngster to be lost in the bush, and never found, alive or dead’. (SF in italics)

---

*Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387. The Privy Council appeal of the case is reported at *Grant v Australian Knitting Mills Ltd* (1935) 54 CLR 49.

Ibid, 409.

Ibid, 410.

*Chester v The Council of the Municipality of Waverley* (1939) 62 CLR 1.

Ibid, 18 quoting unspecified passages from Joseph Furphy, *Such is Life: Being Certain Extracts from the Diary of Tom Collins* (1903). Evatt J also quotes the poetry of William Blake on the same point (17).
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

It is notable that Evatt J did not draw on judicial ‘common sense’ as a basis for this SF but rather referred to a source (although literary rather than empirical). Latham CJ (in the majority who dismissed the claim) however considered the impact of experiencing the death of a child as usually ‘temporary’ and accordingly psychological injury by a parent as not foreseeable by a ‘reasonable person’. He stated (relying apparently only on judicial ‘common sense’):

\[
\text{Death is not an infrequent event, and even violent and distressing deaths are not uncommon. It is, however, not a common experience of mankind that the spectacle, even of the sudden and distressing death of a child, produces any consequence of more than a temporary nature in the case of bystanders or even of close relatives who see the body after death has taken place.}^{35}\text{(SF in italics)}
\]

In the same case, Rich J (also in the majority and again in apparent reliance on judicial ‘common sense’) said in words that seem more reflective of tort reformers of this century, than of judges of the last:

\[
\text{The attempt on the part of the appellant to extend the law of tort to cover this hitherto unknown cause of action has, perhaps, been encouraged by the tendencies plainly discernible in the development which the law of tort has undergone in its progress towards its present amorphous condition. For the so-called development seems to consist in a departure from the settled standards for the purpose of giving to plaintiffs causes of action unbelievable to a previous generation of lawyers. Defendants appear to have fallen entirely out of favour. In this respect perhaps judges are only following humbly in the footsteps of juries.}^{36}\text{(SF in italics)}
\]

Despite the apparent widespread judicial use of SF from the earliest of negligence cases and apparent differing judicial approaches to SF, the role of SF in judicial reasoning in negligence cases has been mostly ignored by scholars. This study aims to fill that gap. Its primary objectives are to explore whether and how judges use and construct SF in

\[35\text{Ibid, 10. This SF appears to be based on judicial use of ‘common sense’ assumptions about the psychological effects on parents of experiencing the death of a child.}\]

\[36\text{Ibid, 11-12. This unsourced SF appears to be based on judicial ‘common-sense’ assumptions about personal injury litigation patterns, judicial empathy to plaintiffs and ‘beliefs’ of the legal profession.}\]
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

Australian High Court negligence cases, what factors explain judicial use and construction of SF in negligence cases, and the wider implications of judicial SF use for understandings and accuracy of judicial reasoning in negligence cases. The study operates within an interpretivist epistemological framework. It adopts a social constructionist approach to analyse how judicial knowledge of SF is ‘created, disseminated and entrenched’ and reflects the influence of multiple complex, inter-related and inter-dependent factors. The study uses a content analysis methodology to analyse negligence judgments of the High Court of Australia from 2001-2005 as relevant texts. Content analysis is an empirical method that involves the collection of a set of documents, reading the documents systematically, recording consistent features of the documents and drawing inferences from the data recorded. Section 1 of this chapter discusses the significance and contributions of this study and briefly indicates its place within existing literature. Section 2 outlines the key research questions addressed in this study. Section 3 explains the interpretivist framework and social constructionist approach which underpinned this study, and the methodology adopted. Finally, Section 4 outlines the key arguments that will be made and provides an overview of the chapters of this thesis.

1. SIGNIFICANCE AND CONTRIBUTIONS OF THE STUDY

There are three main areas of significance and contribution to knowledge made by this study. The first of these areas relates to the reconceptualisation of the nature of judicial reasoning in negligence cases to recognise a distinct role for SF. The second area of

38 There were 45 negligence cases studied.
39 Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinion' (2008) 96 California Law Review 63, 65. The content analysis methodology used in this study is discussed further in Chapter 2.
significance and contribution is the use of the empirical method of content analysis to study SF in High Court negligence cases. The third area is the development of an explanatory framework for judicial use and construction of SF in negligence cases.

The first area of significance and contribution to knowledge of this study is to reconceptualise the use of SF in judicial reasoning in Australian negligence cases to recognise a distinct role for SF. While this might include the judicial use of traditional ‘policy’ concerns, the roles of SF in judicial reasoning in negligence cases will be shown to be much broader. The use of extra-legal facts or value statements in judicial reasoning in Australian cases has been acknowledged by a range of commentators including Mullane, Selway, Graycar, Mason, and Malbon. As noted in the first introductory quote in this chapter, it has also been acknowledged by Australian High Court judges themselves including Callinan J, McHugh J, Heydon J, and Kirby J.

40 This term is used to refer to judicial statements of general fact, not introduced by parties during the litigation process.
45 Malbon, above n 6. It was also famously noted as early as 1942 by Kenneth Culp Davis in the United States. See Kenneth Culp Davis, ‘An Approach to the Problems of Evidence in the Administrative Process’ (1942) 55 Harvard Law Review 364.
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court Negligence Cases

However, the examination of these kinds of statements in Australian negligence cases has tended to be subsumed into discussions about the use and permissibility of ‘policy’ in judicial reasoning. Policy is a difficult term to define. For present purposes, ‘policy’ means considerations which are predictive of the effects of a particular case on society more generally.

Corrective justice and rights based theoretical accounts of tort law have taken a strong view that instrumentalist ‘policy’ concerns should play no part in judicial reasoning in negligence cases. These theories typically suggest that judicial reasoning in negligence cases should be focussed only on factors relevant to the particular individuals to a


51 For example see the discussion in Witting, Christian Witting, ‘Tort Law, Policy and the High Court of Australia’ (2007) 31 Melbourne University Law Review 569, 571-3. The concept of ‘policy’ will be discussed further in Chapters 3 and 7. Stapleton, in an examination and identification of factors underlying tort law, has argued there is a blurred division between the terms ‘policy’ and ‘principle’. She prefers the term ‘legal concerns’. See Jane Stapleton, ‘Duty of Care Factors: A Selection from the Judicial Menus’ in Peter Cane and Jane Stapleton (eds), The Law of Obligations: Essays in Celebration of John Fleming (1998) 59. Witting suggests these include both ‘positive’ factual features of a case as well as normative policy concerns(573).

dispute. 53 Cane has argued of justice theorists that they ‘seem united in the idea that private law is best understood “non-instrumentally”, as a relatively autonomous universe of normative discourse based on concepts such as “rights”, “wrongs”, “responsibility” and, of course, “justice”’. 54 Despite this, it appears that public policy is widely utilised by judges in the High Court as part of their judicial reasoning in negligence cases. Luntz notes the ‘leeways of choice’ open to members of the High Court in tort cases, leading to discussions by judges of policy concerns. 55 Many commentators have discussed the way judges of the Australian High Court use ‘policy’ in negligence cases as part of judicial reasoning and development of negligence law. 56 Witting has argued that despite the formal reluctance of the Australian High Court to acknowledge use of policy in negligence cases, 57 there is clear evidence of the judicial use of policy in High Court negligence judgments. However, in the initial stages of this study it became apparent that judicial SF type statements in negligence cases were not only synonymous with ‘policy’. Judges seemed

54 Ibid.
56 For example see Andrew Robertson, 'Constraints on Policy-Based Reasoning in Private Law' in Andrew Robertson and HW Tang (eds), The Goals of Private Law (2009); Luntz above n 55; Witting above n 51.
57 See the decision of the High Court in Sullivan v Moody (2001) 207 CLR 562 where the High Court (Kirby J not sitting) unanimously held that explicit consideration of public policy concerns was not appropriate as part of an Australian test for duty of care. However, see later negligence cases such as Cattanach v Melchior (2003) 215 CLR 1 where policy concerns formed part of the reasoning of many members of the High Court. This is sometimes judicially legitimised by the use of the vague term ‘legal policy’.

10
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

to also use SF in other ways. The judicial SF from the early negligence cases referred to in the introduction to this chapter do not generally concern the ‘consequences’ of negligence liability. They refer to general ‘background’ judicial understandings of the world, institutions and human behaviour which inform the judicial development and application of law, or which are used to assess the adjudicative facts of the particular case. For example, the bereaved mother’s psychological response to experiencing the death of her child in Chester v The Council of the Municipality of Waverley58 is only seen as legally ‘unforeseeable’ by Latham CJ because he measures it against what he assumes to be the ‘normal’ ‘temporary’ response to such an event. This study therefore adds to the discipline by examining the distinct place of SF in judicial reasoning in negligence cases and the roles SF play in judicial reasoning. The study also has implications for descriptive theories of judicial reasoning in negligence cases which need to account for judicial use of SF.59

The second area of significance and contribution made by this study relates to the use of an empirical method, namely content analysis, to study the Australian High Court and negligence cases. This study is the first and so far only explicit content analysis of Australian High Court judgments (and Australian negligence judgments).60 While scholars have noted the use of SF type statements or ‘policy’ by Australian High Court judges and

58 Chester v The Council of the Municipality of Waverley (1939) 62 CLR 1.
59 This will be discussed in Chapter 9.
60 My research has not located any other explicit content analysis study of Australian High Court cases, or of Australian negligence judgments. Haigh has explored the use of the terms ‘trite’ and ‘trite law’ in Australian High Court cases since 1947 utilising a computer search of AustLII and Lexis case law databases. See Richard Haigh, 'It is Trite and Ancient Law: The High Court and the Use of the Obvious' (2000) 28(1) Federal Law Review 87. However, Haigh does not refer to his study as a ‘content analysis’ and makes no reference to empirical methodology literature.
other Australian judges, there has been very limited empirical investigation of this question. There has also been limited Australian empirical research concerning the broader operation of the Australian High Court, Australian judicial decision-making or Australian negligence cases. Despite the rapid growth of empirical research based on the judicial decisions and judgments of courts in the United States, very little Australian empirical research has been undertaken on the content of Australian High Court judgments. The existing general scholarly literature on the High Court of Australia was described in 2000 as ‘meagre’.62

Some early empirical work on the High Court of Australia by Schubert and Blackshield in the 1960s and 1970s considered the possibility of the influence of ideology and personal judicial background on judicial behaviour.63 In the last fifteen years a body of empirical literature analysing Australian court judgments including judgments of the High Court has emerged. One body of work uses citation analysis to measure and analyse patterns in the nature and frequency of citations by judges in their written judgments.64 Much of this

61 For example see discussion in Hall and Wright, above n 39; Richard Posner, How Judges Think (2008).
work identifies, counts and categorises footnote citations in judgments. Smyth and Groves have also undertaken empirical analysis of writing style of High Court judgments 1903-2001 including charting changing judgment lengths. While the content analysis conducted as part of this study addressed what sources judges cite for SF, it was concerned with much broader issues about how judges use and construct SF.

The second major area of emerging Australian empirical scholarship, undertaken by Smyth and Lynch, considers judicial disagreement and in particular dissent patterns.

---


Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

These dissent studies do not directly address the issues of concern in this study. This study is not primarily concerned with judicial voting patterns or dissent rates in isolation from the text of judgments. However, as will be discussed in Chapter 2, some aspects of the dissent studies were useful in identifying dissenting judgments in this study for the purposes of investigating the incidence of SF in dissent and majority judgments. Third, a body of work has emerged that focuses on issues such as ideological influences on judicial decision-making, the application of the attitudinal model (and associated models) of judicial decision-making to the Australian High Court, and the effects of court cohesion on the Australian High Court. 67 Again, these studies do not directly address the


issues of concern in this study although they are briefly referred to in Chapters 7 and 8 as part of the discussion of the effect of judicial values on judicial use and construction of SF.

The only existing detailed Australian study of the use of ‘social facts’ in Australian court judgments was undertaken by a judge of the Family Court of Australia, Justice Graham Mullane. The Mullane study analysed a sample of Family Court custody cases decided in 1992, and surveyed Family Court judges. The study found that judges of the Family Court did use ‘social facts’ as part of their reasoning. As will be discussed in Chapter 3, the definition of SF in this content analysis study differs from the ‘social fact’ definition adopted by Justice Mullane. In addition, while empirical in approach and similar to a content analysis, Justice Mullane did not use a methodology that was explicitly grounded in social scientific research methodology or in the methods of content analysis.

Nonetheless, this content analysis study acknowledges the value of Mullane’s study, and particularly the detailed manner in which it investigated the text of a sample of judgments to investigate judicial use of ‘social facts’. This study builds on the approach of Mullane’s

---

68 Mullane, above n 41.

69 See Chapter 3 Section 3.

70 For instance he does not refer to any methodological literature in relation to the design of his analysis of social facts in Family Court custody cases, or in relation to the design of surveys which he also utilises in his study. He does not specifically consider issues such as replicability, reliability and validity.
study by explicitly adopting a content analysis methodology to analyse High Court negligence judgments.

Serpell considered the reception and use of ‘social policy’ in the High Court of Australia in his study. He defined social policy information as ‘information that may assist a judge in determining the social and economic consequences of a law’. The examination of the use of social policy information was based on more traditional methods of legal analysis and involved case study discussion of four High Court cases. Again, this content analysis study acknowledges the value of Serpell’s study which confirmed judicial use of ‘social policy’ more broadly in the High Court of Australia. This study differs from Serpell’s study in a number of ways including its focus on negligence cases, the investigation of SF (as discussed above, a broader and more pervasive concept than ‘policy’), its use of an empirical content analysis methodology, and its examination of a greater number of High Court cases (45).

There is a substantial American literature on the use of social science in judicial decision-making. However much of that literature is not empirically based nor does it primarily

---

72 Ibid, 7.
focus on the use of SF in judgments, but rather discusses the use of social scientific evidence cited in judgments.  

English carried out a doctrinal study that detailed the different ways in which courts utilise ‘social facts’ in judicial decision-making in the United States. However, English’s study was based on case studies that demonstrated different possible uses of ‘social facts’ in judgments and the implications of these uses, rather than an empirical model that tracked all ‘social fact’ statements and their source across a set of cases from a single court.

The third major area of significance and contribution of this study relates to the discussion of the factors which explain judicial use and construction of SF in negligence cases. As discussed earlier in this chapter, there is little existing discussion of the role of SF in judicial reasoning or of what factors explain judicial use and construction of SF. This study develops an explanatory framework for judicial use and construction of SF in High Court negligence cases. This framework proposes that inter-related and inter-dependent legal, institutional, individual, cognitive and cultural factors explain judicial use

---


74 An exception to this is Peggy C. Davis, "'There is a Book out...': An Analysis of Judicial Absorption of Legislative Facts' (1987) 100 Harvard Law Review 1539. This study considers the absorption by American Courts of psychological parent theory. While this study has a brief methodology section (at 1546-7) there is no explicit reference to any empirical methodological literature, and issues such as reliability and validity of data, or explicit guidance on coding are not discussed.

Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

and construction of SF.\textsuperscript{76} This framework acknowledges and applies emerging

scholarship relating to the impact of cognitive factors and cultural worldviews on judicial
decision-making. There is a growing body of American work (some based on

experimental empirical studies) which suggests that American judges are unconsciously

influenced by a range of cognitive factors (eg heuristics and biases).\textsuperscript{77} A number of

Australian commentators have acknowledged that Australian judges are also likely to be

unconsciously affected by cognitive factors however there is limited Australian

investigation (empirical or otherwise) of judicial cognition.\textsuperscript{78} In addition, emerging

American work in cultural cognition\textsuperscript{79} suggests that cultural worldviews\textsuperscript{90} are likely to

\textsuperscript{76} Chapters 7 and 8 discuss how this explanatory framework differs from ‘single-factor’ explanations of judicial reasoning, such as the ‘law’ or ‘judicial ideology’ is the main influence on judicial reasoning.


influence how judges make risk assessments and construct facts about the world.\textsuperscript{81} There has been no Australian discussion about how Australian judges might be affected by cultural cognition, and what responses should be implemented in response to this.\textsuperscript{82} This study builds on work about judicial cognition and cultural cognition, and investigates how an explanatory framework for judicial use and construction of SF can incorporate the effects of both cognitive factors and cultural worldviews. Importantly, it contributes to broader Australian debates about the nature of judicial decision-making, and how the accuracy of judicial decision-making can be evaluated and improved.

2. KEY RESEARCH QUESTIONS

As discussed in the introduction to this chapter, this study concerns how and why Australian High Court judges use and construct SF in High Court negligence cases, and what factors explain how High Court judges use and construct SF. This gives rise to three main related research questions:

1. Do judges use SF in negligence cases in the High Court of Australia and how do they use and construct SF?

2. What factors explain judicial use and construction of SF and how do those factors impact upon judicial use and construction of SF?

\textsuperscript{80} Cultural worldview refers to one’s preferences about ‘how society should be organised’. See discussion in Kahan and Braman, above n 79.

\textsuperscript{81} This is discussed at length in Chapter 8.

\textsuperscript{82} My research has not revealed any Australian literature applying cultural cognition to Australian courts.
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

3. What are the implications of judicial SF use for our understandings of judicial reasoning in negligence cases, and for the accuracy of judicial reasoning?

Each research question has sub-questions. The first research question has sub-questions concerning the meaning of SF, the roles SF play in negligence cases, the incidence and frequency of SF in High Court negligence cases, and judicial sources for SF.

1. Do judges use SF in negligence cases in the High Court of Australia and how do they use and construct SF?
   
   I. What are SF?
   
   II. What are the roles of SF in judicial reasoning in negligence cases?
   
   III. Do judges use SF in High Court negligence cases?
   
   IV. Do individual judges use SF in High Court negligence cases?
   
   V. What is the frequency of judicial use of SF in HC negligence cases?
   
   VI. How frequently are SF referenced or sourced by High Court judges in negligence cases?
   
   VII. What kinds of sources do judges refer to in support of SF in negligence judgments?
   
   VIII. How are SF constructed by High Court judges in negligence cases?

The second research question has sub-questions examining what factors explain judicial use and construction of SF:

2. What factors explain judicial use and construction of SF, and how do those factors impact on judicial use and construction of SF?

   I. What legal and institutional factors affect judicial use and construction of SF?
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

II. What individual factors affect judicial use and construction of SF?

III. What cognitive and cultural factors affect judicial use and construction of SF?

IV. How do legal, institutional, individual, cognitive and cultural factors combine to explain judicial use and construction of SF in High Court negligence cases?

The final research question has sub-questions exploring the implications of judicial use and construction of SF for accuracy of judicial reasoning, understanding the process of judicial reasoning in negligence cases, and potential responses:

3. What are the implications of judicial SF use for our understandings of judicial reasoning in negligence cases, and for accuracy of judicial reasoning?

I. What are the implications of judicial use and construction of SF in negligence cases in the High Court of Australia for accounts of judicial reasoning in negligence cases?

II. What are the implications of judicial use and construction of SF in negligence cases for accuracy of judicial reasoning?

III. What responses should be considered in relation to the implications identified in research questions 3(I) and 3 (II)?

As will be discussed in section 3, these questions were addressed within an interpretivist epistemological framework, adopting a social constructionist approach.
3. AN INTERPRETIVIST EPISTEMOLOGICAL FRAMEWORK AND SOCIAL CONSTRUCTIONIST APPROACH TO METHODOLOGY

Both the research questions and the interpretivist framework and social constructionist approach taken in this study, influenced the development of the research methodology for the study.

A. An Interpretivist Epistemological Framework and a Social Constructionist Approach

The study reflects an interpretivist (rather than positivist) epistemological paradigm, or understanding of ‘knowledge’. As Webley describes, researchers in the interpretivist tradition are ‘inclined to focus on an individual’s inner world’ and ‘their understanding of the world’.

Researchers working in this tradition also understand that people’s statements and narration of events can not be seen as ‘straightforwardly representational of reality’ and do not merely mirror ‘what is there’. Rather, the way we (including judges) tell our stories reflects ‘the voice’ or ‘voices’ of ‘our culture’.

The interpretivist epistemological framework is distinguished from the positivist epistemological framework. The positivist framework ‘considers people as the products of their

---


84 Crotty, above n 83, 64.

85 Ibid. Crotty argues that social constructionism is ‘relativist’. It recognises that ‘different people may well inhabit quite different worlds. Their different worlds constitute for them diverse ways of knowing, distinguishable sets of meanings, separate realities.’
A social constructionist approach is ‘principally concerned with explicating the processes by which people come to describe, explain or otherwise account for the world (including themselves) in which they live’.\(^8^8\) Haltom and McCann suggest a social constructionist analysis ‘typically interrogates knowledge and meaning within varying cultural contexts. Such analysis often proceeds by critical interpretation of selected social texts.’\(^8^9\) This involves ‘examining the multiple, interrelated paths through which such knowledge is created, disseminated and entrenched in cultural practice’.\(^9^0\) Social constructionism is ‘derived from and used in a variety of social sciences, including sociology, social psychology, and linguistics’\(^9^1\). Malloy describes social constructionist approaches\(^9^2\) as having two major tenets. First, social constructionism questions “‘taken for granted” knowledge of the world around us’ and ‘questions whether commonly held perceptions and understandings of the world’ reflect the ‘true nature of things’.\(^9^3\) Second, social constructionism views understandings of the world as ‘developed and sustained through

\(^8^6\) Webley, above n 83, 930.

\(^8^7\) Ibid.


\(^8^9\) Haltom and McCann, above n 37, 13.

\(^9^0\) Ibid.


\(^9^2\) As Malloy notes (274-5) there have been numerous scholarly approaches to the ‘theoretical perspective’ of social constructionism, not all of which can be reconciled.

\(^9^3\) Ibid.
social interactions’. This approach has been adopted by a range of scholars to critique how particular legal and social actors ‘construct’ the meaning of particular kinds of laws.

The interpretivist framework and social constructionist approach are reflected in the study in a number of ways. First, the study understands the process of judicial use and construction of SF as multi-factorial. It explores the complex inter-related and interdependent factors that explain how judges use and construct SF in High Court negligence cases. These include legal, institutional, individual, cognitive and cultural factors. This is to be distinguished from traditional legal accounts of judicial decision-making which assume judges are only or predominantly influenced by legal principles and adjudicative facts. Second, the account of judicial use and construction of SF in this study is not primarily concerned with normative explanations of how judges ought to judicially reason within the law. Rather, it asks what factors may actually influence how judges construct SF knowledge through their decision-making. Third, the emphasis on ‘construction’ of judicial knowledge rather than positivist fact ‘finding’ recognises that knowledge about the world may be fluid, and affected by a range of legal, institutional, individual, cognitive and cultural factors. This study proceeds on the basis that judges should be viewed as typically constructing knowledge about SF, rather than strictly fact ‘finding’. Fact finding implies that judges typically search out and ‘find’ valid and correct

---

94 Ibid.
95 Ibid, 275. As Malloy notes this may include legal scholars.
96 Guthrie, Rachlinski and Wistrich distinguish their work on judicial decision-making from traditional theories of law in much the same way: ‘We do not consider the legal positivists, such as H.L.A. Hart, and their critics, such as Ronald Dworkin, as creating a theory of judicial decision making because they focus largely on providing a theory of law, not a descriptive account of judging itself.’ See Guthrie, Rachlinski, Wistrich, ‘Blinking on the Bench’, above n 77, 3(n 9). See also Serpell, (above n 71, 15) who distinguishes his study in similar ways.
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court

Negligence Cases

SF on all occasions. This positivist understanding of fact finding does not reflect literature outside the law on how human beings make decisions and construct knowledge. It also does not appear to explain the way in which judges actually use SF as reflected in the results of the content analysis discussed in Chapters 4-6. Finally, as often used in scholarship taking a social constructionist approach, this study critically analyses text systematically in order to comment on the manner in which concepts are constructed.

B. Research Methodology

The methodology of this study combined literature review (drawing from law, and interdisciplinary materials which use the insights of fields such as psychology to inform legal and policy analysis), legal analysis of case law and legislation, and content analysis. Table 1.1 adjacent indicates which aspects of the methodology are used in relation to each research sub-question, and the main chapter which addresses each research question.  

---

97 This is discussed further in Chapter 8. However, this does not suggest that where there is available convincing empirical material in relation to a matter that a judge should not utilise it. This is discussed further in Chapter 9.

98 This is discussed further in Chapter 8. See for an example Guthrie, Rachlinski and Wistrich, above n 77.

99 Chapter 9 will also include a summary of findings in relation to each research question.
### Table 1.1 Research Questions, Methodology and Chapter

<table>
<thead>
<tr>
<th>Question</th>
<th>Research Question</th>
<th>Methodology</th>
<th>Chapter</th>
</tr>
</thead>
<tbody>
<tr>
<td>1(I)</td>
<td>What are SF?</td>
<td>Literature review</td>
<td>3</td>
</tr>
<tr>
<td>1(II)</td>
<td>What is the role of SF in judicial reasoning in negligence cases?</td>
<td>Literature review, legal analysis and content analysis</td>
<td>3</td>
</tr>
<tr>
<td>1(III)</td>
<td>Do judges use SF in High Court negligence cases?</td>
<td>Literature review, legal analysis and content analysis</td>
<td>3-6</td>
</tr>
<tr>
<td>1(IV)</td>
<td>Do individual judges use SF in High Court negligence cases?</td>
<td>Content analysis</td>
<td>4</td>
</tr>
<tr>
<td>1(V)</td>
<td>What is the frequency of the use of SF in HC negligence cases?</td>
<td>Content analysis, literature review, legal analysis and inductive theorising</td>
<td>4</td>
</tr>
<tr>
<td>1(VI)</td>
<td>How frequently are SF referenced or sourced by High Court judges in negligence cases?</td>
<td>Content analysis, literature review, legal analysis and inductive theorising</td>
<td>4</td>
</tr>
<tr>
<td>1(VII)</td>
<td>What kind of sources do judges refer to in support of SF in negligence judgments?</td>
<td>Content analysis, literature review, legal analysis and inductive theorising</td>
<td>4</td>
</tr>
<tr>
<td>1(VIII)</td>
<td>How are SF constructed by High Court judges in negligence cases?</td>
<td>Content analysis, literature review, legal analysis and inductive and deductive theorising</td>
<td>5-8</td>
</tr>
<tr>
<td>2(I)</td>
<td>What legal and institutional factors affect judicial use and construction of SF?</td>
<td>Literature review and legal analysis, content analysis and inductive and deductive theorising</td>
<td>7</td>
</tr>
<tr>
<td>2(II)</td>
<td>What individual, factors affect judicial use and construction of SF?</td>
<td>Literature review, content analysis and inductive and deductive theorising</td>
<td>8</td>
</tr>
<tr>
<td>2(III)</td>
<td>What cognitive and cultural factors affect judicial use and construction of SF?</td>
<td>Literature review, content analysis and inductive and deductive theorising</td>
<td>8</td>
</tr>
<tr>
<td>2(IV)</td>
<td>How do legal, institutional, individual, cognitive and cultural factors combine to explain judicial use and construction of SF in High Court negligence cases?</td>
<td>Literature review, content analysis and inductive and deductive theorising</td>
<td>7-8</td>
</tr>
</tbody>
</table>

The content analysis methodology is discussed in detail in Chapter 2.
Negligence Cases

3(I) What are the implications of judicial use and construction of SF in negligence cases in the High Court of Australia for accounts of judicial reasoning in negligence cases?

3 (II) What are the implications of judicial use and construction of SF in negligence cases for accuracy of judicial reasoning?

3 (III) What responses should be considered to improve judicial SF accuracy and overcome inappropriate external and internal restraints and influences?

| What are the implications of judicial use and construction of SF in negligence cases in the High Court of Australia for accounts of judicial reasoning in negligence cases? | Literature review, content analysis and inductive and deductive theorising | 1, 3, 7, 8, 9 |
| What are the implications of judicial use and construction of SF in negligence cases for accuracy of judicial reasoning? | Literature review, content analysis and inductive and deductive theorising | 5-9 |
| What responses should be considered to improve judicial SF accuracy and overcome inappropriate external and internal restraints and influences? | Literature review, content analysis and inductive and deductive theorising | 9 |

The literature review and legal analysis stages of the methodology were an iterative process. As Kritzer notes socio-legal research rarely proceeds on pure deductive positivist lines. There is a ‘dynamic data-theory interaction that begins almost as soon as data collection begins’. The initial exploratory reading and analysis stage of this study involved the identification of a number of areas of interest (for example literature and legal cases and legislation on the use of policy and social values in tort law, social facts, the rules of evidence and the doctrine of judicial notice, and judicial use of social science) and close analysis of those sources. This was followed by the later identification of additional areas of focus once gaps were identified in the original material (for example

---


102 See Kritzer, ‘Data, Data, Drowning in Data’, above n 101, 761.

literature on judicial ideology, judicial cognition, and cultural cognition). Some of this later material became particularly relevant once the social constructionist approach in the study developed further. These literature review and legal analysis phases in the methodology assisted in the refinement of research questions, the development of the content analysis, and of course ultimately in the responses to the research questions.

The content analysis of High Court negligence cases from 2001-2005 forms the centrepiece of the study, and is the main basis for inductive theory building\(^\text{104}\) in response to the research questions. Further details of the nature of content analysis in empirical legal research, and the manner in which the method was implemented in this study are considered in Chapter 2. As will be discussed further in Chapter 2, a qualitative approach was taken to the content analysis. This study does not undertake complex statistical analysis or modelling of the data as a quantitative content analysis might have done. Rather, the frequency and sourcing of SF identified in the study will be reported by number and percentage where relevant, particularly in Chapter 4.\(^\text{105}\) Chapters 5 and 6 will rely on more detailed discussion of themes and patterns that emerged in the text of the data collected.\(^\text{106}\)

\(^{104}\) Inductive reasoning ‘seeks to derive general themes or patterns from the data gathered as the research progresses’. This is distinguished from deductive reasoning which is based on ‘general hypotheses posed before data collection begins. Inductive reasoning is generally associated with an interpretivist paradigm and with qualitative research, although this need not necessarily be the case. See Webley, above n 83, 929-30.

\(^{105}\) Hall and Wright, above n 39, note that a ‘credible content analysis does not always need to use complex or sophisticated statistics—or indeed any statistics at all.’ (117). Published judicial judgment content analysis studies relying on number and percentage findings and qualitative discussions include Fradella, above n 73; Davis above n 74; Mullane above n 41.

\(^{106}\) Hall and Wright, above n 39, 118.
4. KEY ARGUMENTS AND THESIS STRUCTURE

The overall arguments that this study makes in response to the research questions is that judges in the Australian High Court use and construct SF in negligence cases, SF play a range of roles in judicial reasoning in negligence cases, judicial use of SF can result in judicial error, judicial inaccuracy, and judicial value preferences, and judicial use and construction of SF is affected by legal, institutional, individual, cognitive and cultural factors. These arguments in more detail are as follows:

1. Australian High Court Judges use SF as part of judicial reasoning in negligence cases. Current accounts of judicial reasoning in negligence cases do not account for the role that SF play in judicial reasoning.

2. SF play a range of roles in judicial reasoning in negligence cases in the Australian High Court. Those roles include to provide context and background to judicial reasons, to assess and evaluate adjudicative facts, and in traditional ‘policy’ ways predicting consequences of liability.

3. Judicial use and construction of SF in negligence cases can result in judicial error, SF which conflict with empirical evidence, and the use of unreliable or inaccurate SF. It can also result in the exclusion from judicial reasons of SF which address those marginalised by the law and SF which reflect less dominant cultural worldviews.

4. There are complex, inter-related and interdependent legal, institutional, individual, cognitive and cultural factors that explain how judges use and construct SF in negligence cases in the High Court of Australia.
Chapter 1: Introduction: Judicial Use and Construction of Social Facts in Australian High Court Negligence Cases

This thesis is structured around the three main research questions outlined above in Section 2. The first part of the thesis (Chapters 2 and 3) provides the background to the content analysis of High Court negligence cases from 2001-2005 undertaken in this study. Chapter 2 discusses the content analysis methodology adopted for the study. It focuses on the suitability of this method to address the research questions investigated in this study, and details the approach taken to the use of the method particularly details of coding. Chapter 3 reviews the existing scholarship on the meaning of the term SF, outlines the definition of SF used in this study and drawing on data from the content analysis, discusses the range of roles played by SF in judicial reasoning in negligence cases.

The second part of the thesis (Chapters 4-6) addresses research questions 1(III)-(VIII). These chapters outline and analyse the results of the content analysis of High Court judgments from 2001-2005. Chapter 4 outlines the overall general findings of the content analysis. Chapters 5 and 6 discuss the qualitative results of the content analysis focussing particularly on the text of SF.

The third part of the thesis (Chapters 7 and 8) addresses research questions 2(I)-(IV). The chapters propose an explanatory framework for judicial use and construction of SF. They argue that there are a range of complex inter-related and interdependent legal,

---

107 These questions concern the incidence and frequency of judicial SF use, and the nature and frequency of sources used for judicial SF.

108 These questions concern the identification and effect of legal, institutional, individual, cognitive and cultural factors which impact on judicial use and construction of SF, and the impacts of this for understandings and accuracy of judicial use and construction of SF in negligence cases.
institutional, individual, cognitive and cultural factors that explain judicial use and construction of SF in negligence cases in the Australian High Court. Chapter 7 discusses the legal and institutional factors that affect judicial use and construction of SF. These include the influence of law and Australian approaches to the use of policy in negligence law, the effect of rules of evidence (including the doctrine of judicial notice) and institutional influences including the adversarial system, and the nature of the Australian High Court. Chapter 8 discusses individual, cognitive and cultural factors which affect how High Court judges use and construct SF in negligence cases. These factors include the effects of Australian legal culture on judges, the effects of individual characteristics and background of Australian High Court judges, the effects of cognitive factors including heuristics and biases and group determination on judicial reasoning, and the impact of cultural worldviews.

The fourth and final part of the thesis (Chapter 9) addresses research question 3 (I)- (III). Chapter 9 summarises the findings of the study and suggests that judicial use and construction of SF is a ‘wicked’ problem. It re-engages with the overall research questions of this study, and argues that the findings of the study generate challenges for existing understandings of judicial reasoning in negligence cases and for understandings of how legal, institutional, individual, cognitive and cultural factors affect judicial reasoning. The chapter suggests a range of options for reform for future research and consideration. Finally, the chapter notes a range of matters for future further research that emerge from the findings of this study.

109 These questions concern the implications of judicial use of SF for accounts of judicial reasoning and accuracy of judicial reasoning, and potential responses.
The next chapter discusses in more detail the nature of the empirical content analysis method adopted in this study, and how the method was utilised.
If empirical legal scholars wish to study whether extralegal ideological considerations affect judicial decisions, they must first develop an appropriate normative account of what constitute extralegal considerations, and then develop a methodology for separating out those types of factors from standard, run-of-the-mill judicial decision-making. Identifying those extralegal factors and testing for their influence is a potential project for the field...The task of coding legal materials is not easy, but creative solutions or sheer muscle could overcome some of the problems, and systematic evaluation of the effect of precedent, records on appeal, or legal materials prepared by the parties, could prove extraordinarily illuminating. More sophisticated analysis of the outputs—judicial decisions—could also prove extremely useful, and law professors may be well suited to the task.1

INTRODUCTION

As outlined in Chapter 1 this study explored how judges use and construct social facts (SF2) in negligence cases in the High Court of Australia. This issue was explored through three major research questions—do judges use SF and how do they use and construct them, what factors explain judicial use and construction of SF, and what are the implications of judicial SF use for understanding judicial reasoning in negligence cases and for accuracy of judicial reasoning. Importantly, the study was conducted within an

2 As discussed in Chapter 1 social facts (SF) are statements about society, the world, and the nature and behaviour of institutions (including legal institutions) and human beings. They are statements made as part of judicial development and general application of law. ‘SF’ refers to both the plural ‘social facts’ and the singular ‘social fact’. The concept of SF will be developed further in Chapter 3.
interpretivist epistemological framework, and takes a social constructionist approach.\textsuperscript{3} It is concerned with understanding the processes by which judges come to construct and explain their ‘understandings’ of the world.

The research methodology adopted in this study utilised three main research methods to address the research questions.\textsuperscript{4} Literature review and legal analysis of case law, legislation and legal materials iteratively informed aspects of the study—for example the identification of factors which impact on judicial use and construction of SF. However, the centrepiece of the study was an empirical content analysis of High Court negligence cases from 2001-2005. Content analysis is used to analyse texts and images, and ‘often involves thematic categorisation or coding, as well as counting the frequency with which those themes and codes appear.’\textsuperscript{5} It can be ‘descriptive’ as well as being used to ‘explain or develop’ theories.\textsuperscript{6} Legal scholars have tended to approach questions regarding the nature and content of judicial reasoning by utilising legal analysis of particular selected judgments, and by making more ‘tentative’ findings.\textsuperscript{7} However, the empirical method of content analysis was more appropriate for this study because it allowed more systematic

\textsuperscript{3} See the discussion of this in Chapter 1 Section 3.
\textsuperscript{4} See Chapter 1 Section 3 and Table 1.1 which indicates the methods used to address each research sub-question.
\textsuperscript{5} Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), \textit{The Oxford Handbook of Empirical Legal Research} (2010) 927, 941.
\textsuperscript{6} Ibid.
\textsuperscript{7}For example see Justin Malbon, 'Extra-Legal Reasoning' in Ian Freckleton and Hugh Selby (eds), \textit{Appealing to the Future: Michael Kirby and His Legacy} (2009) 579, 588. In this study, Malbon considered seven judgments of Justice Kirby and the manner in which those judgments utilised ‘extra-legal’ value based reasoning. He acknowledged that his findings could not be said to be systematic or representative of all cases decided by Justice Kirby. However, the findings did allow ‘tentative insights’ to be made, However, not all legal authors are as restrained as Malbon, in extrapolating the results of limited case study analysis to wider conclusions about judicial reasoning.
analysis of a large number of legal judgments, allowed for the presentation of qualitative numerical and textual data in response to the research questions, and formed the basis of inductive theorising.  

This chapter (together with chapter 3 which concerns the definition of the term SF) discusses and documents the use of the empirical method of content analysis used in this study. The use of this method of empirical analysis is relatively uncommon in Australian legal scholarship, and is still evolving in United States empirical legal research. The use of content analysis to analyse High Court negligence judgments forms part of the original contribution this study makes to the legal discipline, and therefore requires some elaboration and explanation. Section 1 will discuss the nature of the empirical method of content analysis and in particular its adaption to socio-legal research. Sections 2-4 will discuss in more detail the content analysis of SF in negligence cases in the High Court of Australia and in particular how cases were selected and coded, how reliable and valid data was gathered, and the overall parameters of the study.

1. AN EMPIRICAL METHOD: CONTENT ANALYSIS OF CASE LAW

How often do Australian High Court judges make statements about SF in negligence cases? What evidence do judges cite for SF, if any, and where does the evidence come from?  

---

8 Inductive reasoning or theorising seeks to ‘derive general themes or patterns from the data collected as the research progresses’. This is contrasted with deductive reasoning which is ‘based on a general hypothesis posed before data collection begins’. See Webley, above n 5, 929.

9 Research question 1(V).

10 Smyth has addressed the issue of judicial citation in a number of citation analysis studies which typically focus on citations in the footnotes of judgments. For example see Russell Smyth, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia' (2001) 30(1) University of Western Australia Law Review 1; Russell Smyth, 'Law or Economics? An Empirical Investigation into the Influence of Economics on Australian Courts' (2000) 28(1) Australian Business Law Review 5; Russell Smyth, 'The
Chapter 2: Content Analysis Methodology

from?\textsuperscript{11} Which judges refer to SF more frequently?\textsuperscript{12} As indicated above, a legal approach to these kinds of questions might have involved selecting a number of cases where SF were used prominently by judges, reading and analysing the cases and making anecdotal inferences from the cases. Heise has argued that ‘assertions unconnected to an empirical basis fill law review articles (and judicial opinions)’.\textsuperscript{13} This occurs he argues, because little expertise is required to gather anecdotal evidence, and it is relatively ‘simple and transparent’.\textsuperscript{14} Of course, this kind of approach used in traditional legal research does have value. However, unlike content analysis, it does not allow for systematic analysis of whole bodies of case law and does not allow for generalisable findings to be made with a high degree of certainty.

A. Content Analysis and Law

Content analysis involves the collection of a set of documents, reading the documents systematically, recording consistent features of the documents and then drawing inferences from the data recorded.\textsuperscript{15} Content analysis has been widely utilised in the

\begin{itemize}
\item Russell Smyth, 'Other than "Accepted Sources of Law"? A Quantitative Study of Secondary Source Citations in the High Court' (1999) 22(1) University of New South Wales Law Journal 19;
\end{itemize}

\textsuperscript{11} Research question 1(VII).

\textsuperscript{12} Research question 1 (IV).


\textsuperscript{14}Ibid.

\textsuperscript{15}Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinion' (2008) 96 California Law Review 63, 64.
Chapter 2: Content Analysis Methodology

social sciences including media and communication studies, political science, industrial relations, psychology, anthropology, sociology, linguistics and education.\textsuperscript{16} It is utilised to provide ‘replicable and valid inferences from texts’.\textsuperscript{17} It differs from traditional legal analysis of judgments, as it is an ‘empirically grounded method’ and addresses different kinds of questions and uses different methods of analysis.\textsuperscript{18} It has not been widely used by legal researchers, although Hall and Wright document its increasing use by American scholars studying the content of judicial opinions.\textsuperscript{19} There are Australian examples of the use of content analysis to study legal phenomenon and documents such as judgments and judicial decisions, print media and material produced by government agencies.\textsuperscript{20}

\textsuperscript{16} Ibid, 42-3.
\textsuperscript{17} Ibid, 18. This of course is the perspective of positivist ‘classical’ accounts of content analysis. More interpretative models of content analysis may not place as much emphasis on concepts such as validity and replicability.
\textsuperscript{18} Klaus Krippendorf, \textit{Content Analysis: An Introduction to Its Methodology} (2\textsuperscript{nd} ed, 2004), xvii.
\textsuperscript{19} Hall and Wright, above n 15.
However, as noted above, content analysis has not been explicitly utilised prior to this study to study the Australian High Court. 21

Hall and Wright, writing about the emerging use of content analysis to study judicial opinions in the United States, note that:

Legal scholars developed their uses of content analysis organically, similar to the way that judges develop the common law. Many legal content analysts designed their studies without referring to other examples of this method, and only in retrospect did a set of methodological principles start to emerge. 22

They also note the relatively rare reference by legal researchers utilising a content analysis method to any methodological literature regarding content analysis. 23 Hall and Wright argue that content analysis ‘is perfectly suited for examining aspects of legal method’. 24 Judgments are ‘detailed repositories’ about ‘how judges reason to their conclusion’ and content analysis can be an appropriate method to analyse judicial reasoning in a detailed and systematic way. 25

Rebecca Deering and David Mellor, ‘Sentencing of Male and Female Child Sex Offenders: Australian Study’ (2009) 16(3) Psychiatry, Psychology and the Law 394. Some of the Australian citation and dissent studies referred to in Chapter 1 n 65-7 might meet the technical description of content analysis however those studies do not refer to themselves as content analysis or cite content analysis methodology literature.

21 The Haigh study (Richard Haigh, ‘It is Trite and Ancient Law: The High Court and the Use of the Obvious’ (2000) 28(1) Federal Law Review 87) is in the nature of a simple content analysis however it makes no explicit reference to the method or to any empirical methodology literature. It utilised the more traditional ‘legal’ approach of searching the AUSTLII and Lexis Caselaw databases for the terms ‘trite’ and ‘trite law’.

22 Hall and Wright, above n 15, 65.

23 Ibid, 74.

24 Ibid, 93.

Chapter 2: Content Analysis Methodology

B. An Adaptive Model of Legal Content Analysis

Hall and Wright, after reviewing the growth of content analysis studies particularly over the last 10-15 years in the United States, suggest that this method is developing within the socio-legal discipline in ways that are uniquely legal. This development has given rise to an adaptive form of content analysis that is based on the social science methodology but which differs from it ‘in some respects’. Part of the challenge of adopting content analysis as the basis for this study was that, as Hall and Wright note, there is no accepted systematic approach to content analysis within the socio-legal academy. Researchers are left to ponder how traditional social scientific restraints regarding reliability and validity should be applied when using the method in law. This question of course is not one that is confined to the use of content analysis. Some empiricists, particularly those from backgrounds such as political science with a more ‘positivist’ quantitative approach to methodology, have strongly criticised the failure of socio-legal scholars generally to comply with strict rules of inference in their empirical work. Other socio-legal scholars, particularly those working within more qualitative paradigms, have argued for a less positivist, more interpretative and distinct socio-legal empirical methodology for socio-legal empirical work.

26 Ibid, 64-78.
28 Ibid.
As discussed in chapter 1, the development of the research methodology for this study was based on an interpretative approach to empirical research rather than the positivist approach. As sections 2, 3 and 4 of this chapter discuss, methodological issues such as replicability of the study, reliability and validity have been taken into account in research design. However, this has occurred within the context of a constructivist and interpretative paradigm as opposed to a positivist one.

2. SELECTION OF CASES

Some empirical studies of court judgments by socio-legal scholars have been criticised on the basis that the studies could not be replicated due to insufficient detail regarding the selection of cases chosen for study. This is due, in part, to a failure by some socio-legal researchers to adequately provide details of the judgments studied, the methods used to choose and sample the judgments, and/or failures to justify the choice of the judgments studied as opposed to other possible data sources. Section 2 discusses the choice of cases in this study including why High Court negligence cases were chosen, how cases were identified, why 2001-2005 was chosen as the time frame for the study, and how cases were coded for ‘significance’.


31 Hesse-Biber and Leavy (Sharlene Nagy Hesse-Biber and Patricia Leavy, The Practice of Qualitative Research (2006), 48) describe the constructivist or interpretative approach to research as assuming reality is ‘subjective and consists of stories or meanings produced or constructed by individuals within their natural settings’. Krippendorf, (above n 18, 16) defines this approach as focussing on ‘how reality comes to be constituted in human interactions and in language, including written text.’

32 See Epstein and King, above n 29, 38-45. Guidelines for choosing cases to utilise for content analysis studies are also discussed in Hall and Wright, above n 15, 101-109.

33 Ibid.
A. Why Negligence Cases? Why High Court Cases?

This study was based on High Court negligence cases, rather than other cases for a number of reasons. As discussed in Chapter 1, there is a longstanding debate about the use of policy in negligence cases and an apparent longstanding use of SF in negligence cases. Despite this, there has been very little academic study of SF in negligence cases. Negligence cases also make up a relatively significant proportion of the overall appeal judgments handed down by the High Court. In 2001-2005, negligence cases comprised 12.2% of the overall appeal judgments.\(^{34}\) The apparent judicial use of SF in negligence cases also appears to potentially correlate with the reference by judges of the High Court to secondary source materials in their judgments. In his 1999 study, Smyth studied the citation patterns of secondary source material in High Court judgments published in the CLR in 1960, 1970, 1980, 1990 and 1996.\(^{35}\) He found that in 1996 tort cases (including negligence cases) accounted for 13% of all cases where secondary material was cited by judges.\(^{36}\) This was second only to constitutional cases, which accounted for 44% of citations in that year.\(^{37}\) Finally, there is very little Australian empirical research that has

\(^{34}\) I have calculated that over the relevant period, the negligence cases in this study made up 12.12% of all appeal judgments handed down by the High Court (44/363 appeal judgments handed down in 2001-2005) and 15.06% of all civil appeal judgments (44/292 civil appeal judgments). The number of appeal judgments is drawn from the High Court of Australia Annual Reports available at High Court of Australia, *Annual Reports* <http://www.hcourt.gov.au/publications/annual-reports/annual-reports> at 5 October 2011.

\(^{35}\) Smyth, ‘Other than Accepted Sources of Law’, above n 10.

\(^{36}\) Ibid, 33.

\(^{37}\) Ibid. Smyth notes this accords with American studies which found that constitutional cases in the United States accounted for the highest rate of secondary citations. Smyth accounts for this on the basis of the difficult interpretation issues in constitutional cases and also the predominance of constitutional cases in the caseload of the court.
been conducted in relation to tort law in Australia, and there is great potential for the development of social-legal research into Australian tort law.\(^38\)

High Court cases were chosen for study rather than lower appellate court cases or trial judgments for a number of reasons. The High Court has a direct law making function. The leeways of choice in decision-making available to High Court judges are not necessarily available to trial or lower level appellate judges.\(^39\) This makes it more likely that judges of the High Court (compared to other judges) would use SF. Luntz has argued that the need to obtain special leave to have the High Court consider an appeal results in cases being heard by the High Court where there is room for argument and where arguments can be formulated in different ways.\(^40\) This results in cases where leeways of judicial choice exist which ‘necessarily depend on policy and values’.\(^41\) Where judges refer to policy and values rather than only legal principle, it appeared more likely they would use SF. Clearly the High Court also has an innate importance in the Australian community.\(^42\) The manner in which High Court judges construct their vision of social reality through the use of SF has wide social and political implications. In addition, as discussed in Chapter 1 there is a relatively meagre empirical scholarship on the Australian High Court and no previous explicit content analysis study has focussed on the Australian High Court.

\(^38\) See the discussion of this in Kylie Burns, 'Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective' (2007) 15 Torts Law Journal 1, 4-5.


\(^40\) Ibid, 63-64.

\(^41\) Ibid.

\(^42\) Smyth, ‘Other than Accepted Sources of Law’, above n 10, 20.
Chapter 2: Content Analysis Methodology

B. Identification of Cases

This content analysis study was based on 45 High Court negligence cases, where judgments were handed down by the High Court during the five calendar years of 2001-2005. These cases are listed in Appendix 2.1 at the end of this chapter. All High Court negligence judgments during those years were studied and accordingly no sampling issues arose.\(^{43}\) The cases were identified by referring to the individual indexes of all *Commonwealth Law Report (CLR)* volumes 204-223\(^{44}\) covering 2001-2005 and also by reference to the AustLII High Court database.\(^{45}\) Previous studies of High Court cases have utilised only cases reported in the CLR on the basis this is the authorised version of the judgments of the High Court and the CLR can ostensibly be relied upon to report the most important decisions of the High Court.\(^{46}\) However, this study utilised a complete set of negligence cases including both reported and unreported decisions because its aim was to systematically consider a whole body of judgments over a time period. In addition, many negligence cases from 2001-2005 were not yet reported in the

---

\(^{43}\) Hall and Wright found that the selection of a universal sample of cases limited only by year was the most common form of selection of cases (85% of studies reviewed) chosen by researchers using content analysis to study judicial decisions. See Hall and Wright, above n 15, 102. Hall and Wright note this avoids selection/sampling bias issues that arise in many areas of the social sciences.

\(^{44}\) This was cross checked to the CLR Master Indexes covering the volumes in 2001-2005.

\(^{45}\) Cases in each relevant year were searched at the AustLII High Court page (Australasian Legal Information Institute, (High Court of Australia) <http://www.austlii.edu.au/au/cases/cth/HCA/> at 5 October 2011) at using the simple term ‘negligence’ in the AustLII search engine. Cases were then checked against the CLR list, reviewed to ensure they met the definition of a negligence case, and were then included in the list of relevant cases.

CLR at the time of data entry.\textsuperscript{47} Cases were categorised as ‘negligence’ cases if they were indexed under the relevant CLR index or AustLII case headnote headings as being about negligence or damages (where the relevant case was a negligence case) and dealt with an element of a negligence action.\textsuperscript{48}

All cases were coded from the electronic full text version of the High Court judgments for 2001-2005 available on AustLII.\textsuperscript{49} Although these are not the strictly authorised versions of the judgments, these versions were chosen for several reasons. First, it allowed for all cases to be coded from a consistent source given all cases were not available in the CLR version at the time coding occurred. Second, it was more accurate to code certain parts of the judgments (for example the full text of each SF) by copying over text from the electronic version of the judgments into the ACCESS database used for storing data. Finally, electronic versions of unreported High Court case law are now widely utilised and cited prior to the release of electronic and paper CLR versions of the reported judgments.

\textsuperscript{47} A number of cases continue to be unreported in the CLR at the time of writing this thesis, see Appendix 3.1. One of the most interesting (yet important) cases to continue to be unreported in the CLR is the occupier liability case \textit{Neindorf v Junkovic} (2005) 222 ALR 631.

\textsuperscript{48} Cases were included where these headings cross-referenced to another index entry (for example practice and procedure) and the case was considered relevant (for example about interest calculation on personal injury damages in a negligence case). Element of negligence actions considered were duty of care, breach, causation, defences, damages. Cases were not considered a ‘negligence’ case if they were indexed only under private international law and dealt with issues arising out of that area of law, were indexed under workers’ compensation (where a common law issue did not also arise), only dealt with issues relating to statutory accident compensation schemes, only dealt with limitation of actions procedures or other pure procedural issues (eg pleading rules or damages interest calculations), or only raised issues arising from the \textit{Trade Practices Act 1974} (CTH).

\textsuperscript{49} See above n 45.
Chapter 2: Content Analysis Methodology

C. Why 2001-2005 period?

The period of 2001-2005 was chosen for three main reasons. First, five years allowed an adequate number of judgments to collect sufficient data to make valid observations. In addition, the period was chosen to allow (as far as possible) a stability in the composition of the High Court during the period studied. The period of 2001-2005 included two judicial retirements (Gaudron J and McHugh J) and two judicial appointments (Heydon J and Crennan J). However, Crennan J did not take part in any negligence judgments handed down in late 2005 following her appointment and is not included in the content analysis study. Table 2.1 notes the judges of the High Court during the period studied, the dates of retirement and appointment for Justices Gaudron and McHugh and Justices Heydon and Crennan, and the gender of the judges. Given the retirement of Gaudron J early in the study period, the majority of judgments studied in the content analysis did not include any judgments by a female judge.

---

50 Analysis of the judgments in 2001-2005 resulted in 1208 SF data entries in the ACCESS database.
51 Given it was not possible to have absolute stability, Chapter 4 gives an indication for each judge of average SF per judgment (Table 4.11) so that comparisons may be made between all judges.
Table 2.1 High Court Judges, Appointment, Retirement, Gender

<table>
<thead>
<tr>
<th>Justice</th>
<th>Date of Retirement/Appointment during 2001-2005.</th>
<th>Gender</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gleeson CJ</td>
<td></td>
<td>M</td>
</tr>
<tr>
<td>Gaudron J</td>
<td>10 February 2003 retired</td>
<td>F</td>
</tr>
<tr>
<td>Gummow J</td>
<td></td>
<td>M</td>
</tr>
<tr>
<td>McHugh J</td>
<td>31 October 2005 retired</td>
<td>M</td>
</tr>
<tr>
<td>Kirby J</td>
<td></td>
<td>M</td>
</tr>
<tr>
<td>Hayne J</td>
<td></td>
<td>M</td>
</tr>
<tr>
<td>Callinan J</td>
<td></td>
<td>M</td>
</tr>
<tr>
<td>Heydon J</td>
<td>11 February 2003 appointed</td>
<td>M</td>
</tr>
<tr>
<td>Crennan J</td>
<td>8 November 2005 appointed</td>
<td>F</td>
</tr>
</tbody>
</table>

Finally, since 2000 tort scholars have documented a change in direction of the High Court in negligence cases to more defendant orientated policies of individual responsibility and away from policies such as accident prevention. Justice Kirby noted in 2005:

Changing attitudes in this Court to the content of the common law of negligence have resulted in a discernible shift in the outcomes of negligence cases. According to Professors Skene and Luntz, '[t]he common law, as emanating from the High Court of Australia, was already moving to a much more restrictive

52 For example see Harold Luntz, 'Torts Turn Around Downunder' (2001) 1 Oxford University Commonwealth Law Journal 95.
attitude towards the tort of negligence.’ Now the shift has been accelerated by statute.\textsuperscript{33}

There was a likelihood that this apparent change in direction of the High Court in negligence cases might be reflected in the nature of SF used by judges of the High Court. This was considered during the analysis of SF data identified in the content analysis and will be discussed particularly in Chapter 6.

**D. Significance of Cases**

Given the absence of a similar study of the High Court, significance criteria were developed by the researcher to reflect the complexity and importance of each case both from the perspective of the High Court itself and from the perspective of the legal profession and legal academy. The High Court cases studied were coded as high significance (H), medium significance (M) or low significance (L) to allow an analysis of whether the frequency of judicial SF varied based on case complexity and importance.\textsuperscript{54}

The nature of the special leave process in the High Court of Australia, as Luntz argues,\textsuperscript{55} does mean that all cases heard on appeal in the High Court have a special or important significance compared to other negligence cases heard in State courts. However, even in the High Court some cases will be of more relative significance or importance than others. Cases were coded as high, medium or low significance by considering the combination of a number of factors selected by the researcher. The ‘significance’ factors included whether the case was about a novel, difficult or unresolved legal issue directly related to one of the elements of negligence, whether it was reported in the authorised

\textsuperscript{33} Neindorf v Junkovic (2005) 222 ALR 631,635-6 [19](Kirby J). See also New South Wales v Fahy (2007) 232 CLR 486 at 539-40 [172](Kirby J).

\textsuperscript{54} There were 16 high significance cases, 21 medium significance cases and 8 low significance cases. As Chapters 4 and 7 discuss the study found SF were more frequent in high significance cases.

\textsuperscript{55} Luntz, above n 39.
reports (CLR), how many High Court judges sat on the case, how frequently in the five years following the case it had been cited and applied in other negligence cases, and how frequently in the five years following the case it had been discussed in journal articles.\textsuperscript{56} Appendix 2.1 indicates the degree of significance attributed to each case.

\textbf{3. CODING, RELIABILITY AND VALIDITY OF DATA}

As discussed above, socio-legal scholars carrying out empirical work have been criticised on the basis that they do not sufficiently comply with social scientific rules of inference.\textsuperscript{57} There are three general ‘rules’ or (preferably) guidelines of good empirical research.\textsuperscript{58} These require that the research be replicable by other scholars, be reliable and have validity. Replicability requires that ‘researchers working at different points in time and perhaps under different circumstances should get the same results when applying the same technique to the same data. Replicability is the most important form of reliability’.\textsuperscript{59} Valid results require ‘that the research effort is open for careful scrutiny and the resulting claims can be upheld in the face of independently available evidence’.\textsuperscript{60} Content analysis might be considered a more robust qualitative method in terms of replicability than other methods such as participant observation and interviews. This is because of the general

\textsuperscript{56} Searches of the database CASEBASE were utilised to gather this information for each case studied. For example, a case that was only reported in the ALR, only tangentially related to an element of negligence, involved only three judges, was short and had not been cited frequently in cases or articles was coded as low significance (L). Cases which were about a critical aspect of an element of negligence, involved the full court, were lengthy involving multiple judgments, were reported in the CLR, and were cited frequently in cases or articles were coded as high significance (H).

\textsuperscript{57} See for example Epstein and King, above n 29.

\textsuperscript{58} I would adopt the terminology of guidelines utilised by Sisk and Heise in Gregory Sisk and Michael Heise, 'Judges and Ideology:Public and Academic Debates About Statistical Measures' (2005) 99 Northwestern University Law Review 743, 791-793. This approach is also adopted by Hall and Wright, above n 15, 100-101.

\textsuperscript{59} Krippendorf, above n 18, 18.

\textsuperscript{60} Ibid.
availability of the sources studied in a content analysis study (in their original form of
documents or images) to other researchers to study.  

Once cases to study are chosen, replicability and reliability are achieved in content
analysis of judicial judgments primarily through the use of application of coding
instructions and through reliable coding. This section discusses the methods of coding
SF in High Court negligence judgments from 2001-2005, including coding instructions
and methods to ensure reliability in coding. It must be recognised that there are
interpretative elements that are inherent in coding some variables in this research (for
example whether a particular statement complies with the definition of SF in Chapter 3,
or what constitutes a thematic category). While this chapter documents coding
instructions as fully as possible, it is impossible to assert that coding is perfectly
reproducible particularly given some of the complex and interpretive decisions made in
coding. Replicability and reliability should be seen as aspirational goals rather than hard
set rules, particularly in areas where the researcher is operating within an interpretative
and constructionist paradigm.

This section firstly discusses the general coding instructions used to code the High Court
negligence cases from 2001-2005. It then outlines the thematic SF categories which
emerged from the data and which assisted in the process of inductive theory building.
Finally it discusses how particular coding issues were dealt with, including issues such as

---

61 In this study, for example, researchers seeking to replicate the study could access the judgments studied
(and identified in this chapter) from the CLR, ALR and AustLII.
62 Krippendorf, above n 18, 18.
63 See above n 30.
determining whether judgments were in dissent or majority. As discussed below data was recorded in an ACCESS database.\textsuperscript{64}

A. Coding in the SF Database

Each negligence case in Appendix 2.1 was closely read.\textsuperscript{65} Each individual statement meeting the definition of SF discussed in Chapter 3\textsuperscript{66} was identified and was entered into the ACCESS database as a single SF record. For each SF identified in a judgment the following fields\textsuperscript{67} were entered:

- **Name of Case (Case Code)**
- **Paragraph of judgment**
- **Judge or judges who made the statement**
- **Whether judge or judges in majority or minority/dissent**
- **Whether single judgment or joint judgment**
- **Text of SF**
- **Category of SF**
- **Whether reference provided**
- **Whether reference was case, secondary source, empirical source, or other source (eg expert evidence, legislation, counsel brief, intervenor brief or general other)**
- **Name of reference**

\textsuperscript{64} ACCESS database on file with author.

\textsuperscript{65} It was read and coded by Kylie Burns.

\textsuperscript{66} The discussion of the definition of SF in Chapter 3 forms a crucial part of the coding instructions for the content analysis but they will not be repeated in detail here.

\textsuperscript{67} There were also a number of ancillary fields not used for analysing data including a general comment field for my own reference.
Chapter 2: Content Analysis Methodology

These fields represented the major areas of interest for the research questions posed in the study. They were used as the basis for further analysis which is detailed in chapters 4-6.

Each SF entered into the database as far as possible dealt with a single topic or category, although often it was impossible to separate statements or paragraphs into constituent statements without losing context. Where more than one SF of same or similar content and category occurred in a single numbered paragraph of a judgment, they were coded as a single SF record. However, where a SF of similar content and category occurred in a subsequent numbered paragraph, it was coded as a new SF record. SF in a judgment which were derived from quotes or reasoning from a lower court judgment or other case, expert witness testimony or counsel’s submissions, were only entered into the database as a SF where the relevant High Court judge explicitly adopted or accepted the statement rather than just restating it as part of the background to the judgment. When there were a number of judges who joined in a single joint judgment each SF in that judgment was coded as a single SF entry in the database. However, the entry noted the SF as made by each and every judge in the joint judgment. For the purposes of chapter 4-6, when individual judge’s use of SF is analysed the analysis for each judge includes those statements they made in individual judgments as well as those they made in joint judgments.

68 For example I did not include SF in New South Wales v Bujdoso (2005) 227 CLR 1,8 [28] or in Swain v Waverley Municipal Council (2005) 220 CLR 517, 541-2 [57]-[59] and 544 [67]-[69] where the SF were stated as part of the summary of material facts as found by the courts below. In addition I did not include SF referred to by Callinan J in D’Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1, 113 [361]-[362] where the SF are only accepted for ‘the sake of argument’.

69 Note this did not include judges who gave a separate judgment which simply concurred with another judge.
Chapter 2: Content Analysis Methodology

A SF was recorded as referenced when a footnote reference was provided for at least part of the statement (even if not for all of the statement) or when it was made clear in the text of the SF that it was sourced to some other source such as an expert witness, counsel’s brief or intervener. If a judge only explicitly cited to their own previous judgement in a case, that was not counted as a reference. Multiple references were recorded for single SF entries when a single footnote to the SF entry included a number of different sources, or where a number of different footnotes were provided for a SF. The analysis in chapter 4 includes a discussion of the nature of the judicial references provided for SF. It discusses, for example, whether the references provided for SF in this content analysis study included case law, legislation, secondary material such as texts, journal articles and legal encyclopaedias, expert evidence testimony or empirical or social scientific material.

B. Categories in the Social Fact Database

Following the entry of all SF into the database, all the data were organised into categories, and was recoded. These categories were used as practical organisational aids in reading and qualitative analysis of the data. However, as will be noted in Chapters 5 and 6, the themes that emerged from data often crossed the boundaries of individual ‘organisational’ categories. Much of the commentary in those chapters is based on larger themes in the data (for example use of common sense reasoning, treatment of risk, and evidence of judicial cultural worldviews) rather than descriptive accounts of categories. Where more than one category might have been appropriate for coding, the SF was coded for the dominant category in the SF text. While it may have been possible to code data into more than one category this was avoided to minimise unnecessary complexity in the study. It was also unnecessary given the categories were primarily to aid thematic
qualitative rather than statistical quantitative analysis. Table 2.3 adjacent lists the main organisational categories that emerged from the SF data and were used for category coding.
### Table 2.3 Categories of Social Facts in Australian Negligence Cases

<table>
<thead>
<tr>
<th></th>
<th><strong>Litigation, Legal Institutions and Court Process</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Including administration of justice, promotion of justice, effect of injustice, respect for the law, process of litigation, trial process, benefits of trial, availability of legal aid, prospects of flood of litigation, public review or response to litigation, patterns of litigation, nature of legal institutions</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th><strong>Legal Actors</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Nature, behaviour and beliefs of judges, lawyers, barristers, juries, litigants, plaintiffs, defendants, expert witnesses, witnesses</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th><strong>Nature of World and Society</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Australian society, institutional behaviour, religion, natural state or attributes of the physical world, medicine and science, nature and actions of government, history, economics, theology, philosophy, consequences or effects on humans generally (eg financial consequences)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th><strong>Human Behaviour and Relationships</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Human actions and behaviour, human relationships, gender, nature of family life and marriage, parenthood, children, human characteristics, human psychology, human knowledge and cognition</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th><strong>Individual Responsibility and Autonomy</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Including commercial and business autonomy</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th><strong>Indeterminate Liability and Burden on Actions</strong></th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th></th>
<th><strong>Social Values</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Statements of accepted social and moral values</td>
</tr>
</tbody>
</table>
| 8 | **Insurance, Loss Distribution and Compensation**  
|   | Includes deep pocket statements and also tort reform and insurance crisis  
|   | Availability or unavailability of insurance  
| 9 | **Deterrence and Accident Prevention**  
|   | Includes deterrence, over-deterrence and defensive practice  

## C. Dissent/Majority Judgments and Joint/Single Judgments

Each single entry for a SF was coded for whether the SF was made in a majority or minority/dissent judgment and whether the SF was stated in a single judge or joint judge judgment. This was to allow an analysis of the frequency of SF in majority judgments when compared to dissent judgments, and joint judgments compared to single judgments. There is a methodological debate about how to categorise High Court judgments as either majority or dissent judgments for the purpose of dissent studies.

This study adopted the simple method of categorising a judgment as a majority judgment if it concurred with the majority on the overall resolution of the appeal, either allowing or dismissing the appeal on the orders. A judgment was coded as a majority judgment if it concurred with the majority on the overall resolution of the appeal, even if some aspects of the judicial reasoning differed among the majority judges or where there was dissent on a costs or procedural issue only.

---

70 As discussed in Chapter 4 the study found that SF were more frequent in dissent judgments than majority judgments, and more frequent in single judgments compared to joint judgments.


72 For example see *CSR Limited v Eddy* (2005) 226 CLR 1 where all judges agree on the resolution of the substantial appeal issues but differ on procedural and costs issues. Lynch takes a more stringent approach to coding for concurring judgment and would only code a judgment as concurring in the majority if it
Chapter 2: Content Analysis Methodology

4. CONTEXT OF THIS STUDY

There are number of parameters of this study, flowing from methodological issues, which are taken into account when making inferences and conclusions from the data gathered.

A. The Period and Court Chosen

The content analysis of High Court cases covers a five year period and covers a period where the High Court was under the leadership of a single Chief Justice, Chief Justice Gleeson. It is possible that different results may emerge from studies of previous or future High Courts where there is a difference in leadership, ideology of the judiciary or appointing government or more diverse racial or gender mix. For example, it is possible that a content analysis of the Mason High Court negligence judgments might yield a high incidence of SF in judgments. This is because the Mason High Court is considered to have been a more activist and policy orientated High Court. On the other hand, content analysis of negligence decisions from the Dixon High Court or even the current French High Court might yield a very low number of SF. This is because the Dixon High Court is considered to have been a very legalistic High Court utilising a strict version of legalism, and the French High Court appears to be experiencing a high degree of concurs on all issues. See Lynch above n 71. However, Smyth has adopted a modified version of Lynch’s methodology which codes judgments as concurring in the majority if they are in substantive overall agreement on the orders resolving the appeal. See Russell Smyth, 'The Role of Attitudinal, Institutional and Environmental Factors in Explaining Variations in the Dissent Rate on the High Court of Australia' (2005) 40(4) Australian Journal of Political Science 519. This study adopts the latter approach given it is not a study that is focussed strictly on dissent rates.

73 For a discussion of the Mason High Court see Jason I. Pierce, Inside the Mason Court Revolution: The High Court of Australia Transformed (2006).
cohesion (which might reduce individual expressions of SF particularly in dissent).

These are areas for further research noted in Chapter 9.

B. Negligence Cases

This study conducts a content analysis of negligence cases in 2001-2005. It does not analyse other kinds of cases or the overall judgment output of the High Court. Some care needs to be taken in extrapolating the results of this study to make conclusions about SF patterns in High Court judgments overall. That said, there are a number of reasons why the findings of this study do have significance for thinking about how the High Court uses SF more generally. First, as noted above, the negligence cases studied made up a relatively significant proportion of the overall appeal judgments handed down by the High Court over 2001-2005.

Other significant categories of High Court judgments including constitutional law have also been noted as including judicial reference to SF. A detailed and systematic content analysis is yet to be carried out on these categories of High Court cases. The only existing similar study on judicial reference to ‘social facts’ in judgments in Australian courts confirmed that Family Court judges refer to ‘social facts’ in their judgments. Given all of this, the analysis in chapters 4-8 and the discussion of implications in Chapter 9, will assume as a general proposition that Australian High

---

74 See Michael Coper et al, 'Multiple Opinions Project - Report' (ANU College of Law, National Judicial College, 2010). This may be reflected in briefer opinions focused on alleged judicial errors.

75 See above n 34.


77 Mullane above n 20.
Court judges use SF in all categories of cases although the frequency, nature and categories of SF used may differ between categories of case. Again this is an area for future research noted in Chapter 9.

C. Un-stated Sources

Where the source of a SF is not stated by a judge, it is not usually possible to attribute the SF to a source. SF which are not attributed to a source in a judgment may be sourced from the judge’s ‘common sense’ intuition, from an un-stated published source, from the parties’ submissions with no acknowledgment, from research by the judge’s associate, or from the judges’ own private un-stated research. Such sources cannot be stated with certainty for an individual unreferenced SF. However, it does raise the possibility for future research using different methods.  

D. Reliability of Coding

Traditional ‘positivist’ social-scientific and content analysis methodology requires a number of procedures to ensure reliability of coding. This includes independence and objectivity of coders, statistical reliability testing of multiple coders and reliability testing of coding. Hall and Wright note that the traditional ‘scientifically vigorous method’  


79 For example see discussions in Hall and Wright, above n 15, 109-117.
adopted for selection of coders is for researchers to utilise independent trained coders rather than self-code and for statistical reliability testing to be carried out. This supposedly avoids subjectivity in the research. Hall and Wright note that many legal researchers conducting content analysis do not however utilise outside coders and code judgments themselves. Their study did not show a significant degree of formal coding reliability testing by legal scholars. Only 14% of judicial decision content analysis studies they reviewed conducted formal coder reliability testing. The reasons for this may include lack of resources to engage and train coders in small projects, and high levels of expertise not possessed by student coders being required to code the relevant judicial opinions meaningfully. These coder identity and reliability issues are at the core of the difference between strict positivist social scientific methodological approaches and the more interpretative approach adopted by legal scholars who view themselves as having the most expertise to analyse legal decisions. This appears to be one of the areas in which legal scholars are adapting traditional forms of social scientific methodology to suit our discipline. For example, Webley notes that in much qualitative empirical legal research ‘the researcher is the data collection tool, as well as the one who analyzes the data’ and ‘dependability and integrity’ of the research rests on the nature of the research process and analysis carried out by the researcher.

---

81 Ibid. Hall and Wright note that in 78% of the studies they considered researchers did their own coding.
82 Ibid, 112.
83 Ibid, 110-112.
84 Ibid.
85 Webley, above n 5, 935. This includes for example the extent to which the researcher pilots, adjusts and details methods, is reflexive, reports on strengths and weaknesses of the research, is ‘specific rather than too sweeping’ in conclusions, and provides evidence in support of ‘acceptable’ conclusions.
Chapter 2: Content Analysis Methodology

The negligence judgments studied in this content analysis study have been coded by the researcher Kylie Burns for a number of reasons. As noted above, it appears that this is the approach commonly used by legal scholars adopting content analysis to study judicial opinions. Perhaps, more importantly, the nature of the complex interpretative process involved in the methodology of this study meant it would be difficult for other researchers to accurately code. The researcher had the most appropriate expertise to code parts of the judicial decisions, particularly on issues of SF definition and thematic categories which had interpretative elements. This kind of more interpretative coding for the purposes of qualitative analysis does not lend itself as neatly to coding by outside coders as a traditional positivist quantitative version of methodology might suggest.

Finally, unlike other content analysis research which might be carried out in teams allowing double-coding (which allows for a form of triangulation), this research occurred within the context of a PhD degree which required individual work by the PhD researcher. Issues of reliability were dealt with by adopting coding instructions discussed in this chapter and Chapter 3 (definition of SF), and also by documenting the research methodology as specifically as possible in this chapter to address issues of replicability.

The possibility of coding error and coder bias has also been responded to in a number of further ways including:

1. All the SF data entries were rechecked at the completion of the analysis of the relevant High Court cases to ensure, as far as possible, that coding choices over time were consistent. Amendments to coding were made as necessary during this process.

2. Coding choices were made in a conservative way. For example, SF were coded as referenced even if only part of the SF (rather than all parts of the SF statement of
the judge) was footnoted or internally referred to some other source. The content analysis is therefore skewed to over-coding referencing of SF rather than under-coding. It provides a more stringent testing of the researcher’s initial assumption that most judicial SF were unsourced. In addition, the initial assumption of the researcher was that High Court judges frequently referred to SF in their negligence judgments. Accordingly, where there was doubt whether a part of a judgment was a SF (that is it was borderline whether it fulfilled the SF definition in Chapter 3) it was not coded as a SF. Again this should result in under-counting rather than over-counting SF and result in a more stringent testing of initial assumptions.

CONCLUSION

This study focuses on finding out how judges use and construct SF in negligence cases in the High Court of Australia, what factors explain judicial use and construction of SF, and the implications of this for understandings and accuracy of judicial reasoning in negligence cases. The study has been undertaken utilising a social constructionist approach and within an interpretivist epistemological paradigm. These have influenced the methodology adopted. Traditionally, legal scholars would have used methods such as literature review and legal research and analysis to investigate these kinds of questions. These methods are used in parts of this study. However, this chapter has explained why empirical content analysis, adapted for use in the socio-legal context is a method that is particularly valuable for systemically analysing bodies of case law to document and investigate how judges use and construct SF. As this chapter and Chapter 1 have demonstrated, part of the significant contribution made by this study has been the use of content analysis to study decisions of the High Court of Australia. Given the lack of
similar studies, this has required the original development and application of the content analysis method in a way appropriate for a study which investigates the use and construction of SF in the context of the High Court of Australia.

The chapter has outlined the key design and coding decisions made in the content analysis framework to ensure reliability and validity. These include outlining and justifying the cases chosen for analysis, and discussing how coding choices were made. The chapter has also discussed the nature of the organisational categories of SF which emerged from the data, which were used to assist the qualitative thematic analysis of the SF data. The parameters of the study have also been considered. The next chapter, Chapter 3, explores the parameters of the definition of the term SF used in this study, and the roles SF play in judicial reasoning in negligence cases.

86 This forms part of the ‘coding’ instructions for the study.
## APPENDIX 2.1 HIGH COURT NEGLIGENCE CASES IN CONTENT ANALYSIS WITH SIGNIFICANCE CODE

<table>
<thead>
<tr>
<th>Year</th>
<th>Case Name</th>
<th>Citation</th>
<th>Significance Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>Rosenberg v Percival</td>
<td>(2001) 205 CLR 434</td>
<td>H</td>
</tr>
<tr>
<td>2001</td>
<td>Liftronic Pty Ltd v Unver</td>
<td>(2001) 179 ALR 321</td>
<td>M</td>
</tr>
<tr>
<td>2001</td>
<td>Derrick v Cheung</td>
<td>(2001) 181 ALR 301</td>
<td>L</td>
</tr>
<tr>
<td>2001</td>
<td>Brodie v Singleton Shire Council</td>
<td>(2001) 206 CLR 512</td>
<td>H</td>
</tr>
<tr>
<td>2001</td>
<td>Tepko Pty Ltd v Water Board</td>
<td>(2001) 206 CLR 1</td>
<td>H</td>
</tr>
<tr>
<td>2002</td>
<td>Graham Barclay Oysters Pty Ltd v Ryan</td>
<td>(2002) 211 CLR 540</td>
<td>H</td>
</tr>
<tr>
<td>2002</td>
<td>De Sales v Ingrilli</td>
<td>(2002) 212 CLR 338</td>
<td>H</td>
</tr>
<tr>
<td>2002</td>
<td>Tame v New South Wales; Annetts v Australian Stations Pty Ltd</td>
<td>(2002) 211 CLR 317</td>
<td>H</td>
</tr>
<tr>
<td>2003</td>
<td>Cattanach v Melchior</td>
<td>(2003) 215 CLR 1</td>
<td>H</td>
</tr>
<tr>
<td>2003</td>
<td>Whisprun Pty Ltd v Dixon</td>
<td>(2003) 200 ALR 44</td>
<td>M</td>
</tr>
<tr>
<td>2003</td>
<td>Suvaal v Cessnock City Council</td>
<td>(2003) 200 ALR 1</td>
<td>L</td>
</tr>
<tr>
<td>2003</td>
<td>Fox v Percy</td>
<td>(2003) 214 CLR 118</td>
<td>M</td>
</tr>
<tr>
<td>2003</td>
<td>Amaca Pty Ltd v NSW</td>
<td>(2003) 199 ALR 596</td>
<td>L</td>
</tr>
</tbody>
</table>

*Citations are made to the ALR where the case has not been reported in the CLR.*
# Chapter 2: Content Analysis Methodology

<table>
<thead>
<tr>
<th>Year</th>
<th>Case Title</th>
<th>Year</th>
<th>Case Title</th>
<th>Year</th>
<th>Case Title</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>Hoyts Pty Ltd v Burns</td>
<td>2003</td>
<td>Shorey v PT Ltd</td>
<td>2003</td>
<td>Dovuro Pty Limited v Wilkins</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>Shorey v PT Ltd</td>
<td>2003</td>
<td>Dovuro Pty Limited v Wilkins</td>
<td>2003</td>
<td>Gifford v Strang Patrick Stevedoring Pty Ltd</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>Dovuro Pty Limited v Wilkins</td>
<td>2003</td>
<td>Gifford v Strang Patrick Stevedoring Pty Ltd</td>
<td>2003</td>
<td>Woolcock Street Investments Pty Ltd v CDG Pty Ltd</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>Woolcock Street Investments Pty Ltd v CDG Pty Ltd</td>
<td>2004</td>
<td>Andar Transport Pty Ltd v Brambles Limited</td>
<td>2004</td>
<td>Anikin v Sierra</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>Andar Transport Pty Ltd v Brambles Limited</td>
<td>2004</td>
<td>Anikin v Sierra</td>
<td>2004</td>
<td>HTW Valuers(Central QLD) Pty Ltd v Astonland Pty Ltd</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>HTW Valuers(Central QLD) Pty Ltd v Astonland Pty Ltd</td>
<td>2004</td>
<td>Pledge v Roads and Traffic Authority; Ryan v Pledge</td>
<td>2004</td>
<td>Cole v South Tweed Heads Rugby League Football Club</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td>Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba</td>
<td>2005</td>
<td>Commissioner of Main Roads v Jones</td>
<td>2005</td>
<td>Czatyrko v Edith Cowan University</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td>Commissioner of Main Roads v Jones</td>
<td>2005</td>
<td>Czatyrko v Edith Cowan University</td>
<td>2005</td>
<td>Mulligan v Coffs Harbour City Council</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

64
<table>
<thead>
<tr>
<th>Year</th>
<th>Case Title</th>
<th>Citation</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005</td>
<td>Willett v Futcher</td>
<td>(2005) 221 CLR 627</td>
<td>M</td>
</tr>
<tr>
<td>2005</td>
<td>Laybutt v Glover Gibbs Pty Ltd</td>
<td>(2005) 221 ALR 310</td>
<td>L</td>
</tr>
<tr>
<td>2005</td>
<td>The Waterways Authority v Fitzgibbon</td>
<td>(2005) 221 ALR 402</td>
<td>M</td>
</tr>
<tr>
<td>2005</td>
<td>Swain v Waverley Municipal Council</td>
<td>(2005) 220 CLR 517</td>
<td>M</td>
</tr>
<tr>
<td>2005</td>
<td>D'Orta-Ekenaike v Victoria Legal Aid</td>
<td>(2005) 223 CLR 1</td>
<td>H</td>
</tr>
<tr>
<td>2005</td>
<td>New South Wales v Bujdoso</td>
<td>(2005) 227 CLR 1</td>
<td>M</td>
</tr>
<tr>
<td>2005</td>
<td>Thompson v Woolworths (QLD) Pty Ltd</td>
<td>(2005) 221 CLR 234</td>
<td>M</td>
</tr>
<tr>
<td>2005</td>
<td>CSR Limited v Eddy</td>
<td>(2005) 226 CLR 1</td>
<td>M</td>
</tr>
<tr>
<td>2005</td>
<td>Manley v Alexander</td>
<td>(2005 223 ALR 228</td>
<td>L</td>
</tr>
</tbody>
</table>
Chapter 3

What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

INTRODUCTION

This chapter discusses the definition of the term ‘social fact’ (SF)¹ used in this study, and explores the role of SF in judicial reasoning in negligence cases. Chapter 2 discussed the content analysis method used in this study to investigate judicial use and construction of SF in Australian High Court negligence cases. A critical part of the content analysis method (including coding instructions) was the definition of the concept of SF. The general definition of SF in this study² is that SF are statements about society, the world, and the nature and behaviour of institutions (including legal institutions) and human beings. They are statements made as part of judicial development and general application of law, rather than as part of adjudicative fact finding relevant only to the parties to a dispute. This chapter explores the key attributes and parameters of the definition of SF further³ and explains how the definition of SF in this study differs from similar concepts. The chapter also explores the roles that SF play in judicial reasoning in negligence cases.⁴

---

¹ SF refers to both the plural ‘social facts’ and the singular ‘social fact’.
² As introduced in Chapter 1.
³ Research question 1(I).
⁴ Research question 1(II).
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

The concept of SF (including the roles played by SF in judicial reasoning) developed in this study has been informed by existing literature including the work of Davis, and Monahan and Walker. The parameters of the term SF have also been informed inductively by the data collected in the content analysis study of High Court negligence cases from 2001-2005.

There are a number of crucial aspects of the concept of SF that will be discussed in this chapter. Section 1 will discuss how the concept of SF distinguishes between facts used by judges in their adjudicative role and facts judges use as part of their law-making role. Section 2 argues, drawing on existing literature, that SF play a range of different roles in judicial reasoning in negligence cases. Section 2 also shows how the findings of the content analysis of Australian High Court negligence cases from 2001-2005 conducted as part of this study confirmed that High Court judges do not just use SF as part of ‘policy’ reasoning. Judges use SF in a number of different ways in their judicial reasoning. This study confirmed that SF were used by judges to provide context and background, to assess adjudicative facts and to make policy statements or statements about the consequences of liability.

Section 3 explains that SF may draw from a range of sources which might include empirical sources, but most often will not. This distinguishes the definition of SF in this study from other definitions of similar concepts which are explicitly linked to the existence of empirical evidence or to evidence from a particular discipline. Finally,
defining SF is a ‘messy business’. Interaction with data inevitably reveals the blurred edges of definition of concepts and ‘sorting and categorising involves lots of judgment calls because language is often very ambiguous’. Section 4 discusses the blurred division between principle, policy and values in negligence cases.

1. SF ARE NOT ADJUDICATIVE FACTS

This study is concerned with how judges use and construct ‘facts’ as part of general judicial development and application of law, rather than as part of adjudicative fact finding. The term SF used in this study reflects the distinction between the adjudicative role judges play in determining specific factual disputes between the parties to an individual litigation and the role they play in determining and applying law more generally. The highly influential work of Kenneth Culp Davis is the starting point for

---

6 Ibid, 274.
7 This is not the subject of this study.
8 The use of SF by judges during this process is the subject of this study.
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

distinguishing between the use of ‘facts’ by judges in these two different roles. His work proceeds on the premise that ‘no judge can think about law, policy or discretion without using extra record facts’.10 His landmark article in 1942 traced a long history in American courts (including the United States Supreme Court) of utilising general facts in support of law-making or policy making, as opposed to adjudication of facts relevant only to the parties to a particular proceeding.11 These kinds of ‘facts’ appeared to come to the attention of courts in numerous ways, including in tandem with evidence of adjudicative facts, through counsel briefs and through extra-record research of judges.12

Davis identified that despite many examples of the use of facts by courts in this legislative or policy way, the only apparent clearly recognised terminology was ‘constitutional facts’ dealing with the courts’ use of facts to determine the limits of constitutional powers.13 Davis identified in this original and later work a distinction between two uses of facts in judicial decision-making — the first use was as adjudicative

---

10 Davis, ‘Judicial, Legislative and Administrative Lawmaking’ above n 9, 7.
11 Davis, ‘An Approach to the Problems of Evidence’, above n 9. For example, he identified (at 403) the historic use of a brief of social scientific material regarding the effect of working hours on women by Louis D Brandeis (later Justice Brandeis of the United States Supreme Court) in the case of Muller v Oregon, 208 US 412 (1908). He also identified (at 403) later examples of the use of this kind of factual material by Brandeis J when appointed a justice, for example in Jay Burns Baking Co v Bryan, 264 US 504 (1920) when Brandeis J ‘went outside the record to acquaint himself with the “art of bread-making and the usages of the trade”’. 12 Ibid, 403.
facts and the second was as legislative facts. Where a ‘court or an agency finds facts concerning the immediate parties—who did what, where, when, how and with what motive and intent—the court or agency is performing an adjudicative function’ so that the relevant facts are ‘adjudicative facts’. Where a ‘court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation.’ The use of facts in this context is referred to as ‘legislative facts’. Legislative facts ‘help the tribunal to determine the content of law and policy and to exercise its judgment or discretion’, are usually general in nature and are utilised ‘in the creation of law or policy’.

Davis argued that it was indisputable that judges referred to legislative facts as part of their law-making role. This was a ‘plain fact’ and recognised that ‘a human being is probably unable to consider a problem—whether of fact, law, policy, judgment or discretion —without using his past experience, much of which may be factual and much highly disputable.’ Davis identified shortcomings in the way judges approached

---

14 Davis, ‘Judicial Notice’ above n 9, 952-3.
15 Ibid, 952.
16 Ibid.
17 Ibid.
18 Ibid.
19 Ibid, 949. It is interesting to note Davis’ use of the word ‘his’ to describe judicial practice and experience which is reflective of the lack of female judges at the time Davis was initially writing. In addition, Davis mentions the relevance of ‘past experience’ and also refers to the process of ‘human reasoning’ as influences on judicial reasoning, and as explanations for judicial use of legislative facts. He also notes how this may lead to ‘highly disputable’ statements of legislative fact. Chapters 4–6 discuss how the results of this study showed that SF in Australian High Court cases can be ‘highly disputable’ and can be empirically wrong or questionable. Chapters 7 and 8 discuss how individual judicial background factors and cognitive (human reasoning) factors form part of an explanatory framework for judicial use and construction of SF developed in this study.
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

legislative facts, with ‘more conventional opinion purporting to rest exclusively upon the record but which in reality is heavily dependent upon the assumption of unproved facts that are left vague and unidentified.’ 20 He also exposed anomalies in rules of evidence, which did not adequately distinguish between the two kinds of ‘facts’. 21 In particular, he argued that restrictive rules of judicial notice should not apply to legislative facts but rather only to adjudicative facts. 22 Judges should be free to make their own searches for relevant legislative fact information.

While arguing that restrictive rules of judicial notice should not apply to legislative facts, Davis also acknowledged that the existing processes used by courts to inform themselves of extra-record legislative facts were clearly inadequate. 23 He argued, for example, that the United States Supreme Court had utilised, with unsatisfactory results, a number of strategies when faced with a need for legislative facts in a particular case. 24 These included sending the case back to trial for further evidence, imposing a burden of proof in relation to the legislative fact on a party to the litigation, asserting legislative facts with

20 Ibid, 953. Chapter 4 discusses how the results of this study show that High Court judges predominantly used judicial ‘common sense’ as the basis for SF
21 Ibid, 946. The US Federal Rules of Evidence adopted the distinction between adjudicative and legislative facts with the doctrine of judicial notice expressed only to apply to adjudicative as opposed to legislative fact finding (see rule 201 ‘Judicial Notice of Adjudicative Facts’). Chapter 7 discusses how the Australian rules of evidence (including the doctrine of judicial notice) are unclear in relation to the treatment of SF and do not make a clear distinction between ‘adjudicative’ uses of facts and ‘legislative’ uses of facts.
22 Ibid. Chapter 7 will discuss how the Australian doctrine of judicial notice does not appear to apply to legislative facts, but the situation is far from clear.
23 Davis, ‘Judicial, Legislative and Administrative Lawmaking’, above n 9, 5-8. Chapter 7 will argue that the Australian situation is similar, and the current adversarial system and institutional structure of the High Court does not support the provision of high quality SF information to High Court judges.
24 Ibid, 9.
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

no support or based only on ‘common experience’, ignoring the need for legislative fact material, utilising published sources inaccurately, and conducting extra-record research without notice to the parties. Similar strategies have been utilized by the High Court of Australia. Davis also considered how the reception of legislative facts by courts, particularly the United States Supreme Court, might be improved. For example, he suggested that Brandeis briefs should be further encouraged, that law offices might employ professional social science specialists to prepare such material and that a research organisation might be formed to assist the United States Supreme Court.

The work of Davis informed the definition of SF in this study in a number of ways. He clearly identified the widespread (if not indisputable) practice of judges using material often sourced outside the record, in their lawmaking and policy making role. As discussed further in Chapters 4-6, there is also clear evidence of this practice by the High Court justices in negligence cases from 2001-2005. Further, he placed this observation outside the debates about judicial activism and restraint and linked it to the practical way in which human beings (including judges) approach decision-making processes. This insight into judicial cognitive processes is now being taken up in the literature on the

---

25 Ibid, 10-11.
27 A brief of supporting social scientific material filed with the court by the parties to the action. The Brandeis brief is named after the submission of such material by Justice Brandeis (prior to elevation to the US Supreme Court) in Muller v Oregon, 208 US 412 (1908).
28 Davi, above n 9, 15.
29 Ibid. Chapter 9 discusses possible reform options to improve the accuracy of SF used by Australian High Court judges in their reasoning.
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

effects of cognition on judicial decision making which is discussed further in Chapter 8.\textsuperscript{30}

Finally, the definition of SF in this study (like legislative facts) also draws on the distinction between judicial statements of facts which are relevant only to the parties to litigation, and those which pertain more generally to the development and application of law.

It is important for the purposes of this study to appreciate how judicial statements which pertain to the development and application of law (and thus are SF) differ from other judicial statements. This is best done by using some examples identified in the content analysis to show why some judicial statements were considered SF in this study, and why some SF were not considered SF. Examples 3.1-3.5 following demonstrate some of the distinctions that were made when applying the definition of SF during the collection of data. For example a SF in this study is not a factual finding that is directly descriptive of the facts of the trial matter.

Example 3.1

A statement that Mrs Melchior was a 46 year old housewife, is not a SF.\textsuperscript{31}

Importantly, SF are ‘facts’ used as part of law-making or the development of law. Pure statements of law, legal rules or legal reasoning are not SF in this study. They are not SF because they are not judicial statements about society, the world, or the nature and behaviour of institutions (including legal institutions) and human beings.


Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

**Example 3.2**

A statement that a cause of action in negligence requires causation between the breach of duty and the damage be shown, is not a SF.

Legislative backgrounds which generally state the nature, subject matter, content and dates of legislation are also not treated as SF as they are in the nature of legal information, and again are not statements about society, the world or the nature and behaviour of institutions and human beings.

**Example 3.3**

The following judicial statement of legislative background is not a SF. ‘Some other legislative events must be noticed. Since 1999, State legislatures have given close attention to what has been called "tort law reform". In particular, close attention has been paid to the law of negligence, and a number of statutes have been passed since 2000 which have dealt with that general subject. In none of that legislation has there been any reference to the immunities from suit of advocates, witnesses or judges.’

However, judicial statements which describe the general beliefs, behaviour, attitudes or actions of governments as institutions are treated as SF. They are SF because they describe a particular institution, for example the Commonwealth or a State Government of Australia.

---

32 *D’Orta-Ekenaie v Victoria Legal Aid* (2005) 223 CLR 1, 23 [53] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

33 Rather than describing their ‘legal’ actions.
Example 3.4

The statement in *Dovuro Pty Limited v Wilkins* ‘what account could be taken of financial and political pressures on bodies like AgWest or the Agriculture Protection Board? What is done by government or governmental agencies will often reflect such pressures.’ is a SF because it deals with what motivates the behaviour of a government or government body as an institution.

Similarly, statements that concern legal institutions and the nature and behaviour of legal actors are included as SF.

Example 3.5

SF include statements that describe the nature and state of the court system, the litigation process and the general conduct and behaviour of legal actors such as judges, lawyers, litigants, juries and expert witnesses.

So, Davis’ distinction between adjudicative and legislative facts informed the definition of SF adopted in this study. However, as the next section discusses, Davis’ category of legislative facts, does not describe all SF. Not all SF are legislative facts. There are also other roles that SF play in judicial reasoning in negligence cases.

**2. SF PLAY A RANGE OF ROLES IN JUDICIAL LAW-MAKING**

This section argues that SF play a range of roles in judicial reasoning in negligence cases, and are not only used as part of ‘policy’ reasoning, or even only as ‘legislative facts’. SF may also be used as part of judicial development of background or context (including as

---

34 *Dovuro Pty Ltd v Wilkins* (2003) 215 CLR 317, 371[170] [Callinan J and Hayne J.](#)
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

part of understanding the general background of the subject matter of a case) and as part of judicial interpretation of adjudicative facts. This section refers to examples identified in this study to demonstrate how judges use SF in these ways.

A. SF as Legislative Facts

Most of the discussion in the literature of ‘extra-record’ facts in negligence cases has centred on the role they play in determination of policy—the social consequences of liability. ‘Policy’ statements in negligence cases have typically concerned such issues as deterrence, loss distribution, and concerns of indeterminate liability. However, judges also often make statements about more general ‘consequences’ of liability.

Example 3.6

For example, a judge may make statements about the psychological effects on children born following a failed sterilisation, when they learn later of litigation against the relevant medical professional. Heydon J stated in Cattanach v Melchior that ‘even if McMurdo P and Davies JA are correct in saying that unwanted or unplanned pregnancies are common, their commonness does not negate the potentiality of harm for particular children on learning the facts. It is one thing to learn of an unplanned pregnancy which took place because the child was born too soon or because of casual contraceptive failure. It is another thing to learn that not only did an unplanned pregnancy take place after the parents had resolved never to have children again, and had resorted to medical

35 See discussion in Chapter 1.
36 For example see Cattanach v Melchior (2003) 215 CLR 1, 141 [384]-[386].
Judicial use of SF as part of policy determination in negligence cases clearly comes within the ambit of the term ‘legislative fact’ as defined by Davis. As noted above the term ‘legislative fact’ refers to the role extra-record facts play when courts develop law or policy. Woolhandler argues that the ‘paradigmatic legislative fact is one that shows the general effect a legal rule will have and is presented to encourage the decision-maker to make a particular legal rule’. But, what of judicial statements that are not explicitly used as part of a policy determination by a judge and are not necessarily predictive of the future consequences of a legal rule? Judges might, for example, make general background statements of social context which are not directly relevant to a legal rule or issue, or directly at issue between parties.

Context or general background statements were included as SF in this study when they fulfilled the definition of SF—ie they were statements about society, the world, and the nature and behaviour of institutions (including legal institutions) and human beings, and were used as part of judicial development and general application of law. These SF may for example form part of a judge’s creation of the background context or social setting of

58 Ann Woolhandler, 'Rethinking the Judicial Reception of Legislative Facts' (1988) 41 Vanderbilt Law Review 111, 114. She refers to legislative facts as ‘typically predictions about the relative importance of one factor in causing a complex phenomenon’. 

78
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

a case. They may form part of the story or narrative the judge tells in his or her reasons, and may serve a rhetorical function.

Example 3.7

For example, a judge may describe the traditional nuclear family unit as the central and most important foundation group of society.

Example 3.8

A judge may make observations on the nature of society or social changes. "There are probably just as many work-shy or extravagant, or unreliable men now as there were in 1968." Of course, these ‘context’ SF are often far from the neutral statements they may seem and can play a crucial role not only in the determination of the case at hand but in the wider construction of social norms and understandings.

Despite Woolhandler’s characterisation of paradigmatic legislative facts, it appears that Davis intended ‘legislative fact’ to operate as a broad church term which would

---


40 Ibid, 100.

41 For example see Cattanach v Melchior (2003) 215 CLR 1, 22 [35] (Gleeson CJ).


Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

encompass the wide range of facts which help a court to ‘determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take’. Accordingly, SF which set a context or provide background information could also be described as legislative facts. However, the work of Monahan and Walker identified how SF might also play other roles in judicial reasoning.

B. SF as Social Authority and Social Framework

The work of Monahan and Walker during the late 1980s and early 1990s recognised that there is a wider spectrum of the use of factual material in judicial reasoning, beyond the adjudicative and legislative paradigms adopted by Davis. In a series of articles Monahan and Walker considered the different roles social science information played in judicial legal reasoning. They noted the influence of Davis’ work, and accepted ‘Davis’ insight that empirical information can play two different roles in legal decision-making’. However, they critiqued his work on the basis that the adjudicative/legislative fact distinction perpetuates ‘the old pre-Realist boundaries of the distinction between “fact”

44 Davis, ‘Judicial Notice’ above n 9, 952. Numerous examples of judicial statements which are not necessarily statements regarding the consequences of legal rule or legal liability, and which are more in the nature of background or social context facts are given in his 1942, 1955 and 1986 articles.


46 Monahan and Walker, ‘Social Authority’, above n 9, 485.
and “law”.”

They argued that Davis’ notion that facts used to create a rule of law should be treated differently from other facts is a ‘largely negative proposal’. It provided no ‘clear direction regarding how courts should obtain social science data’, evaluate social science data or what ‘effect they should give to the evaluation of other courts.’

Monahan and Walker found the conceptual basis of Davis’ work inadequate to resolve the central questions they asked about how courts should obtain and use social science data. From a jurisprudential perspective, they sought to engage with Davis’ work on the basis that he was wrong when he treated social science material as ‘fact’. Davis’ binary categories, they argued, were based on the way legal formalists would have artificially divided law from fact, a division which failed to recognise the other sources of information relevant to judicial decision-making.

The underlying premise of the body of Monahan and Walker’s work dealing with the use of social science in law is that courts should treat social science research as a source of authority rather than as a source of facts. They argued that social science research can be legitimately treated as like law (authority) at least for some legal purposes where to do so would prove to be ‘most useful for the legal process’. They proceed then on the basis

---

47 Ibid.
48 Ibid.
49 Ibid.
50 Ibid, 487.
51 Ibid, 486-7.
52 Ibid, 494-5. Monahan and Walker defend this argument against criticisms that it ignores the fact that social science research lacks the official sanction of legal authority on several bases including that common law courts of the United States and England have routinely incorporated similar materials into the common law for centuries, for example through the incorporation of custom into areas such as property and contract law (493). They also rely on the ‘extensive literature in the field of classification’ to argue that
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

that if the legal process will operate more efficiently and fairly by treating social science research like legal authority/legal precedent, then it is feasible to treat it in the same way. They do not suggest social science research is legal authority or precedent. Rather, that given some shared characteristics of social scientific material and legal authority, better legal processes will result from treating social science research in the same way as legal authority rather than fact for some purposes. This jurisprudential treatment of social science research as like legal authority underpins the set of proposals Monahan and Walker develop through their work. These proposals seek to answer questions about how courts should obtain and evaluate social science research, and how courts should treat empirical conclusions established by other courts.

Monahan and Walker categorise the use of social scientific material by judges, by considering ‘three possible legal functions of any knowledge about how the world works.’ The first function, most closely connected to Davis’ notion of legislative fact, is the use of facts like legal authority in the determination of legal rules or policy. This is described as ‘social authority’. Such facts are ‘general, apply beyond the case at bar, and often are treated by judges as if they were legal authority’. For example, social authority material in a negligence case might include social science evidence about the general

the way concepts are categorised in the law should depend on the shared similarities between concepts that are most useful for the relevant purposes (494-5).

53 Ibid.
54 Ibid. Aspects of these proposals have been critiqued by others including Woolhandler (above n 38) and Christopher Nowlin, ‘Should Any Court Accept the "Social Authority" Paradigm?’ (2001) 14(1) Canadian Journal of Law & Jurisprudence 55.
56 Monahan and Walker, ‘Social Authority’, above n 9, 488.
57 Saks, above n 55, 1019.
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

social and economic consequences of a particular finding of liability. Monahan and Walker argue social authority material should be presented in briefs rather than testimony and that judges should be free to locate such material of their own research. 58

The second functional category of social science material proposed by Monahan and Walker reflects the use of general social science knowledge used to determine a particular disputed issue in the case at hand. 59 This use of social science is termed social frameworks. 60 Social framework material is not used to determine general issues of law or policy so can not be considered a legislative fact in Davis’ binary category scheme. 61 It is also not an adjudicative fact. 62 Rather, it provides a ‘framework’ to assist the evaluation of, and ultimate judicial determination of adjudicative facts. 63 This kind of material has traditionally been offered by one of the parties through expert witness testimony. 64 Social framework material could include, for example, general scientific evidence about ‘eyewitness identification, assessments of dangerousness, battered women and sexual victimisation.’ 65 Social framework evidence might be used in negligence actions to

58 Monahan and Walker, ‘Social Authority’ above n 9, 495-502.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid, 560.
65 Ibid, 559-60.
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

determine the adjudicative fact of how a particular party may have acted during the relevant events. For example, a court may receive evidence about the general ability of autistic children to control a horse during a horse riding lesson, to assist in determining the ability of a particular plaintiff child to control a horse.\textsuperscript{66} Again, Monahan and Walker argued that the current procedures for the reception of this form of evidence (via oral expert evidence) are misconceived.\textsuperscript{67} They originally suggested this form of evidence would be better provided by the parties in the form of a written brief or located by the trial judge rather than via expert testimony.\textsuperscript{68} Following criticism of this aspect of their original suggestions, Monahan and Walker have recently accepted that expert testimony may be the ‘most effective mechanism for communicating social framework evidence to juries’.\textsuperscript{69}

The third functional category proposed by Monahan and Walker relates to the use of social scientific evidence relevant to issues in the case at hand. This is referred to as ‘social fact’\textsuperscript{70} and is closely aligned with Davis’ adjudicative fact category.\textsuperscript{71} As discussed below, their use of the term ‘social fact’ should be distinguished from the term SF as used in this study. Monahan and Walker’s ‘social fact’ category includes social science evidence.

\textsuperscript{66} See for example the discussion of this by the NSWCA in \textit{Lloyd v Ohlstein} (2006) Aust Torts Reports 81-866. Special leave to appeal this case to the High Court of Australia was granted ([2007] HCATrans 262) but it appears the case did not proceed.

\textsuperscript{67} Monahan and Walker, ‘Social Frameworks’ above n 45, 560.

\textsuperscript{68} Ibid, 583-98.


\textsuperscript{70} Walker and Monahan, ‘Social Facts’, above n 45, 881.

\textsuperscript{71} Ibid, 881.
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

material directly relevant to the factual issues about and concerning the parties to an action. This might include for example survey material about the perceptions of members of public about the parties’ products in trademark cases,72 or about public perceptions of words or communications used by defendants in defamation cases. This kind of use of commissioned specific social scientific material seems likely to be less common in negligence cases. Monahan and Walker argue that it is the research methodology of the social fact empirical evidence presented that should be recognised as having precedential value, as opposed to results of the individual research.73

What implication then, does the work of Monahan and Walker have for the parameters of the term SF in this study? The most important implication from their work is that there is a range of different roles SF play in judicial law-making. Social science or other judicial statements used to perform a ‘social fact’ function (in Monahan and Walker’s typology) would not be SF in this study because they are adjudicative facts relevant only to the parties to the litigation. Statements which are in the nature of ‘social authority’, similar to ‘legislative facts’, would be included as a SF in this study. The use of facts as ‘social authority’ would on a broad reading of the function of ‘relevant to creating a rule of law’ include the use of SF as social context statements. The introduction of the category of social frameworks expressly recognises that judges might utilise social science material in ways that are neither strictly adjudicative nor legislative. This adds a new dimension to the binary categories of Davis, and recognises that some judicial statements may not fall neatly into either of Davis’ category. Social science material or general

72 Ibid, 880.
73 Ibid, 880 and 887-95. At 887-95 Monahan and Walker more specifically discuss what constitutes the ‘methodology’ and which aspects of methodology should be given precedential status.
judicial statements might also play a role in providing a framework to assess adjudicative facts. Judicial statements of this ‘social framework’ kind are within the ambit of SF in this study.

**Example 3.9**

> For example, assumptions about the effect of alcohol on human beings or how people act when intoxicated may be made to determine the adjudicative fact of how drunk a particular party to an action may have seemed at the relevant point in time.\textsuperscript{74}

All of Monahan and Walker’s three categories are expressly conceptually based around different uses of social scientific or empirical evidence. However, as Davis noted in his work, judges often fail to cite any empirical or other evidence for their legislative fact statements.\textsuperscript{75} Monahan and Walker also utilise the same heuristics (ie social authority and social framework) to describe the use of judicial facts relevant to legal reasoning even where no supporting empirical material would be available. As will be discussed later in this chapter, the term SF used in this study includes judicial statements where no empirical evidence is provided.

To summarise, the concept of SF in this study encompasses the idea that SF play a range of roles in judicial reasoning. Table 3.1 adjacent provides an overview of the types of judicial statements discussed in Sections 1 and 2 thus far, shows whether they are

---

\textsuperscript{74} See for example *Joslyn v Berryman* (2003) 214 CLR 552, 576-7 [75]-[76]. See also the judicial discussion of the effects of alcohol and community knowledge of the effects of alcohol in *Cole v South Tweed Heads Rugby League Football Club* (2004) 217 CLR 469, 475[10][12][13], 478[17], 493[85],499[105], 507[131].

\textsuperscript{75} See n 25.
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

included in the definition of SF in this study, and also indicates how those statements would be treated using the typologies of Davis, and Monahan and Walker.

Table 3.1 Nature and Roles of SF in Judicial Reasoning

<table>
<thead>
<tr>
<th>Nature of Judicial Statement</th>
<th>SF (Burns Content Analysis Study)</th>
<th>Legislative Fact (Davis)</th>
<th>Social Authority (Monahan and Walker)</th>
<th>Social Framework (Monahan and Walker)</th>
<th>‘Social Fact’ (Monahan and Walker)</th>
</tr>
</thead>
<tbody>
<tr>
<td>General policy/ consequences of liability statement</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>General background or context statements</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>General statements used to assess adjudicative facts</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>X</td>
</tr>
<tr>
<td>Specific facts about parties/nature of particular litigation (adjudicative fact)</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>✓</td>
</tr>
<tr>
<td>Statement of law or legal principle</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

C. Confirming the Role of SF in the Content Analysis Study

The parameters of the concept SF in this study was informed by analysis of existing literature, particularly the scholarship of Davis and Monahan and Walker. However, as Kritzer notes socio-legal research rarely proceeds on pure deductive positivist lines.\(^76\) There is a ‘dynamic data-theory interaction that begins almost as soon as data collection begins’.\(^77\) As data from the content analysis was collected it was used to test and confirm the definition of SF. The results of the content analysis study\(^78\) confirmed that judges used SF in a range of different ways in reasoning in negligence cases.

First, the study identified examples of SF that referred to the potential consequences of negligence liability or that predicted or promoted particular policy or social outcomes. This confirms the arguments made by others, including Witting and Luntz,\(^79\) that despite the High Court’s reluctance to confirm the role of ‘policy’ in judicial reasoning in Australian negligence cases, policy arguments are still often used in

---

\(^76\) Herbert M Kritzer, "Data, Data, Data, Drowning in Data": Crafting The Hollow Core (1996) 21 Law and Social Inquiry 761, 761.


\(^78\) The results of the content analysis are discussed fully in Chapters 4-6, however examples of data are given in this chapter to demonstrate the roles that SF play in judicial reasoning in negligence cases.

Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

negligence judgments in the High Court. Examples of SF identified in this study (in italics) that were in the nature of ‘policy’ statements included:

The damages are not indeterminate. That they should be awarded is also consistent with the underlying notion that their availability in tort serves as a measure of deterrence of tortious conduct.

The rejection of this appeal will reinforce indifference and belated and formal offers of transport by a club where proper standards of reasonable care require a significantly more prompt and higher standard of attention to the case of such a vulnerable individual.

Risk of action does no doubt conduce to the defensive practice of a profession, in turn leading to delay and unnecessary expense.

To the extent that an immunity to liability for negligence and nuisance is afforded, exceptionally, to highway authorities, a burden of loss distribution is imposed on the victims of the neglect of such authorities. The immunity obliges those victims to bear the economic, as well as personal consequences, even of gross and outrageous neglect and incompetence.

... the majority reasoning tends to generate litigation about children capable of causing the children distress and injury if they bear about it.

One consequence is that actions mounted, and defences pleaded upon the basis of the law as it was previously understood will become worthless. Another is that affairs which have been arranged on the basis of the prior understanding of the law, have to be, if they can be, rearranged, or may be set at nought.

Second, the study found that judges also used SF in ways that Monahan and Walker would identify as social framework. These ‘social framework’ SF were used as part of judicial evaluation of the adjudicative facts about parties to the litigation. They were also

80 See the further discussion of this in Chapter 7 section 2.
84 Brodie v Singleton Shire Council (2001) 206 CLR 512, 603 [235] (Kirby J).
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

used as part of judicial reasoning about whether particular elements of negligence were satisfied on the facts of the case (for example the nature or severity of a particular risk, whether a particular risk was foreseeable, whether appropriate precautions were taken by a defendant or whether a breach of duty had occurred). Examples of ‘social framework’ SF (in italics) identified in the study where judges explicitly used SF as part of evaluating adjudicative facts or as part of the application of the law to adjudicative facts, included:

They have a loving relationship with a healthy child. It does not involve any special financial or other responsibilities that might exist if, for example, the child had an unusual and financially burdensome need for care. The financial obligations which the respondents have incurred, legal and moral, are of the same order as those involved in any ordinary parent-child relationship.\(^87\)

In a social, as in a commercial, context, the risk of injury associated with the consumption of alcohol is not limited to cases where there is an advanced state of intoxication. Depending upon the circumstances, a guest who has had a few drinks and intends to drive home may be at greater risk than a guest who is highly intoxicated but intends to walk home.\(^88\)

The notion that the appellant, as far gone and as offensively abusive as she was, would have been amenable to counselling, or simple restraint, or indeed to any measures intended to restore her composure, is fanciful. Forceful restraint was out of the question. No sensible person would ever remotely contemplate such a course, capable, as it would be, of leading to a physical altercation, an assault, and the possibility of criminal and civil proceedings in relation to it.\(^89\)

The respondent said that she was driving in second gear because of the steep fall of the road. Having regard to the fact that the bend in the road was to the left, any natural inclination on the part of a descending driver would probably have been to the left, not to the right-hand side where the road fell away.\(^90\)

The method of work instituted by the appellant was primitive. The instrument provided to the respondent and his assistant was akin to that used in the building of the pyramids. It was not part of a system appropriate to a contemporary Australian workplace.\(^91\)


\(^{89}\) Ibid, 504 [125] (Callinan J).


\(^{91}\) Liftronic Pty Ltd v Unver (2001) 179 ALR 321, 346-7 [96] (Kirby J).
Entrants might (like the respondent in the present case) be momentarily distracted. The occupier will generally have more time and occasion to consider issues of risk and safety than short-term entrants.  

Third, the study identified SF that were used more generally (rather than specifically) to frame judicial assessment of the circumstances pertaining to a case, were used by judges to provide a context or general background to judicial reasons, or formed part of general judicial rhetorical reasoning. For example, in *New South Wales v Bujdoso* the unanimous High Court commented that ‘many of the people in prisons are there precisely because they present a danger, often a physical danger to the community’, and noted the propensity of prisoners to do ‘grave physical injury to other prisoners’. It was acknowledged as ‘notorious’ that those convicted of sexual offence against minors were at greater risk of harm. In *Cole v South Tweed Heads Rugby League Football Club* judges discussed the management practices of publicans and the nature of publican and customer relationships which should not be unduly disturbed. In a range of cases judges discussed the work practices of police, how police act in investigations, how police resources are deployed, and the nature of police intelligence gathering. In several cases judges discussed the nature of commercial building and commercial development of premises and land. In *Hollis v Vabu Pty Ltd*
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

members of the court discussed the magnitude of the ‘purchase and maintenance of a bicycle’ and Callinan J peered into the minds of bicycle couriers:

The provider of a bicycle and his or her services may wish to retain his or her freedom to work or not to work and a measure of independence just as keenly as a computer programmer whose resources are a computer, learning, experience and skills. The modesty of the means of doing the work, a bicycle and other minor equipment, and the relatively unskilled capacity to ride it are not to be denigrated on those accounts.

Judges in Neindorf v Junkovic discussed the nature of residences of ‘ordinary people’, how they maintain those premises, the frequency of defects in ordinary people’s houses, and the nature of hazards in ordinary houses. In the same case, garage sales were described as a ‘familiar event in Australian suburbia’. Kirby J noted that painted lines to delineate surface hazards were ‘extremely cheap to instal’. In NSW v Lepore members of the court commented on the nature of school children, the nature of teaching, practices school authorities could take to prevent child sexual assault, and the prevalence of sexual assault. In a case that concerned physical injuries which occurred in a school

---


102 Ibid, 649 [69] (Kirby J).

Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

playground, judges commented on a range of factors including the nature of school students, and the nature and costs of playground supervision. The majority of judges in that case indicated that continuous supervision by teachers would damage the child-teacher relationship and retard child development.

There were other more general examples of context or background SF. A selection is referred to below to give an indication of the breadth and variety of SF referred to by the High Court:

Many Australians are as dedicated to cricket as the English.

Corporations can only think, decide and act by natural persons.

It is accepted as relevant that the social context in which this issue is to be resolved is that of a secular society, in which attitudes towards control over human reproduction have changed.

Such thinking (like the earlier notion of enforced adoption) 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.
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

There are many forms of excessive eating and drinking that involve health risks.\textsuperscript{110} As increasing numbers of people live to great ages, creating a wider need for care, the question of how far defendants who have tortiously injured carers of those people should be liable becomes both an important question and a question on which the opinions of citizens may differ sharply.\textsuperscript{111}

Journalists and publishers regularly negligently inflict harm upon persons about whom they write or speak.\textsuperscript{112}

The days have long passed (some 2400 years or so) since medicine could be described as simply an art and not largely or entirely a science.\textsuperscript{113}

The magnitude of the risk of being involved in a motor car accident is very high, and the risk could be minimised, if not eliminated, by no car ever travelling at more than 10 kilometres per hour. But few would contend that travelling at 10 kilometres per hour was the only reasonable response to the risk of a motor car accident.\textsuperscript{114}

Conducting any enterprise carries with it a variety of risks.\textsuperscript{115}

In a rights-conscious and litigious society, in which people are apt to demand reasons for any decision by which their rights are affected, the trend away from jury trial may be consistent with public sentiment.\textsuperscript{116}

In summary, the SF identified in the content analysis of High Court negligence cases from 2001-2005 were not only statements of ‘policy’ or about consequences of liability. As identified by Davis and Monahan and Walker, ‘extra-record’ judicial statements do indeed serve a range of roles in judicial reasoning. In negligence cases (as in other cases) they are used by judges to provide context and background, as part of judicial evaluation.


\textsuperscript{111} CSR Limited v Eddy (2005) 226 CLR 1, 32 [65] (Gleeson CJ).

\textsuperscript{112} D’Orta-Ekenaik e v Victoria Legal Aid (2005) 223 CLR 1, 112 [360] (Callinan J).

\textsuperscript{113} Ibid, 115 [366] (Callinan J).


\textsuperscript{115} New South Wales v Lepore (2003) 212 CLR 511, 588 [221] (Gummow J, Hayne J).

Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

of adjudicative facts and as ‘policy’ statements or evaluation of the consequences of liability.

3. SF COME FROM A RANGE OF SOURCES

The definition of SF in this study does not require that a SF be sourced to empirical (or other) evidence and does not require that where a source is cited it comes from a particular discipline. Monahan and Walker expressly recognised that judges do not always have available empirical research that adequately addresses the empirical questions they wish to ask.\(^{117}\) They addressed what a court should do when ‘it recognises that a case turns in significant part upon an empirical proposition, yet no credible data exist to support or refute that proposition.’\(^{118}\) They adopt the same ‘heuristic’ terms of social authority, social fact and social framework to describe how they believe that judges should deal with circumstances where empirical evidence is unavailable.\(^{119}\) However, the striking thing about the approach offered by Monahan and Walker to characterise situations where there is a lack of empirical evidence, is that it is expressly based upon there being no available empirical evidence. Their heuristic categories do not involve any concept of judges failing to seek out empirical evidence where it might be available.

Outside of this study there is evidence that Australian courts do not always, or even often, refer to empirical evidence in support of SF.\(^{120}\) While some SF may (at least notionally) have a basis in an empirical discipline such that empirical evidence could be

\(^{118}\) Ibid, 570.
\(^{119}\) Ibid, 571.
sought out, this is certainly not true of all (or even many) SF. SF may be highly contentious by scientific standards or unsupported by available empirical evidence. SF may not be stated in a way that is falsifiable in scientific terms. Given this, the concept of SF in this study included statements made by judges where there was no apparent attempt to refer to or source empirical material that might have been available. As will be discussed in Chapters 4-6, SF used by High Court judges in negligence cases may even conflict with available empirical evidence.

A number of studies have confined the definition of ‘social fact’ to those statements sourcing from particular disciplines. As indicated in earlier chapters, the only existing Australian study of the use of ‘social facts’ by an Australian court was undertaken by a judge of the Family Court of Australia, Graham Mullane. This study considered ‘social facts’ (as defined by Mullane) in a sample of 1992 Family Court custody decisions. The term ‘social fact’ was defined by Mullane for the purposes of his study as a statement ‘concerning human behaviour’. He indicated the basis for ‘social facts’ may be ‘revealed’ by social scientific disciplines such as ‘history, psychology, sociology, anthropology, political science and related fields.’ Mullane’s definition of ‘social fact’ is similar to that adopted by English and Sales. English and Sales defined behavioural and ‘social facts’ as being proven rather than unproven ‘facts’ about human behaviour.

121 Many SF are not inherently probably even capable of being scientifically tested—for example how could we test a value statement such as ‘Human life is inherently valuable’.

122 Mullane, above n 120. The methodology of Mullane’s study was discussed in Chapters 1 and 2.

123 Ibid, 434.

124 Ibid.

Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

and human social interactions. They argue these facts source from behavioural and social sciences such as ‘psychology, sociology, criminology, family studies, communications, economics, linguistics, anthropology and political science’.

Both Mullane’s and English and Sale’s definition of ‘social fact’ are quite narrow. They are focussed only on human behaviour, rather than wider issues such as institutional behaviour and general assumptions about how society and the world operate. This study defined the term SF in much wider terms and does not require that SF are referenced to or have a notional basis in an empirical discipline. Of course, SF stated with a reference to empirical evidence are included in the SF definition. Assumptions about human behaviour and knowledge are clearly often relevant to the determination of negligence cases. However, as noted in Section 2, judges of the High Court of Australia make a much broader range of SF statements in negligence cases. Some SF may notionally have a basis in a social science, others may have a notional basis in some other scientific discipline. Some may have no notional empirical basis at all.

4. SF ARE A ‘MESSY BUSINESS’

Sections 1-3 have discussed the parameters of the term SF used in this study. However, in any form of empirical research including qualitative research ‘inevitably there will be

---

126 Ibid, 9.
127 Ibid.
128 For example, assumptions about how reasonable people might behave are closely connected to a number of negligence elements including breach, causation and contributory negligence. Assumptions about the effect of liability on human behaviour may also be relevant, and are reflected in traditional policy concerns such as deterrence and indeterminate liability.
129 Kritzer, above n 5.
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

lots of things that do not fit’. Chapter 2 discussed the coding instructions used in the content analysis and how this issue was generally dealt with by coding. However, there is one particular aspect of difficulty in defining SF in negligence cases that needs further discussion. As Stapleton points out, there is a difficulty in categorising some kinds of judicial statements in negligence cases as either principle or policy. These include judicial statements that indicate underlying ‘legal values’ such as respect for human life or indeterminacy. It is probably also impossible that there can ever be a strict definition of the difference between statements of legal principle (law) and factual finding (fact). Many statements made by judges include elements of both, and it is beyond the purposes of this study to enter the taxonomic debate about the difference between fact and law. However, for the purpose of defining SF for the content analysis of High Court negligence cases, some arbitrary or bright line boundaries had to be drawn between some of the categories of judicial statements.

As indicated above, statements framed by judges as bare general legal propositions even though they may have included underlying and un-stated SF were not considered SF in this study. This is because they were used in the case in which they appeared in this study in a way more akin to ‘law’ or legal principle. In addition, they were not positive

130 Ibid, 274.
132 Others have long considered the traditional distinction between law and fact to be ‘flawed’. See for example Ronald Allen and Michael Pardo, ‘The Myth of the Law-Fact Distinction’ (2003) 97 Northwestern University Law Review 1769 which discusses the attempt to find the ‘essential’ difference between two as ‘doomed from the start’ (1769).
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

statements about society, the world, and the nature and behaviour of institutions and human beings.

Example 3.10

Statements that the law values life or the law does not encourage indeterminacy would not be a SF. Nor would the following judicial statement in *D’Orta-Ekenaïke v Victorian Legal Aid* about the ‘tenet’ of finality. ‘A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.’

However, positive statements of consequence framed in terms of ‘values’ were included as SF. Judicial statements about what society and community values are, were included as SF. Judicial statements that identified underlying ‘policy’ assumptions of the law were also included as SF on the basis they were positive statements about society, the world, and the nature and behaviour of institutions and human beings.

Example 3.11

For example judicial statements that particular legal rules will encourage deterrence, due administration of justice, fulfilment of legitimate expectations for compensation, or that liability will not lead to an indeterminate number of claims would be SF. Judicial statements such as society accepts that all human lives have value would also be SF. SF also include statements of identification of policy assumptions underlying the law, for

---

133 *D’Orta-Ekenaïke v Victoria Legal Aid* (2005) 223 CLR 1, 17 [34] (Gleeson CJ, Gummow J, Hayne J, Heydon J).
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

example that the underlying assumption of the law is that children will be harmed by litigation.

By way of contrast with the quote from *D’Orta–Ekenaik v Victorian Legal Aid* referred to in Example 3.10, the following judicial statement from the case would be considered a SF. Rather than being stated as a ‘tenet’ of law, the statement is phrased in terms of the effects of particular practices (the settlement of issues between the parties) on the administration of justice.

**Example 3.12**

‘As was said in the joint reasons in *Coulton v Holcombe*: "[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial". *

The approach to all these difficult categories sought to make the distinction between those judicial statements that were essentially in the nature of law, as opposed to those statements which identified a SF underlying the law, or a statement which was about the consequences of law. A judicial statement was always assessed as to whether it fulfilled the overall SF definition of ‘positive statements about society, the world, and the nature and behaviour of institutions and human beings’ which were part of judicial development and general application of law.

---

CONCLUSION

This chapter has further discussed the definition of SF, the roles that SF play in judicial reasoning in negligence cases and the parameters of the term SF in this study. The development of the definition and parameters of the term SF was influenced by existing literature and similar terms used by others. However, it also reflected interaction with the data from the content analysis conducted as part of this study. In this study, a SF is a judicial statement about society, the world, and the nature and behaviour of institutions (including legal institutions) and human beings. There are a number of key aspects of the term SF. First, SF are utilised by judges as part of judicial development and general application of law. The scholarship of Kenneth Culp Davis discussed in Section 1 introduced the influential distinction between adjudicative facts and legislative facts. The core theme in this distinction, that judges use facts in law-making ways, was the starting point for the definition of SF in this study.

Second, Section 2 argued that SF may play a number of roles in judicial legal reasoning—not just the ‘policy’ role assumed in much of the existing tort law scholarship. SF may play a traditional policy role, and may be used to set a background or social context. These ‘roles’ come within the ambit of Davis’ concept of legislative fact. However, SF may also play other roles in judicial reasoning. The heuristics developed by Monahan and Walker to describe the use of social scientific evidence by judges (social authority and social framework) discussed in Section 2 have also influenced the development of the concept of SF in this study. In particular, Monahan and Walker identified the limitations of Davis’ binary distinction between adjudicative and legislative facts to describe all uses
Chapter 3 What are Social Facts? What Role do Social Facts Play in Judicial Reasoning in Negligence Cases?

They identified a ‘new’ use of social science as a framework for the evaluation of facts in issue between the parties (‘social framework’). SF will include statements used in this ‘social framework’ manner in judicial reasoning. Section 2, drawing on the results of the content analysis, confirmed the use of SF in differing roles by High Court judges in negligence cases from 2001-2005.

Third, SF may come from a range of sources. This was discussed in Section 3. It is not necessary that a judicial statement have an actual or notional empirical source to be a SF. SF are not restricted to statements of human behaviour or to SF which have a basis in particular disciplines only. Finally, there are inevitably blurred edges in defining and applying terms in empirical research. Section 4 discussed the difficulties in applying the term SF to statements of mixed law, policy and values in negligence cases. Those value statements which are more akin to statements of law will not be considered SF. However, those which include consequence statements or are phrased in terms of social values or underlying policy concerns will be considered SF.

Part 1 (Chapters 2 and 3) has outlined the parameters of the term SF used in this study, and the details of the content analysis used to study judicial use and construction of SF in High Court negligence cases from 2001-2005. The next chapter commences Part 2 (Chapters 4-6) which discusses and analyses the results of that content analysis.
Chapter 4

Content Analysis of Social Facts in Australian High Court Negligence Cases 2001-2005

INTRODUCTION

Part 2 (Chapters 4-6) reports on and analyses the findings of the content analysis of High Court negligence cases from 2001-2005 carried out as part of this study.¹ This chapter focuses on the general findings of the content analysis, the first of its kind to explicitly examine the use of SF² in High Court cases. It discusses how frequently judges used SF in High Court negligence cases,³ the frequency and nature of judicial referencing or sourcing of SF⁴ and patterns of individual judicial use of SF.⁵ Chapters 5 and 6 focus on themes that emerged from an analysis of the text of SF identified in the content analysis and in particular on how judges constructed SF.⁶ Chapter 5 discusses how most SF identified in the study reflected judicial use of ‘common sense’ and ‘common understanding’ and the dangers that can arise from this. Chapter 6 argues that particular values (those which stress the role of the individual in society and individual responsibility, the importance of free enterprise, and the value of traditional social

¹ The methodology for this study was discussed in Chapter 2. Part 2 (Chapters 4-6) predominantly addresses research question 1 (Do judges use SF in negligence cases in the High Court of Australia and how do they use and construct them?).
² SF refers to the singular ‘social fact’ and the plural ‘social facts’.
³ Research questions 3 (III) and 3 (V).
⁴ Research questions 3 (VI) and (VII).
⁵ Research question 3 (IV).
⁶ These chapters explore how judges constructed SF (research question 3 (VIII)).
structures and social elites) were predominantly emphasised in the SF used by judges in the negligence cases studied. Part 3 (Chapters 7 and 8) asks why the patterns of judicial use and construction of SF identified in the content analysis occurred. It discusses the legal, institutional, individual, cognitive and cultural factors which affect judicial use and construction of SF by High Court judges in negligence cases.

This chapter discusses how this study found that judges do use SF in their judgments in negligence cases; however SF do not generally dominate judicial reasoning. Judges did not use SF in all cases in the same way. Judges used SF more in high significance cases, and cases with multiple separate judgments. Judges also used SF more in single and dissent judgments than joint and majority judgments. Most SF referred to by judges were not sourced or referenced in any way. Where a source or reference for a SF was given by a judge it was usually to case law or some other legal source. Judicial reference to empirical research was rare. There were overall commonalities in the way different judges used SF. For example all judges mostly gave no reference for their SF statements, or referred to cases or legal sources. That said, some differences between individual judges emerged with variations in the frequency with which judges used SF in their judgments, and in the manner in which they sourced or referenced SF. Section 1 discusses the number of SF identified overall in the cases studied and the frequency of SF across judgments. Section 2 analyses how judges used SF across each of the 45 High Court cases studied. Section 3 focuses on the sources of SF in judgments. Section 4 analyses the results of the content analysis as they relate to each of the individual High Court judges studied. Finally, Section 5 demonstrates that judicial use of SF appeared to

---

7 Research question 1(III).
be affected by whether a judge was in a single judgment or joint judgment, and whether a judge’s reasons formed part of a dissent or majority decision in a case.

1. **DOES THE AUSTRALIAN HIGH COURT USE SF IN NEGLIGENCE CASES? NUMBERS AND FREQUENCIES**

The results of the content analysis of negligence cases from 2001-2005 clearly show that High Court judges do use SF as part of judicial reasoning in negligence cases, although SF do not generally dominate judicial reasoning. As seen in Table 4.1 below, 1208 separate SF records were identified in the 45 High Court decisions (which included 158 separate judgments and 6676 separate paragraphs of text) studied. This was an average of 26.84 SF for every case studied, 7.65 SF for every judgment studied and one SF for every 5.52 paragraphs of text. As discussed below in Section 2, the frequency and distribution of SF in cases varied according to a range of factors including the significance of the case, and the number of judgments in a case.

---

8 See Table 4.2 below.
Table 4.1 Number and Frequency of SF in Negligence Cases 2001-2005

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Cases(^9)</td>
<td>45</td>
</tr>
<tr>
<td>Total Number SF records(^10)</td>
<td>1208</td>
</tr>
<tr>
<td>Total Number of Judicial Judgments(^11) (Individual and Joint, Dissent and Majority)</td>
<td>158</td>
</tr>
<tr>
<td>Total Number of Judgment Paragraphs(^12)</td>
<td>6676</td>
</tr>
<tr>
<td>SF/Case</td>
<td>26.84</td>
</tr>
<tr>
<td>SF/Judicial Judgment</td>
<td>7.65</td>
</tr>
<tr>
<td>SF/Paragraph</td>
<td>1 SF per 5.52 paragraphs</td>
</tr>
</tbody>
</table>

The findings of the content analysis showed that SF played a role in judicial reasoning in negligence cases. The nature of these roles (context, background, social framework, policy) was discussed in Chapter 3. However, the role of SF in judicial reasoning in negligence cases did not generally outweigh the role of other traditional sources of legal reasoning such as legal principles and adjudicative facts. As Table 4.1 shows, the majority of text in negligence decisions in the High Court of Australia was made up of statements that were not SF—statements that were legal principles, adjudicative facts and

---

\(^9\) See Appendix 2.1.

\(^10\) This is the total number of individual SF records recorded for all cases as discussed in Chapter 2.

\(^11\) Each separate judgment, either individual or joint, was counted for each case.

\(^12\) The total paragraphs of the judgments in each case were counted and added together.
statements which were in the nature of ‘legal’ values. There was, on average, one SF statement for every 5.52 paragraphs of text of judicial reasons. The traditional sources of legal reasoning (legal principles and adjudicative facts) still generally dominated judicial reasoning in negligence cases. This study argues that there are inter-related and interdependent legal, institutional, individual, cognitive and cultural factors which explain why judges use and construct SF as they do, including why they rely predominantly on legal principles and values and adjudicative facts. This complex explanatory framework is discussed in Chapters 7 and 8. However, by way of example, the adversarial system and the institutional structure of the High Court privilege the provision of legal information to judges, and do not support the provision of SF information to judges. In addition, the culture of the legal profession, traditional legal training and positivist views of judicial reasoning tend to view judicial reasoning as a closed system of legal rules and adjudicative facts. These factors likely contribute to the dominance of legal principles and adjudicative facts in judicial reasoning identified in this study.

However, as discussed in Section 2, judicial use of SF in negligence cases was not uniform. The results shown in Table 4.1 are average results across the 45 cases studied. The next section shows that there were clusters of cases where SF were more frequently used by judges, and clusters of cases where SF were used very little. This adds an extra level of complexity to how we understand judicial use of SF in negligence cases, and the role of SF in judicial reasoning. In some categories of negligence cases it appears SF have a quite important role to play in judicial reasoning, while in other categories of negligence case SF facts have little or no role to play.

13 For examples matters such as coherency and consistency.
2. INDIVIDUAL CASES AND SF

This section considers the frequency of judicial use of SF across the 45 cases studied. The analysis of the cases studied showed that SF were not used in a uniform way across negligence judgments. A number of factors affected how frequently SF were used in a particular case. The inter-related factors that appeared to influence the frequency of judicial SF in a case were the significance of the case and the number of judgments in a case. As will be demonstrated below, judges tended to use SF more in ‘high significance’ cases, and cases with higher numbers of judgments.

Each individual High Court negligence case studied was coded for a number of factors. These included the number of individual judgments, the number of joint judgments and single judgments, the number of dissent judgments and majority judgments, the length of the case in paragraphs, and the significance of the case. Cases were coded as high significance, medium significance or low significance. There were 16 high significance cases, 21 medium significance cases and eight low significance cases. The total number of judicial SF for each case was also extracted from the overall SF database. These factors

14 Chapter 2 discusses how cases were coded as high significance, medium significance and low significance. High significance cases were those cases which would be considered the most complex and important from the perspective of the High Court, the legal profession and the academy. These cases were typically difficult and complex, related directly to one of the elements of negligence law, involved an unresolved or novel issue, involved 5-7 High Court judges, were reported in the CLR, and were highly cited in cases and discussed in journal articles in the five years following the decision. Medium and low significance cases were typically cases of (relatively) lesser importance, difficulty and complexity, less likely to involve all of the judges of the High Court, less likely to involve novel, difficult and complex issues directly related to elements of negligence, less likely to be reported in the CLR, and comparatively less cited by other judges or written about by scholars in the five years following the decision.

15 See the discussion of coding in Chapter 2.

16 This included joint judge and single judge judgments within a case.
are represented for each case studied (with an abbreviated name17) in Table 4.2 adjacent, which also shows the cases organised in order from the highest number of SF (Cattanach v Melchior with 167 SF) to lowest number of SF (Czatyko v Edith Cowan University and Manley v Alexander with zero SF).

17 Full case names and citations are referred to in Appendix 2.1 in Chapter 2.
### Table 4.2 Individual Cases and SF

<table>
<thead>
<tr>
<th>Case Name</th>
<th>No: SF</th>
<th>No: Para</th>
<th>Judgments (single + joint)</th>
<th>Diss J</th>
<th>Maj J</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Cattanach v Melchior</td>
<td>167</td>
<td>414</td>
<td>6</td>
<td>3</td>
<td>3</td>
<td>H</td>
</tr>
<tr>
<td>2. D'Orta-Ekenaikie</td>
<td>138</td>
<td>388</td>
<td>4</td>
<td>1</td>
<td>3</td>
<td>H</td>
</tr>
<tr>
<td>3. De Sales v Ingrilli</td>
<td>75</td>
<td>198</td>
<td>5</td>
<td>1</td>
<td>4</td>
<td>H</td>
</tr>
<tr>
<td>4. Tame v NSW</td>
<td>73</td>
<td>367</td>
<td>6</td>
<td>0</td>
<td>6</td>
<td>H</td>
</tr>
<tr>
<td>5. Woods v Multi-Sport</td>
<td>71</td>
<td>170</td>
<td>5</td>
<td>2</td>
<td>3</td>
<td>H</td>
</tr>
<tr>
<td>6. Woolcock</td>
<td>70</td>
<td>234</td>
<td>4</td>
<td>1</td>
<td>3</td>
<td>H</td>
</tr>
<tr>
<td>7. Brodie</td>
<td>61</td>
<td>382</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td>H</td>
</tr>
<tr>
<td>8. Lepore</td>
<td>45</td>
<td>354</td>
<td>6</td>
<td>1</td>
<td>5</td>
<td>H</td>
</tr>
<tr>
<td>9. Cole</td>
<td>43</td>
<td>133</td>
<td>5</td>
<td>2</td>
<td>3</td>
<td>H</td>
</tr>
<tr>
<td>10. Rosenberg v Percival</td>
<td>41</td>
<td>224</td>
<td>5</td>
<td>0</td>
<td>5</td>
<td>H</td>
</tr>
<tr>
<td>11. Swain</td>
<td>39</td>
<td>237</td>
<td>5</td>
<td>2</td>
<td>3</td>
<td>M</td>
</tr>
<tr>
<td>12. Graham Barclay Oysters</td>
<td>37</td>
<td>332</td>
<td>6</td>
<td>0</td>
<td>6</td>
<td>H</td>
</tr>
<tr>
<td>13. Neindorf v Junkovic</td>
<td>37</td>
<td>117</td>
<td>4</td>
<td>1</td>
<td>3</td>
<td>M</td>
</tr>
<tr>
<td>14. Vairy</td>
<td>36</td>
<td>227</td>
<td>5</td>
<td>2</td>
<td>3</td>
<td>H</td>
</tr>
<tr>
<td>15. Fox v Percy</td>
<td>33</td>
<td>155</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>M</td>
</tr>
<tr>
<td>16. Whisprun</td>
<td>24</td>
<td>171</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td>M</td>
</tr>
<tr>
<td>17. Dovaro</td>
<td>22</td>
<td>177</td>
<td>6</td>
<td>2</td>
<td>4</td>
<td>M</td>
</tr>
<tr>
<td>18. Hollis v Vabn Pty Ltd</td>
<td>22</td>
<td>124</td>
<td>3</td>
<td>1</td>
<td>2</td>
<td>H</td>
</tr>
<tr>
<td>19. CSR Limited v Eddy</td>
<td>17</td>
<td>128</td>
<td>3</td>
<td>0</td>
<td>3</td>
<td>M</td>
</tr>
<tr>
<td>20. Gifford</td>
<td>16</td>
<td>132</td>
<td>5</td>
<td>0</td>
<td>5</td>
<td>M</td>
</tr>
<tr>
<td>21. Fitzgibbon</td>
<td>15</td>
<td>193</td>
<td>6</td>
<td>2</td>
<td>4</td>
<td>M</td>
</tr>
<tr>
<td></td>
<td>Case Name</td>
<td>Rel</td>
<td>Pub</td>
<td>Trea</td>
<td>Adv</td>
<td>Leta</td>
</tr>
<tr>
<td>---</td>
<td>----------------------------</td>
<td>-----</td>
<td>-----</td>
<td>------</td>
<td>-----</td>
<td>------</td>
</tr>
<tr>
<td>22.</td>
<td>Suvaal</td>
<td>13</td>
<td>151</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>23.</td>
<td>Tepko Pty Ltd</td>
<td>12</td>
<td>172</td>
<td>4</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>24.</td>
<td>Liftronic Pty Ltd</td>
<td>11</td>
<td>102</td>
<td>4</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>25.</td>
<td>Pledge</td>
<td>10</td>
<td>51</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>26.</td>
<td>Hadba</td>
<td>10</td>
<td>51</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>27.</td>
<td>Jones</td>
<td>9</td>
<td>86</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>28.</td>
<td>Layburt</td>
<td>8</td>
<td>40</td>
<td>3</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>29.</td>
<td>Mulligan</td>
<td>7</td>
<td>84</td>
<td>5</td>
<td>0</td>
<td>5</td>
</tr>
<tr>
<td>30.</td>
<td>Koehler v Cerebos</td>
<td>6</td>
<td>58</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>31.</td>
<td>Hoyts Pty Ltd v Burns</td>
<td>6</td>
<td>77</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>32.</td>
<td>Joslyn v Berryman</td>
<td>5</td>
<td>159</td>
<td>4</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>33.</td>
<td>Thompson v Woolworths</td>
<td>5</td>
<td>43</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>34.</td>
<td>Sullivan v Moody</td>
<td>4</td>
<td>66</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>35.</td>
<td>Andar Transport</td>
<td>4</td>
<td>132</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>36.</td>
<td>Frost v Warner</td>
<td>3</td>
<td>86</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>37.</td>
<td>Bujdoso</td>
<td>3</td>
<td>52</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>38.</td>
<td>Derrick v Cheung</td>
<td>3</td>
<td>17</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>39.</td>
<td>HTW Valuers</td>
<td>2</td>
<td>70</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>40.</td>
<td>Anikin v Sierra</td>
<td>2</td>
<td>88</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>41.</td>
<td>Amaca Pty Ltd</td>
<td>1</td>
<td>27</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>42.</td>
<td>Shorey v PT Limited</td>
<td>1</td>
<td>89</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>43.</td>
<td>Willett v Futcher</td>
<td>1</td>
<td>56</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>44.</td>
<td>Czatycko</td>
<td>0</td>
<td>18</td>
<td>1</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>45.</td>
<td>Manley</td>
<td>0</td>
<td>44</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>
Chapter 4: Content Analysis of Social Facts in Australian High Court Negligence Cases 2001-2005

A. Case Significance and SF

An analysis of the data in Table 4.2 above, shows that cases which concerned complex, novel or highly disputed legal issues during 2001-2005 (which were coded as high significance cases) were more likely to include larger numbers of judicial SF statements. These included high profile cases during 2001-2005 such as Cattanach v Melchior\(^{18}\) (wrongful birth) with 167 SF, D’Orta-Ekenaike v Victoria Legal Aid\(^{19}\) (advocates’ immunity) with 138 SF, Tame v New South Wales\(^{20}\) (duty of care for psychological injury) with 73 SF, Brodie v Singleton Shire Council\(^{21}\) (road authority immunity) with 61 SF, New South Wales v Lepore\(^{22}\) (non-delegable duty/vicarious liability) with 45 SF and Cole v South Tweed Heads Rugby League Club\(^{23}\) (alcohol server’s liability) with 43 SF. Cases which primarily concerned lower significance issues such as procedural, evidential, or damage calculation issues tended to have much lower numbers of SF. These included cases such as Czatyrko v Edith Cowan University\(^{24}\) (contributory negligence on application of adjudicative facts) with zero SF, Shorey v PT Ltd\(^{25}\) (determination of whether expert witness withdrew opinion and effect of this) with one SF, Willett v Futter\(^{26}\) (assessment of damages,

\(^{19}\) D’Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1.
\(^{21}\) Brodie v Singleton Shire Council (2001) 206 CLR 512.
\(^{22}\) New South Wales v Lepore (2003) 212 CLR 511.
\(^{24}\) Czatyrko v Edith Cowan University (2005) 214 ALR 349. Manley v Alexander (2005) 223 ALR 228 (which concerned the interpretation of the relevant adjudicative facts in relation to whether a breach had occurred) also had zero SF.
\(^{26}\) Willett v Futter (2005) 221 CLR 627.
investment advice fees) with one SF and *Amaca Pty Ltd v State of New South Wales*\(^27\) (contribution, powers of court of appeal) with one SF.

As Graph 4.3 demonstrates, high significance cases were clearly the ‘type’ of case where judges were likely to refer to SF as a significant part of their judicial reasoning. Large differences can be seen between the average use of SF by judges in high significance cases, and average judicial use of SF in low and medium significance cases. High significance cases had on average 56.25 SF/case, with medium significance cases having only 12.9 SF/case and low significance cases 4.63/case.

**Graph 4.3 Average Number of SF / Case in each Category of Case**

<table>
<thead>
<tr>
<th>Significance of Case</th>
<th>SF/Judgment</th>
</tr>
</thead>
<tbody>
<tr>
<td>High Significance Case</td>
<td>60</td>
</tr>
<tr>
<td>Medium Significance Case</td>
<td>10</td>
</tr>
<tr>
<td>Low Significance Case</td>
<td>0</td>
</tr>
</tbody>
</table>

\(^27\) *Amaca Pty Ltd v State of New South Wales* (2003) 199 ALR 596.
As Chart 4.4 demonstrates, when the overall group of SF identified in the study were considered, a large majority of all SF came from high significance cases. Nine hundred SF (74.5% of all SF) came from a high significance case, with 271 (22.4%) from medium significance cases and only 37 (3.1%) from low significance cases.

**Chart 4.4 Percentage of Total SF by Case Significance**

There were a small number of ‘outlier’ cases in the data. Judicial reasons in a small number of high significance cases did not refer to particularly large numbers of SF. The most striking example of this is the case of *Sullivan v Moody* with only 4 SF.28 This case concerned the liability of a number of individuals, government bodies and institutions, to fathers who had been wrongly accused of child sexual abuse. It is one of the leading Australian cases on the test for duty of care. The case held that a duty of care was not

---

28 *Sullivan v Moody* (2001) 207 CLR 562. This equated to .06 SF/paragraph of the judgment.
owed to the fathers by the defendants. The court, in a unanimous judgment, rejected the three stage approach\(^{29}\) to determining duty of care in Australia. The judgment stressed the role of principle and not policy in the test for duty of care in Australia.

A number of factors may explain the low number of SF in this case despite its high significance. The case itself could be considered an ‘outlier’ among all the cases coded as high significance in this study such that it is not surprising that the number of SF in the case differed from other high significance cases. The case was a single unanimous judgment of only 66 paragraphs, highly unusual in High Court cases concerning novel or difficult legal issues. There were only eight cases out of the 45 cases studied which had unanimous joint judgments, and *Sullivan* was the only high significance case with a single unanimous joint judgment. Despite its relative brevity and its unanimous judgment, it clearly warranted being coded as a high significance case given its status as a leading High Court case on the principles of duty of care, its treatment of a novel question of duty, and its citation in other cases and in the literature. The High Court was particularly concerned in *Sullivan v Moody* to limit the role of extra-legal concerns and policy in the test for determination of duty of care in Australia. Accordingly, it would have been counter-intuitive for the judicial reasons to then include large numbers of SF. As discussed below, the analysis of data from the content analysis also found there was less judicial use of SF in cases where there were lower numbers of individual judgments. In *Sullivan*, there was only a single unanimous judgment. In addition, as discussed in Section 5, joint majority judgments exhibited the lowest average number of SF/judgment.

\(^{29}\) This is the English approach to determination of duty of care, which requires a consideration of reasonable foreseeability, proximity and whether it is ‘fair, just and reasonable’ to impose liability on the defendant. See *Caparo Industries plc v Dickman* [1990] 2 AC 605.
Finally, Kirby J did not sit as part of the High Court in *Sullivan v Moody*. As Section 4 will discuss Kirby J was the highest judicial user of SF identified in the content analysis.

**B. Number of Judgments and SF**

The number of judgments in a case was also related to the overall number of SF identified in a case. Cases with a larger number of judgments tended to have a larger number of SF. The number of judgments was also typically related to the overall significance or complexity of a case. As can be seen in Table 4.2 high significance cases tended to have larger numbers of total judgments. Graph 4.5 below shows that the larger the number of judgments in a case, the larger the number of average SF in the case. Six judgment cases had an average of 59.8 SF/case, five judgment cases an average of 43.22 SF/case, four judgment cases an average of 36.5 SF/case, three judgment cases an average of 13.88 SF/case, two judgment cases an average of 4.8 SF/case and one judgement cases an average of 2.38 SF/case.

---

30 Kirby J would have dissented from the court on at least the question of the test for duty of care as the five judges who sat in *Sullivan v Moody* expressly rejected the Caparo test which had been supported by Kirby J in previous cases, and also following *Sullivan v Moody*. See *Pyrenees Shire Council v Day* (1998) 192 CLR 330; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 626 [238].
Graph 4.5 Average Number of SF/Case and Number of Judgments in the Case

It is not surprising that cases with a larger number of judgments might have larger total numbers of SF—the more judgments there are in a case, the more opportunity there is for judges to refer to SF. However, this study also directly compared cases where the size of the judicial panel varied between five, six and seven judges. More complex cases often involve all seven of the High Court judges, but this does not always occur. For example, in *Sullivan v Moody* discussed above, only five judges sat on the High Court

---


appeal. Graph 4.6 adjacent allows the direct comparison of 5, 6 and 7 member courts by comparing the average number of SF/judgment for each category of case, rather than the total number of SF/case for each category of case. Higher numbers of judgments in a case was related to higher average numbers of SF/judgment. The more judges sat on a case, the more each judge in that case used SF in their judicial reasons. Cases which had 4-6 judgments produced much higher average SF/judgment than those cases where there were only 1-3 judgments. Six judgment cases had an average of 9.9 SF/judgment, five judgment cases had an average of 8.64 SF/judgment, four judgment cases had an average of 9.13 SF/judgment, three judgment cases had an average of 4.63 SF/judgment, two judgment cases had an average of 2.4 SF/judgment and one judgment cases had an average of 2.38 SF/judgment.
The number of individual judgments in a case affected not only the total number of SF used in the case overall, but it also affected how many SF there were in each individual judgment within that case. The more judgments there were in a case, the more SF there were in the case overall and the more SF there were in each individual judgment in the case. As Section 5 also shows below, there was a difference between how much judges used SF in single judgments and how much judges used SF when they were in a joint judgment with other judges. Judges in single judgments used SF more. In addition, as noted above in this section, there were more SF in high significance cases and most SF came from high significance cases. Why was that so? As discussed above,
Part 3 (Chapters 7 and 8) will argue that there are inter-related and inter-dependent legal, institutional, individual, cultural and cognitive factors that explain judicial use and construction of SF. For example, Chapter 7 will discuss how legal constraints on judicial use of SF appear to restrain judges far less in complex and difficult (or high significance) cases, than in less complex and less difficult cases. Chapter 8 will discuss how cognitive influences, such as those relating to the effects of group composition, can impact upon judicial reasoning with grouping with other judges potentially suppressing the use of SF by each judge.

3. **WHERE DO JUDICIAL SF COME FROM? SOURCES OF SF**

One of the key aspects of the Australian adversarial litigation system is that judicial reasoning should be based on admissible (relevant and reliable) evidence and legal precedent. These principles lie at the very heart of Australian evidence law and practice.\(^{33}\) Judges are not ‘participants’ in the litigation, and generally are not ‘permitted to go outside the evidence present and to act upon information privately obtained’.\(^{34}\) Accordingly, it might initially be expected that where judges use SF in their judgments, those SF will be sourced from admissible evidence from initial and later proceedings of a matter. Where SF are ‘empirical’ in nature (that is they concern social, behavioural or scientific phenomena which have been empirically studied or are capable of empirical study) it might be expected that judges would refer to reliable empirical sources. In an ideal world, those studies would be introduced into evidence by the parties to litigation. However, this section shows how the results of the content analysis conducted in this

---


\(^{34}\) Ibid.
study found that judges most commonly did not refer to a source for SF in their judgments. Where judges referred to a source for a SF, it was typically to a ‘legal’ source such as another case. Judicial reference to empirical material was very rare.

A. How Often did Judges Source or Reference SF?

The majority of SF referred to by judges in the cases studied were not sourced or referenced in any way. Table 4.7 shows that only 26% of all SF used by judges were referenced or sourced. This leaves 74% of all SF used by judges, which were not sourced or referenced in any way. This is further demonstrated in Chart 4.8.

Table 4.7 Sources of SF

<table>
<thead>
<tr>
<th>Total Number of SF</th>
<th>1208</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Number of SF with judicial reference or source</td>
<td>315</td>
</tr>
<tr>
<td>Percentage of SF with judicial reference or source</td>
<td>26%</td>
</tr>
<tr>
<td>Percentage of SF with no judicial reference or source</td>
<td>74%</td>
</tr>
</tbody>
</table>
It is possible (and perhaps sometimes likely) that some of the SF used by High Court judges in the cases studied had an un-stated source such as counsel’s submissions, expert witness testimony or the judge’s own research. It is impossible to come to any conclusion about this from examining only the reasons for judgment using a content analysis method. However, it appears that most SF which were not sourced or referenced were

---

35 Some cases did refer explicitly in some sections to SF evidence which had been given by expert witnesses. For example see Swain v Waverley Municipal Council (2005) 220 CLR 517; Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540. In addition, during the course of this study I reviewed the High Court files for the matters which lead to the decisions in Cattanach v Melbior (2003) 215 CLR 1 and D'Orta-Ekenaikhe v Victoria Legal Aid (2005) 223 CLR 1. Both these High Court files showed some evidence (for example in Counsel's submissions and in Accompanying Material filed on behalf of the parties) that parties do make some references to SF (sourced and unsourced) during their written arguments to the High Court on appeal.

36 An investigation of how judges implicitly use SF material is an area for further research. This question would need to be investigated using different research methods, for example judicial interviews and
drawn from judges’ own general knowledge or intuition.\textsuperscript{37} They were ostensibly based on judicial conceptions of ‘common sense’ or ‘common knowledge’. Chapter 5 and 6 argue that there are particular dangers that can arise from judicial use of ‘common sense’ or ‘common knowledge’, which impact on the accuracy of judicial reasons and restrict the inclusion of the perspectives of marginalised groups and less dominant cultural worldviews\textsuperscript{38} in judicial reasoning. Chapters 7 and 8 will argue that there are complex inter-related and interdependent legal, institutional, individual, cultural and cognitive factors which explain why it is unsurprising, on closer examination, that judges do not generally provide sources for SF. For example, as noted above, there are some legal and institutional impediments to the supply of good quality SF material to judges. In addition, particular cognitive factors\textsuperscript{39} may unconsciously encourage judges to assume that their own ‘common sense’ in fact represents reality.

**B. What Kind of Sources did Judges Refer to?**

The content analysis study found that 26\% of judicial SF referred to a source or reference in some way. There were 351 SF reference categories\textsuperscript{40} recorded for the 315 surveys, or by using a different form of content analysis to investigate how SF in counsels’ submission (oral and written) or expert evidence are reflected in judicial reasoning.

\textsuperscript{37} This is discussed further in Chapter 5.

\textsuperscript{38} Cultural worldview refers to one’s preferences about ‘how society should be organised’. See discussion in Dan Kahan and Donald Braman, ‘Cultural Cognition and Public Policy’ (2006) 24 \textit{Yale Law and Policy Review} 147.

\textsuperscript{39} For example the availability heuristic and the representative bias.

\textsuperscript{40} Each SF record was reviewed and it was determined what kind of reference or source it referred to or contained. The case was coded for each ‘category’ of reference or source the SF referred to, rather than the total number of references or sources referred to by the SF. For example a SF which was referenced to four cases and one secondary source was coded once for the case category and once for the secondary source category.
referenced or sourced SF. Some SF were referenced or sourced by judges to more than one kind of reference or source, resulting in a higher number of categories recorded than referenced SF. For example, a single SF might be referenced to both cases and a secondary source, which would have resulted in case category and a secondary source category being recorded for that SF. As noted in Table 4.9 adjacent, the source for SF most frequently referred to by judges were cases (57% of all category entries).

41 For example in Cattanach v Melchior (2003) 215 CLR 1, 88 [240] Hayne J referred to the fact that ‘sterilisation procedures have been available and used for much of the 20th century.’ This was sourced at n 454 to a 1934 American case Christensen v Thomby 255 NW 620 (1934) and a 1930 journal article Miller and Dean, ‘Liability of Physicians for Sterilisation Operations’ (1930) 16 American Bar Association Journal 156.
Table 4.9 Sources of Referenced SF

<table>
<thead>
<tr>
<th>Total Number SF Category Records</th>
<th>35142</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number SF referenced to cases</td>
<td>200</td>
</tr>
<tr>
<td>Overall % Case References</td>
<td>57%</td>
</tr>
<tr>
<td>Number SF referenced to Secondary Source</td>
<td>62</td>
</tr>
<tr>
<td>Overall % Secondary Source References</td>
<td>17.66%</td>
</tr>
<tr>
<td>Number SF referenced to Empirical Evidence</td>
<td>14</td>
</tr>
<tr>
<td>Overall % Empirical Evidence Reference</td>
<td>4%</td>
</tr>
<tr>
<td>Number SF referenced to Other Source</td>
<td>75</td>
</tr>
<tr>
<td>Overall % Other Source Reference Category</td>
<td>21.37%</td>
</tr>
</tbody>
</table>

The second most common source referred to was ‘other source’ (21.4% of all category entries). Most references in this category were to legal sources such as legislation, expert evidence or general evidence, and counsel submissions. There were also some references to law reform commission reports, other government reports and international instruments and covenants. The third most common category of source for SF was

42 This number exceeds the total number of referenced SF (315) as some SF were referenced to more than one category of source (eg to cases and to secondary sources). Each category was only counted once for each SF record. For example, if a SF was referenced to five cases and one secondary source that resulted in a record which coded the case category and the secondary source category once each. This method of coding tends to significantly underestimate the prevalence of case references as many SF were referenced to more than one case.
secondary sources such as books and articles\textsuperscript{43} (17.66\% of all category records). The least common form of reference was empirical sources with only 14 SF (out of 1208 SF in total) citing an empirical source or reference (only 4\% of all SF category entries, and 1.16\% of all SF). Chart 4.10 below represents what proportion of overall SF category references is made up by each of the four categories.

\textit{Chart 4.10 Types of SF References}

Traditional legal sources such as cases, legislation and expert evidence, predominated the sources used by the judges for SF. However, as will be discussed in Chapter 5, ‘legal’ sources can be poor quality sources of SF information. The use of existing cases tends to simply reproduce judicial ‘common sense’ from one case to the next with the potential

\textsuperscript{43} These books and articles were predominantly legal books and articles. Books or articles which were published empirical studies were counted in the empirical evidence category.
errors this brings. There is some evidence in the data from the content analysis that occasionally this problem might be circumvented when the cases referred to by a judge to support a SF, themselves considered empirical or expert evidence related to the SF. This appears to have occurred in respect of a number of SF identified in the content analysis which concerned the reliability of assessments of witness credibility.\textsuperscript{44} However, this raises the further problem of potential judicial reliance on empirical findings (via an existing precedent) which are old and outdated.\textsuperscript{45}

There was evidence that in a number of cases High Court judges drew on expert witness testimony or evidence given during the case as the basis for their SF statements. For example in \textit{Cole v South Tweed Heads Rugby League Football Club}, Kirby J quoted from and accepted part of the expert report of a pharmacologist detailing the effects of alcohol consumption.\textsuperscript{46} A number of judges in \textit{Graham Barclay Oysters Pty Ltd v Ryan} referred to SF about the nature of the oyster growing process, and the process by which oysters can be subject to viral contamination.\textsuperscript{47} There were a number of SF identified in \textit{Swain v Waverley Municipal Council} where judges referred to expert evidence about the hazards of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{45} See the further discussion of this in Chapter 5. The most recent empirical source noted in the material referred to in the \textit{Trawl} and \textit{SRA} cases (as cited in Fox v Percy (2003) 214 CLR 118) was 25 years old at the time of judgment in Fox v Percy.
\item \textsuperscript{46} Cole v South Tweed Heads Rugby League Football Club (2004) 217 CLR 469, 498 [103].
\end{itemize}
\end{footnotesize}
swimming, and the nature of beaches and beach formation. In *Woods v Multi-Sport Holdings Pty Ltd*, judges referred to expert evidence on issues such as the nature and history of indoor cricket as a sport, frequency of eye injuries in sport including indoor cricket, wearing of helmets and protective equipment in sport generally. This judicial use of expert witness statements and testimony shows the potential of expert reports and testimony to introduce reliable SF information to the High Court. Unfortunately, despite some judicial reference to this kind of evidence in a number of cases it was not a widespread source for judicial SF.

As noted above in Table 4.9, there were only fourteen instances where a judge provided some kind of direct empirical source for a SF. Examples of these included references by McHugh J to an Australian Institute of Health and Welfare report on costs of injury, and references by Kirby J to a report prepared by the National Centre for Social and Economic Modelling Pty Ltd for AMP setting out the costs of child-raising and to the

---


128
Chapter 4: Content Analysis of Social Facts in Australian High Court Negligence Cases 2001-2005

Kinsey reports (of 1948 and 1963) on human sexuality. Justice Kirby has had a long affiliation with the Kinsey Institute and has spoken of the influence of the Kinsey research on his own life, so had a long personal familiarity with the Kinsey Reports. The report on the costs of raising children was referred to in Appellants Written Submissions to the High Court during the hearing of Cattanach v Melchior and a copy was provided to the High Court as part of the accompanying materials filed for the Appellants. Most of the empirical sources cited were research carried out by government bodies or the Australian Bureau of Statistics with eight empirical references either to Australian Bureau of Statistics research or reports prepared by another

52 Cattanach v Melchior (2003) 215 CLR 1, 44 [105] n 196 citing Alfred Kinsey, Wardell Pomeroy and Clyde Martin, Sexual Behaviour in the Human Male (1948) and Alfred Kinsey et al, Sexual Behavior in the Human Female (1953). The Kinsey Reports although path breaking, are now 63 and 57 years old respectively. They could not be said (of themselves) to represent 'current' empirical evidence from the field of human sexuality research. See for example, examples of the contemporary research carried out at the Kinsey Institute The Kinsey Institute <http://www.kinseyinstitute.org/> at 31 August 2011.


54 Appellants' Submissions and Accompanying Materials (Appellant) Volume 2, Submission in Cattanach v Melchior, 24 January 2003. I noted these materials during a search of the High Court file for the Cattanach case carried out during the course of the research for this study.

55 These included a number of references in De Sales v Ingrilli (2002) 212 CLR 338 to Australian Bureau of Statistics statistics on marriage and divorce, and to the growing incidence of de-facto relationships. See for example the reference by Kirby J at 380 [117] n 100 to Australian Bureau of Statistics and Office of the Status of Women, 'Australian Women's Yearbook' (1997).
government body. This suggests that empirical research that has not been introduced to a case through expert evidence, by the parties in submissions or was not drawn from an official government body was very unlikely to be used by judges in High Court negligence cases. The empirical sources used by High Court judges identified in this study were also not necessarily comprehensive or necessarily up to date. The ease of availability of the empirical material to judges (for example via Counsel's submissions or as part of material filed by a party), or existing familiarity with the empirical material seem to have been more likely influences on the judicial choice of empirical material, than an assessment of whether the material was contemporary, comprehensive, valid and reliable.

Why were so few SF identified in this study referenced to empirical material? One reason for lack of judicial use of empirical material in support of SF may be that no empirical material is available about some SF and that some SF are not even articulated in a form which could be empirically studied. There is simply uncertainty. However, many SF are potentially matters about which there might be some available empirical material. It is difficult to imagine that in only 14 instances out of 1208 SF identified in this study there was any directly available published empirical material about the relevant SF. Chapters 7 and 8 discuss in more detail the interdependent legal, institutional, individual, cultural and cognitive factors which might explain why empirical support for SF was rarely provided by judges in this study. However, by way of example, as discussed above the nature of the adversarial system and the institutional features of the High Court do not support the

56 See for example the reference in Bradie v Singleton Shire Council (2001) 206 CLR 512, 538 [51] n 89(Gaudron, McHugh, Gummow JJ) to Parliament of New South Wales Public Bodies Review Committee, 'Public Liability Issues Facing Local Councils' (November 2000).
provision of quality SF information to judges and this likely results in little empirical material being presented to the High Court. In addition, the ease of availability of material likely impacts on what sources judges rely on in their reasoning. Like other human beings, judges are likely to cognitively utilise that material most available and accessible to them (eg cases and legal sources) and are likely to resist departing from their ‘usual’ sources of information.  

4. INDIVIDUAL JUDGES AND SF

Sections 1-3 have discussed the overall results of the content analysis of High Court negligence cases from 2001-2005. We have considered the frequency of judicial use of SF, how this varies across different categories of case depending on case significance, how frequently judges refer to sources for SF, and what kind of sources judges refer to. This section shows that there were commonalities in the way the individual High Court judges, examined in this study, used and sourced SF. For example, all judges referred to legal principles and adjudicative facts much more than SF in their judicial reasoning, all judges predominantly gave no sources for SF, and where sources were given they were mostly to legal sources such as case law. But despite these commonalities the judges of the High Court are not a homogenous group. In the same way that judges have different judicial philosophies, so different judges used SF in somewhat different ways in their judicial reasoning.

57 Chapter 8 discusses the effects of cognitive factors on judges including the availability heuristic and the status quo bias. For a discussion of these see Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93(1) Cornell Law Review 1.

Table 4.11 demonstrates that there were some variations in how frequently the judges studied utilised SF in their judgments. The frequency of use of SF in judgments ranged from the 9.27 SF/Judgment for Kirby J to 4.92 SF/Judgment for Gummow J and 4.8SF/Judgment for Gaudron J. This suggests that there were differing propensities of individual judges in relation to the use of SF in judgments.

Table 4.11 Individual Judges and SF

<table>
<thead>
<tr>
<th>Judge</th>
<th>Number Cases</th>
<th>Total Number SF</th>
<th>SF in Single Judgment</th>
<th>SF in Joint Judgment</th>
<th>SF/Judgment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kirby J</td>
<td>37</td>
<td>343</td>
<td>245</td>
<td>98</td>
<td>9.27</td>
</tr>
<tr>
<td>Heydon J</td>
<td>22</td>
<td>181</td>
<td>79^5</td>
<td>102</td>
<td>8.23^5</td>
</tr>
<tr>
<td>Gleeson CJ</td>
<td>39</td>
<td>275</td>
<td>170</td>
<td>105</td>
<td>7.05</td>
</tr>
<tr>
<td>McHugh J</td>
<td>39</td>
<td>268</td>
<td>208</td>
<td>60</td>
<td>6.87</td>
</tr>
<tr>
<td>Hayne J</td>
<td>34</td>
<td>190</td>
<td>78</td>
<td>112</td>
<td>5.58</td>
</tr>
<tr>
<td>Callinan J</td>
<td>42</td>
<td>225</td>
<td>160</td>
<td>65</td>
<td>5.36</td>
</tr>
<tr>
<td>Gummow J</td>
<td>36</td>
<td>177</td>
<td>6</td>
<td>171</td>
<td>4.92</td>
</tr>
<tr>
<td>Gaudron J</td>
<td>10</td>
<td>48</td>
<td>2</td>
<td>46</td>
<td>4.8</td>
</tr>
</tbody>
</table>

^50 If Cattanach v Melchior was disregarded then Heydon’s score for SF/Judgment would have been only 4.8.
It is unsurprising that Kirby J is the highest user of SF. As will be discussed further in Chapter 8, he has a background somewhat different to other judges of the High Court. His background in law reform and other interests might suggest that he was more inclined to use SF in his judgments. It may also reflect his expressed philosophy of judicial honesty and openness in the use of policy matters in negligence judgments.\textsuperscript{61} It is perhaps surprising that Heydon J is the second highest user of SF/judgment basis given his very critical views prior to appointment to the High Court on the use of extra-legal reasoning in judicial decision-making.\textsuperscript{62} However, Heydon J is only the second highest user of SF/judgment because of the very high number of SF he used in one of his first judgments on the High Court in \textit{Cattanach v Melchior}.\textsuperscript{63} This judgment has been criticised for the high use of contestable SF.\textsuperscript{64} \textit{Cattanach} accounts for all of the single judgment SF made by Heydon J. All other SF, used in 21 other cases, were made in joint judgments. If \textit{Cattanach} was disregarded then Heydon J would have been one of the lowest users of SF on the High Court during the relevant period.

The other striking pattern that emerges from this data is that the highest judicial users of SF (apart from Heydon J), namely Kirby J, Gleeson J and McHugh J have significantly
more SF in single judgments than joint judgments. The lowest judicial users of SF have significantly more SF in joint judgments. As will be discussed below, this may mean that overall judges appear more likely to make SF statements when they are alone in a single judgment, than when they are in a joint judgment with other judges. Gaudron J is the lowest SF user on a per judgment basis of the judges studied. However, Gaudron J only sat on ten of the 45 cases studied so her results may not be directly comparable to the rest of the judges who sat on much higher numbers of cases. In addition, Gaudron J was not a member of the High Court in either of the two most prolific SF cases shown in Table 4.2, Cattanach v Melchior and D'Orta-Ekenaike v Victoria Legal Aid.

As Table 4.12 adjacent demonstrates there were also differences between judges in relation to their use of references or sources for SF. Justices Gaudron, Gummow and Kirby were the most frequent users of a source for a SF. However, even those judges did not use sources for the majority of SF, with between 64.6% (Gaudron J) and 67.35% (Kirby J) SF unsourced or unreferenced.
Table 4.12 Individual Judges and Reference or Source for SF

<table>
<thead>
<tr>
<th>Judge</th>
<th>Number SF</th>
<th>Number of SF referenced or sourced</th>
<th>% SF referenced or sourced</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gaudron J</td>
<td>48</td>
<td>17</td>
<td>35.41%</td>
</tr>
<tr>
<td>Gummow J</td>
<td>177</td>
<td>60</td>
<td>33.9%</td>
</tr>
<tr>
<td>Kirby J</td>
<td>343</td>
<td>112</td>
<td>32.65%</td>
</tr>
<tr>
<td>Heydon J</td>
<td>181</td>
<td>52</td>
<td>28.73%</td>
</tr>
<tr>
<td>McHugh J</td>
<td>268</td>
<td>76</td>
<td>28.35%</td>
</tr>
<tr>
<td>Callinan J</td>
<td>225</td>
<td>48</td>
<td>21.33%</td>
</tr>
<tr>
<td>Hayne J</td>
<td>190</td>
<td>38</td>
<td>20%</td>
</tr>
<tr>
<td>Gleeson J</td>
<td>275</td>
<td>53</td>
<td>19.27%</td>
</tr>
</tbody>
</table>

There were also differences between judges in relation to the kind of sources they used for SF. Table 4.13 adjacent shows the percentage of SF used by individual judges that were referenced to sources other than case law. The tendency to predominantly rely on case law as a source of SF was common amongst all judges. Even the highest user of non-case law sources for SF, Gaudron J, McHugh J and Kirby J, only used secondary sources, empirical sources or other sources for just over 14% of SF. As discussed above, the use of case law as a source for SF tends to simply reproduce previous judicial use of ‘common sense’ recorded in precedent. It is perhaps unsurprising that two of the highest users of non-case-law sources were McHugh J and Kirby J who have both showed an
appreciation of the use of non-legal sources in judicial reasoning. These results are even more amplified when the 14 instances of empirically supported SF are considered. Four of these references were by Kirby J and seven were in judgments of McHugh J. It is also perhaps unsurprising that the lowest users of sources other than case law were Heydon J and Callinan J who have both indicated an antipathy towards such sources.


66 This includes a SF in a joint judgment with Gaudron J and Gummow J in Brodie v Singleton Shire Council (2001) 206 CLR 512.

67 See Heydon above n 58; Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460, 510-515 [162]-[169] (Callinan J). Callinan J concludes his judgment in the Woods’ case by ‘referring to Disraeli’s disdain for statistics by equating them with falsity’. One of the instances of SF referenced to an empirical source includes Callinan J’s references to Australian Bureau of Statistics, ‘National Health Survey: Injuries, Australia’ (1998), however he cites the statistics to refute the arguments of McHugh J and finds the statistics ‘unhelpful to the appellant’s cause’ (514 [169]). Writing extra-judicially Heydon J has however noted the widespread judicial use of SF, see Hon J D Heydon, ‘Developing the Common Law’ in Justin Gleeson and Ruth Higgins (eds), Constituting Law: Legal Argument and Social Values (2011) 93.
Table 4.13 Individual Judges and References or Source other than Case Law

<table>
<thead>
<tr>
<th>Judge</th>
<th>Number SF</th>
<th>Number of SF referenced or sourced to secondary source, empirical source or other source</th>
<th>% SF referenced or sourced</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gaudron J</td>
<td>48</td>
<td>7</td>
<td>14.58%</td>
</tr>
<tr>
<td>McHugh J</td>
<td>268</td>
<td>38</td>
<td>14.18%</td>
</tr>
<tr>
<td>Kirby J</td>
<td>343</td>
<td>48</td>
<td>14.1%</td>
</tr>
<tr>
<td>Gummow J</td>
<td>177</td>
<td>20</td>
<td>11.3%</td>
</tr>
<tr>
<td>Gleeson J</td>
<td>275</td>
<td>25</td>
<td>9.09%</td>
</tr>
<tr>
<td>Hayne J</td>
<td>190</td>
<td>14</td>
<td>7.37%</td>
</tr>
<tr>
<td>Callinan J</td>
<td>225</td>
<td>13</td>
<td>5.78%</td>
</tr>
<tr>
<td>Heydon J</td>
<td>181</td>
<td>9</td>
<td>4.97%</td>
</tr>
</tbody>
</table>

Although there were some differences in how the individual judges used and sourced SF, the commonalities among judges were more pronounced than the differences. For all judges, SF were not used frequently in judicial reasoning compared to legal principles, adjudicative facts and legal values. All judges predominantly appeared to rely on ‘common sense’ or case law as a source for SF in their negligence judgments. There were some differences between judges in relation to how much they used SF and how much they sourced or referenced SF. The effects of these ‘differences’ were most pronounced in the judgments of Kirby J. This shows that there are obviously some factors that

---

68 This includes reference to a secondary source, empirical evidence or some other source such as expert evidence.
influenced individual judges differently to others. These are discussed in detail in Chapter 8.

5. GROUP EFFECTS AND SF: JOINT JUDGMENTS, SINGLE JUDGMENTS, MAJORITY AND DISSenting JUDGEMENTS

Martinek has recently argued that group dynamics can impact on how judges use non-legal factors in their decision-making, with membership in the small group of ‘the court’ with its shared cultural and legal norms potentially driving more reliance on ‘legal’ factors than non-legal factors. Edwards has also suggested that the effects of judicial deliberations may have moderating effects on an individual judge’s reasoning. Edwards has stressed the critical importance of precedent in the process of group judicial deliberations. Chapter 8 will discuss how cognitive factors relating to group deliberation are one of the factors that explain judicial use and construction of SF. This section shows that there were apparent ‘group’ effects in the results of the content analysis. Judges used SF more in single judgments than joint judgments, and more in dissent judgments than majority judgments. When these factors were combined (for example single dissent judgment) there were even greater effects on judicial use of SF.

There were differences in the frequency of the use of SF by judges dependent on whether they wrote a judgment as an individual or whether they wrote a judgment with other judges as part of a joint judgment. This difference can be seen below in Table 4.14

---


71 Ibid.
and Graph 4.15. The frequency of SF in single judge judgments (8.54 SF/judgment) was much higher than the frequency of SF in joint judgments (5.53 SF/judgment). Judges in joint judgments tended to use SF less (and presumably rely more on legal principles and adjudicative facts as a basis for judgment). These results appear to support the argument made by Martinek that grouping of judges tends to result in more reliance on legal rather than non-legal factors in judgments. It also appears to support the argument made by Edwards regarding the importance of precedent as part of group judicial deliberations.

**Table 4.14 SF in Joint Judgments and Single Judgments**

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Number Joint Judgments</td>
<td>47</td>
</tr>
<tr>
<td>Number SF in Joint Judgments</td>
<td>260</td>
</tr>
<tr>
<td>SF/Joint Judgment</td>
<td>5.53</td>
</tr>
<tr>
<td>Number Single Judgments</td>
<td>111</td>
</tr>
<tr>
<td>Number SF in Single Judgments</td>
<td>948</td>
</tr>
<tr>
<td>SF/Single Judgment</td>
<td>8.54</td>
</tr>
</tbody>
</table>
Care needs to be taken in over-stating the ramifications of the ‘group’ effect seen in these results for wider understanding of High Court judicial decision-making. Many of the single judgments in this study were by Justices Kirby, McHugh and Glee son. As noted in Table 4.11 above, these judges were amongst the highest users of SF/judgment. What appears to be an effect related to the difference in judicial use of SF between single and group judgments, could instead reflect wholly or partially individual characteristics of these particular judges. In addition, the results of this content analysis are confined to 45 negligence cases over a defined time period (2001-2005). There are possible differences that could be seen over other time periods, and as a result of different compositions and leadership of the High Court which might result in different group dynamics and differences in court cohesion.\textsuperscript{72} However, the results certainly do raise interesting

\textsuperscript{72} For a discussion of the effects of court cohesion on judicial decision-making see Jason Pierce, 'Institutional Cohesion in the High Court of Australia: Do American Theories Travel Well Down Under?'
possibilities about how group dynamics affect judicial reasoning more generally. Future research could investigate whether similar differences in judicial SF use could be seen between single and joint judgments in different categories of case, over different time periods and with different judicial composition and leadership of the High Court.  

The other factor that had a significant effect on judicial use of SF identified in this study was whether a judge was part of the majority decision in a case, or was writing a dissent judgment. Most SF occurred in majority judgments with 800 SF in 122 majority judgments. This is unsurprising because there many more majority judgments (122) overall than dissent judgments (36) in the cases studied. However, as Table 4.16 and Graph 4.17 adjacent show SF were far more frequent on a per judgment basis in dissent judgments (11.33 SF/judgment) than in majority judgments (6.56/judgment). Judges writing dissents used SF much more frequently than judges writing majority judgments.


73 Chapter 9 will discuss areas for future research.
**Table 4.16 Dissent, Majority and SF**

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Number Dissent Judgments</td>
<td>36</td>
</tr>
<tr>
<td>Total Number Dissent SF</td>
<td>408</td>
</tr>
<tr>
<td>Dissent SF/Dissent Judgment</td>
<td>11.33</td>
</tr>
<tr>
<td>Total Number Majority Judgments</td>
<td>122</td>
</tr>
<tr>
<td>Total Number Majority SF</td>
<td>800</td>
</tr>
<tr>
<td>Majority SF/Majority Judgment</td>
<td>6.56</td>
</tr>
</tbody>
</table>

**Graph 4.17 Average SF/Judgment Dissent Judgments and Majority Judgments**
Justice Kirby has argued that judicial dissent plays an important role in appellate judicial decision-making and encourages judicial honesty and transparency.\(^{74}\) It appears from the results of this analysis that judges in dissent judgments may indeed be more ‘transparent’ in their use of SF. Again, for similar reasons to those discussed above, care needs to be taken in extrapolating the effects of dissent shown in this study to the use of SF by the High Court generally. However, again the results show a fertile new ground for research which compares the differences in the nature of judicial reasoning and judicial use of SF in majority and dissent judgments.\(^{75}\)

As can be seen in Tables 4.18-4.19 (and in Graph 4.20) adjacent the factors of ‘single’ judgment and ‘dissent judgment’ have a combined effect. Most SF identified in the study were from single majority judgments (584 SF). However, the highest rate of SF/Judgment occurred in dissent single judgments (11.74SF/Judgment) and the lowest rate of SF/Judgment in majority joint judgment (5.14 SF/Judgment). As can be seen in Table 4.19 even where a judgment was joint rather than single, the fact that it was dissenting still resulted in a large number of SF/Judgment (8.8 SF/Judgment). This is a much higher number of SF/Judgement than majority single judgments (7.3 SF/Judgments).


\(^{75}\) Areas for future further research are discussed in Chapter 9.
### Table 4.18 Dissent, Single Judge and Joint Judge SF

<table>
<thead>
<tr>
<th>Type of Judgment</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dissent Single Judgments</td>
<td>31</td>
</tr>
<tr>
<td>Dissent Single Judge SF</td>
<td>364</td>
</tr>
<tr>
<td>Dissent Single Judge SF/Dissent Single Judgments</td>
<td>11.74</td>
</tr>
<tr>
<td>Dissent Joint Judgments</td>
<td>5</td>
</tr>
<tr>
<td>Dissent Joint Judge SF</td>
<td>44</td>
</tr>
<tr>
<td>Dissent Joint Judge SF/Dissent Joint Judgment</td>
<td>8.8</td>
</tr>
</tbody>
</table>

### Table 4.19 Majority, Single Judge and Joint Judge SF

<table>
<thead>
<tr>
<th>Type of Judgment</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Majority Single Judgments</td>
<td>80</td>
</tr>
<tr>
<td>Majority Single Judge SF</td>
<td>584</td>
</tr>
<tr>
<td>Majority Single Judge SF/Majority Single Judgments</td>
<td>7.3</td>
</tr>
<tr>
<td>Majority Joint Judgments</td>
<td>42</td>
</tr>
<tr>
<td>Majority Joint Judge SF</td>
<td>216</td>
</tr>
<tr>
<td>Majority Joint Judge SF/Majority Joint Judgment</td>
<td>5.14</td>
</tr>
</tbody>
</table>
The combined effects of dissent and majority judgments and single and joint judgments can be seen in Graph 4.20. While, as discussed above, there are potential ‘group’ effects on judicial use of SF, dissent is an even strongest indicator of high judicial use of SF. Again, this is a fertile area for further future research.

CONCLUSION

Section 1 showed that High Court judges did use SF as part of judicial reasoning in negligence cases from 2001-2005. The analysis identified 1208 SF in the 45 cases studied. Section 1 also discussed the frequency of SF/judgment studied. While judges did use SF as part of their reasoning in negligence cases, judicial reasoning in the cases was still generally dominated by legal principles, legal values and adjudicative facts.
Section 2 demonstrated that SF were more frequently used by judges in high significance cases. Most SF identified in the content analysis (74.5% of all SF) came from this category of case. These were typically the most complex negligence cases heard by the High Court concerning novel or complex issues directly related to the elements of negligence. SF assumed far more importance in judicial reasoning in this category of case, than in cases of lesser significance such as those concerning technical matters or matters relating to disputes regarding adjudicative facts. Section 2 also showed that cases with more individual judgments exhibited more SF overall and more SF in each individual judgment.

Section 3 showed that the majority of SF used by judges (74% of all SF) were not sourced or referenced in any way. Where SF were sourced or referenced by judges, this was predominantly to legal sources such as cases. Judges very rarely referred to empirical evidence in support of SF used in judgments. Section 4 discussed how despite significant commonalities in judicial use of SF, judicial use and sourcing of SF was not homogenous. Some judges (notably Kirby J) used and sourced SF more than other judges. Finally Section 5 showed how judicial use of SF identified in the study appeared to be affected by whether a judge gave reasons in a single judgment or a joint judgment, and whether a judge gave reasons supporting the majority of the High Court or in dissent. Both of these factors appeared to influence judicial use of SF. Both dissent and single judgments had higher frequencies of SF/judgment and this was compounded where a judgment was both a single and a dissent judgment. These findings raise the potential for further research on a wider scale as to the effects of both dissent and judicial grouping on judicial use of SF in the High Court of Australia.
These findings raise the obvious question—why did the judges use and source SF in the way they did? What factors affected judicial use and construction of SF? Part 3 (Chapters 7 and 8) proposes that interdependent legal, institutional, individual, cognitive and cultural factors interact to explain judicial use and construction of SF in the Australian High Court. These factors potentially explain the results of the content analysis of High Court negligence cases discussed in this chapter.

This chapter has shown that the majority of SF used by judges of the High Court in negligence cases from 2001-2005 were not sourced or referenced in any way. Chapter 5 will argue that many of those SF were drawn from judicial notions of ‘common sense’ or ‘common understandings’. As Chapter 5 will show, this practice has inherent dangers and threatens the accuracy and the inclusivity of judicial reasoning.
Chapter 4 discussed how the results of the content analysis of High Court negligence cases from 2001-2005 conducted as part of this study showed judges used SF\(^1\) as part of their judicial reasoning in negligence cases. The content analysis found that 74% of all SF used by judges had no reference or source.\(^2\) Where judges referred to a source or reference for a SF, it was usually to a case or some other ‘legal’ source. Judicial reference to empirical sources for a SF was very rare. This chapter explores how judges used judicial notions of ‘common sense’ and ‘common knowledge’ as a basis for constructing SF\(^3\) in the negligence cases studied. The chapter argues\(^4\) that an analysis of the text of SF identified in the content analysis shows that judicial SF identified in the content analysis of High Court negligence cases were predominantly drawn (explicitly and implicitly) from judicial assumptions of ‘common sense’ or ‘common knowledge’. It further argues that this judicial use of ‘common sense’ or ‘common knowledge’ SF can lead to the use of empirically unsupported, wrong or incomplete SF, and SF which do

---

\(^1\) SF refers to the plural ‘social facts’ and the singular ‘social fact’.

\(^2\) See Chapter 4, Table 4.7.

\(^3\) This responds to Research Question 1 (VIII) ‘How are SF constructed by High Court judges in negligence cases?’.

\(^4\) This chapter uses inductive theorising from the qualitative data as a basis for arguments.
not represent the life experiences of those groups traditionally marginalised by the law and the legal system.\(^5\)

Section 1 argues that an analysis of the text of the SF identified in this study shows that High Court judges in the negligence cases studied often perceived that their SF statements drew on ‘common knowledge’ or ‘public knowledge’ rather than their own private construction of knowledge. As Graycar argues, this has the effect of elevating judicial private understanding by virtue of judicial status and authority, into the public domain.\(^6\) Sometimes judges explicitly indicated that they were drawing on ‘commonly’ accepted ideas or views about particular phenomena, even though there was no evidence that their views were indeed commonly accepted. At other times, judges simply stated propositions as if they were indisputable (and implicitly matters which would be commonly accepted).

Sections 2 and 3 argue that there are dangers that can arise from judicial use of ‘common sense’ or ‘common knowledge’ SF. Judicial use of ‘common sense’ as a basis for SF can impede the accuracy of judicial reasoning.\(^7\) Section 2 argues that the first, and obvious, danger is that a SF might be contrary to existing empirical evidence — unsupported, wrong, incomplete or outdated. Section 3 argues that the second danger is that there may be missing SF in a judgment — judges may fail to consider SF which might be relevant in a case. Judicial use of ‘common sense’ can result in judicial selectivity and the failure of judges to consider SF which reflect the experiences of those already marginalised in the

\(^5\) This responds to Research Question 3(II) ‘What are the implications of judicial SF in negligence cases for accuracy of judicial reasoning?’.


\(^7\) Sections 2 and 3 provide examples of these dangers drawn from the SF identified in the content analysis.
legal system including women, young people, elderly people, people not of white Anglo-Saxon or Anglo-Celtic heritage, lesbian, gay, bisexual and transgender people, and people with a disability.

1. DRAWING ON COMMON KNOWLEDGE

This section shows how an analysis of the SF identified in the content analysis found that judges explicitly and implicitly relied on ‘common sense’ or ‘common understandings’ as a basis for SF. Graycar has noted that judges often draw on their belief that there is a ‘pre-existing body of knowledge’ or a ‘common-sense understanding’ of the world as part of their SF assertions in judicial reasons. These understandings may be ‘counter-intuitive’ and may be ‘contrary to …all empirical evidence’. Graycar’s arguments are consistent with the findings of this study that High Court judges mostly gave no source or reference for their SF statements and where a source was given it was very rarely to empirical research. Where a source was given, it was mostly to case law or another ‘legal’ source such as legislation or legal journal article. Judicial reference to a ‘legal’ source for a SF does not usually mean that the SF was not based on judicial common sense. The use of case law as a source for SF can simply allow the reproduction of judicial ‘common sense’ from one case to another, particularly where there was no empirical evidence for the ‘original’ judicial SF. The reference to ‘legal’ sources such as legislation and legal journal articles can also be problematic to the extent that legislation

---

8 Ibid, 272.
9 Ibid, 273.
10 See Chapter 4.
11 See Chapter 4 Table 4.9.
12 My Associate Supervisor Professor Giddings has helpfully suggested these could be called ‘contagious’ SF.
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

and journal articles themselves simply base assertions of SF on ‘common sense’ or common understandings rather than on available empirical material. Legal scholarship, for example, has been criticised by empirical researchers on the basis that it frequently makes arguments based on anecdotal understandings of the world, rather than on scientifically tested understandings.  

It is not the case that the judges studied were completely unaware of the potential dangers of relying on ‘common sense’ or ‘common understanding’ as a basis for SF. A number of judges in cases included in the study acknowledged the dangers in judicial application of common sense understandings of the world and common ‘social’ values. This is consistent with the extra-curial statements of judges that judging should not involve the application of personal preference or the application of extra-judicial information.  

The cases studied included the following judicial statements reflective of this view:

It may also be open to question how reliably judges and lawyers generally can make informed assumptions about social conditions, changes and practices and whether the changes are real or only apparent, and how widespread their effect is.  

The ‘stick in the gullet’ test for the recovery of damages is simply the latest illustration of judges applying to the legal rights of individuals in contemporary society values formed in the far-off days of judicial youth, thirty or more years earlier, when social facts were significantly different.

---


16 Cattanach v Melchior (2003) 215 CLR 1, 64 [164] (Kirby J).
Of course it must be recognised, as it was 150 years ago, that ‘it may be that Judges are no better able to discern what is for the public good than other experienced and enlightened members of the community’.17

When courts refer to ‘community values’, they may create an impression that such values are reasonably clear, and readily discernible. Sometimes a judge might be attributing his or her personal values to the community with little empirical justification for a belief that those values are widely shared.18

… rarely is there any universal acceptance of what are true history, politics and social ethics. Anyone with any knowledge of these will be aware that there is a huge, indeed probably immeasurable, range of differences as to what they legitimately are, and the ways in which they are to be identified, understood and applied.19

Something needs to be said about the appellant's submissions as to changing times and attitudes. On the opening page of Mansfield Park Jane Austen wrote in 1814:

‘[t]here certainly are not so many men of large fortune in the world, as there are pretty women to deserve them.’

It is easy to see that the author's pronouncement is discordant with contemporary Australian society and values. It is less easy however for a judge to say what those values are, and what part they should play in the application of a form of an enactment which has fairly consistently been applied throughout the country for many decades now.20

Despite these judicial warnings and apparent judicial recognition of the dangers of judicial use of ‘common sense’ or ‘common understandings’, there was widespread use of SF based on these assumptions identified in the study.21 Judges often implicitly (and invisibly) drew on ‘common sense’, ‘common understanding’ notions of SF ostensibly drawn from some ‘pre-existing body of knowledge’22 in their judgments. Examples of SF included ‘the most obvious risk to someone who has consumed excessive amounts of

21 As discussed in Chapter 4, all judges studied used SF in their reasoning in negligence cases including the judges who warned of the dangers of doing so.
22 Graycar, above n 6, 272.
alcohol is the risk associated with drink driving’; 23 ‘there are many forms of excessive eating and drinking that involve health risks’ 24 and ‘the social context in which this issue is to be resolved is that of a secular society.’ 25

However, many judicial SF were more explicit, positively asserting that the SF actually reflected common sense, a ‘common understanding’ or were indisputable or well-known. Examples of terms used by judges which explicitly referred to judicial assumptions of common sense, ‘common understandings’, or common knowledge included:

   It is notorious that… 26
   Experience tells… 27
   Many citizens believe… 28
   But few would contend that… 29
   It may be readily accepted that… 30

26 ‘It is notorious that over many years the first appellant and other members of the group of companies to which it belongs mined asbestos, and manufactured and supplied asbestos-based products. Very large numbers of their employees have been exposed to asbestos; many of them have contracted asbestosis and mesothelioma as a result…’ CSR Limited v Eddy (2005) 226 CLR 1, 35 [80] (Gleeson CJ, Gummow J, Heydon J).
27 ‘Experience tells that in human affairs there are many controvertible assertions, and, matters of science and mathematics apart, real disputation as to which facts may be and which may not be incontrovertible’. Fox v Percy (2003) 214 CLR 118, 168 [152] (Callinan J).
28 ‘Many citizens may believe that, in various matters, there should be more extensive government regulation. Others may be of a different view, for any one of a number of reasons, perhaps including cost.’ Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540, 533 [6] (Gleeson CJ).
29 ‘But few would contend that travelling at 10 kilometres per hour was the only reasonable response to the risk of a motor car accident.’ Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540, 586 [111] (McHugh J).
30 ‘It may readily be accepted that public authorities, armed with statutory powers to compel, prevent or punish conduct, frequently exercise informal and non-coercive influence or persuasion over those persons and organisations against whom they are empowered formally to act.’ Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540, 610 [185] (Gummow J, Hayne J).
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

It is common to speak of…

They are a well-known and natural phenomenon…

A garage sale is a familiar event in Australian suburbia. (italics added)

Examination will usually reveal that...

It is well understood that...

explains the increasing awareness, both in the medical profession and in the community generally...

Observation confirms that, in this community, it is accepted...

...as is common knowledge...

In the ordinary course...

31 ‘Another is that the market is mistaken on some basis other than manipulation. It is common to speak of shares being undervalued (or overvalued) by the market.’ HTW Valuers(Central QLD) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640, 658 [37] (Gleeson CJ).

32 ‘Most of the time, the creek contained sand dunes known as bedforms. They are undulations on the floor of the creek, caused by the movement of water along the bed of the creek, particularly the movement of water caused by tides. They are a well-known and natural phenomenon, found in tidal estuaries around the world.’ Mulligan v Coffs Harbour City Council (2005) 223 CLR 486, 492-3 [12] (McHugh J).


34 ‘Examination will usually reveal that the event came about as the result of a complex mixture of acts or omissions.’ Pledge v Roads and Traffic Authority (2004) 205 ALR 56, 59 [9] (Hayne J).

35 ‘It is well understood that the legal concept of causation differs from notions of causation which appear in the speculations of philosophers and the perceptions by scientists of the operation of natural laws.’ Rosenberg v Percival (2001) 205 CLR 434, 460 [85] (Gummow J).

36 ‘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.’ Tame v New South Wales (2002) 211 CLR 317, 332 [14] (Gleeson CJ).

37 ‘Observation confirms that, in this community, it is accepted that there may be some circumstances in which reasonableness requires public authorities to warn of hazards associated with recreational activities on land controlled by those authorities. Most risky recreational activities, however, are not the subject of warning signs.’ Vairy v Wyong Shire Council (2005) 223 CLR 442, 427 [8] (Gleeson CJ, Kirby J).

38 ‘Not surprisingly, it was accepted, as is common knowledge, that the level of the ocean floor may and does change because of the movement of sand along the coast caused by currents and wind.’ Vairy v Wyong Shire Council (2005) 223 CLR 442, 474 [187] (Callinan J, Heydon J).

39 ‘In the ordinary course a person who is not injured will not have to husband a large sum of money over a long period of time in such a way as to ensure an even income stream but the complete exhaustion of the
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

Everyone ‘relies’…\(^{40}\)
Most adults know…\(^{41}\)
Everyone knows…\(^{42}\)
Common sense and frequent experience confirm that…\(^{43}\)
As a matter of experience and general knowledge…\(^{44}\)

There was widespread reliance by Australian High Court judges in negligence cases in this study on ‘common understandings’ or common sense as a basis for SF. The cases studied reveal that there were some occasions where judges were reluctant to draw on common understandings and acknowledged their own limitations of knowledge. For example some judges, particularly Callinan J, were reluctant on occasion to consider SF about insurance including the nature of insurability, or the consequences of liability on future insurability.\(^{45}\) Judicial reference to SF about insurance are considered further in the

\(^{40}\) ‘Everyone "relies", to a greater or lesser extent, on others in society doing what they should. Whenever anyone resorts to facilities which are provided by or at the direction of government, such as water, electricity, gas, roads, or the airways, they rely on the relevant authorities to do their work properly. Few, if any, test the water before drinking it, test the bridge before driving over it, or ask the pilot of the aircraft to challenge every instruction given by air traffic control. To say that in these ways individuals rely on those who provide these services or facilities is to state an observable fact.’ Brodie v Singleton Shire Council (2001) 206 CLR 512, 627 [307] (Hayne J).

\(^{41}\) ‘Most adults know that drinking to excess is risky.’ Cole v South Tweed Heads Rugby League Football Club (2004) 217 CLR 469, 476 (Gleeson CJ).

\(^{42}\) ‘Everyone knows at the outset that if the consumption continues, a stage will be reached at which judgment and capacity to care for oneself will be impaired, and even ultimately destroyed entirely for at least a period.’ Cole v South Tweed Heads Rugby League Football Club (2004) 217 CLR 469, 507 [131] (Callinan J).

\(^{43}\) ‘Common sense and frequent experience confirms that notices can be important means of accident prevention’ Hoyts Pty Ltd v Burns (2003) 201 ALR 470, 488 [76] (Kirby J).

\(^{44}\) Tepko Pty Ltd v Water Board (2001) 206 CLR 1, 44 [133] (Kirby J, Callinan J).

\(^{45}\) See for example his statements in D’Orta-Ekemaje v Victoria Legal Aid (2005) 223 CLR 1, 114 [363] ‘Whether barristers are compelled to, or would prudently, in any event, carry insurance is not in my view relevant. Insurance policies are written no doubt upon the basis of the current law, and that is that the
next chapter. Judicial refusal to use some ‘common sense’ SF may reflect the tension in negligence law and scholarship concerning the appropriateness of judicial use of policy or ‘instrumental’ arguments.\textsuperscript{46} The ‘anti-policy’ argument clearly does not operate as a total restraint against the use of policy SF by judges in negligence cases in the High Court of Australia. However, there may be some categories of case or of SF where the ‘no-policy’ argument does operate as at least a partial constraint against some judicial use of SF.

For example, this might explain the very small number of SF in \textit{Sullivan v Moody},\textsuperscript{47} the case which expounded the High Court’s preferred principle based anti-policy approach to duty of care.\textsuperscript{48} In addition, it might explain some judicial reluctance to refer to particular kinds of SF like those about defendant insurability.\textsuperscript{49}

Feminist scholars have noted judicial invocations of ‘common sense’ notions essentially reflect the ‘private’ and often ‘male’ understandings of a judge.\textsuperscript{50} Graycar has powerfully characterised this judicial process of referring to common-sense understandings of the world as resembling:

\begin{quote}
\end{quote}

\textsuperscript{46} This is discussed in Chapter 1 and Chapter 7.
\textsuperscript{48} See the discussion of this case in Chapter 4 Section 2.
\textsuperscript{49} Although see the discussion in Chapter 6 of ‘insurance’ SF which notes how the judges studied did in fact refer to insurance SF, and generally in ways which did not favour arguments for plaintiffs.
\textsuperscript{50} Graycar, above n 6.
seeing is the society they know. (And they do not see that they are looking in a mirror). \textsuperscript{51}

Chapters 7 and 8 propose that there are complex interacting and inter-dependent legal, institutional, individual, cultural and cognitive factors that explain judicial use and construction of SF. These factors are discussed in detail in Chapters 7 and 8, however the rest of this section (by way of preview) briefly outlines how some of these factors might explain why judges rely on notions of ‘common knowledge’, why they are generally confident in their ability to understand what ‘common knowledge’ is and why such ‘common knowledge’ is likely to reflect ‘the society they know’.

Judges should not generally be seen as deliberately preferring or deliberately stating their own private and personal views about SF. High Court judges are likely to experience judicial bounded rationality \textsuperscript{52} as a result of the constraints that both legal and institutional factors present to the provision of accurate SF information to the High Court. \textsuperscript{53} As a result of these constraints, High Court judges in negligence cases are likely to encounter gaps in the knowledge that they require in order to craft their reasons. In the absence of

\textsuperscript{51} Ibid, 278.

\textsuperscript{52} As will be discussed further in Chapter 8, bounded rationality, (the term coined by Herbert Simon in his highly influential article Herbert Simon, ’A Behavioral Model of Rational Choice’ (1955) 69(1) The Quarterly Journal of Economics 99), refers to the concept that human cognitive abilities are limited and that ‘actors often take short-cuts in making decisions that frequently result in choices that fail to satisfy the utility maximisation prediction’. Reasons for bounded rationality are complex but include the costs and difficulties of obtaining relevant information, ambiguity, and inherent complexity of the decision-making. (Russell B Korobkin and Thomas Ulen, ’Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics’ (2000) 88 California Law Review 1051, 1076, 1079-83).

\textsuperscript{53} This is discussed further in Chapter 7. This chapter argues for example that the adversarial system and the institutional nature of the High Court do not support the provision of good quality SF information to judges.
reliable SF information, judges rely on their ‘intuitive’ understandings of the way human beings, institutions and the world operate.

Judges can be unconssciously affected by ‘cognitive illusions’ in their decision-making when operating in an ‘intuitive’ mode of reasoning.\(^{54}\) A number of cognitive illusions can interact to reinforce judicial notions of common knowledge or common sense. The related optimism, self-serving and egocentric biases\(^{55}\) can lead judges to interpret information in ways that are consistent with their ‘preconceived notions’ and prevent judicial awareness of the limitations of their own knowledge.\(^{56}\) The availability heuristic\(^{57}\) suggests that human beings often base judgements on memory and information that can be readily called to mind rather than on evaluation of accuracy of sources.\(^{58}\) This can result in judges drawing on their own ‘available’ knowledge\(^{59}\) and extrapolating it to ‘general’ knowledge even where it may be empirically inaccurate. Legal cultural


\(^{55}\) See above n 54.

\(^{56}\) Optimism bias suggests that ‘human beings tend to be optimistic’ and tend to underestimate the nature of certain risks. (Cass Sunstein, 'Introduction' in Cass Sunstein (ed), *Behavioral Law and Economics* (2000) 1, 4.) The optimism bias is closely related to the self-serving/egocentric bias which suggests that people often ‘interpret information in ways that serve their interests or preconceived notions’ (Russell B Korobkin and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 *California Law Review* 1051, 1092).

\(^{57}\) See above n 54.

\(^{58}\) Heuristics are decision making shortcuts.

\(^{59}\) See Sunstein, above n 55, 5.

\(^{59}\) Which might be drawn from their own life experiences, or from highly available (although not always accurate sources) like the media and case law.
background, social background including gender and education, and the impact of cultural cognition\(^{60}\) can also influence how judges construct SF in High Court judgments. These factors can contribute to judicial assumptions that a judge’s own beliefs are in fact accurate and widely held. The phenomenon of cognitive dissonance also likely reinforces this. Cognitive dissonance causes people to disbelieve or dismiss information which disconfirms or is contrary to their own beliefs.\(^{61}\)

Cognitive dissonance, together with ‘naïve realism’, might also explain why paradoxically the High Court judges studied seemed to sometimes recognise the ‘dangers’ of using common sense SF, yet still often referred to SF in their reasoning in negligence cases. Naïve realism is a ‘psychological mechanism … which refers to a psychological tendency to attribute the perceptions of those who disagree with us to the distorting impact of their political predispositions (the realism part) without being sensitive to how our own predispositions might affect our own perceptions (the naïve part).’\(^{62}\) Naïve realism leads people to assume that their own assessments of fact are in fact ‘objective’ assessments.\(^{63}\) Judges are like other human beings. How human beings say they reason and reach

\(^{60}\) Cultural cognition refers to the ‘psychological disposition of persons to conform their factual beliefs about the instrumental efficacy (or perversity) of law to their cultural evaluations of the activities subject to regulation.’ Dan Kahan and Donald Braman, ‘Cultural Cognition and Public Policy’ (2006) 24 *Yale Law and Policy Review* 147, 149-40. This is discussed further in Chapter 8.


\(^{63}\) Kahan and Braman, above n 60, 164. Kahan and Braman also identify other complimentary psychological mechanism which reinforce people’s existing cultural beliefs including cognitive dissonance avoidance, affect, biased assimilation and in group/out group dynamics(153-4, 163-4). These are discussed further in Chapter 8.
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

decisions (often based on an assumption of a rational conscious thought process) is not always congruent with how they actually reason and reach decisions. 64

This section has shown how the analysis of the text of SF identified in the content analysis confirmed that judges often explicitly and implicitly drew on notions of ‘common sense’ and ‘common understanding’ as the basis for SF. The section has also argued that in some ways this is not surprising. Judicial gaps in knowledge (which are contributed to by legal and institutional factors) encourage intuitive reasoning by judges. 65 The interaction of a range of individual, cognitive and cultural factors, encourage judges to assume ‘private’ knowledge is in fact reliable ‘common knowledge’. However, judicial use of these assumed ‘common sense’ SF can present dangers to the accuracy of judicial reasoning. These dangers are discussed further in Sections 2 and 3.

2. THE DANGERS OF JUDICIAL USE OF ‘COMMON SENSE’ SOCIAL FACTS: WRONG AND INCOMPLETE SF

Some (and perhaps many) SF which are based on judicial notions of common sense or common understandings are likely to be acceptable to most, if not all, Australians. They are unlikely to attract criticism that they are wrong or represent only one possible interpretation of a phenomenon. For example, consider the following SF identified in this study:

64 Stephen Porter, Leanne ten Brinke and Chantal Gustaw, 'Dangerous Decisions: The Impact of First Impressions of Trustworthiness on the Evaluation of Legal Evidence and Defendant Culpability' (2010) 16(6) Psychology, Crime and Law 477, 480. This is discussed further in Chapter 8. For example Posner has written that ‘most judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule-bound it is) and often to believe it, though it does not describe their actual practices’. Richard Posner, How Judges Think (2008), 2.

65 This is discussed further in Chapters 7 and 8.
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

Conducting any enterprise carries with it a variety of risks.\textsuperscript{66}

The ages of school children range from infancy to early adulthood. Although attendance at school is compulsory for children between certain ages, many secondary school students remain at school for several years after it has ceased to be obligatory.\textsuperscript{67}

A supply of pure water is a feature of Australian domestic life. Living in Houses connected to a water supply is not unusual in Australia.\textsuperscript{68}

Corporations can only think, decide and act by natural persons.\textsuperscript{69}

Does this mean that we should not worry about judges using ‘common sense’ (which is essentially private judicial knowledge) as a basis for SF in judicial reasoning in negligence cases? The answer to this question lies in understanding that not all SF identified in this study could be characterised as value-free, certain, unlikely to attract criticism and as inherently likely to reflect a universally acceptable version of societal ‘common understanding’. Sometimes judicial use of ‘common sense’ SF threatens the accuracy of judicial reasoning. At the very least, judicial SF can often represent only one viewpoint of a particular issue. Sometimes they are wrong or incomplete. Consider the following SF identified in the study, each of which assumes a particular ‘debatable’ viewpoint:

It might be to the overall economic advantage of the community that couriers operate as independent contractors efficiently, quickly and competitively, that they continue to provide a service that in the past large, centralised organisations were unable or unwilling to provide, or provided less efficiently. It might also be in the interests of the community, the respondent, its customers and the couriers that the last have a direct financial incentive to deliver articles quickly under the present arrangements.\textsuperscript{70}

Dismissal of the appeal carries the certain consequence, for better or for worse, that the skills and ingenuity of the lawyers who advise plaintiffs as a class,

\textsuperscript{66} New South Wales v Lepore (2003) 212 CLR 511, 588 [221] (Gummow J, Hayne J).

\textsuperscript{67} Ibid, 540 [53] (Gleeson CJ).

\textsuperscript{68} Tepko Pty Ltd v Water Board (2001) 206 CLR 1, 54 [165] (Kirby J, Callinan J).


whether rich or poor, will be devoted at once to extending recovery far beyond the limited level which the present plaintiffs sought. That is not in itself necessarily an argument against recovery. But it does indicate the nature of the litigation which will ensue if recovery is permitted.\textsuperscript{71}

Thirdly, the majority reasoning tends to generate litigation about children capable of causing the children distress and injury if they hear about it.\textsuperscript{72}

Each of these SF reflects particular liberal, individualist and traditional values, and there are competing versions of those SF which might reflect different sets of values.\textsuperscript{73} The first SF assumes individual contracting rather than employment will lead to better delivery of services to the community and better outcomes to a ‘worker’. The second SF assumes plaintiff lawyers and plaintiffs will act in ways that result in excessive litigation and suggests a ‘blame culture’ amongst plaintiffs supported by plaintiff lawyers. There is little empirical support for this proposition.\textsuperscript{74} The final example, the ‘harm the child’ SF often used in wrongful birth cases such as \textit{Cattanach v Melchior},\textsuperscript{75} appears to be unsupported by empirical evidence. It is also based on assumptions about parent child relationships and the protection of the status of the traditional nuclear family unit.\textsuperscript{76}

There are a number of dangers that can emerge from judicial use of ‘common sense’ understandings of SF which are essentially private in origin but become ‘public’ and authoritative through their inclusion in judicial reasoning. Judges can incorporate SF assumptions into judicial reasoning which are wrong. Judicial SF may conflict with available empirical material and demonstrate judicial factual error, or may be completely

\textsuperscript{72} Ibid, 126 [347] (Heydon J).
\textsuperscript{73} This is discussed further in Chapter 6.
\textsuperscript{74} See discussion in Chapter 6 Section 6.
\textsuperscript{75} \textit{Cattanach v Melchior} (2003) 215 CLR 1.
\textsuperscript{76} See discussion below in this section.
unsupported by empirical information. SF may rely on empirical ‘assumptions’ which are out of date. On occasion, these empirically questionable SF form a critical part of a judge’s reasoning in negligence cases. These dangers are discussed further in this section.

Second, there may be ‘missing’ SF in judgments. Judges may fail to consider or include in their judgments relevant SF which reflect the life experience of those already marginalised in the legal system. This danger is discussed in Section 3. Finally, SF may (as noted above) reflect particular sets of values and there might be competing (and equally acceptable) versions of a SF. This is discussed further in Chapter 6.

A. SF which Conflict with Empirical Evidence

There were a number of SF identified in this study which demonstrate the first danger that can arise from judicial common sense assumptions of SF. This danger concerns SF which are inconsistent with, or which are not supported by existing empirical evidence.

One of the most significant examples of this identified in the study concerned SF statements by Heydon J in *Cattanach v Melchior,*77 a case concerning a wrongful birth claim. Heydon J made a number of SF statements which were contrary to or unsupported by available empirical material, but which were central to his reasoning to reject the plaintiff’s claim. Heydon J made the SF statement sourced to a 1965 law review article78

78 RJL, "The Birth of a Child Following an Ineffective Sterilization Operation As Legal Damage" (1965) 9 Utah Law Review 808, 812 n 23. The reasons identified by the author of this article (as quoted by Heydon J in *Cattanach v Melchior* (2003) 215 CLR 1, 139-40 [384]) for secrecy in adoption include to protect the child from public knowledge or their own knowledge of adoption, to assist the child to feel a ‘natural’ child of the adoptive parents, and so that the child will not be discriminated against in the adoptive home, and will not know he was unwanted by the natural parents.
(and supported by earlier discussion of 1964 Queensland adoption legislation\(^79\)) that ‘the confidentiality which surrounds adoption suggests a perception by the legislature of the damage which can flow to children from learning that their parents regard them as a burden.’\(^80\) This was used as an analogous argument to support a rejection of liability in wrongful birth cases in order to perpetrate secrecy and to protect children from the knowledge that they were unplanned and were the subject of litigation.

However, this SF is clearly contestable and contentious and reflective of social values of the 1960s as opposed to modern research and practice in adoption services. Modern adoption research and practice recognises the significant damage that old practices of secrecy in adoption inflicted on birth parents and adopted children (including feelings of loss of family and culture) and advocates a more open approach to adoption.\(^81\) Australian

\(^{79}\) Ibid, 123-4 [337] referring to the Adoption of Children Act 1964 (QLD). It should be noted that since 2002 Queensland had been reviewing the Adoption of Children Act 1964 (QLD), with a view to developing new contemporary legislation which better reflected current social views and understandings about adoption. The Adoption Act 2009 (QLD) resulted from this process. This was the first major review of the QLD legislation in over thirty years. The review and subsequent legislation recognised the significant social changes that had occurred since 1964. See Queensland Government Department of Families, 'Adoption Legislation Review Consultation Report: Overview of Key Issues' (Queensland Department of Families, 2003), 2. See also Queensland Department of Families, 'Adoption Legislation Review: Consultation Paper' (Queensland Department of Families, 2002) Chapter 3 'The concept of adoption and general principles' and Chapter 4 'Open Adoption Practice' which notes at 32 that ‘since the mid-1970s, there has been a move away from confidential adoption arrangements, closed adoption records and the assumption that such arrangements are in the best interests of children requiring adoption and birth or adoptive parents. Adoption practice reflects social, political, economic and moral changes in society and the move towards more open adoption practice is part of a trend towards more openness in society generally.’ The Adoption Act 2009 (QLD) s 6(2) (h) (ii) provides that one of the principles of the act is that a child should be cared for in a way that promotes openness and honesty about the child’s adoption.

\(^{80}\) Ibid, 139-40 [384].

\(^{81}\) See the discussion above in n 79 and Daryl Higgins, 'Impact of Past Adoption Practices:Summary of Key Issues from Australian Research Final Report' (Australian Institute of Family Studies, 2010). See also the New South Wales Law Reform Commission, 'Review of the Adoption of the Children Act 1965 (NSW):
legislatures, including Queensland and New South Wales, have reviewed their adoption legislation in line with modern research and practice in adoption particularly in relation to the right to knowledge and the damage inflicted on all parties to adoption by practices of secrecy. The SF used by Heydon J in *Cattanaeb* were clearly in conflict with modern empirical evidence about the impacts of secrecy on adopted children and parents, but also were not reflective of the movement of Australian legislatures (based on evidence) away from notions of secrecy and closed adoption.

---

Report 81' (1997). At [7.1] the Commission indicates that ‘one of the most distinctive features of recent thinking and practice in adoption is the view that adoption law should not facilitate deception or secrecy, but should promote honesty and openness. This mode of thinking developed from research into the long-term effects of adoption and the needs of consumers of adoption services. Research and experience both in Australia and overseas shows that this is in the best interests of the child and should, therefore be encouraged.’ For a background of the outdated social notions (including for example the shame of unmarried parenthood and illegitimacy) underlying notions of secrecy see NSW Law Reform Commission, 'Review of the Adoption Information Act 1990 Summary Report: Report 69' (1992) Chapter 2. The report notes at [2.5] social changes away from secrecy, and indicates at [2.4] that ‘at least by the mid 1960s adoptive parents were being advised by adoption agencies to tell children of their adoptive status.’ In New South Wales ‘after 1977 adoptive parents had to agree to tell their children of their adoptive status’ [2.8]. In discussing the changes in social values and the incidences of adoption since the 1960s Graycar and Morgan also note ‘furthermore the social and emotional consequences of giving up babies for adoption are now widely discussed’ (Reg Graycar and Jenny Morgan, "Unnatural Rejection of Womanhood and Motherhood": Pregnancy, Damages and the Law’ (1996) 18 *Sydney Law Review* 323, 340). See also the objectives of the *Adoption Act 2000* (NSW) in s 7 which provides amongst other things that the objectives of the act include ‘to ensure that adoption law and practice assist a child to know and have access to his or her birth family and cultural heritage' and ‘To encourage openness in adoption'.

82 Ibid.
Heydon J also referred repeatedly to the so-called ‘emotional bastard’ SF which in effect states that children will be psychologically damaged by the knowledge they were not only unplanned by their parents but were the subject of litigation. This SF appears to have originated in the United States of America in the late 1950s and Heydon J refers to a number of American cases in support of it. However, there are a number of major difficulties with this SF. First, there appears to be no empirical support for this essentially social scientific fact (knowledge that would potentially stem from the discipline of psychology) either available or stated in the relevant case law sources. Second, a number of the American cases cited by Heydon J positively source the veracity of the SF to two

---

83 For example see Cattanach v Melchior (2003) 215 CLR 1, 136-40 [372]-[384], 141 [390]-[391], 143[392],144 [399], 147 [410].
84 RJL, above n 78, 812 (n 25) uses the term ‘emotional bastard’ because he argues (in 1965) that wrongful birth claims are similar to a ‘claim of bastardry’ (a husband’s claim a child was the result of adulterous conduct of his wife) on the basis that in those claims neither the husband nor wife can testify ‘to the fact of non access which could render the child illegitimate’. This is to ensure the child is not harmed ‘emotionally’ by the ‘stigma’ of illegitimacy.
85 See the discussion in Sherlock v Stillwater Clinic, 260 NW 2d 169 (Minn, 1977) which refers to the 1957 case of Shabeen v Knight, 6 Lyc 19, 11 Pa D & C. 2d 41 (1957). The argument seems to have been first rejected in 1967 in Custodio v Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr 463, 27 ALR 3d 884 (1967) noting the new ‘modern’ social attitudes to such matters.
86 For example see Cattanach v Melchior (2003) 215 CLR 1(2003) 215 CLR 1, 137-8 [374]-[380] where Heydon J discusses Sherlock v Stillwater Clinic, 260 NW 2d 169 (Minn, 1977); Wilbur v Kerr, 628 SW 2d (Ark, 1982); Boone v Mullendore, 416 So 2d 718 (Ala, 1982); McKeran v Aasheim, 687 P 2d 850 (Wash, 1984); University of Arizona Health Services Center v Superior Court of the State of Arizona, 667 P 2d 1294 (Ariz, 1983); Burke v Rivo, 551 NE 2d 1 (Mass, 1990).
87 See Kirby J comments in Cattanach v Melchior (2003) 215 CLR 1, 56 [145] and McHugh and Gummow JJ, 36 [79]. Certainly I have not identified any social scientific evidence in support of the SF either cited in the American cases or in the relevant academic articles.
88 For example Wilbur v Kerr, 628 SW 2d (Ark, 1982); Boone v Mullendore, 416 So 2d 718 (Ala, 1982); McKeran v Aasheim, 687 P 2d 850 (Wash, 1984); University of Arizona Health Services Center v Superior Court of the State of Arizona, 667 P 2d 1294 (Ariz, 1983).
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

law review articles.\(^9\) However, neither of those articles affirmatively verify the existence of the ‘emotional bastard syndrome’ and simply restate it as a theory referred to in case law as a policy against recovery. Ultimately both law review authors reject the legitimacy of the argument as a basis to reject liability.\(^8\)

The emotional bastard SF was probably never a proven psychological effect at all but rather a construction by judges\(^9\) which reflected and/or constructed the social norms and values at the time of its inception during the 1950s. This was a time when openness in families was not necessarily encouraged, and when fertility issues were clouded in secrecy and shame. Even the use of the term ‘emotional bastard’\(^9\) in the cases and American law review articles harks to old attitudes about the stigma of illegitimacy and the lack of control of individual fertility and reproduction. It seems that the very genesis of the ‘emotional bastard’ SF (and its close relative the secrecy in adoption SF) in wrongful birth cases is that by analogy with the position of the illegitimate child, the adopted or unplanned child (when the fact of adoption or lack of planning is known) would and should feel social stigma and shame, and accordingly would suffer psychological harm.

---

\(^8\) See Gerald Robertson, ' Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation ' (1978) 4(2) American Journal of Law and Medicine 131, 153. Robertson while disposing of the ‘theory’ does appear to recognise the possibility of some psychological damage to children however does not advocate this as a sufficient reason to reject wrongful birth actions but as reason to provide separate representation for children. See also Brian McDonough, 'Wrongful Birth: A Child of Tort Comes of Age' (1981) 50 University of Cincinnati Law Review 65, 74.

\(^9\) Ibid.

\(^9\) And legal academics, see n 84 above.

\(^9\) The term is used in quotes from the American cases, cited by Heydon J in Cattanach v Melchior (2003) 215 CLR 1, 137 [375], 137-8 [376].
Another example of judicial ‘common-sense’ SF assumptions identified in the study which is inconsistent with available empirical material occurred in *Koehler v Cerebos*.

This case concerned a female plaintiff claiming for psychiatric injury suffered in the workplace as a result of work over-load. In the majority judgment, as part of the discussion of the question of the reasonable foreseeability by the employer of such an injury, McHugh J, Gummow J, Hayne J and Heydon J stated in an unsourced SF:

> It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work.\(^9^5\)

This SF statement implies that although it may have been common knowledge that some psychiatric illnesses may be triggered by stress, the risk of psychiatric injury to all employees from stress through overload at work was either not a recognised phenomena or at least was not common knowledge. The statement also wrongly appears to assume that only particular individual employees will be susceptible to psychiatric injury in the workplace and that individual susceptibility is the major factor in workplace psychological injury. However, a very large and sophisticated body of international and Australian research dating from the 1980’s and even earlier documents the role of institutional factors at work (including psycho-social hazards such as work overload and

\(^9^3\) *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.


\(^9^5\) *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44, 57 (McHugh J, Gummow J, Hayne J, Heydon J). See also Callinan J (65 [57]) regarding pressure and stress being a normal part of employment conditions.
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

lack of control of workload) in the development of psychiatric illnesses of employees.\textsuperscript{96} Significant literature also exists that documents the rising prevalence of workplace psychiatric injury in Australia and internationally, and the costs of workplace psychiatric injury to employers, workers’ compensation schemes and the Australian economy.\textsuperscript{97}

Clearly judicial assumptions about the nature of how workplace psychiatric injuries are caused, and how well known this is to employers are critical factors in negligence cases concerning workplace psychiatric injury. The outcome of cases can be called into question where judicial assumptions of SF are not properly informed (or are wrong). Judicial assumptions of ‘normal’ workload and ‘normal’ stress at work could also be seriously out of step with conditions in the Australian workplace generally. This is particularly given the propensity of those who are High Court judges (as a small elite group within the legal profession) to make a personal choice\textsuperscript{98} to work excessively in a


\textsuperscript{97} Ibid. See also the National Occupational Health and Safety Commission, 'The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community' (2004). This report estimated the total costs of workplace injury and illness more generally to the Australian economy in 2000-1 as $34.3 billion.

\textsuperscript{98} Through accepting appointment as a judge.
high pay, high job security, high control job.\textsuperscript{99} If looked at this way, it shows how incongruous it was for High Court judges to make ‘common-sense’ SF assessments about the foreseeability of psychiatric injury to a middle aged woman in a low job-security, low control, high physical workload, unskilled job who had been demoted to part-time pay for a full time workload.\textsuperscript{100}

**B. Incomplete or Outdated SF**

There was a range of SF identified in the study which were congruent with some aspects of available empirical evidence, but which were nevertheless incomplete or reflected outdated empirical evidence. For example, some SF referred to ‘common knowledge’ about the changing status of women in Australian society, the growing financial independence of women in Australian society and gender equality in modern Australian society. Examples (drawn from *De Sales v Ingrilli*) included:

\textsuperscript{99}Unlike judges, many psychologically injured workers (like Mrs Koehler) will not have experienced a workplace where they had significant control over their work, workload, or job security. The British Health and Safety Executive Management Standards in relation to psychological injury in the workplace (which were based on available research) recognise that workplace risk factors include high demand workplaces, lack of employee control of work and workload, lack of support, lack of positive workplace relationships, unclear role in the organisation, and poor change management. See Cousins et al, above n 96; Mackay et al, above n 96.

\textsuperscript{100}A separate question which was never considered in this case (because the judges of the High Court did not appear to be aware of the existing research) was whether the relevant knowledge and research on the effects and causes of workplace stress and employee psychological injury could be said to have been within the knowledge of the employer at the time the injury was sustained in 1995. There is evidence that at least by the late 1990’s the Western Australian Workers’ Compensation and Rehabilitation Commission and other Australian workers’ compensation and workplace health and safety bodies were aware of the nature of work-related stress and its link to psychological injury and were providing material to employers in relation to the risks of workplace stress. See for example Kendall et al, above n 96, and the other reports cited above n 96.
Amongst the changes are the following: (3) The growing incidence of female employment and of the economic and social independence of women.\textsuperscript{101}

However, injury can occur in circumstances in which there is no dependency. For example, it is now common for both parties to a legal or de facto marriage to have salaried or income-producing occupations. Each may expect to obtain financial advantage from the other, even where they are both fully able to support themselves from their own income, and are therefore not ‘dependent’ in any sense.\textsuperscript{102}

It may be acknowledged that, in today's society, it is easy to think of individual cases, or of circumstances, in which a widow would not be better off financially as a result of remarrying. It is just as easy to think of individual cases, or of circumstances, in which a married woman would not suffer financial harm as a result of the death of her husband.\textsuperscript{103}

But changing social conditions may also have made it less safe to assume that remarriage will be to the financial benefit of a widow or widower. A widow who remarryes might, through her own income, support her new husband. A widower who remarries might marry someone who is unwilling or unable to provide the same domestic services as his previous wife. Even so, it is important to bear in mind, as noted earlier, that financial benefit from remarriage does not necessarily involve dependency.\textsuperscript{104}

One change that may have occurred, I cannot say whether it has or not, is that many women, of which this appellant may be one, transform their lives as their children grow older, by studying and working and ceasing to be dependent at all upon their husbands: indeed they sometimes become the, or the principal provider.\textsuperscript{105}

Empirical research does show that in the last few decades gains have been made by Australian women in participation in the labour market and there have been improvements in the financial status of Australian women.\textsuperscript{106} However, the judicial SF

\textsuperscript{101} \textit{De Sales v Ingrilli} (2002) 212 CLR 338, 392 [153].
\textsuperscript{102} Ibid, 347 [12] (Gleeson CJ).
\textsuperscript{103} Ibid, 351 [23] (Gleeson CJ).
\textsuperscript{104} Ibid, 352 [26] (Gleeson CJ).
\textsuperscript{105} Ibid, 406 [192] (Callinan J).
\textsuperscript{106} See for example Australian Bureau of Statistics, 'Australian Social Trends 2006 : Trends in Women’s Employment' (2006). Note however that the report indicates that the ‘growth in employment for women
about these matters identified in the study tended to overstate the employment and financial status of women in Australia, and suggested comparative equality with Australian men. This is inconsistent with the empirical research widely publicly available (for example that produced and distributed by the Australian Bureau of Statistics and other government bodies) which still shows very significant disparities between Australian women and men in employment and financial status. Women still earn on average far less than men. More women work part-time and in casual jobs (rather than in full-time permanent jobs) than men, and women have on average far less superannuation savings than men to fund their retirement. Particular groups of women, particularly ‘elderly single women and female sole parents are over-represented in groups living on low incomes.’ Women who separate from or divorce their partners...
experience far more significant drops in income than men who separate from or divorce their partners.\textsuperscript{111} Far more women than men are carers of people with a disability or who are elderly, and carers experience high levels of financial distress.\textsuperscript{112}

A recent Australian Productivity Commission Report on working patterns of older Australian women (aged 45-64 years old) throws particular light on the SF statement by Callinan J above that suggests many older women may now be working and becoming financially independent of their spouses or becoming the primary breadwinner.\textsuperscript{113} The Productivity Commission research finds that there has been growth in workplace contribution of older women to total contribution of working hours in the Australian economy from 6\% to 15\% over the last three decades, and this will continue to steadily grow.\textsuperscript{114} However, ‘in 2009, women aged 45 to 64 years accounted for 16.7 per cent of employed people aged 15 to 64 years in Australia, while their share of hours worked was only 14.6 per cent.’\textsuperscript{115} At this very low level of workplace participation obviously it is

\begin{itemize}
  \item \textsuperscript{111} Australian Human Rights Commission, above n 109, 21 which notes that ‘in 2003 men who separated experienced an average drop in their household disposable income by $4,100 per year, compared to women who separated experiencing a drop of $21,400.’ In addition the report found that ‘examining the financial circumstances of individuals aged 55-74, by marital status and gender, shows that divorced women have the lowest levels of household income, superannuation and assets compared to married people and divorced men. Divorced women were also less likely to own their home outright compared to married women.’
  \item \textsuperscript{113} \textit{De Sales v Ingrilli} (2002) 212 CLR 338, 406 [192] (Callinan J).
  \item \textsuperscript{115} Ibid.
\end{itemize}
incongruous to suggest that ‘many’ older women might be becoming financially
dependent and primary breadwinners.

One explanation for the differences between judicial assumptions about SF relating to
female work and financial status and the empirical reality may lie in the availability
heuristic — that is judges intuitively extrapolating the experiences of women known to
them to represent the majority of women. In this sense, as Graycar suggests, ‘people are
always talking about themselves’.116 She argues that ‘if a judge can equate “knowledge”
about women, gained through his own “private” experience, with “truth”, then a judge
can conflate all women’.117 One of the strongest factors which raises workplace
participation rates and financial status of women is education level. Highly educated
women with a University qualification (ie those more likely to form part of judicial work
cultures, and social circles)118 have much higher workplace participation rates over their
lifetimes than women with lower forms of qualifications or no qualifications.119

There are sometimes instances where a SF in a case is based on some underlying
empirical evidence and subsequent judicial references in other later cases reference the
original case for the SF (rather than the underlying empirical evidence). This may result
in more reliable SF than reliance on simply judicial assumptions of ‘common knowledge’
or ‘common understanding’. However, it is still nowhere near as reliable as reference to
up-to-date available empirical studies given the propensity of science to evolve and

117 Ibid. Note Graycar’s example of a judge who refers to the employment experiences of the wives of his
fellow judges on the NSW Court of Appeal to argue judges have experience of the ‘more modern way of
life’. (272-3).
118 Of course this is in itself a SF assumption.
119 Gilfillan and Andrews, above n 114, XXI.
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

change. Contemporary empirical studies can sometimes discredit or qualify previous empirical studies. Or, new studies may build upon and provide new insights on topics investigated in previous studies. Empirical material which is relied on in case law and then reproduced into other cases can very quickly become out of date or incomplete. This is of particular concern when the original empirical material was used to ground a SF of key importance.

There was a number of examples of this identified in this study particularly in cases which concerned the trial judge’s assessment of witness credibility as a central issue. For example, in 2003 in Fox v Percy Gleeson CJ, Gummow J and Kirby J made the following SF statement about credibility assessment referenced to a 1992 case (Trawl Industries) and a 1999 case (SRA):

Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials.

The underlying empirical evidence cited in the sources given for the credibility SF above was very dated by 2003, the year Fox v Percy was decided. The 1992 judgment, Trawl Industries, in turn referred to a 1983 law journal article and a 1985 Australian Law Reform

---

120 These cases included Suwal v Cessnock City Council (2003) 200 ALR 1; Fox v Percy (2003) 214 CLR 118; Rosenberg v Percival (2001) 205 CLR 434.
121 Trawl Industries Pty Ltd v Effem Foods Pty Ltd (1992) 27 NSWLR 326.
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

Commission Report. The empirical material concerning credibility of witnesses discussed in the ALRC report was even older. The most recent empirical source referred to in the ALRC report was published in 1978, some 25 years prior to the SF statement in the judgment in Fox v Percy. The SRA case also referred to as a source for the SF, did not directly refer to any newer empirical material, rather citing the same evidence as the Trawl case in addition to some law journal articles (the most recent published in 1996) and a 1984 psychology text.

This needs to be considered in context. The study of the impact of appearance and other personal characteristics on human credibility assessment has been described as giving rise to a ‘huge’ literature in the fields of social psychology and psychology and law. It is a sophisticated and constantly evolving body of literature, particularly in the last twenty years. The research has evolved to the point where it is most likely that the manner in which the SF in Fox v Percy is stated is too weak when it refers to there being ‘doubt’ about the relationship between appearance and credibility. In addition to the SF identified above, there were also other SF statements identified in the study that

125 Australian Law Reform Commission, above n 124, [797]-[800] n 37-58. The oldest empirical evidence referred to was published in 1946.
126 State Rail Authority of NSW v Earthline Constructions Pty Ltd (in liq) (1999) 160 ALR 588, 617 n 109. The most recent legal journal articles referred to was published in 1996. No scientific journal articles or articles from the field of social psychology (the relevant scientific field of study) were cited. One 1984 psychology text was also referred to, Gary Wells and Elizabeth Loftus, Eyewitness Testimony (1984).
128 For example see the literature reviews in Spellman and Tenney, above n 127 and Porter, Brinke and Gustaw above n 64.
129 The statement of Kirby J in Rosenberg v Percival (2001) 205 CLR 434, 488 [163] that there is a ‘very strong doubt’ due to a ‘now substantial body of scientific evidence’ is more accurate.
suggested that although there might be some doubts about the ability of trial judges to assess credibility based on appearance, trial judge assessments of credibility were still advantaged by seeing and hearing witnesses. For example:

No persuasive research suggests that the interests of justice would be better served if appellate courts decided appeals on the printed record without regard to the advantage that the trial judge has in seeing and hearing the witnesses. No social necessity has arisen that would justify the revolutionary step of jettisoning doctrines that have served Anglo-Australian law well for more than a century.\footnote{Fox v Percy (2003) 214 CLR 118, 147 [93] (McHugh J). See also Rosenberg v Percival (2001) 205 CLR 434, 27 (McHugh J), 448 [41] (McHugh J) regarding the advantage of trial judges, and Suvaal v Cessnock City Council (2003) 200 ALR 1, 19 [71] (Kirby J) which suggests that despite some possible limitations the advantages persist.}

However, a recent literature review of the empirical studies of human credibility assessment by Porter, Brinke and Gustaw found ‘there is little support for the long-standing assumption that judges and jurors can accurately assess credibility’ and there is widespread evidence of faulty credibility assessments.\footnote{Porter, Brinke and Gustaw, above n 64. Porter, Brinke and Gustaw refer to studies over at least the last thirty years.} This reinforces the danger that can arise when judges are implicitly (or explicitly) relying on empirical evidence which is outdated at the time of decision, particularly when SF based on this ‘evidence’ forms an important part of the judicial reasons.

As this section acknowledged at the outset, judicial use of ‘common sense’ as a basis for SF is not always problematic. Sometimes, and even perhaps often, ‘common-sense’ judicial SF are unlikely to threaten the accuracy and acceptability of judicial reasons in negligence cases. However, as this section has demonstrated, the results of this study show that there are certain dangers that can arise from judicial use of \textit{some} ‘common sense’ SF, particularly when a SF forms an important part of the basis of a judicial
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

decision. This section has shown how this can occur when a SF is empirically unsupported, wrong or incomplete, or where it relies on some underlying but very outdated empirical material. The next section discusses how the accuracy and acceptability of judicial reasoning in negligence cases can be affected by the SF judges fail to consider—the missing SF.

3. MISSING SF: THE SF JUDGES FAIL TO CONSIDER

A valid and reliable analysis of data gathered in a content analysis study 'also should consider what is missing or not present in the text being analysed.' 132 The second danger of the use of judicial ‘common-sense’ or ‘common understanding’ SF confirmed in this study is exclusion of relevant SF which reflect the life experiences of those already marginalised by the law including women, people with a disability, young people, elderly people, people not of white anglo-saxon/anglo-celtic heritage, 133 and lesbian, gay, bisexual and transgender people.

There were some examples identified in this study where judges did make SF statements which recognised the life experiences of people from these traditionally marginalised groups. For example, some judges spoke of an ageing population and the effect of this on carers. 134 Justice Kirby noted the increasing incidence of non-traditional families and


133 This area is the subject of critical race scholarship. See Marett Leiboff and Mark Thomas, Legal Theories: Context and Practice (2009), Chapter 15.

134 CSR Limited v Eddy (2005) 226 CLR 1, 32 [65] (Gleeson CJ, Gummow J, Heydon J), De Sales v Ingrilli (2002) 212 CLR 338, 347-8 [16] (Gleeson CJ);392-3 [153] (Kirby J); Cattanach v Melchior (2003) 215 CLR 1, 21 [21](Gleeson CJ). This is noteworthy and perhaps not surprising given (as will be discussed in Chapter 8) the age of the High Court judges studied at the time of judgments (55-70).
same sex partnerships. The nature and behaviour of children (although not children’s ‘experiences’ or their ‘perspectives’ but rather adult perspectives of children) were discussed in a number of cases. However, as will be discussed below, there were notable examples identified in the study of relevant ‘missing’ SF. This section predominantly focuses on examples which show how this occurred in relation to SF about disability and gender.

Many (if not most) negligence cases in the High Court deal with liability for personal injury, resulting in serious and usually permanent physical and/or psychological disability. The adjudicative facts about a particular plaintiff’s injury will be dealt with in evidence at the trial of a matter. However, the general nature and effects of disability on people and their lives are significant ‘background’ or ‘context’ matters in a negligence case. They are at least as important as general concerns about such issues as future impacts of liability

135 Cattanach v Melchior (2003) 215 CLR 1, 63-4 [164] (Kirby J). It is noteworthy, that as will be discussed in Chapter 8, Justice Kirby was the only gay member of the High Court during the time period covered by the study (2001-2005).

136 These SF were not referenced to any form of empirical evidence. They tended to typically describe children in ‘generic’ ways that referred to their innate human value. For example see Cattanach v Melchior (2003) 215 CLR 1, 22 [35] (Gleeson CJ), 90 [249] (Heydon J), 93[261] (Heydon J), 127-9 [353] (Heydon J), 132-3 [353]-[356] (Heydon J), 133[361]-[362](Heydon J). Other SF referred to more negative character aspects of children such as fragility, vulnerability, immaturity, inexperience, tendency to ignore instructions, irrationality, mischievousness, and tendency to cause their parents trouble. See for example Cattanach v Melchior (2003) 215 CLR 1, 118 [324] (Heydon J), 144 [399] (Heydon J); New South Wales v Lepore (2003) 212 CLR 511, 600 [259] (Gummow J, Hayne J); Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba (2005) 221 CLR 161, 171 [27] (Gleeson CJ, Hayne J, Callinan J, Heydon J), 174 [39] (McHugh J) , 175 [44] (McHugh J), 176 [46] (McHugh J). Justice Kirby was the only judge to refer to children in a way that recognised positive characteristics of children such as resilience (see for example Cattanach v Melchior (2003) 215 CLR 1, 56 [145] (Kirby J). The field of childhood studies is a growing discipline and it examines (amongst other matters) the way in which the law and the judiciary constructs facts about children and childhood that do not always accord with empirical evidence or reflect the lived experiences of children. See for example Michael Freeman (ed), Law and Childhood Studies (forthcoming).
on business, employers, government and commerce.\textsuperscript{137} Despite this, there were very few SF identified in the study which recognised the general incidence of disability in Australia, the general effects of disability on people with disability, the general incidence and nature of injury-caused disability, or the lived experiences of people with disabilities. Justice McHugh in \textit{Woods v Multisport Holdings Pty Ltd} referred to a number of empirical sources in support of a SF about the extent of recreation-caused injuries and their cost to the Australian Health system\textsuperscript{138} and there was also reference in that case to expert evidence regarding the incidence of indoor cricket injury.\textsuperscript{139} In \textit{Cattanach v Melchior} McHugh J and Gummow J recognised that ‘the differential treatment of the worth of the lives of those with ill-health or disabilities has been a mark of the societies and political regimes we least admire.’\textsuperscript{140} There were also a number of judicial SF which identified increasing societal awareness of mental illness.\textsuperscript{141}

The paucity of references to SF about disability, a SF associated with plaintiffs, occurred despite a range of cases in the study concerning personal injury where a plaintiff had

\textsuperscript{137} SF about these matters identified in the content analysis are discussed in Chapter 6.
\textsuperscript{139} Ibid, 476-7 [58] (McHugh J).
\textsuperscript{140} \textit{Cattanach v Melchior} (2003) 215 CLR 1, 35-6 [78] (McHugh J, Gummow J). See also Kirby J’s statement (63 [164]) that ‘(i)n Australia, even the use of the description of such parents as "afflicted with a handicapped child" would be offensive to most such parents and contrary to their attitudes about themselves, their child and others. Essentially, such differentiation rests on outmoded reasoning …’
\textsuperscript{141} For example see \textit{Tame v New South Wales} (2002) 211 CLR 317, 332 [14] (Gleeson CJ). See above however, the discussion in Section 2 of the failure of the High Court to adequately appreciate the nature of workplace related psychiatric illness in \textit{Koehler v Cerebos (Australia) Ltd} (2005) 222 CLR 44.
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

suffered catastrophic permanent disability such as spinal injuries.\footnote{142} In those cases, this kind of disability SF material might have formed part of the general context or background of the case or formed part of arguments about accident prevention (as they did in McHugh J’s judgment in \textit{Woods}). Again, general ‘anti-policy’ arguments which counsel judges against referring to extra-legal concerns in tort cases\footnote{143} might have resulted in this lack of SF about disability. However, this study identified an array of other judicial SF that discussed ‘burdens’ and ‘limitations’ on classes of defendants such as government, business and employers. These are discussed in the next chapter. This seems to suggest that there are other reasons why judges fail to refer to SF about disability.\footnote{144} Part of the reason may lie in the insights from Disability Studies, which suggests that the ‘law’ considers able-bodiedness as the ‘un-stated norm’ and accordingly fails to appreciate or acknowledge the lived experiences of people with disability.\footnote{145}

Just as disability studies scholars argue the law fails to acknowledge the lived experiences of people with disability, feminist tort scholars have long argued that judicial judgments are gendered —they do not adequately or properly recognise the life perspectives of women.\footnote{146} As argued in Section 2 of this chapter, the application of ‘male’ judicial


\footnote{143} Discussed in Chapter 1 and Chapter 7.

\footnote{144} Chapter 7 and 8 will discuss this further but reasons might include lack of reliable SF information about disability, lack of personal experience with disability, and cultural worldviews which do not encourage more communitarian, egalitarian approaches to decision-making, or accident prevention in tort law.


\footnote{146} See for example Reg Graycar, 'Gender, Race, Bias and Perspective: OR, how Otherness Colours Your Judgment' (2008) \textit{15}(1-2) \textit{International Journal of the Legal Profession} 73; Reg Graycar, 'Telling Tales: Legal Stories About Violence Against Women' (1996) 8 \textit{Cardozo Studies in Law and Literature} 298; Reg Graycar,
‘common sense’ can lead to incomplete or incorrect assumptions about women which become apparent when available empirical material is examined. Feminist critique of judging suggests that it is ‘gendered and implicitly male’ and draws from ‘a history of social, political, and legal practices, and beliefs now deeply entrenched in the substantive body of law with which judges work’. There were comments made by a number of judges (particularly by Kirby J) in the cases in this study that did suggest an awareness by judges of feminist critiques of judging and a belief that legal and judicial attitudes to women and judicial understanding of the lives of women had evolved and greatly changed in recent times:

In the result, it was not uncommon to see widows described by judges as ‘well groomed, attractive and presentable ... [with] a personable and warm nature’ and other such like epithets. On my reading of the cases, such an evaluation of the physical attractiveness is not normally made in the case of male claimants. If the judge considered that the widow was ‘elderly’ or of ‘unattractive appearance or disposition, or suffers from some disability, or is encumbered with a large number of young children’ such comments (except perhaps the last) might usually be left unsaid but with only a small discount for the prospects of remarriage being allowed.

Amongst the changes are the following:...(8) The increase in the number of judges who may be less likely to refer to the physical attractions, warmth of personality and remarriage prospects of a widow based upon stereotyped assumptions about the considerations that contribute to the initiation and continuance of domestic partnerships...

Our law has moved a long way since Blackstone asserted: ‘the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything’. Yet reading the cases on the so-

---


147 Graycar, above n 6, 266. Hunter, above n 146, 38.
149 Ibid, 393 [153] (Kirby J).
called ‘remarriage discount’, one cannot escape the conclusion that they reveal a ‘distinctly male perspective’. 150

Commentators have pointed out that domestic work is not entirely analogous to this type of civil society engagement because domestic work is not optional. Somebody must do it. This is undeniable. 151

As discussed above, however, on the occasions that judges in the study referred to their common sense based SF about the ‘new’ status of women, these SF often over-estimated the social changes that had occurred and were not fully in accord with empirical evidence. These SF about women (for example those discussed in Section 2 of this chapter concerning the financial and employment status of women), tended to suggest that while women had been disadvantaged in the past, there was now comparative social and financial gender equality in Australian society. These might be called ‘aspirational’ SF. They correctly reflected that there had been significant welcome changes in the status of women in Australian society, however did not fully acknowledge there were still significant differences between the social and employment experiences of men and women.

This apparent judicial assumption of social and economic equality appeared to have a second impact in the cases in the study. In many cases, judges tended to talk about the experience of gender ‘neutral’ parties — such as parents, employees, and spouses. This occurred even in cases where empirical evidence might have suggested differences between the experiences of the genders potentially relevant to the case. It had the effect of conflating male experiences to represent the whole ‘neutral’ experience, effectively silencing female perspectives and de-contextualising the facts of the case. 152 This resulted

150 Ibid, 393-4 [156] (Kirby J).
152 Graycar above n 6, 276. See also Hunter, above n 146, 38-9.
in ‘missing’ SF— SF the High Court never considered which would have been potentially relevant in the case. An example of this occurred in Cattanach v Melchior.\textsuperscript{153}

This was a wrongful birth case. Wrongful birth cases essentially concern the reproductive autonomy of women and the effect of child bearing and child raising on women’s lives. Work and family balance, reproductive autonomy, childcare and the effect of bearing children are major issues affecting Australian women. As Lord Bingham noted in the House of Lords in another birth case in Rees v Darlington Memorial Hospital NHS Trust:

The spectre of the well-to-do plundering the NHS National Health Service should not blind one to the other realities: that of the single mother with young children, struggling to make ends meet and counting the days until her children are of an age to enable her to work more hours and so enable the family to live a less straitened existence; the mother whose burning ambition is to put domestic chores behind her and embark on a new career or resume an old one. Examples can be multiplied. To speak of losing the freedom to limit the size of one’s family is to mask the real loss suffered in situations of this kind. This is that a parent, particularly (even) today the mother, has been denied through the negligence of another, the opportunity to live her life in the way that she asked and planned.\textsuperscript{154}

However, the SF surrounding these issues were virtually absent in Cattanach with only Kirby J generally noting the relevance of the effect of children on Australian women’s lives:

The propounded distinction between immediate and long-term costs of medical error is not drawn in other cases of medical negligence. It is arbitrary and unjust in this context. Such a distinction could even be said to be discriminatory, given that it involves a denial of the application of ordinary compensatory principles in the particular circumstances of child-birth and child-rearing, circumstances that biologically and socially pertain to the female experience and traditionally fall within the domain of women.\textsuperscript{155}


\textsuperscript{154} Rees v Darlington Memorial Hospital NHS Trust [2004] 1 AC 309, 317 [8]. However, Lord Bingham joined by the other Law Lords in the majority Lord Nicholls of Birkenhead, Lord Millett and Lord Hope, thought 15 000 pounds was a sufficient ‘conventional sum’ to match this ‘injury and loss’. It is hard to imagine that this sum even represents one year of the true value of mothering a child.

\textsuperscript{155} Cattanach v Melchior (2003) 215 CLR 1, 62-3 [162] (Kirby J). He also notes generally that there have been social changes affecting women and marriage (43 [105]).
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

For the rest of the court, the role of ‘mother’ and the effect of children on the lives of ‘mothers’ were simply silenced. Mothers were considered one half of the generic parental duo and effects on the lives of parents generally (mothers and fathers) were ascribed to women. However, empirical research has made it clear that the effects of parenthood are not generic. Parenthood impacts more greatly on the lives and careers of mothers than fathers. There is a rich literature of empirical material that may have been relevant and accessible to the court which shows that on average mothers continue to carry out far more child care and perform far more housework than fathers. Characterisation of wrongful birth cases as if the birth of an unplanned child has an equal and neutral effect on both mothers and fathers misconceives the very nature of these kinds of cases.


157 For example see Australian Bureau of Statistics, ’4153.0 How Australians Use Their time, 1997’ (Australian Bureau of Statistics, 1997). More recent statistics on time use are available in Australian Bureau of Statistics, ’4153.0 How Australians Use Their Time 2006’ (Australian Bureau of Statistics, 2006); Australian Bureau of Statistics, ’Australian Social Trends 2009: Work. Life and Family Balance’ (Australian Bureau of Statistics, 2009). See also Lyn Craig, ’The Time Cost of Parenthood: An Analysis of Daily Workload: SPRC Discussion Paper No 117’ (2002). Craig notes that her research adds to the body of work that shows that domestic work and the family have different impacts on men and women. Her report finds the time cost of motherhood higher than fatherhood with mothers working part-time having the highest overall workload (18). Further research by Craig confirms that the nature of childcare is also qualitatively different for mothers with fathers ‘more likely to have someone to take over, to be able to avoid the less pleasant and more urgent tasks, and rarely do other tasks at the same time as child care’ (Lyn Craig, ’Caring Differently: A Time Use Analysis of the Type and Social Context of Child Care Performed by Fathers and Mothers: SPRC Discussion Paper No 116’ (2002), 18). For further discussion see Lyn Craig, Contemporary Motherhood: The Impact of Children on Adult Time (2007).
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

Why was there such silence on such important SF? Chapters 7 and 8 discuss in more detail the legal, institutional, individual, cognitive and cultural reasons that might explain why judges do not refer to relevant empirical material for SF and rely on ‘common sense’. Section 1 referred to some of those factors. In the Cattanach case, it appears that empirical material on the gendered nature of parenting was not presented to the High Court on the hearing of the matter. Accordingly, the High Court did not have (without independent judicial research) relevant material before it. Reliance on the ‘anti-policy’ view that the High Court should focus on legal principle only or at the most ‘legal’ policy may in this case have acted as a constraint and had the effect of discouraging the use of relevant SF generally, including those relating to the effect of children on women’s lives. Senior Counsel for the plaintiff respondent while making submissions during the hearing of the High Court Appeal stated the classic anti-policy argument made in negligence cases. When responding to judicial questions relating to the relevance of particular matters of ‘public policy’, he commented that:

In our submission, if public policy is to be used from time to time in the shaping of the common law…then it ought never to be by choice of a kind which could realistically and fairly be called partisan during a current or raging controversy. In our submission, that is exactly what would be happening in this case. And all the judges, or most, regardless of the side they line up with on this issue, observe that there is much to be said on either side.

158 As discussed in Chapter 4 Section 3 an inspection of the High Court file revealed that the Appellants in Cattanach v Melchior did refer in submissions and submit a report prepared by the National Centre for Social and Economic Modelling Pty Ltd for AMP setting out the costs of child-raising (Richard Percival and Ann Harding, ‘AMP:NATSEM Income and Wealth Report Issue 3: All They Need is Love …and Around $450 000’ (National Centre for Social and Economic Modelling, 2002). This was cited in the decision by Kirby J (Cattanach v Melchior (2003) 215 CLR 1, 56 [144] n 285.. However, there was no other evidence in the court file of relevant empirical material.

159 See the discussion of this possible legal and institutional restraint on judicial SF use discussed further in Chapter 7.

160 Transcript of Proceedings, Cattanach v Melchior (High Court of Australia, B22/2002, Mr B W Walker S C, 12 February 2002), 55.
However, this study shows that judges in *Cattanach* clearly did make statements about an array of SF — just not to those relating to the specific and relevant life experiences of women. The case in fact contained the highest number of SF (167) of any of the cases analysed in this study. The recognition of SF relating to the effect of parenting children on the lives of women would have supported a policy argument in favour of the recovery of damages in the case. It is beyond the scope of this study to suggest that SF concerning the effects of children on the lives of women are necessarily trump arguments in wrongful birth cases. However, such SF (particularly where they can be supported by strong empirical evidence) do at least warrant some attention and recognition particularly in preference to unproven SF like the ‘emotional bastard’ SF discussed in Section 2 above.

It is possible that some women on the bench or at the bar may have led to more discussion in the judgments (or at least some discussion) of SF applicable to the lives of women. All members of the High Court at the time of *Cattanach* were male, and all

---

161 See Chapter 4 Table 4.1 which shows 167 SF identified in the *Cattanach* case compared to an average of 26.84 SF/case in the overall sample.

162 This is an area for further research discussed in Ch 9. Membership of a particular gender group does not equate to sharing a viewpoint on all issues or a shared common experience of gender, with other members of that gender group. As discussed in Chapter 8, there are many factors including culture, race, education, sexuality religion and social status that influence and shape life experience. Mixed gender on the bench might not automatically equate to a change in overall judicial perception of a particular SF. On the care that needs to be taken in assuming the simply appointing female judges will automatically make a difference, Graycar, above n 6, 265-6; Rosemary Hunter, ‘Can Feminist Judges Make a Difference?’ (2008) 15(1 and 2) *International Journal of the Legal Profession* 7. However, a total lack of one gender on the bench of the High Court and in any speaking roles before the High Court certainly diminishes the opportunity for developing an understanding of SF, perceptions and life experiences directly connected to
counsel\textsuperscript{163} who argued \textit{Cattanach v Melchior} on appeal before the High Court were male.\textsuperscript{164}

As Hoyano has noted of the judgment of Hale LJ (a female judge) in the English judgment of \textit{Parkinson v St James and Secroft University Hospital NHS Trust}:\textsuperscript{165}

\begin{quote}
In a tour de force, Hale LJ wrote an extended essay on the physical, psychological, practical and legal implications of pregnancy, child birth and motherhood for a woman’s personal autonomy, possibly a deliberate ‘reality check’ to the panegyrics to parenthood in which all of the (male) Law Lords indulged in \textit{McFarlane}.\textsuperscript{166}
\end{quote}

A review of other cases in the study shows that they also had potentially ‘missing’ SF—SF which were not noted in judicial reasons or which were subsumed into neutral SF which treated male and female experiences as equivalent. These missing SF concerned empirically supported gender differences in social context, or in the nature and incidence of accidents and injury that might have been relevant to the determination of the case if considered by the court. Examples of these ‘missing’ SF included \textit{Koehler v Cerebos}\textsuperscript{167} (women such as the plaintiff were much more likely to have a psychological injury caused

\begin{thebibliography}{99}
\item\textsuperscript{163} Except for one junior counsel appearing for one of the interveners, the Attorney General for Western Australia. See Transcript of Proceedings, \textit{Cattanach v Melchior} (High Court of Australia, B22/2002, Mr B W Walker S C, 12 February 2002).
\item\textsuperscript{164} For a discussion on the necessity for reform of judicial appointment procedures to allow more female appointments to the bench see George Williams and Rachel Davis, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 \textit{Melbourne University Law Review} 820. See also the discussion of the fact that women are ‘largely absent from the ranks of lawyers who appear and speak before the High Court’ (828). Davis and Williams refer to speeches given by Justice Kirby that estimate that only 2-3% of the total number of counsel appearing before the court (during the periods discussed in the speeches) were women in speaking roles. See Justice Michael Kirby, 'Women Lawyers- Making a Difference ' (1998) 10 \textit{Australian Feminist Law Journal}125, 129-34 ; Justice Michael Kirby, 'Women in the Law-What Next' (2002) 16 \textit{Australian Feminist Law Journal} 148.
\item\textsuperscript{165} \textit{Parkinson v St James and Secroft University Hospital NHS Trust} [2002] QB 266.
\item\textsuperscript{166} Laura Hoyano, 'Misconceptions about Wrongful Conception' (2002) 65(6) \textit{Modern Law Review} 883, 897.
\item\textsuperscript{167} \textit{Koehler v Cerebos (Australia) Ltd} (2005) 222 CLR 44.
\end{thebibliography}
Chapter 5: Common Sense Social Facts in High Court Negligence Cases.

by workplace stress than a male employee), \(^{168}\) *Tame v New South Wales*\(^{169}\) (mental disorders and illnesses such as anxiety and depression are more common in women and the leading cause of disease and injury burden for women in Australia), \(^{170}\) and *The Waterways Authority v Fitzgibbon*, \(^{171}\) *Vairy v Wyong Shire Council*, \(^{172}\) *Mulligan v Coffs Harbour City Council*\(^{173}\) and *Swain v Waverley Municipal Council*\(^{174}\) (men are more risk orientated than women, suffer injuries and die accidentally at a greater rate than women and suffer severe spinal cord injuries far in excess of women). \(^{175}\)

This section has shown how judicial use of ‘common sense’ SF can have the effect of excluding SF which reflect the life experiences of those who have been traditionally disenfranchised by the law. Judges are more likely to talk about SF which are within their own life experience than SF which are not. This can result in the de-contextualisation of judicial reasoning and judicial presumptions about ‘neutrality’ in the human experience which are not congruent with available empirical evidence. This can lead to judicial error, or at the very least judicial reasons which are incomplete.

**CONCLUSION**

This chapter has discussed the use of ‘common sense’ and ‘common understanding’ as the basis for judicial assertions of SF and the dangers that can result from judicial use of


\(^{170}\) Luntz, above n 168.

\(^{171}\) *The Waterways Authority v Fitzgibbon* (2005) 221 ALR 402.

\(^{172}\) *Vairy v Wyong Shire Council* (2005) 223 CLR 442.


\(^{175}\) Luntz, above n 168, 149.
'common sense' and 'common understanding'. Section 1 showed that many SF identified in this study either implicitly or explicitly drew on judicial notions of 'common sense'. This can result in judicial extrapolation of 'private' knowledge to 'common knowledge'—judges reproducing their own knowledge as if it is an objective truth. This likely results from the interaction of legal, institutional, individual, cognitive and cultural factors. These will be discussed further in Chapters 7 and 8.

Section 2 discussed the dangers that can arise from judicial use of 'common sense' based SF. The first danger, confirmed by examples identified in this study, is that judicial SF can be wrong, incomplete or out of date. SF may be unsupported or unsupportable by empirical material. A SF which relies on case law as a source (where that case originally referred to some empirical source) can reflect empirical findings which are severely out-of-date. Section 3 discussed the second danger, again demonstrated in this study, that judicial use of common sense SF can result in 'missing' SF — judicial failure to refer to relevant SF which reflect the life experiences of those groups already marginalised by the law. Finally, the use of common sense SF can lead to contestable SF which emphasise only one particular set of values to the exclusion of others. This 'danger' is taken up in the next chapter which continues the analysis of the text of the SF identified in the study, and discusses how particular groups of SF identified in the study predominantly reflected liberal, individualist and traditional social values.
INTRODUCTION

The content analysis of High Court negligence cases from 2001-2005 conducted as part of this study found that judges referred to SF\(^1\) in their reasoning and that judges commonly referred to no source or reference for SF.\(^2\) The last chapter discussed how this study also showed that judges frequently based SF on assumptions of ‘common sense’ or ‘common understanding’ (which in fact represent extrapolations of judicial ‘private’ knowledge). It argued that this potentially gives rise to three possible dangers including judicial use of empirically wrong, empirically unsupported or empirically outdated SF, and judicial failure to consider SF which represent the life experiences of groups traditionally marginalised by the law and the legal system. This chapter discusses the third possible danger. Judicial SF might reflect only particular sets of values, where there might be equally acceptable versions of a SF which align with competing or alternative values accepted in society.

This chapter argues that the SF identified in this study about a range of different matters\(^3\) predominantly aligned with a particular set of values. These values stress the role of the

---

\(^1\) SF refers to the singular ‘social fact’ and the plural ‘social facts’.

\(^2\) See discussion in Chapter 4 and Table 4.1 and Table 4.7.

\(^3\) This chapter discusses SF about Australian society; individual responsibility, autonomy and accident prevention; risk; employment and the risks of employment; government, commerce, and insurance; and legal actors and legal institutions. These are discussed in Sections 1-6 of this chapter.
individual in society and individual responsibility, the importance of free enterprise, and the value of traditional social structures and social elites. SF which aligned with these values tended to support arguments for defendants rather than plaintiffs. SF aligned far less frequently with values which stressed communal responsibility, egalitarianism and social diversity. SF which aligned with these values tended to support arguments in favour of plaintiffs. Where SF did align with the latter values, they were almost always from a judgment of Kirby J.

The results of the content analysis showed Kirby J also diverged from other members of the High Court in use and construction of SF in a number of other ways. He used SF more than other judges, sourced SF more than other judges, referred to empirical material more than most judges, and was more likely than other judges to refer to issues like gender and diversity.

---

4 As will be discussed in Chapter 8, these values are those which align with individualistic and hierarchical cultural worldviews. A ‘cultural worldview’ is a preference ‘for how society should be organised’. Dan Kahan, David Hoffman and Donald Braman, 'Whose Eyes Are You Going to Believe? Scott v Harris and the Perils of Cognitive Illiberalism' (2009) 122 Harvard Law Review 837, 859. Individualist cultural worldviews expect people to ‘secure the conditions of their own flourishing with interference or assistance.’ Hierarchical cultural worldviews favour ordering in which entitlements, obligations, opportunities, and offices are all assigned on the basis of conspicuous and largely fixed attributes, such as gender, race, lineage, class and the like. The effect of cultural worldviews on judicial reasoning is discussed further in Chapter 8. See also the discussion of the reflection of these values in conservatism and libertarianism in Dan Priel, 'Torts, Rights and Right-Wing Ideology' (2011) 19(1) Torts Law Journal 1.

5 As will be discussed in Chapter 8, these values are those which align with more solidaristic/communitarian and egalitarian cultural worldviews. A communitarian worldview supports a social ordering in which the interests of the individual are subordinated to the needs of the collective, which is in turn responsible for securing the needs of individual flourishing. An egalitarian worldview rejects that traditional ‘hierarchical’ distinctions or characteristics should affect social opportunities, entitlements and offices. See Kahan, Hoffman and Braman, above n 4.

6 This is consistent with an unspecified study by retired judge Bill Pincus referred to in AJ Brown’s recent biography of Kirby. Brown notes that Pincus argued that ‘it was Kirby, and often only Kirby, whose opinions systematically stood up for the rights of the everyman.’ See A J Brown, Michael Kirby: Paradoxes and Principles (2011), 392.

7 See discussion in Chapters 4 and 5. As Chapter 4 shows, however, Kirby J cannot be seen as a complete outlier amongst the High Court in relation to SF. For example, like the other judges, the majority of SF
It is not surprising that the results of the content analysis show that SF in the High Court negligence cases studied tended to align with values of individualism and individual responsibility, free enterprise, traditional social values and respect for social elites. It is consistent with the trend identified by Harold Luntz in High Court tort case outcomes from 1999, away from plaintiffs and towards defendants.\(^8\) It is consistent with an ideological shift in the High Court from the late 1990s\(^9\) and also potentially with the rise of the influence of corrective justice and rights theories in tort law.\(^10\) It also coincides with the rise of the influence of neo-liberalism on Australian (and Western world) economic and public policy from the 1980s onwards which peaked during the Howard coalition government of 1996-2007.\(^11\)

The principles which ‘define’ neo-liberalism used by Kirby J still had no source and were likely drawn from judicial ‘common sense’. However, as discussed in Chapter 8 there are some reasons (individual, cognitive and cultural) that might explain why Kirby J differed from other judges in his use and construction of SF.

---


\(^9\) Four of the judges in this study were appointed by the Howard Coalition government including Chief Justice Gleeson, and Justices Callinan, Hayne, and Heydon. See the discussion of the change in the ideological approach of the High Court from the late 1990s in A J Brown, Michael Kirby: Paradoxes and Principles (2011), Chapters 14-16. Brown notes this ideological shift in the High Court placed Kirby J on the ‘fringe’ (377) and in ‘isolation’ (384). See also the discussion in Jason L. Pierce, Inside the Mason Court Revolution: The High Court of Australia Transformed (2006) 278-84 of the effect of ‘conservative’ appointments to the High Court by the Howard government which he argues contributed to the reversal of the creativity of the Mason High Court.

\(^10\) Priel has argued that at least ‘rights based’ theories of tort law are not neutral and reflect ‘right-wing explanations of tort law’, Priel above n 4, 1.

including the autonomy of the individual and the role of the free market, reflect the
values of liberalism and marketisation. Individualism and respect for hierarchy and
traditional social values and structures are also reflected in the culture of the Australian
legal profession, and particularly the Bar and the Bench.

The chapter is organised around a number of SF themes that emerged during qualitative
analysis of the SF identified in the content analysis study of High Court negligence cases
from 2001-2005. Section 1 will discuss SF about the nature of a changing Australia.
Section 2 will discuss SF about individual responsibility and autonomy, and accident
prevention and deterrence. Section 3 will discuss SF about risk. Section 4 will discuss SF
about employment and risks associated with employment. Section 5 will focus on SF
about government, commerce, and insurers. Finally, Section 6 will discuss SF about legal
institutions and legal actors.

1. SF ABOUT A CHANGING AUSTRALIA

Many SF about the nature of Australia and Australian society were identified in this
study. As previously discussed, this study showed that these kinds of SF are often used

12 Western, above n 11, 402.
13 See the discussion of this in Chapter 8 section. All High Court judges the subject of this study were
judges or barristers prior to appointment. Justice Callinan was the only High Court judge studied appointed
directly from the Bar.
14 The method used to categorise the SF identified in this study to allow more organised analysis of data is
discussed in the methodology chapter (Chapter 2). The themes discussed in this Chapter draw from those
categories however are not always drawn from within only one single identified category (for example SF
about risk, the world, burden on business and autonomy) but from a number of categories where a
thematic pattern across categories was observed during data analysis.
Chapter 6: Social Facts and Values

by judges as part of setting the ‘context’ or background of their judicial reasons. The breadth of these ‘Australian’ SF revealed the very broad base of ‘common knowledge’ that judges presumed to draw upon, sometimes in areas well known to ordinary citizens but often in more specialist areas of knowledge. This section argues that SF about the nature of Australia and Australian society recognised the phenomenon of social change. However, traditional social values and respect for traditional social institutions were still heavily reflected in SF in this category. SF about Australian society were also often aspirational—they reinforced rather than questioned the value of the Australian status quo.

SF about Australian life tended to reinforce the social value of ‘traditional’ aspects of Australian social life such as marriage and the nuclear family. Judges indicated that traditional forms of social arrangements such as heterosexual marriage and the traditional nuclear family were still at the core of Australian society. The role of Christian religion in Australian society or in the development of the common law was also sometimes mentioned by judges, although the increasing secularism of Australian society was noted. There was relatively little discussion of issues such as increasing social diversity,

15 See Chapter 3 Section 2.
16 As previously discussed this is not a new phenomenon. Judges used these kind of ‘common sense’ SF in the earliest negligence cases. See the discussion in Chapter 1 of MacPherson v Buick Motor Co, 217 NY 382, (NY, 1916); Donoghue v Stevenson [1932] AC 562; Donoghue v Stevenson [1932] AC 562. See also the discussion in Chapter 5 of common sense SF.
17 For example heterosexual marriage and Christian religion.
18 See for example Cattanach v Melchior (2003) 215 CLR 1, 22 [35] (Gleeson CJ); 92 [258] (Hayne J); 118 [323] (Heydon J); 133 [363] (Heydon J).
19 For example in Cattanach v Melchior (2003) 215 CLR 1, 10 [6] Gleeson CJ noted that the common law’s attachment to the ‘value of human life’ was originally based on religious ideas, although also noted in a secular society these values were also respected on other basis. Kirby J made a similar statement at 54 [140]. See also Heydon J at 130 [358] who noted that ‘as Thomas JA said “not all religious or cultural
and where this occurred it was generally from a judgment of Kirby J. For example, he noted the wider social composition in Australia indicating the ‘reality’ of modern Australia as including the growing incidence of divorce, the changing nature of personal relationships, marriage, non-married people, sexual relationships, contraception, same-sex relationships, and economic circumstances.\(^{20}\)

Judges correctly acknowledged in SF identified in the study that in recent times (ie over the last 20-50 years) the nature of Australia had changed in many ways, including social, economic and domestic. Examples of these SF included:

Such thinking (like the earlier notion of enforced adoption) 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.\(^{21}\)

Society has changed markedly since Lord Campbell's Act was first enacted. The Fatal Accidents Act, unlike its predecessor, deals not only with surviving spouses but with survivors of de facto relationships. Very great changes occurred during the last half of the twentieth century in the nature and durability of family relationships, in the labour market, and in the expectations that individual members of society have for themselves and about others - economically, socially, domestically, culturally, emotionally. Even if once it were the case, no longer can a court make any assumption about the role that an individual can be expected to play in the family or in the economy.\(^{22}\)

values are necessarily wrong.”\(^*\) See also the statement by Kirby J in Neindorf v Junkovic (2005) 222 ALR 631, 653 [85] as to the scriptural foundations of the neighbourhood test. Gleeson CJ also noted in Cattanach v Melchior (2003) 215 CLR 110 [8] that ‘it is accepted as relevant that the social context in which this issue is to be resolved is that of a secular society, in which attitudes towards control over human reproduction have changed.’

\(^{20}\) See for example Cattanach v Melchior (2003) 215 CLR 1, 63-4 [164].

\(^{21}\) Ibid. In relation to changing social practices in relation to contraception and sterilisation see also 76-7 [10] (Hayne J), 88 [240] (Hayne J), 36 [79] (McHugh J, Gummow J), 64 [165] (Kirby J); De Sales v Ingrilli (2002) 212 CLR 338, 392 [153] (Kirby J).

\(^{22}\) De Sales v Ingrilli (2002) 212 CLR 338, 363 [65] (Gaudron J, Gummow J, Hayne J). See also 374 [99] (McHugh J) on ‘ever threatening spectre of divorce’ and 380 [117] (Kirby J) on ‘increased incidence of de facto relationships in Australia’ and 392-3 [153] (Kirby J) on growth in the incidence in divorce and de facto partnerships.
Amongst the changes are the following: (4) The availability of social security payments that render individuals less financially dependent than they previously were upon domestic partnerships with another person…

Similarly, Chapter 5 discussed how there were SF identified in the study that acknowledged the changing status of women in Australia. However, these SF tended to be ‘aspirational’ and to overestimate the positive impacts on women of general societal changes. This ‘aspirational’ judicial tendency was also evident in SF concerning Australia and Australian social values. Australian society and social values were mostly represented as appropriately positively ‘changed’—the existing social order was generally represented to be operating well. There were few SF which positively investigated or recognised persisting social inequalities. These were minimised (or were ‘missing’ as discussed in the last chapter in relation to SF about women and disability).

For example, modern government welfare and social security arrangements in Australia were positively discussed in a number of cases. There were, however, no SF identified in the study relating to the poverty levels or financial difficulties experienced by Australians on welfare payments. These kind of SF might have reflected a concern for whether all Australians were actually enjoying the ‘collective’ benefits of Australian society. Justices Callinan and Heydon in *Vairy v Wyong Shire Council* mentioned the availability of social security to injured plaintiffs. However, they stressed the individual

---

23 *De Sales v Ingrilli* (2002) 212 CLR 338, 392-3 [153] (Kirby J). See also *Cattanach v Melchior* (2003) 215 CLR 1, 10 (Gleeson CJ). See however *Vairy v Wyong Shire Council* (2005) 223 CLR 442, 483 [220] (Callinan J, Heydon J) in relation to the awareness that people should have they may be a burden of social security and the state if injured.

24 See Chapter 5 Section 2.

25 See n 23.
Chapter 6: Social Facts and Values

responsibility of a plaintiff to take care not to be injured so as to avoid being a burden on social security.26 Justice Kirby noted that there was no place for a ‘class-based’ notion of Australian society.27 However, there was no discussion in the cases studied about whether Australian society did in fact still manifest class-based stratifications.28 As noted above, social changes reflecting ‘secularism’ and changed attitudes to matters such as human reproduction were raised by judges. However, there was little recognition that such matters continue to be often matters of heated public discourse and disagreement in Australian society, or that many people were still prohibited by law from exercising choice about matters such as control over reproduction or the ability to take advantage of traditional social institutions such as marriage or parenthood.29

Very few SF identified in the study about the changing nature of Australian society or life suggested that there were still remaining negative aspects of Australian society or that there were still deep issues in Australia relating to problems such as discrimination, racism, economic stratification, or class issues. Notable exceptions to these ‘aspirational’ SF included references to the growth in divorce rates,30 and the apparent increase in child sexual abuse.31 This is unsurprising as these are both matters which would be seen as contrary to traditional conceptions of marriage and family (so likely to be mentioned as SF aberrant to traditional value systems) and were also particularly salient in the relevant

26 Vairy v Wyong Shire Council (2005) 223 CLR 442, 483 [220].
27 D’Orta-Ekenaite v Victoria Legal Aid (2005) 223 CLR 1, 100 [319].
28 Although perhaps based more today on economic resources rather than purely on circumstances of birth.
29 For example, witness the current debates on such issues as same sex marriage, abortion (still illegal in parts of Australia), the contraceptive RU 486, and chaplains in schools.
cases. Perhaps reflecting their own age group, a number of judges noted the growing implications of an ageing population and the implications of this for Australians and Australian society. Similarly, children were also noted to be dependent on their parents for longer periods of time. Justice Kirby referred to a number of SF which showed a ‘darker’ Australia including Australia’s culture of alcohol consumption with some Australians finding drunkenness ‘amusing and socially tolerable’ and an apparent increasing acceptance of disregard for prevention of injuries to fellow citizens. These SF discussed by Kirby J reflect collective rather than individual needs and are concerned with taking collective steps to ensure the protection and flourishing of the individual. The reflection of these ‘collective’ values in SF used by Kirby J is a recurring theme identified in this study and will be discussed further in the remaining sections of this chapter.

2. SF ABOUT INDIVIDUAL RESPONSIBILITY AND AUTONOMY, ACCIDENT PREVENTION AND DETERRENCE

Major changes were afoot in the law of negligence in Australia at the start of the last decade. It has been well documented that from the late 1990s there was a shift in the

---

32 For example New South Wales v Lepore (2003) 212 CLR 511 concerned the liability of school and public authorities for child sexual abuse and *De Sales v Ingrilli* (2002) 212 CLR 338 considered how to take into account future contingencies such as the chances of successful remarriage in wrongful death damages calculation.


36 *Neindorf v Junkovic* (2005) 222 ALR 631,651 [75], 653 [85].

37 These are values which are associated with solidaristic/communitarian and egalitarian cultural worldviews. See above n 5.
Chapter 6: Social Facts and Values

High Court of Australia in negligence cases from an approach based on collectivist values to an approach which increasingly privileged autonomy of action and stressed individual responsibility.\textsuperscript{38} The value of autonomy of action and the ‘need’ for individual responsibility were also heavily reflected in national tort reform legislation introduced in 2001-2003.\textsuperscript{39} Typically, these values were related in negligence cases and the legislation to individual responsibility of plaintiffs (rather than defendants) and the autonomy of action of defendants (rather than the promotion of freedom of choice of plaintiffs).\textsuperscript{40} At the time of national tort reform there was very little to no legislative or judicial focus on issues such as the need to reduce accidents which caused personal injury, or on the need to have a system which responded to the significant inadequacies of the common law in compensating injured people.\textsuperscript{41} This study found that judicial SF in negligence cases in 2001-5 about autonomy and individual responsibility, and personal injury and deterrence showed similar patterns.


\textsuperscript{39} Tort Reform legislation was introduced in all Australian states and territories. For example the NSW Act introducing reforms was titled the Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW). Tort Reform legislation is probably a further example of the neo-liberal shift in Australian public policy discussed in the introduction to this chapter. See Sappideen and Vines, above n 38, 120, 159.

\textsuperscript{40} Note that the terms of reference of the National review of the law of negligence provided that the review was to make recommendations with the object of limiting liability for injuries and quantum of damages, and to limit the circumstances where liability would extend for injuries. See Commonwealth of Australia, 'Review of the Law of Negligence: Final Report' (2002), ix (‘Ipp Report’).

\textsuperscript{41} Sappideen and Vines, above n 38, 28. Note the Ipp Report indicated that there was significant research supporting a no fault system of compensation however such issues were outside the terms of reference of the report. See however the recent proposals for a National Disability Insurance Scheme, Productivity Commission, Disability Care and Support: Draft Report (2011) Commonwealth of Australia
Chapter 6: Social Facts and Values

A. Individual Responsibility and Autonomy

SF about autonomy and individual responsibility identified in this study tended to emphasise the need to avoid unnecessary burdens on defendant action, the need to promote freedom of action and the need to encourage individual responsibility of plaintiffs. SF about these matters also often generally predicted (with no empirical or other evidence) that very significant burdens and restrictions on individual freedom of action (usually of defendants) would follow from the imposition of liability in negligence. Examples included:

Whatever the decision, so long as the decision is to pursue a lawful course, it would be wrong for the law to characterise that course as unreasonable. To do so would deny the individual's autonomy to choose the lawful course of action which, to that individual, seems best.\textsuperscript{42}

Speaking generally, a person owes no duty to prevent economic loss to another person even though the first person intends to cause economic loss to that other person. This particular immunity from liability reflects the common law's concern with the autonomy of the individual and its desire to give effect to the choices of the individual by not burdening his or her freedom of action.\textsuperscript{43}

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.\textsuperscript{44}

\textsuperscript{42} Cattanach v Melchior (2003) 215 CLR 1, 86 [221] (Heydon J).

\textsuperscript{43} Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, 548 [78] (McHugh J).

Chapter 6: Social Facts and Values

The consequences of the appellant's argument as to duty of care involve both an unacceptable burden upon ordinary social and commercial behaviour, and an unacceptable shifting of responsibility for individual choice.\textsuperscript{45}

There is a further reason why a prohibitory sign was not warranted. It is that authorities should not lightly criminalize recreational conduct, particularly conduct, unlike that of the motorist driving too close to the preceding vehicle, which is unlikely to harm others. Even in times of increasing intrusions by governments and local authorities upon personal autonomy, some degree of latitude of choice in conduct must be allowed.\textsuperscript{46}

Generally, members of the High Court described autonomy in ways that were concerned with avoiding burdens on defendants and protecting their freedom of action. However, Kirby J described autonomy in a way that linked it to more substantive ‘positive’ (rather than negative) justice notions that emphasised the need for individuals to have the actual ability to exercise freedom of choice and action.\textsuperscript{47} Information, knowledge and physical and mental ability to exercise freedom of choice were seen as essential to the exercise of autonomy and individual responsibility, particularly by plaintiffs. Examples from Kirby J’s judgments included:

> Whatever difficulties free-will assumptions pose for the law in normal circumstances, such assumptions are dubious, need modification and may ultimately be invalidated having regard to the particular product which the Club sold or supplied to patrons such as the appellant, namely alcoholic drinks. The effect of that product can be to impair, and eventually to destroy, any such free will.\textsuperscript{48}

> The greater the risk, the higher the duty to notify. Involved in this principle is a respect for the autonomy of individuals to make informed decisions concerning their own interests when placed in a position of risk by the acts or omissions of others. Where there is potentially a high risk, as in the supply of imported seed


\textsuperscript{46} Vairy v Wyong Shire Council (2005) 223 CLR 442, 483 [219] (Callinan J, Heydon J).

\textsuperscript{47} This at least in some ways seems to have been influenced by Justice Kirby’s commitment to the incorporation of principles of international human rights into Australian law. See Brown, above n 6, Chapter 11.

into a vulnerable domestic farming area, the importer with technical and scientific expertise available to it, will be held to a high standard of care for, and of notification to, the growers who were necessarily reliant on being alerted to any unusual risks to which they are exposed.\textsuperscript{49}

To decide whether, in a particular case, a notice is required, it is necessary to take into account the social considerations that the law is seeking to advance…From the point of view of the entrant, the law is seeking to uphold that person’s entitlement to make informed choices concerning the kind of risks in which he or she will participate on the basis of knowledge provided by the occupier. At the heart of the latter objective lies a conception of respect for individual autonomy that probably has its source in notions of fundamental human rights and human dignity.\textsuperscript{50}

Fundamentally, the rule is a recognition of individual autonomy that is to be viewed in the wider context of an emerging appreciation of basic human rights and human dignity. There is no reason to diminish the law’s insistence, to the greatest extent possible, upon prior, informed agreement to invasive treatment, save for that which is required in an emergency or otherwise out of necessity.\textsuperscript{51}

These SF (unlike those of other members of the High Court) stressed more collective and egalitarian values which encompassed the need for society to ‘secure the conditions of individual flourishing’.\textsuperscript{52}

B. Accident Prevention and Deterrence

SF which reflect notions of accident prevention and deterrence are a natural counterpoint to SF which reflect notions of autonomy and individual responsibility. Autonomy and individual responsibility SF focus on the ‘individual’ and their freedom to act in an unconstrained manner or the expectation that they ‘secure their own needs without collective assistance’\textsuperscript{53}. However, SF about accident prevention and deterrence

\begin{itemize}
\item \textsuperscript{49} Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317, 357 [120] (Kirby J).
\item \textsuperscript{50} Hoyts Pty Ltd v Burns (2003) 201 ALR 470, 486 [70] (Kirby J).
\item \textsuperscript{51} Rosenberg v Percival (2001) 205 CLR 434, 480-1 [145], 484-5 [154] (Kirby J).
\item \textsuperscript{52} These are values which are associated with solidaristic/communitarian and egalitarian cultural worldviews. See above n 5.
\item \textsuperscript{53} Dan Kahan and Donald Braman, ‘Cultural Cognition and Public Policy’ (2006) 24 Yale Law and Policy Review 147, 151. These are values associated with an individualistic cultural worldview.
\end{itemize}
focus on the collective—the need for individuals to act or to be encouraged to act in a way which prevents injuries to others in their community.\footnote{Ibid. These are values reflected in solidaristic and communitarian cultural worldviews.}

Unlike autonomy and individual responsibility, accident prevention and deterrence were not strong themes in the SF identified in this study. These values were however recognised in a number of contexts. SF about accident prevention, particularly the failure of the existing law to achieve it, was a part of judicial reasoning in \textit{Brodie v Singleton Shire Council}, the case which overturned existing principles of highway authority immunity.\footnote{\textit{Brodie v Singleton Shire Council} (2001) 206 CLR 512. Although note the later practical reversal of this in the tort reform legislation, for example see \textit{Civil Liability Act 2003} (QLD) ss 35-7.}

Secondly, a result of the growth of the misfeasance rule (and that respecting ‘artificial structures’) is that an authority will escape liability if it has never attempted to repair some danger on a road or bridge but thereafter may become liable if it attempts, even perfunctorily, to repair it. The practical consequence is to abrogate the immunity once an authority takes any remedial action and to open up its actions to scrutiny according to the usual principles of negligence. This state of affairs provides a strong incentive to an authority not to address a danger on a roadway.\footnote{Ibid, 572 [135] (Gaudron J, McHugh J, Gummow J).}

Justice Callinan made reference in \textit{Cattanach v Melchior} to the deterrence SF (the contestable assertion\footnote{See Harold Luntz et al, \textit{Torts: Cases and Commentary} (6th ed, 2009), 34 which suggests that at best the empirical evidence that tort law actually deters accident causing behaviour is weak.} that tort law actually deters tortious conduct) which has been recognised in the past as supporting the deterrence or accident prevention aim of tort law:

\begin{quote}
The damages are not indeterminate. That they should be awarded is also consistent with the underlying notion that their availability in tort serves as a measure of deterrence of tortious conduct.\footnote{\textit{Cattanach v Melchior} (2003) 215 CLR 1, 107-8 [299] (Callinan J). See also \textit{Tepko Pty Ltd v Water Board} (2001) 206 CLR 1, 54 [66] (Kirby J, Callinan J).}\
\end{quote}
Chapter 6: Social Facts and Values

The deterrence SF was also noted by judges in a number of cases concerning vicarious liability and non-delegable duty, as underlying one of the rationales for the principles of law in those areas.\(^59\) Chief Justice Gleeson, Gummow J and Hayne J were, however, sceptical in *New South Wales v Lepore* that schools could take steps which would prevent criminal behaviour like child sexual abuse, where it was clear that criminal sanctions had already failed to deter an offender.\(^60\) Justice Kirby in the same case was much less sceptical, strongly endorsing the deterrence SF in cases where an institutional body failed to prevent sexual abuse, while admitting in the particular circumstances of the case there may not have been a strong argument:

> The second policy basis of vicarious liability is deterrence. It is seriously unjust to leave the burden of the damage, and thus of prevention of harm, on the victim. The only truly effective way of encouraging employers (in enterprises that expose vulnerable people to risks of sexual abuse) to reduce that risk by introducing effective precautions and other initiatives, is by imposing economic sanctions on employers in cases where harm is proved. So long as those who suffer such damage are left to bear it alone, there will be no, or no sufficient, stimulus upon employers to put in place the necessary preventive and supervisory precautions and remedies. I accept that this argument is less persuasive in the circumstances of the present appeals. The school may not have been able to prevent the assaults. As Gummow and Hayne JJ point out, there already were criminal sanctions in place to deter such acts. However, they failed to have the desired deterrent effect.\(^61\)

While the study found that accident prevention and deterrence SF were only minimally used by most members of the High Court, these values were much stronger themes in the judgments of Kirby J. These values were accorded a central role in a ‘community’ orientated concept of justice and protection of the vulnerable which (unlike most

---


Kirby J saw as critically underlying the law of negligence. Justice McHugh was the only other member of the High Court to also make more significant SF statements about accident prevention and deterrence. Examples of Kirby J and McHugh J SF about accident prevention and deterrence included:

The cost of injuries to society and the effects on the individuals who suffer them have undoubtedly played a significant role in raising the standard of care required of those who owe duties of care. This is particularly so when the duties owed arise in the course of conducting activities organised for the financial benefit of those who owe the duties. (McHugh J)\(^{62}\)

The rejection of this appeal will reinforce indifference and belated and formal offers of transport by a club where proper standards of reasonable care require a significantly more prompt and higher standard of attention to the case of such a vulnerable individual. (Kirby J)\(^{64}\)

To the extent that the Court turns away from the earlier principles, in my respectful view it endorses notions of selfishness that are the antithesis of the Atkinian concept of the legal duty that we all owe, in some circumstances, to each other as ‘neighbours’… It is the notion that, in the past, encouraged care and attention for the safety of entrants on the part of those who invite others onto their premises. (It also encouraged such persons to procure insurance

\(^{62}\) \textit{Woods v Multi-Sport Holdings Pty Ltd} (2002) 208 CLR 460, 481-2 [71] (McHugh J). This SF continues as follows: ‘Commenting on the rise in the standard of care required of employers in the previous twenty or thirty years, Brennan and Deane JJ, writing in 1986, said:

“While it is true that that has, in part, been the consequence of the elucidation and development of legal principle, it has, to a greater extent, reflected the impact, upon decisions of fact, of increased appreciation of the likely causes of injury to the human body, of the more general availability of the means and methods of avoiding such injury and of the contemporary tendency to reject the discounting of any real risk of injury to an employee in the assessment of what is reasonable in the pursuit by an employer of pecuniary profit.”’

See also 477 [62] where McHugh J suggests that ‘accident prevention is a major concern of Australian society.’

\(^{63}\) Ibid, 492 [105]. On important role of notices in accident prevention see \textit{Hoyts Pty Ltd v Burns} (2003) 201 ALR 470, 488 [76] (Kirby J).

against risk). To the extent that these ideas are overthrown, and reversed, this Court diminishes consideration of accident prevention. (It also reduces the utility and necessity of insurance). (Kirby J) 65

Looked at in this light, the argument of the appellant in support of its claim for recovery against the respondents is not unpersuasive... It would also instil proper standards of professional engineering conduct. It would sanction unsafe building practices. It would encourage better building design and supervision. It would protect life, property and investments from the kind of unsafe conduct that allegedly occurred in this case. If the tort of negligence is ultimately concerned with moral issues such as fault and blameworthiness and the protection of those vulnerable from harm done by others who, legally speaking, are their ‘neighbours’—including in business contexts—the provision of a legal remedy to the appellant in its proceedings against the respondents would not, without more, be inconsistent with the purposes of the tort. (Kirby J) 66

The examination of SF identified in this study about autonomy and individual responsibility, and accident prevention and deterrence demonstrates a number of things. First it confirms, as argued by others, that values of individualism and individual responsibility, freedom of action and autonomy were influential on judicial reasoning in negligence judgments of the High Court during 2001-2005. These values were generally expressed in SF in ways that showed the court’s concern not to burden defendants, as opposed to in ways that were concerned with empowering the free will of plaintiffs. Second, the study confirmed that the values of accident prevention and deterrence were far less dominant in the SF used by most members of the High Court. Finally, the study showed a distinction between the SF used by Kirby J and those used by most other members of the High Court. Kirby J was far more influenced by values associated with accident prevention and deterrence, which he saw as central to the purpose of negligence law, and was more likely to interpret values of free will and responsibility in ways which

65 Neindorf v Junkovic (2005) 222 ALR 631, 653 [85].
66 Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, 565 [135].
acknowledged issues such as vulnerability and need for knowledge and power to facilitate actual exercise of ‘free’ will.

3. LIFE IS RISKY: SF ABOUT RISK

Life is risky. People do not expect, and are not entitled to expect, to live in a risk-free environment.\textsuperscript{67}

The law of negligence is concerned with how to allocate the risks of accidents as between plaintiffs and defendants. The element of breach requires judges to identify the nature, probability and potential gravity of risk and to evaluate the reasonableness of the defendant’s response to that risk.\textsuperscript{68} Given this, how judges construct SF about ‘risk’ can be critically important to (amongst other things) whether defendants are found to breach a duty. This section argues that judicial SF about risk identified in this study were predominantly aligned with individualistic values which required individual plaintiffs to self-assume risk, rather than with values which stressed collectivisation of risk or protection of plaintiffs from risk. A dominating theme in SF about ‘risk’ was the riskiness of everyday human life and activity. These risks tended to be normalised, viewed as inherent and as related to an individual’s ‘normal’ experience of life rather than as something aberrant which required preventative measures by the community or by particular defendants.\textsuperscript{69}

\textsuperscript{68} Wyong Shire Council v Shirt (1980) 146 CLR 40.
\textsuperscript{69} Giddens has argued that in modern ‘risk society’ there is a ‘renewed’ discussion of responsibility as ‘situations of manufactured risk shift the relation between collective and individual responsibility’. Anthony Giddens, ‘Risk and Responsibility’ (1999) 62(1) The Modern Law Review 1, 9. Drawing on the work of Beck (Ulrich Beck, Risk Society-Towards a New Modernity (1992)), Rochford has argued that the individualisation of risk is ‘also a key feature of the “risk society”’. Individuals are called upon to be ‘responsible’ for the risks of ‘modern’ life. See Francine Rochford, 'The Law of Negligence in a "Risk Society": Calculating Ideas of
It is important at the outset of this section to understand that people, including judges, can be poor at accurately evaluating and predicting risk. This is because, as will be discussed in more detail in Chapter 8, there are cognitive and cultural factors which impact on individual and judicial construction of ‘risk’. As a result, ‘common sense’ judicial evaluations of risk can be flawed and can reflect particular sets of values to the exclusion of alternative values. Sunstein has argued, for example, that people can irrationally evaluate risks and hazards, leading to mis-estimation of risk. Sunstein’s work forms part of the wider work on risk perception, a field based on the social sciences which ‘seeks to comprehend the diverse processes by which individuals form beliefs about the seriousness of various hazards and the efficacy of measures designed to mitigate them.’ Individual’s risk perceptions (like their decision-making) can be influenced by a range of cognitive mechanisms and can be magnified by ‘social forces’. Kahan, Slovic, Braman and Gastil also suggest that cultural worldviews

---

**Reasonable Risk** (2007) 16(1) Griffith Law Review 172, 175. Rochford also identifies this with the policies of ‘neo-liberal’ governments.

70 These are discussed further in Chapter 8.


73 Ibid. For example risk perception might be affected by the availability heuristic, probability neglect (‘the disposition of people to “focus on the worst case, even if it is highly improbable”’) (1077), loss aversion (the tendency of people to ‘value goods more once they have them than they did before they acquired them’) (1078), affect (emotional responses). See further discussion of the effects of cognitive mechanisms in Chapter 8.

74 Sunstein, above n 71, 96. For example this might be affected by ‘availability cascades’ (the phenomenon that happens when ‘fear inducing accounts’ are repeated to large numbers of people (98) or by ‘group polarisation’ (the phenomenon that happens which occurs when like-minded people engage in risk deliberations together, which results in more extreme individual versions of the risk) (98).
interact with cognitive mechanisms to determine the direction that an individual’s risk perception will take. Particular sets of ‘cultural’ values (like individualism, respect for free enterprise and social elites) can shape how people interpret and construct ‘risk’. These cognitive and cultural influences on judicial construction of SF, including SF about risk, are discussed further in Chapter 8.

SF about risk identified in this study were almost inevitably linked to ‘individual responsibility’ arguments which suggested plaintiffs should bear these risks and be denied recovery for injuries. Judges especially stressed the inherent, pervasive and often serious risks involved in recreational activities and in the Australian outdoors. Examples included:

Death, disaster, shock and disappointment are an inevitable part of life. Everyone encounters such events throughout life. Each will have its effect on the individual.

There are other forms of risk of physical injury which may accompany the consumption of alcohol, even in relatively moderate amounts.

And, despite their allure, the sea waters of Australia, notoriously, are far from benign. Depending on how far north the traveller goes, sea lice, flotsam and jetsam, weed, blue bottles, stingers, quicksand, sea snakes, crocodiles, unpredictable waves, sand bars, sharks, absence of effective netting, shifting sea beds, broken bottles on the beach or in the water, sunstroke from sun bathing,

---

75 A cultural worldview is an individual’s ‘preferred vision of the good society’. As will be discussed further in Chapter 8, cultural worldviews tend to cluster into four major groups—individualistic, hierarchical, egalitarian and solidaristic/communitarian. For a brief description of these cultural worldviews see above n 4 and n 5.

76 Kahan, above n 72, 1081. For example, to avoid cognitive dissonance individuals will pay more attention to and recall information about a risk that conforms to their cultural worldview, leading to potential mis-estimation of risk via the availability heuristic. People will trust the views of individuals with similar worldviews, leading to more extreme versions of risk estimation via group polarisation (1085).


and unpredictable tides and currents constitute a non-exhaustive catalogue of the risks a bather runs. Indeed, swimming itself, without more, can be hazardous.\textsuperscript{79}

Every form of physical recreation carries some risk of physical injury. The more energetic the activity, the greater are those risks. Fatigue, lack of fitness, slowness of reaction, general ineptitude can all contribute to injury. The magnitude and probability of occurrence of those risks rise if the activity is one in which there may be a collision between the participant and others, or between the participant and his or her surroundings. That risk of collision is evidently present in contact sports, but the solitary bike rider pedalling along a dedicated cycle track may fall from the bike and suffer serious injury. So too, the solitary swimmer may collide with an obstacle or strike the sea bed.\textsuperscript{80}

Judicial SF about the risks that a defendant’s action might injure another generally suggested\textsuperscript{81} that most people would take no steps in response to ‘normal’ risks of everyday life, or that plaintiffs were also required to take care to avoid that risk. The following examples indicate a community minded accident prevention approach to ‘risk’ was not generally required:

But so are the magnitudes of many risks that reasonable people run because the alternative is too costly or too inconvenient. The magnitude of the risk of being involved in a motor car accident is very high, and the risk could be minimised, if not eliminated, by no car ever travelling at more than 10 kilometres per hour. But few would contend that travelling at 10 kilometres per hour was the only reasonable response to the risk of a motor car accident.\textsuperscript{82}

Ordinary dwelling houses contain many hazards which give rise to a real risk of injury. Most householders do not attempt to eliminate, or warn against, all such hazards.\textsuperscript{83}

\textsuperscript{79} Vairy v Wyong Shire Council (2005) 223 CLR 442, 481-2 [216] (Callinan J, Heydon J).
\textsuperscript{80} Ibid, 468-9 [217] (Hayne J).
\textsuperscript{81} This is not to suggest that there were not cases where the individual adjudicative facts were such that the defendant was specifically aware of or created a specific risk to a plaintiff and the High Court considered this was negligent in the circumstances. For example see Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269; New South Wales v Bujdoso (2005) 227 CLR 1; Thompson v Woolworths (QLD) Pty Ltd (2005) 221 CLR 234.
\textsuperscript{82} Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540, 586 [111] (McHugh J).
Nor is it reasonable to have a system in which children are observed during particular activities for every single moment of time - it is damaging to teacher-pupil relationships by removing even the slightest element of trust; it is likely to retard the development of responsibility in children, and it is likely to call for a great increase in the number of supervising teachers and in the costs of providing them. 84

The result was somewhat different in several psychiatric loss cases (Annetts85 and Gifford86) involving psychiatric injury suffered by family members following the death of a child or parent negligently caused by the defendant employer. In those circumstances, members of the High Court indicated that the nature of a close family relationship between parents and children87 was sufficient to give rise to a ‘risk of psychiatric injury’ which should have been known to the defendant. For example, in Gifford v Strang Patrick Stevedoring Pty Ltd, Gleeson CJ stated:

Not all children have a close and intimate relationship with their parents; and it may be that, even when parents are killed in sudden and tragic circumstances, most grieving children do not suffer psychiatric injury. However, as a class, children form an obvious category of people who might be expected to be at risk of the kind of injury in question.88

84 Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba (2005) 221 CLR 161, 170 [25] (Gleeson CJ, Hayne J, Callinan J, Heydon J). But see the dissenting judgment of McHugh J who held the risk to school children of injury in the playground did require further precautions to avoid injury. See also Thompson v Woolworths (Qld) Pty Ltd (2005) 221 CLR 234, 246 [35] where Gleeson CJ, McHugh J, Kirby J, Hayne J and Heydon stated ‘in ordinary circumstances a motorist in a city street, approaching a pedestrian crossing, will reasonably assume that the pedestrians assembled on the footpath will observe the lights which control the crossing. Most people drive as though it may be expected that other road users will be reasonably careful…’ however also indicated that in particular cases it might still be judged reasonable for ‘a motorist to allow for the possibility that some other road users will be inattentive or even negligent’.

85 Tame v New South Wales (2002) 211 CLR 317 (Annetts v Australian Stations Pty Ltd is reported with the Tame case).


87 In Annetts v Australian Stations Pty Ltd members of the High Court also referred to assurances given by the defendant to the plaintiff parents that care would be taken of the sixteen year old employed child.

88 Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269, 277 [12]. See also the SF statements of McHugh J (289 [49]), Kirby J and Gummow J(301 [89] and 305 [101]).
Chapter 6: Social Facts and Values

Perhaps this might be explained on the basis that ‘protection’ of the tradition social institution, the nuclear family unit, was seen by judges as warranting protection by the law. As will be seen in the next section below, ironically the judicial approach was different when the issue was the risk of ‘direct’ psychiatric injury to workers from workplace stress where members of the High Court refused to consider such a risk foreseeable.

The tendency of High Court judges to stress values of individualism and individual responsibility in SF about risks was particularly prominent in SF about recreation and sport. This was best exemplified in the majority judgment of Callinan J in *Woods v Multisports Holdings* when he discussed the nature of sport:

Almost all sport involves physical exertion, physical competition and a degree of physical domination, in one form or another, by one person or team over another: whether by running faster, jumping higher or further, scrummaging harder, throwing straighter and faster, or hitting a ball with better timing and more accuracy, or bowling faster.

And, for the reasons that I have given, that of the ultimate objective of most sports, of the achievement of physical superiority or domination of one form or another by one person or team over another, promoters and organisers of sport will rarely, if ever, be obliged to warn prospective participants that they might be hurt if they choose to play the game.

These descriptions of sport emphasise that participants are taken to freely engage in inherently risky activities for their own enjoyment. The trade-off for the ability to partake in risk and for the desire to enjoy risk is self-responsibility for all risks (obvious and non-

---

89 This would be consistent with a hierarchical cultural worldview. See above n 4.

90 I use this term to distinguish the ‘secondary’ kind of psychiatric injury suffered in *Annetts and Gifford*, from the primary form of psychiatric injury (ie the negligent act of the defendant directly caused the psychiatric injury to the plaintiff).

91 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 509 [158].

92 Ibid, [159].
obvious, general and specific) of a sport. This vision of sport reflects a particular individualistic model of sport and its intrinsic values, which has been often linked with a ‘masculine’ model of sport. For example, Reaves describes the traditional model of athletic behaviour as ‘based on qualities traditionally associated with men — combativeness, competitiveness and aggression’. Jay also describes a ‘male model’ of competitive, aggressive and combative athletics. Psychological research shows that women are much more likely to avoid or minimise physical risk where possible and to avoid physically risky activity. Men are much more likely to seek out physically risky activities and to seek enjoyment from partaking in physical risk.

The increased participation of men and women, young and old, in sport raises questions about whether the traditional definition and values of sport adequately serve the interests of all participants in sport. There is a valid argument that there needs to be a wider and more inclusive concept of sport and its true values that includes the aims of wider

93 These values could also be characterised more broadly as reflecting an individualistic cultural worldview, rather than as based on pure ‘gender’ differences. See above n 4.


96 Jan Hitchcock, ‘Gender Differences in Risk Perception: Broadening the Contexts’ (2001) Risk: Health, Safety and Environment 179. See also Diane Klein, ‘Distorted Reasoning: Gender, Risk-Aversion and Negligence Law’ (1997) 30 Suffolk University Law Review 629, 644-6. Hitchcock stresses the need for a more sophisticated consideration of the effect of gender on risk acceptance in a wider socio-economic and cultural context. This issue could be explored further as part of the emerging field of cultural cognition which is discussed in Chapter 8.

97 Ibid.

98 For example, there has been discussion of whether traditional coaching styles based on masculine values in sport are always appropriate for women and whether traditional masculine values of sport have contributed to sexual harassment in sport. See Reaves, above n 94.
physical, mental and social benefits of sport alongside the more traditional values. The traditional vision of sport (and consequent risk allocation) may sit comfortably (at least for most participants) in the context of traditional male competitive sports, such as rugby union and cricket and in elite level sport. However, the vision of sport adopted by the majority in the High Court (as exemplified in the SF above from Callinan J’s judgment) becomes less convincing when it is extrapolated to all sporting and recreational activities enjoyed by both genders, young and old, able-bodied and disabled.

McHugh J and Kirby J adopted a different approach in Woods (in the minority) to the ‘risks’ of sport. They used SF which emphasised more communal values, including accident prevention and injury minimisation. This included recognition of safety precautions (not often mentioned in other SF about risky activities) and SF which suggested defendant rather than plaintiff responsibility for risks of injury. Examples of SF from Woods which demonstrate this included:

By reason of the composition of the cricket ball used in indoor cricket and the confined area of the court, players are exposed to a risk of injury to the eye to a

---

99 Ibid, 317-9. See also Jay, above n 95, 33-5. Jay describes aspects of a new cultural feminist model of sport as including nurturing and supportive teams, interconnected/relational teams and non-competitive team activities.

100 For example, in the years just prior to the decision of the High Court in Woods, the most popular organised and non-organised physical activities for adults in 1999–2000 were walking, aerobics/fitness, golf, lawn-bowls, tennis, fishing, cycling, running, ten-pin bowling and netball. Most of these activities do not comfortably fit the Woods paradigm of sport. See Australian Bureau of Statistics, ‘Participation in Sport and Physical Activities 1999-2000’ (2000), <http://www.abs.gov.au/ausstats/abs@.nsf/0/7D1E45B3FDD2C38DCA256DF5007C0816?OpenDocument>.

101 Reflecting a modern trend to make sport safer, for example the use of helmets in sports like outdoor cricket, rules about tackling in football, and rules about scrimmaging in rugby union.
much greater extent than players in outdoor cricket. The nature of the particular risk is not one that would readily occur to the mind of the uninformed player.\footnote{Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460, 484 [80] (McHugh J. See also SF at 483 [77] (McHugh J)), 487 [91]-[93] (Kirby J), 488 [95]. For the contrary view see 503-4 [144] (Hayne J).}

To talk of sporting activities as if they inevitably import physical harm to which the law is indifferent is to ignore the contemporary attempts to reduce unnecessary and excessive damage to players. The wearing of helmets and other protectors in boxing, outdoor cricket, lacrosse, ice hockey, baseball, softball and other popular games bears witness to the limits of imputed consent to physical harm in the name of sport.\footnote{Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460, 491 [104] (Kirby J). See however the recognition by Kirby J that in some sports the element of risk is a ‘feature of the game that may add to its essential enjoyment’ (494 [111]); and that ‘spectators observing at close range fast-moving people or engines inescapably expose themselves to some risks. Participants in games of rugby football, ice hockey, lacrosse and cricket do likewise’ (494 [111]).}

The law, and specifically the law of negligence, promotes a greater consciousness of the need for safety, accident prevention and the avoidance of needless or excessive injury in sport. In doing so, it promotes the true values of sport rather than the brutal and excessive features that debase sport, leaving victims and their families to pick up the pieces over many years, long after the watching crowd’s cheering has subsided.\footnote{Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460, 492 [105] (Kirby J). In another context see SF by Kirby J in relation to the prevention of accidents in boating and shipping in Frost v Warner (2002) 209 CLR 509, 529 [77], 531 [83].}

In summary, SF about risks in a variety of contexts predominantly aligned with individualistic values which stressed the responsibility of plaintiffs to self-assume risk. Risk tended to be normalised as part of an individual’s usual and expected experience of life. This occurred even where defendants, such as recreational providers or even public authorities, either created or controlled (at least partially) the risk. Apart from Justice Kirby (and Justice McHugh in \textit{Woods}), the members of the High Court did not take a community orientated approach to risk, which would have seen more emphasis on risk sharing and risk prevention. In the next section we will see that similar judicial...
approaches were evident when the High Court discussed the nature of employment related risks.

4. SF ABOUT EMPLOYMENT AND THE RISKS OF EMPLOYMENT

This section argues that SF about employment and the risks of employment identified in this study predominantly aligned with values about ‘freedom’ of contracting in the workplace and the individual responsibility of workers to respond to the risks of employment. SF also stressed positive (rather than negative) aspects of changes in modern workplace practices including individual contracting. This represents a significant shift in the High Court from more communitarian notions which were previously reflected in workplace negligence cases in the High Court. As noted in the introduction to this chapter, these ‘individualistic’ and market orientated values were also consistent with the neo-liberal shift in Australian public policy which reached its peak during the period of 2000-2007. The Australian coalition government introduced its ‘Work Choices’ industrial relations legislation during this time. This was a major policy reform which promoted the value of individual contracting and was aimed at relieving the ‘burden’ suffered by employers by expanding employer power to dismiss employees.

Glasbeek, critiquing a 2003 High Court case Andar Transport Pty Ltd v Brambles Ltd, has argued that the use by the High Court of individualistic notions of workplace

---

105 See for example Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301; McLean v Tedman (1984) 155 CLR 306.

106 Workplace Relations Amendment (Work Choices) Act 2005 (Cth).

107 Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424. This context of this case concerned liabilities arising after the corporate reorganisation of labour from ‘employment’ to ‘individual contracting’.
organisation ignore the actual context of worker and employer relations.\textsuperscript{108} He suggests that this occurred in Andar because the High Court ignored the ‘real’ context which involved disparities in bargaining power and the ‘struggle between capital and labour’\textsuperscript{109}.

As discussed below, SF about the risks of injury in workplaces identified in this study (apart from those referred to by Kirby J\textsuperscript{110}) also tended to reflect individualistic values which emphasised the individual responsibility of workers. Similar patterns emerged in SF about employment which assumed ‘freedom’ of contracting in the workplace (without considering the context of possible employer/employee disparities in bargaining power) and which predominantly stressed positive (rather than negative) aspects of changes in modern workplace practices like independent contracting.\textsuperscript{111} Examples included:

\textsuperscript{108} Harry Glasbeek, ‘The Legal Pulverisation of Social Issues: Andar Transport Pty Ltd v Brambles Ltd’ (2005) 13 Torts Law Journal 217. Glasbeek attributes this to conservative approaches to judicial decision making which are inadequate to deal with appropriate consideration of social policy issues. As Chapter 7 argues that might serve as some constraint against judicial use of ‘policy’ but does not adequately explain why judges use and construct SF as they do. As Chapter 7 and 8 argue, a complex interaction of legal, institutional, individual, cognitive and cultural factors likely interact to influence how judges use and construct SF. For example, as is evident from the discussion in this section, this study found that judges clearly did refer to SF about employment—but not usually SF that recognised issues like bargaining inequality in the workplace.

\textsuperscript{109} Glasbeek, above n 108, 240-1.

\textsuperscript{110} This is also consistent with the approach taken by Kirby J in other areas of the law. In the High Court case which upheld the constitutionality of the Work Choices legislation (\textit{New South Wales v Commonwealth} (2006) 229 CLR 1) only Kirby J and Callinan J dissented. Brown discusses in his recent biography of Kirby how Kirby J approached the writing of his dissent. Brown notes that the dissent was influenced by Kirby’s views on the protection of individual rights and freedoms, including rights at work, and by how upholding the legislation would centre around corporations to the ‘detriment of flesh and blood persons.’ See Brown, above n 6, 389-92.

\textsuperscript{111} This tends to result in a workplace which reflects a unitarist rather than pluralistic model of industrial relations. This model rejects workplace collectivism and supports a hierarchist view of the workplace where managerial ‘organisational leaders …represent a single source of authority and a single focus of loyalty.’ Mark Bray, Peter Waring and Rae Cooper, \textit{Employment Relations: Theory and Practice} (2009), 48.
And there may be other consequences of economic significance. It might be to the overall economic advantage of the community that couriers operate as independent contractors efficiently, quickly and competitively, that they continue to provide a service that in the past large, centralised organisations were unable or unwilling to provide, or provided less efficiently. It might also be in the interests of the community, the respondent, its customers and the couriers that the last have a direct financial incentive to deliver articles quickly under the present arrangements.\textsuperscript{112}

Opportunities to do remunerative and useful work for unskilled people may shrink as the cost of directly employing people increases. To impose upon the respondent and couriers the rigidities of a contract of service might perhaps be to destroy an avenue of work for people who might find it difficult to gain remunerative employment otherwise.\textsuperscript{113}

Within the bounds set by applicable statutory regulation, parties are free to contract as they choose about the work one will do for the other. In particular, within those bounds, parties are free to stipulate that an employee will do more work than may be the industry standard amount. Often the agreement to do that will attract greater rewards than the industry standard.\textsuperscript{114}

Despite being major sites of serious injury in Australia\textsuperscript{115} (and accordingly empirically high injury ‘risk’ sites) workplaces were not generally described in SF in ways that


\textsuperscript{113} Ibid.

\textsuperscript{114} Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44, 56 [31] (McHugh J, Gummow J, Hayne J, Heydon J). While the ‘greater rewards’ that the High Court speaks of could be the result of individual contracts stipulating ‘more work’ for highly skilled employees (like lawyers) in high market demand, it is debatable whether that would be the result for more low skilled workers in highly casualised, lowly paid (and traditionally feminised) industries such as retail, hospitality, cleaning and childcare. These were concerns at the heart of campaigns against the Howard government’s Workchoices industrial relations regime.

emphasised the ‘riskiness’ of their operations. SF aligned with values which require individuals to assume care for themselves, and which support the unimpeded operation of commerce and the free markets. As will be argued below, similar values were reflected in SF about government, business and commerce more generally. There were a number of examples of SF about the risks of workplace injury which demonstrated this trend. In Koehler v Cerebos the High Court considered the ‘risk’ of psychiatric injury to an employee from workplace stress. The existence of this risk has been confirmed by significant empirical evidence over several decades. However, it was dismissed as extremely fanciful by Callinan J, and as unforeseeable by McHugh J, Gummow J, Hayne J and Heydon J:


117 See Section 5.

118 Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44. The High Court found against the plaintiff employee. Justice Kirby did not sit on the High Court for this case.

I suppose that it is true that there is nothing new under the sun. With enough imagination and pessimism it is possible to foresee that practically any misadventure, from mishap to catastrophe is just around the corner. After all, Malthus in 1798 famously predicted that the population of the world would inevitably outstrip the capacity of the Earth to sustain it.\textsuperscript{120} (Callinan J)

It may be right to say that it is now a matter of general knowledge that some recognisable psychiatric illnesses may be triggered by stress. It is, however, a further and much larger step to take to say that all employers must now recognise that all employees are at risk of psychiatric injury from stress at work.\textsuperscript{121} (McHugh J, Gummow J, Hayne J and Heydon J)

In the same case, Callinan J also indicated that employees had an individual ‘choice’ whether to undertake pressure and stress in the workplace:

Every responsible position makes its demands upon the person occupying it. As Lord Scott of Foscote succinctly put it in his dissenting speech in \textit{Barber v Somerset County Council}:

‘Pressure and stress are part of the system of work under which [people] carry out their daily duties. But they are all adults. They choose their profession. They can, and sometimes do, complain about it to their employers.’\textsuperscript{122}

In \textit{Liftronic Pty Ltd v Unver}, Callinan J and Gummow J suggested (in noting previous undue judicial inclination in favour of employees) that the safety of employees depended as much or more, on their own behaviour than that of the employer:

The different view of the majority of the Court of Appeal from the jury’s view is probably indicative of too ready a judicial inclination to absolve people in the workplace from the duty that they have to look out for their own safety which will often depend more, or as much, upon their own prudence and compliance with directions, as upon any measures that a careful employer may introduce and seek to maintain.\textsuperscript{123}
These SF (particularly the last SF from *Liftronic*) are inconsistent with modern occupational health and safety research and practice, to the extent that they minimise employer responsibility for workplace risk. For example, the National OHS Strategy 2002-2012 adopted by the Commonwealth and State Governments promotes the ‘adoption of systematic approaches for prevention by government and industry’ and has one of its principles that ‘responsibility to eliminate or control risk rests at the source, be that with the designer, manufacturer or supplier, or in the workplace.’

Ironically, older High Court cases (for example cases from the Mason High Court) contain SF about risks in the workplace which are significantly more attuned to and coherent with the modern legislative approach to occupational health and safety than SF from High Court cases decided from 2001-2005. In *NSW v Faby*, a 2007 case concerning a workplace

---


125 For example in *McLean v Tedman* (1984) 155 CLR 306, 313 Mason CJ, Wilson, Brennan and Dawson JJ said that ‘accident prevention is unquestionably one of the modern responsibilities of an employer.’ In *Bankstown Foundry Pty Ltd v Braittina* (1986) 160 CLR 301, 309 Mason CJ, Wilson and Dawson JJ said that ‘On the other hand, being a question of fact, it is undoubtedly true, as McHugh J.A. said, that what reasonable care requires will vary with the advent of new methods and machines and with changing ideas of justice and increasing concern with safety in the community... What is considered to be reasonable in the circumstances of the case must be influenced by current community standards. Insofar as legislative requirements touching industrial safety have become more demanding upon employers, this must have its
psychiatric injury decided after the period of this study, Kirby J summarised the change of direction from the ‘preventative’ approach taken by earlier High Court cases to the ‘individualistic’ approach taken by the Gleeson High Court:

The approach of the majority in this appeal is yet another instance of the Court’s recent disfavour towards plaintiffs’ claims in personal injury cases. It is the more surprising because it is expressed in a context of employment, where the law has traditionally been at its most protective… I regard this decision as a reaffirmation of this Court’s retreat from its former communitarian approach to negligence liability. The Court turns its back on accident prevention in employment which, not so long ago, was a major theme of our negligence doctrine. Indifference on the part of employers is restored and rewarded.\(^{126}\)

Earlier sections of this chapter have already discussed how analysis of the SF identified in this study showed that Kirby J was more inclined than other members of the High Court to stress values such as accident prevention. Similarly, SF referred to by Kirby J about risks in the workplace suggested that modern Australian workplaces generally should have significant standards of workplace safety and that workers could be placed under undue strain by certain workplace practices. For example:

The method of work instituted by the appellant was primitive. The instrument provided to the respondent and his assistant was akin to that used in the building of the pyramids. It was not part of a system appropriate to a contemporary Australian workplace.\(^{127}\)

As Brennan and Deane JJ remarked at the close of their joint reasons in \textit{Braithwaite}:

‘Contemporary decisions about what constitutes reasonable care on the part of an employer towards an employee in the running of a modern factory are in sharp conflict with what would have been considered reasonable care in a nineteenth century workshop and, for that matter, reflect more demanding standards than those of twenty or thirty years

---

impact on community expectations of the reasonably prudent employer.’ They noted this was not a recent trend in the case law.


\(^{127}\) \textit{Liftronic Pty Ltd v Unver} (2001) 179 ALR 321, 347 [96] (Kirby J). See also his reference to ‘bygone attitudes’ (347 [96]) and his comments about the capacity of an ‘average worker’ to ‘bend and crouch’ (341[77]).
ago. While it is true that that has, in part, been the consequence of the elucidation and development of legal principle, it has, to a greater extent, reflected the impact, upon decisions of fact, of increased appreciation of the likely causes of injury to the human body, of the more general availability of the means and methods of avoiding such injury and of the contemporary tendency to reject the discounting of any real risk of injury to an employee in the assessment of what is reasonable in the pursuit by an employer of pecuniary profit.

Justice Kirby was concerned to stress that accident prevention should be a major theme underlying the evaluation of workplace negligence. However, as argued above in this section, this approach was generally inconsistent with the approach of other members of the High Court who were more inclined to stress values like individualism, individual responsibility, and the value of ‘freedom’ of contracting in the workplace. As Glasbeek has noted, this kind of judicial approach fails to consider the actual context of workplace bargaining including the inequality of bargaining power that can exist between employers and employees and lack of actual (rather than ‘formal’) freedom possessed by employees. This is particularly relevant when the particular contexts of the workplace cases reviewed in this study are considered. The cases before the High Court analysed in

---


129 For an exception to this see McHugh’s J’s statement in Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Fludia (2005) 221 CLR 161, 175 [44] that the ‘boredom and familiarity of repetitive work and the fatigue induced by long hours may cause the employee to lose concentration and increase the risk of injury’. Note also McHugh J’s comments in Hollis v Vabu Pty Ltd (2001) 207 CLR 21, 57 [93] on the need for doctrines like vicarious liability (which he says does not threaten the freedom of business) to remain ‘relevant in a world of rapidly changing work practices’.

130 See above n 108. High Court judges have themselves noted that jury understandings of what ‘community standards’ required in the workplace might be superior to the understandings of judges. See Liftronic Pty Ltd v Unver (2001) 179 ALR 321, 333 [60] (Gummow J, Callinan J) (although this was in the context of suggesting judges may have been too lenient to worker plaintiffs). See also McHugh J’s comments in the same case that ‘juries, with their knowledge of the working conditions in their communities, are probably in a better position than judges to determine whether an employer has breached the duty of reasonable care that it owes to an employee and whether an employee has taken reasonable care for his or her safety. At all events, there is no ground for supposing that judges—including appellate judges—are in a better position to decide these matters than juries are.’ (135 [38]).
Chapter 6: Social Facts and Values

this study did not involve professional, high status and high salary occupations (likely to be within the experience of judges and lawyers) where employees are likely to have more power to bargain with employers. Rather, the cases generally concerned more manual, less skilled and lowlier paid occupations. 131

5. SF ABOUT GOVERNMENT, COMMERCE AND INSURANCE

Secunda has argued that particular values, such as commitment to the autonomy of the economic market, a belief in limited state regulation and a rejection of actions which threaten ‘government and social elites’ are shared by many public and private employers. 132 These values are reflected in attitudes which include antipathy to unions on the basis that employers should be able to ‘control’ workplaces and not be constrained in their actions in the employment market, and a rejection of regulation of workplaces which undermines ‘their vision of how to run their businesses’. 133 Secunda has also suggested that these values might be also reflected in judicial attitudes about ‘facts’, 131 For example in Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44 the injured plaintiff was a part-time sales merchandiser who had already been retrenched from her full-time position andrehired on a part-time basis with no significant changes in workload. In Whisprun Pty Ltd v Dixon (2003) 200 ALR 44 the plaintiff was an abattoir worker. In Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424 the plaintiff was a laundry truck driver who had been required to move from employment to ‘individual contract’ as a result of a corporate re-organisation. In Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269 the deceased father of the psychologically injured plaintiff children was a wharf labourer. In Laybutt v Glover Gibbs Pty Ltd (2005) 221 ALR 310 the plaintiff was a pastry cook. In Czatycko v Edith Cowan University (2005) 214 ALR 349 the plaintiff was a general assistant who delivered mail and moved furniture. In Liftronic Pty Ltd v Unver (2001) 179 ALR 321 the plaintiff was a lift mechanic. Hollis v Vaba Pty Ltd (2001) 207 CLR 21 concerned the vicarious liability of a company for the actions of a bicycle courier.

132 Paul Secunda, ‘Cultural Cognition at Work’ (2010) 38 Florida State University Law Review 107, 114.. Secunda notes these values align to hierarchist and individualistic worldviews. He argues pro-union individuals are likely to embrace collectivist and egalitarian views, disliking the ‘ruling’ class and supporting regulation which responds to workplace risks and unsafe work conditions. (114).

133 Secunda, above n 132.
Chapter 6: Social Facts and Values

particularly in labour and employment cases. He argues that ‘the factual issues that divide judges involve a large amount of speculation and inconclusive evidence about employer and employee motivations, the proper measure for efficiency in both the public and private workplace, and the proper standard for technical or arcane measurements in the workplace…’. As already discussed this study also found that most SF were also based on little to no evidence or were based on speculation, and most likely reflected judicial assumptions of common sense (which is in fact private knowledge). In addition, as discussed in the last section, the values identified by Secunda could also be said to be reflected in the employment SF identified in this study.

This section argues that SF identified in this study about government, commerce, and insurance displayed similar characteristics to those which Secunda suggests are characteristic of judicial assumptions of facts in labour and employment cases (ie they were based on speculation or inconclusive evidence, and stressed particular values which were individualistic, free-market orientated and were respectful of social elites such as business and government bureaucracy). SF identified in this study about government and public authorities, commerce, and insurers tended to stress the value of these institutions to Australian life. SF also referred to the undue burden and potential for ‘indeterminate’ liability which would potentially affect the operation of government, commerce, and insurers as a result of negligence law. There was a general judicial ethos of avoidance of over-regulation and over-intervention, and (as noted above in Section 1) support for individual autonomy and responsibility. Continuing the theme already discussed in this chapter, where SF were more aligned to values such as accident prevention,

134 Ibid, 110.
135 In Chapters 4 and 5.
egalitarianism, and defendant power and responsibility to avoid risk, they were most likely to come from a judgment of Kirby J.

A. SF about Government, Public Authorities and Public Officers

SF about public authorities, Government bodies and public officials (eg police) tended to stress the restrictions and financial burdens suffered by these parties, and the potential for them to be subject to ‘indeterminate’ liability, rather than their ‘power’, knowledge or financial resources. For example:

Daily, agencies of the State and local authorities are concerned with issues of public health. In practical terms it would be impossible for any authority to police all potential sources of dangerous food just as it would be for such an agency to identify and eradicate all potential sources of danger of any kind.136

The massive obligation of the State to which a contrary view would give rise is a relevant and important circumstance to which I should have regard, and which, although not decisive, weighs in the balance.137

To impose a duty to take reasonable care to see that such information, recorded by police officers, is correct would impose on them either an intolerable burden or a meaningless ritual.138

It should not be overlooked that in this country road authorities are called upon to construct and maintain roads over vast distances and at great cost, roads whose use is not necessarily confined to those who pay for them. This is no doubt a powerful policy consideration operating on the minds of legislators in enacting legislation in respect of road authorities.139

The highway immunity case of Brodie v Singleton Shire Council involved the apparent rejection by Gaudron J, McHugh J, and Gummow J of a SF argument that road

137 Ibid.
Chapter 6: Social Facts and Values

authorities would be subject to ‘future’ indeterminate hazards if the law was changed, but only the basis that the judges assumed the existing law was already having that undesirable effect:

The postulate that, without the ‘highway rule’ and with the principles of negligence, statutory authorities will be subjected to fresh, indeterminate financial hazards which the common law will ignore should not be accepted. First, as has been pointed out earlier in these reasons, expenditure of public funds on litigation turning upon indeterminate and value-deficient criteria is encouraged, indeed mandated, by the present state of the law.\textsuperscript{140}

Justice Kirby also recognised that, on occasion, large consequences could flow from public authority liability. For example, in the 2002 \textit{Woods} case he noted that:

I would adhere to what I said, read in the context of Romeo. That was a case where the proposition propounded by the claimant was that a warning sign should have been erected on the edge of an elevated cliff in a natural headland of a public park, to the effect that it was dangerous to approach the edge. Such a proposition had large consequences for every cliff in a natural setting on Australia’s huge coastline.\textsuperscript{141}

Several years later however, he expressed strong regret that his statements in the 1998 \textit{Romeo} case\textsuperscript{142} had been used against plaintiffs in other contexts:

If I could expunge the quoted passage from my reasons in \textit{Romeo}, I would gladly do so. I would take it out, not because it was incorrect as a factual observation in the context of that case but because it has been repeatedly deployed by courts as an excuse to exempt those with greater power, knowledge, control and responsibility over risks from a duty of care to those who are vulnerable, inattentive, distracted and more dependent.\textsuperscript{143}

\textsuperscript{140} Ibid, 559 [104]. See also 599 [22] and 602 [229] where Kirby J accepts that there would be significant costs implications but indicates these should not be ‘exaggerated’. It should also be noted that \textit{Brodie} is also different to others cases analysed in the study as it is one of the few cases to involve Gaudron J prior to her retirement.

\textsuperscript{141} \textit{Woods v Multi-Sport Holdings Pty Ltd} (2002) 208 CLR 460, 499-500 [127].

\textsuperscript{142} \textit{Romeo v Conservation Commission (NT)} (1998) 192 CLR 431.

\textsuperscript{143} \textit{Neindorf v Jankovic} (2005) 222 ALR 631, 651 [75].
Chapter 6: Social Facts and Values

The SF about government referred to by Kirby J generally stressed the power and knowledge that government bodies had and could exercise to avoid loss to individuals, and suggested that adverse outcomes for public authorities should not be over-emphasised and needed to be balanced against issues of ‘responsibility’. For example:

What emerges from the evidence is really only confirmatory of common knowledge, and experience of dealings with planning authorities and state monopolies providing essential commodities and services of which the respondent is one. Their position in relation to developers is dominant. Their words and decisions are usually final. At least this is so without recourse to expensive, and sometimes prolonged and uncertain, legal proceedings (with Callinan J). 144

Thirdly, whilst it is true that a re-expression of the common law would have significant cost implications, imposed retrospectively on an unknown number of highway authorities including the respondents, such implications ought not to be exaggerated. 145

The most that can be said of the material provided by the States is that it shows what commonsense would suggest in any event. Cases of this kind have potentially large economic consequences. In default of enforceable contractual immunities from liability or statutory exemptions from, or ‘caps’ upon, liability, the application of ordinary principles of tort liability will result, potentially, in substantial judgments precisely because the foreseeable consequences of the negligence are large. The issue is, therefore, who should bear those consequences: the victim of the legal wrong or the person responsible for it, the tortfeasor? 146

These SF demonstrate that while (like other members of the High Court) Kirby J acknowledged issues like cost implications and burdens on public authority from liability, he did not consider these factors to necessarily override other relevant features of public authorities like their power, knowledge and dominant position in comparison to most citizens.

144 Tepko Pty Ltd v Water Board (2001) 206 CLR 1, 52 [156] (Kirby J and Callinan J).
145 Brodie v Singleton Shire Council (2001) 206 CLR 512, 601 [229].
B. SF about Business and Commerce

SF about business and commerce tended to stress the value of commerce and business to the Australian economy and the burdens business and commerce would suffer if illegitimately interfered with. These SF stressed the importance of free enterprise, commercial freedom and the importance of limited regulation of business:

One of the reasons for the rejection of a general rule that one person owes to another a duty to take care not to cause reasonably foreseeable financial harm is that the practical consequence of such a rule would be to impose an intolerable burden upon business and private activity. 147

The likelihood that imposing a duty in respect of building premises will have unsatisfactory consequences for the administration of justice and the efficiency of commerce is a powerful reason for not recognising the duty which Woolcock propounds. 148

To impose on suppliers of alcohol a general duty to protect consumers against risks of injury attributable to alcohol consumption involves burdensome practical consequences. 149

I am not in favour of extending the classical tests or their application to make the couriers employees of Vabu. To do so would be likely to unsettle many established business arrangements and have far-reaching consequences for industrial relations, for workers' compensation law, for working conditions, for the obligations of employers to make superannuation contributions and group


148 Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, 558 [109] (McHugh J). See also 555-557 [104] (McHugh J) and 592 [227] (Callinan J) regarding the importance of commercial freedom. Note however that 'business' should not generally be seen as vulnerable: ‘The class likely to be affected, being those who used the seed, would not be an indeterminate class and they would be persons vulnerable to loss if care were not taken, although it may be that assumptions about the respective vulnerabilities of experienced large scale farmers and a seed supplier should not be made too readily.’ Downer Pty Ltd v Wilkins (2003) 215 CLR 317, 368 [159] (Hayne J, Callinan J).

tax deductions and for the payment of annual and long service leave and taxes such as payroll tax.\textsuperscript{150}

There is also a question as to the extent, and potential indeterminacy, of liability. In the case of a medical practitioner, the range of people who might foreseeably (in the sense earlier mentioned) suffer some kind of harm, as a consequence of careless diagnosis or treatment of a patient, is extensive.\textsuperscript{151}

Justice Kirby too, recognised the role of business and commerce in modern Australian society. However, he used SF about the ‘burden’ that business might suffer in two cases referring to commercial plaintiffs,\textsuperscript{152} where he dissented from the decision of the High Court which disallowed recovery for those plaintiffs:

In the global and regional economy that is such a feature of the present age and in which Australian investors and civil engineers must now compete, it is undesirable that we should adopt a more restrictive right of recovery whilst our businesses elsewhere are subject to a larger legal duty.\textsuperscript{153}

Investment and development may, on occasions involve the taking of risks but these are the hallmarks of a vibrant society which enjoys economic freedom. They are the means by which economic progress is made and, relevantly to this case, people are housed. Such investment has been a feature of Australian society since settlement.\textsuperscript{154}

\textsuperscript{150} Hollis v Vabu Pty Ltd (2001) 207 CLR 21, 49 [69] (McHugh J). Note that this SF also reflects a concern with ‘coherency’, an issue identified in negligence cases from the early 2000s as being of importance in the determination of negligence. See for example Sullivan v Moody (2001) 207 CLR 562.

\textsuperscript{151} Sullivan v Moody (2001) 207 CLR 562, 582 [61] (Gleeson CJ, Gaudron J, McHugh J, Hayne J, Callinan J). See also the suggestion of the possibility of inefficient defensive conduct by professions in D’Orta-Ekenaik v Victoria Legal Aid (2005) 223 CLR 1, 117 [374] where Callinan J indicates that unnecessary defensive practices in other professionals is ‘to be regretted’, although this was insufficient basis to hold advocates liable in negligence in the same way as other professionals.

\textsuperscript{152} Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, a case where a commercial investor sought recovery for a latent defect in commercial premises, and Tepko Pty Ltd v Water Board (2001) 206 CLR 1, a case where a developer sought recovery for economic loss suffered consequent upon statements made by a public authority.

\textsuperscript{153} Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, 581-2 [190].

\textsuperscript{154} Tepko Pty Ltd v Water Board (2001) 206 CLR 1, 54 [165].
Chapter 6: Social Facts and Values

However, Kirby J also acknowledged the ‘difference’ between commercial and voluntary enterprises as a consequence of their profit making nature, and noted the impact that business operations might have on individual plaintiffs. These SF tended to support rather than deny imposition of liability on business:

Until that higher standard is imposed by the law, including the common law of negligence, purveyors of alcoholic liquor will continue to gather significant profits with no substantial economic contribution to the occasional victims who are injured as a result, such as the appellant.\footnote{\textit{Cole v South Tweed Heads Rugby League Football Club} (2004) 217 CLR 469, 499 [106].}

The principles of accident prevention expounded in the employment context in \textit{Bankstown Foundry Pty Ltd v Braistina} also apply to the conduct as a business of sporting activities having significant and reasonably avoidable risks of injury. In both such cases, it is not acceptable for the profit-making organisation to shrug off serious injuries as a cost involved in its business, tolerable because it will be borne by others. For those who suffer, there is damage. As a stimulus to accident prevention, and for recompense for those who are the victims of neglect, the law affords remedies.\footnote{\textit{Woods v Multi-Sport Holdings Pty Ltd} (2002) 208 CLR 460, 492 [106].}

Once that happened, the respondent, and commercial organisations like it, would be obliged to recognise indeed that ‘the time [had] now come’ for them to do something about it. The game of indoor cricket would continue. So would the respondent’s business. Like outdoor cricket, ice hockey and many other sports, it would be played with reasonable protection against preventable injuries of a grave kind, such as the appellant suffered to his eye. Parliament, the Federation and the respondent might fail to respond to the unreasonable risk of injury to players. But the common law, especially the community's standards of reasonable care, intervenes to enforce and uphold those standards.\footnote{\textit{Woods v Multi-Sport Holdings Pty Ltd} (2002) 208 CLR 460, 498 [121].}

These examples show how the SF referred to by Kirby J about business and commerce differed from those of other members of the High Court. While Kirby J acknowledged the value of business and commerce to Australian society, he viewed business (by virtue of its profit-making nature) as having communal responsibilities to other members of society. The business and commerce SF of other members of the High Court were more
likely to reflect values of free enterprise with concerns not to over-burden or restrict the operations of business with less concern for the burden that would fall on injured plaintiffs.

C. SF about Insurance

Kirby J noted in *Imbree v McNeilly* that ‘the traditional view of English law was that the existence, or absence, of a policy of insurance between a party sued and an insurer is irrelevant to any issue about the legal liability of the insured in the first place.’ This seems to have rested on the belief that recognition of insurance has had an expansionary effect on the law of negligence, and that ‘while in theory insurance follows liability, in experience insurance often paves the way to liability. In short, it is a “hidden persuader”’. Despite some judicial support for recognition of insurance in Australian law, Kirby J summarised the English and Australian case law on this point. At paragraphs 556-60 Kirby J discusses cases where the availability of insurance has been held to be relevant to the development of the law, and to his own negligence judgments in the High Court which have considered insurance as a relevant factor in negligence case. For example, *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 424-5; *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313, 401-2; *Jones v Bartlett* (2000) 205 CLR 166, 234-5; *Neindorf v Junkovic* (2005) 222 ALR 631, 648 [65], 651 [76]; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161, 193 [106]. He also notes that in *Kars v Kars*, Toohey, McHugh and Gummow JJ and I, in joint reasons, also observed that: "[A] review of the relevance of insurance to the development of the common law liability in tort may indeed be timely." See *Kars v Kars* (1996) 187 CLR 354, 381-2. Kirby J discusses academic views on the role of insurance in negligence in *Imbree*, 562-6 [173]-[179]. For academic discussion of the role of insurance see Jane Stapleton, ‘Tort, Insurance and Ideology’ (1995) 58(6) *The Modern Law Review* 820; Richard Lewis, ‘Insurance and the Tort System’ (2005) 25(1) *Legal Studies* 85; Jonathan Morgan, ‘Tort, Insurance and Incoherence’ (2004) 67(3) *The Modern Law Review* 384.

negligence cases where relevant, at best judicial acknowledgment of insurance has been characterised as hesitant and belated.\textsuperscript{161}

Despite the traditional and widely accepted view that the recognition of insurance is irrelevant in negligence cases, this study found that judges still referred to insurance SF in High Court negligence cases. Where insurance was mentioned in a SF, it was generally associated with concerns about avoiding undue burdens on insurers and insured defendants (such as premium increases and disturbance of existing commercial arrangements). An examination of insurance SF did not support traditional assumptions that where insurance is judicially recognised, it is ‘pro-plaintiff’ and expands negligence liability. On the contrary, insurance SF generally tended to point against negligence liability and in favour of defendants. Similar to other categories of SF discussed in this chapter, when SF aligned with more collective concerns, such as loss distribution and compensation, they generally came from a judgment of Kirby J.

The traditional ‘anti-policy’ argument which precludes judicial consideration of insurance did appear to have some impact on judicial use of SF. This was primarily to support ‘anti-plaintiff’ arguments and support the exclusion of ‘assumptions’ about defendants’ insurance which might meet any liability for damage suffered by plaintiffs. For example:

There are further difficulties about these sorts of assumptions. They are only assumptions. They may, I suspect, have been made without access to all of the relevant information, and not always after rigorous scrutiny by people adequately qualified to process and evaluate that information… The theory is that the insurer and the respondent would then have a financial incentive to ensure that any couriers are properly trained and safety standards rigidly enforced. I say ‘theory’ because there is no material before the Court, and I suspect, detailed and reliable material available anyway, to demonstrate a sufficient correlation between increases in insurance

\textsuperscript{161} Ibid.
 premiums and improvements in safety regimes in the somewhat unusual sorts of circumstances with which this case is concerned.\footnote{162}{Hollis v Vaba Pty Ltd (2001) 207 CLR 21, 68-9 (Callinan J). See also Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269, 315-6 [129] (Callinan J).}

Whether barristers are compelled to, or would prudently, in any event, carry insurance is not in my view relevant. Insurance policies are written no doubt upon the basis of the current law, and that is that the immunity exists.\footnote{163}{D’Orta-Ekennike v Victoria Legal Aid (2005) 223 CLR 1, 114 [363] (Callinan J).}

It would be wrong to assume that the persons or entities potentially subject to this form of tortious liability have ‘deep pockets’, or could obtain, at reasonable rates, insurance cover to indemnify them in respect of the consequences of criminal acts of their employees or independent contractors.\footnote{164}{New South Wales v Lepore (2003) 212 CLR 511, 534 [36] (Gleeson CJ). Note however the identification of the existence of statutory schemes of insurance by Heydon J at Cattanach v Melbior (2003) 215 CLR 1, 143 [395] (Heydon J): ‘It is regrettably difficult for modern society to operate without some risk of injury on the roads or at work. That is why there is statutory compulsion to insure against those risks and why there are statutory creatures to meet the claims if the obligation is not fulfilled.’ This SF is used to contrast motor vehicle negligence claims with other categories of negligence claims where liability is more difficult to prove.}

Further, it is implicit in the submissions for the interveners that highway authorities carry insurance in respect of their liability for misfeasance and other acts or omissions falling outside the ‘highway rule’. The Attorney-General for Victoria submitted that it should not be assumed that road authorities would be able through insurance to ‘transfer ... the financial burden of increased exposure to claims for compensation if their immunity for non-feasance is removed’. Nor should it be assumed that they will be unable to do so.\footnote{165}{Brodie v Singleton Shire Council (2001) 206 CLR 512, 560 [105] (Gaudron J, McHugh J, Gummow J). This SF differs somewhat from the others quoted directly above (see n 162, 163, 164) in that it rejects assumptions about both availability and unavailability of insurance.}

However, judges were prepared to refer to insurance SF in other cases and to assume specialist knowledge about matters such as the calculation of insurance premiums, the relative economic cost of insurability for plaintiffs and defendants, and the financial status of the Australian insurance industry. For example:

\begin{quote}
As Lord Diplock said in a case of exclusion of liability by contract, \textit{Photo Production Ltd v Securicor Transport Ltd}:
\end{quote}
‘It is generally more economical for the person by whom the loss will be
directly sustained to do so rather than that it should be covered by the
other party by liability insurance.”

But *Sullivan v Gordon* claims were not confined to the first appellant or its
subsidiaries. They applied to defendants generally. And one may safely guess that
a number of insurance companies would have many more claims for this kind of
damages than the appellants have or are likely to have.

A contemporary social condition not to be overlooked, if the court were entitled
to consider it, might be the difficulty currently being encountered by people and
organizations in obtaining affordable insurance, a difficulty to which very large
assessments of damages by courts may have contributed: a reason itself for
moderation, by having proper regard to relevant discounting factors.

The vast majority of defendants in personal injury actions are insured.
Consequently, the amount of the verdict will not be met by the defendant.
Nevertheless, it is a charge on the revenue of the insurer for the relevant year and
is ultimately met by the shareholders of the insurer or the individual proprietors
of the insurance business if the insurer is not incorporated. Although the burden
of the plaintiff’s claim is spread in such cases, the consequences for the
proprietors of the insurance business can be significant. When a large number of
claims are allowed to be brought out of time, as has been the case in respect of
some types of injuries or in some industries in recent years, the financial
consequences for an insurer can be drastic.

The existence of an ‘insurance crisis’ was referred to by judges on a number of
occasions. This was despite there being little empirical evidence showing a link between

---

168 *De Sales v Ingrilli* (2002) 212 CLR 338, 405-6 [192] (Callinan J). See also the statements by Heydon J in
*Cattanach v Mekhior* (2003) 215 CLR 1, 141-2 [391] that ‘further, if the professional is insured, the medical
insurer is likely in modern conditions to be in a condition of some desperation.’
also McHugh J’s comments in *CSR Limited v Eddy* (2005) 226 CLR 1, 40 [97]: ‘One may think that the
decision in *Griffiths v Kersemeyer* was a just decision that rightly helped to shift the burden from the carers of
injured persons to the pockets of the insurers who stand behind most defendants in personal injury cases.
Yet even today after many years of applying it, it is not easy to accept that it logically fits in with the
principles for assessing damages in such cases.’
negligence law and the costs and availability of liability insurance in Australia.\textsuperscript{170} This is a further example of the danger identified in the last chapter of judicial use of ‘common sense’ SF which are in fact empirically inaccurate or at best empirically unproven. In addition, the insurance SF used by most judges tended to respond to insurer and defendant concerns, to predict adverse impacts on insurance premiums and were concerned about burdening insurers and defendants (most often commercial or public defendants).

In further evidence of the pattern identified throughout this chapter, insurance SF used by Kirby J tended to emphasise that defendants were or should be insured against liability, and that this in turn promoted accident prevention. These SF (like those about the insurance crisis) were also not supported by empirical evidence and the deterrent effect of negligence law is controversial.\textsuperscript{171} Insurance was seen by Kirby J not as an illegitimate concern or as a burden on defendants, but rather as part of a collectivisation (rather than individualisation) of societal risk and a mechanism which induced accident prevention through changes in insurance premiums. For example:

\begin{quote}
It is against risks of the kind that materialised that people such as the appellant can be expected to take precautions (and against the chance that they may fail, they can be expected normally to secure householders’ insurance as thousands do).\textsuperscript{172}
\end{quote}


\textsuperscript{171} The links between insurance premiums and accident prevention is not empirically clear-cut and as noted elsewhere in this chapter the link between the outcomes of negligence law and deterrence is controversial at best. See above n 57.

\textsuperscript{172} Neindorf v Junkovic (2005) 222 ALR 631, 651 [75] (Kirby J).
Fifthly, a purpose of the law of negligence is, by sanctioning breaches, to promote accident prevention. In turn, this has encouraged the expansion of insurance coverage, particularly in commercial activities where premiums for such coverage are part of normal business costs.173

If responsibility—even partial—is imposed on the Club by the law of negligence a message is sent that control is not just a formal duty imposed on the Club and its officers by Parliament and by statutory offences unlikely to be prosecuted often. A holding of liability in negligence would reinforce such duties by visiting civil consequences that would sound in direct liability to the injured, with a resulting increase in insurance premiums that might stimulate a desirable change of culture and conduct.174

It is the notion that, in the past, encouraged care and attention for the safety of entrants on the part of those who invite others onto their premises. (It also encouraged such persons to procure insurance against risk). To the extent that these ideas are overthrown, and reversed, this Court diminishes consideration of accident prevention. (It also reduces the utility and necessity of insurance). From the point of view of legal policy, these are not directions in which I would willingly travel.175

Overall, Section 5 of this chapter has argued that there is a consistent pattern that occurs across judicial SF identified in this study about government, business and commerce, and insurance. SF about these matters were not ‘neutral’. SF were predominantly associated with values of individualism, the operation of the free market, and the prevention of undue burden on government, business and insurers. These were values more associated with arguments which favoured defendants. SF which stressed the power and knowledge of these institutions, and communal values such as responsibility to protect the community from risks associated with their conduct, were usually only found in the judgments of Kirby J. These values were more associated with arguments which favoured plaintiffs.

Chapter 6: Social Facts and Values

6. SF ABOUT LEGAL INSTITUTIONS AND LEGAL ACTORS

Barton has argued in the American context that:

many legal outcomes can be explained and future cases predicted by asking a very simple question: is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession.\(^{176}\)

Barton draws upon a range of disciplines\(^ {177}\) to suggest that judges, like other human beings, are driven by a ‘combination of incentives, experiences and cognitive biases.’\(^ {178}\) This results in judges favouring the interests of the legal profession. He suggests that unconscious factors\(^ {179}\) influence judges because ‘judges take a particular set of deeply ingrained biases, thought-processes, and views of the world with them to the bench.’\(^ {180}\) These result from a number of factors including the nature of legal education and practice, with judges coming from a select group of individuals who have ‘thrived within the institution of legal thought and practice’.\(^ {181}\) Section 6 makes a similar argument to that advanced by Barton. It suggests that the SF identified in this study about legal institutions and legal actors predominantly align with values which support and revere the role of legal institutions and the legal profession.\(^ {182}\) SF which took a more egalitarian or communitarian approach and focussed on the interests or needs of plaintiffs were less


\(^{177}\) Ibid. These include political science, cognitive psychology, economics, sociology and the ‘new institutionalism’. He does not draw upon cultural cognition which will be discussed further in Chapter 8 of this thesis.

\(^{178}\) Ibid, 457.

\(^{179}\) Ibid. He also suggests (relying on public choice theory) that conscious factors also influence judges. For example many friends and colleagues of judges are lawyers, judges routinely interact with lawyers, and may have been appointed due to the efforts of other lawyers.

\(^{180}\) Ibid, 456.

\(^{181}\) Ibid. These factors are further discussed in Chapter 8.

\(^{182}\) Although note below the more negative attitude taken by judges to personal injury lawyers.
common. Continuing the patterns identified in earlier sections of this chapter, they came predominantly from judgments of Kirby J.

There were many instances in the negligence cases from 2001-2005 where judges used SF which described the nature (and changing nature) of the litigation process, litigation patterns, the nature of courts, legal actors such as lawyers, barristers and litigants, and the ‘public interest’ in the administration of law. This context had particular salience in *D’Orta-Ekenaike v Victorian Legal Aid*, a case concerning advocates immunity. This section focuses on SF about the public interest in the administration of justice, litigiousness, plaintiffs and plaintiff lawyers, and barristers.

### A. The Public Interest in the Administration of Justice

The ‘public’ interest in the administration of justice was a recurring theme through many negligence cases in 2001-2005. SF about ‘the administration of justice’ tended to reflect values which considered the legal system, the court system and legal institutions as critical parts of Australia’s social and governmental structure. The administration of justice and conceptions of ‘public’ need and public expectations in the administration of justice were linked in SF statements to a range of issues which typically were related to legal concerns rather than concerns for outcomes for litigants. These included the avoidance of re-litigation, the settlement of controversies at trial, the acceptance of court decisions as ‘incontrovertibly correct’, the avoidance of inconsistency in

---


184 See the contrary views of Kirby J *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 105 [333].

and the ‘efficiency and authority of the judicial process’ including matters such as ensuring efficient court processes, ensuring appropriate and reliable evidence or proof, and deterring lengthy trials. The involvement of particular legal ‘actors’ in the litigation process in negligence cases was also said to produce proper administration of justice. This included the involvement of juries, and the involvement of barrister advocates.

Typical SF included:

As Deane and Gaudron JJ pointed out in *Rogers*, principles of finality find reflection not only in doctrines of preclusion intended to protect the position of an individual (the doctrines of res judicata, issue estoppel, and so-called ‘Anshun estoppel’) but also in the public need ‘for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct’. It is this public need which must underpin the proposition that a conviction cannot be challenged in subsequent proceedings.

It seems highly unlikely that public confidence in the administration of justice could be maintained at its present level if the administration of justice in all its aspects was a government monopoly.

---

189 For example in *Laybutt v Glover Gibbs Pty Ltd* (2005) 221 ALR 310, 316-7 [30] Gummow J, Callinan J and Heydon J accepted a statement of Gleeson CJ in *Swain v Waverley Municipal Council* (2005) 220 CLR 517 which referred to the jury system as a ‘time-honoured and important part of our justice system…it also has the important collateral advantage of involving the public in the administration of justice.’ Other judges in the case did not explicitly link the administration of justice to the nature and existence of the Bar as such, but focussed on issues such as finality. Kirby J (106[338]) expressly indicated this link between barristers and administration of justice was a ‘false trail’.
190 For example see the statement of McHugh J in *D’Orta-Ekenaik v Victoria Legal Aid* (2005) 223 CLR 1, 41 [111]: ‘But when all the consequences of the adversarial system are taken into account, the fact remains that the administration of justice, as now known, would be greatly impaired without the assistance of an independent Bar.’
192 Ibid, 39 [105] (McHugh J).
Immunity for advice concerning pleas of guilty does, however, serve the important public interests of avoiding re-litigation of issues and maintaining confidence in the administration of criminal justice insofar as that confidence rests on finality of outcome.\(^{193}\)

Few SF regarding the administration of justice reflected the public need or interest in ‘just’ or correct outcomes for litigants themselves. Those that did included:

Lord Millett explained ‘[T]o make the existence of the immunity depend on whether the proceedings in question are civil or criminal would be to draw the line in the wrong place .... it is difficult to believe that the distinction would commend itself to the public. It would mean that a party would have a remedy if the incompetence of his counsel deprived him of compensation for (say) breach of contract or unfair dismissal, but not if it led to his imprisonment for a crime he did not commit and the consequent and uncompensated loss of his job. I think that the public would at best regard such a result as incomprehensible and at worst greet it with derision.’\(^{194}\)

A rule that renders liability in negligence for psychiatric harm conditional on the geographic or temporal distance of the plaintiff from the distressing phenomenon, or on the means by which the plaintiff acquires knowledge of that phenomenon, is apt to produce arbitrary outcomes and to exclude meritorious claims.\(^{195}\)

It would be inimical to the due administration of justice if, on appeal, a party could raise a point that was not taken at the trial unless it could not possibly have been met by further evidence at the trial. Nothing is more likely to give rise to a sense of injustice in a litigant than to have a verdict taken away on a point that was not taken at the trial and could or might possibly have been met by rebutting evidence or cross-examination. Even when no question of further evidence is admissible, it may not be in the interests of justice to allow a new point to be raised on appeal, particularly if it will require a further trial of the action. Not only is the successful party put to expense that may not be recoverable on a party and party taxation but a new trial inevitably inflicts on the parties worry, inconvenience and an interference with their personal and business affairs.\(^{196}\)

In *Taylor* I went on to say: ‘... Courts and commentators have perceived four broad rationales for the enactment of limitation periods... Second, it is oppressive, even

\(^{193}\) Ibid, 54-5 [162] (McHugh J).
\(^{194}\) Ibid, 104-5 [331] (Kirby J).
'cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed.\textsuperscript{197}

As argued previously,\textsuperscript{198} judges often drew on their conceptions of ‘common sense’ as a basis for SF. SF regarding the administration of justice or public interests in administration of justice during 2001-2005 reflect this. Judges drew on their own ‘common knowledge’ assumptions about what factors the public would consider important to the proper administration of justice and what factors would be likely to engender public confidence in the justice system. There was, for example, no empirical evidence referred to in any SF that considered what public views or needs actually were in relation to these issues. These views and needs were judicially assumed. As argued in Chapter 5, these judicial ‘common knowledge’ assumptions are likely to in fact be judges’ own ‘private’ assumptions extrapolated into ‘public’ assumptions via the agency of a number of cultural and cognitive factors. This perhaps explains why the factors featured in SF about what the ‘public’ interest or concern is in relation to judicial administration, were predominantly related to legal process issues or legal values\textsuperscript{199}—those issues within the particular knowledge and experience of judges and lawyers rather than the public.\textsuperscript{200}

Factors such as the personal effects on people and litigants of litigation (for example getting a wrong outcome, going uncompensated for an injury, incurring major legal costs,

\begin{footnotesize}
\begin{enumerate}
\item[197] Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, 555-6[104] (McHugh J). Note this is a pro-defendant SF.
\item[198] See Chapter 5.
\item[199] For example many of the SF referred to an overwhelming public interest or concern in the incontrovertibility of court decisions. It could be argued this essentially reflects legal values. An opposing ‘public’ view of the court system could be the potential public interest in ‘right’ and accurate outcomes and the deterrence of preventable wrong outcomes in litigation.
\item[200] This might suggest the operation of a number of heuristics and biases including the egocentric bias, the availability bias and the (over)optimism bias, and an alignment with a hierarchical cultural worldview. This will be discussed further in Chapter 8.
\end{enumerate}
\end{footnotesize}
or wrongful imprisonment) were very infrequently referred to as being major issues of ‘public interest’ or ‘public concern’ in relation to the administration of justice.

B. Litigious Plaintiffs and Ambulance Chasing Personal Injury Lawyers

In 2004 Haltom and McCann investigated why ‘prominent elites’ and many members of American society believed there was a culture of litigiousness perpetrated by personal injury claimants and their lawyers, despite empirical evidence to the contrary. This kind of negative ‘common sense’ about patterns of personal injury litigation, personal injury claimants and personal injury lawyers also took hold in Australia, particularly during the period of 2000-2005 and influenced major Australian tort reforms in response to an insurance crisis. Contentious and often empirically unsupported assumptions about rates of personal injury litigation and the behaviour of personal injury plaintiffs and lawyers were made by Australian state and federal governments, the Australian media, lobby groups such as medical and insurance interest groups, and even (as demonstrated above) by some judges. These assumptions were questioned by many legal academics.

201 William Haltom and Michael McCann, Distorting the Law: Politics, Media and the Litigation Crisis (2004), ix-x. They took a social constructionist approach to suggest how a number of factors (instrumental, institutional and ideological) came together to produce this ‘negative’ social construction of personal injury litigants and personal injury lawyer which conflicted with available empirical evidence.


203 See for example the retirement comments of Justice Thomas of the Supreme Court of Queensland reported by Michael Lavarch: Michael Lavarch, 'Have the Judges Gone too Far?' (Paper presented at the Judicial Conference of Australia's Colloquium, Launceston, 2002), 1; Hon JJ Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 Australian Law Journal 432. The website for the ABC’s programme Media Watch also reported in 2004 that Chief Justice De Jersey of Queensland and Justice David Ipp of the New South Wales Supreme Court (of the ‘Ipp Report’) had both referred to the infamous ‘Stella Awards’ in conference papers, as examples of unwarranted plaintiff litigation: ABC, Media Watch.
Section 5 has already noted how SF about insurance identified in this study tended to reflect judicial concerns about onerous impacts of claims on insurers. In addition, the section argued that SF about commerce, government and insurers often tended to reflect the need for protection of key ‘elite’ social institutions from the burden of liability, and the need for individual assumption of the risk. An analysis of the SF identified in this study about personal injury litigation, personal injury claimants and personal injury lawyers showed that during 2001-2005 High Court judges predominantly adopted negative ‘common sense’ assumptions about personal injury litigation, plaintiffs and plaintiff lawyers. They did so with no reference to any empirical evidence to support any of the assumptions.

SF about personal injury litigation tended to suggest a failure by injured people to take responsibility for their own actions and suggested a culture of litigiousness amongst claimants and personal injury lawyers. Examples included:

The cases are legion. In the New South Wales Court of Appeal there has been a special list for appeals in cases against highway authorities.205

---


204 See above n 170. Note that Rochford argues these assumptions about insurance and litigation crises resulted from a reflexive spiral. She suggests the over-estimation of risk that occurs in a risk society in response to other societal views of risk (ie the risk management culture which emphasised the risk of injury, lead to a consequent over-estimation of the risk of being sued for failing to prevent risk). See Rochford, above n 69.

Chapter 6: Social Facts and Values

The claim which succeeded in this case was not greedy. It was entirely moderate. It does, however, suggest disquieting possibilities in relation to other much more ambitious claims.206

Dismissal of the appeal carries the certain consequence, for better or for worse, that the skills and ingenuity of the lawyers who advise plaintiffs as a class, whether rich or poor, will be devoted at once to extending recovery far beyond the limited level which the present plaintiffs sought. That is not in itself necessarily an argument against recovery. But it does indicate the nature of the litigation which will ensue if recovery is permitted.207

Moreover, there is evidence that, in the Australian context, even the difficulty of proving an allegation of deficient representation has not dissuaded many persons from making such claims the basis for an appeal.208

Potential liability for not making adventurous claims in pre-emption of possible change could well produce an undesirable and expensive deluge of extravagant claims, with a corresponding impact upon the work of the courts.209

In litigious times, it is sometimes overlooked that accidents, even accidents with catastrophic consequences, can occur without fault on the part of anyone.210

Some SF (in italics below) also portrayed plaintiffs as likely to exaggerate and fabricate aspects of their claims, and as likely to blame others for their misfortunes or for unavoidable accidents:

*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.*211

Personal injury litigation at common law, like much other litigation, is not fought in an altruistic way. *Plaintiffs injured by reason of a tort are, understandably enough, interested in stressing the resulting damage to various of their pre-injury capacities in order to achieve the maximum possible damages recovery.* Further, since there can be no return to

---

208 *D’Orta-Ekenaite v Victoria Legal Aid* (2005) 223 CLR 1, 64 [196] (McHugh J). See also 65 [197] (McHugh J).
the court if the injuries turn out to be worse than they were apprehended to be, there is every reason to assemble evidence which points to the worst possible outcomes. Hence in ordinary personal injury litigation some plaintiffs will feel a strong temptation to exaggerate their symptoms, or at least depict them—to treating doctors, to other doctors, to their lawyers and to the court - in the most forceful way of which they are capable. There are restraints of conscience against this.212

If that party does not succeed, an explanation for failure may be sought in what are perceived to be the failures of others — the judge, the witnesses, advocates—anyone other than the party whose case has been rejected.213

Let it also presently be accepted that people may have a greater awareness of their rights, and, because they form part of a consumerist society, are more ready now to pursue them than in the past. If that be so, people also no doubt are in a position to, and do exercise a greater degree of discernment and control over the conduct of their cases by their advocates in court.214

Some observations of Gleeson CJ in the most recent civil jury case in this Court, Swain v Waverley Municipal Council are relevant to this appeal: … In a rights-conscious and litigious society, in which people are apt to demand reasons for any decision by which their rights are affected, the trend away from jury trial may be consistent with public sentiment.215

In stark contrast to the improper tactics or motives often ascribed to plaintiffs, SF tended to describe defendants in ways that acknowledged the legitimacy of the tactics defendants adopted. For example:

That litigation will have much at stake and is bound to be bitterly fought. It is usually fought against a professional who is defending his or her reputation and possibly his or her continuing right to practise. An uninsured professional will be seeking to protect his or her assets. An insured professional will be attempting to prevent the levying of higher professional indemnity insurance premiums or the refusal of cover in future.216

If a hospital is joined, it will have every reason to resist the claim.\(^{217}\)

Justice Kirby,\(^{218}\) unlike most other judges\(^{219}\) in the High Court, was not inclined to accept SF which assumed litigiousness of plaintiffs or negative stereotypes of plaintiffs or plaintiff lawyers. Rather he noted the barriers faced by plaintiffs and advantages possessed by defendants in litigation. For example:

The approach of confining the decision to the "prime factual issue" overlooked, or betrayed an indifference to, the extreme and well-known difficulties which injured plaintiffs without assets have in mounting complex litigation against defendants who, without impropriety, are seeking to take every step the law affords them to preserve their positions. They may have to marshal lay witnesses not necessarily sympathetic to them. They may have to seek documents from the defendants, or from third parties who may not be amenable to that course. They may have to find expert witnesses and persuade solicitors to pay them. They may have to appeal to the charity of legal advisers prepared to fund litigation without any certainty that either the just fees of the unpaid advisers will ever be paid, or the other expenditures which have been made by those advisers will ever be reimbursed.\(^{220}\) (with Heydon J)

Litigants are sometimes people of limited knowledge and perception. Occasionally, they mistakenly attach excessive importance to considerations of no real importance. In consequence, they may sometimes tell lies, or withhold the

\(^{217}\) Ibid.

\(^{218}\) It is interesting to note that Justice Kirby commenced his career as a personal injury lawyer representing injured workers. See discussion in A J Brown, Michael Kirby: Paradoxes and Principles (2011), 47-8.

\(^{219}\) Although see The Waterways Authority v Fitzgibbon (2005) 221 ALR 402, 413 [45] (Kirby J, Heydon J). See also Cattanach v Melchior (2003) 215 CLR 1, 141-2 [391] where Heydon J does refer to the experiences of plaintiffs in litigation, but in the context of how plaintiff parents should therefore not be encouraged to proceed with litigation on the basis it harms children: ‘But even if the litigation is not fought with any particular bitterness, it will inevitably involve for the plaintiffs stress, expense, publicity and grave risks as to costs. The litigation will reveal intimate details of the parents’ matrimonial history and motivations. It will reveal that the parents were attempting to shift to another set of shoulders the burden of fulfilling the parents’ duty of paying for the child’s rearing and the burden of funding the numerous expenditures flowing from motives other than bare duty.’ See also McHugh J in Woolock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515, who noted that the decision in Bryan v Mahoney (1995) 182 CLR 609 did not ‘appear to have caused the lists of Australian Courts to be flooded with claims.’

entire truth, out of a feeling that they need to do so or that the matter is unimportant or of no business to the court.\(^{221}\)

The general unavailability of legal aid in Australia to support negligence claims against lawyers; the availability of summary relief against vexatious claims; and the rules against abuse of process by relitigation (not to mention the empathy and understanding of judges for co-professionals in unmeritorious cases) make it completely unnecessary to retain an absolute immunity of the broad, even growing, ambit propounded in this case.\(^{222}\)

The fear of floods of litigation, brought by discontented litigants against barristers and their instructing solicitors, which cannot be properly repelled where unwarranted is likewise unsustained by experience. It does not happen in the United States, a most litigious country, where there has never been an immunity from suit for ordinary attorney advocates. It does not happen in Canada, where the courts have rejected such a general immunity.\(^{223}\)

Overall, the results of this study found that apart from Justice Kirby, judges were inclined to accept negative stereotypes of plaintiffs and to assume plaintiff litigiousness. This is consistent with the other findings of the study, discussed in previous sections of this chapter, that judges stressed values of individual responsibility (for plaintiffs) and were inclined to have concerns that defendants such as government, business, employers and insurers were not inappropriately burdened and that their autonomy was not

\(^{221}\) *Whispern Pty Ltd v Dixon* (2003) 200 ALR 44, 478 [120] (Kirby J). See also 471 [95]: ‘To do justice to both parties, the decision-maker was therefore obliged to enter upon a more detailed analysis: not to treat the case as a kind of sport, where a player whose credibility is damaged is inevitably judged the loser. Engaging in this kind of tournament can be comparatively easy for skilled, repeat players’.

\(^{222}\) *D’Orta-Ekennike v Victoria Legal Aid* (2005) 223 CLR 1, 103 [328] (Kirby J).

\(^{223}\) Ibid. In the following paragraph [329] Kirby J gives evidence for this ‘empirical proposition’ including Law Reform Commission of Victoria, ‘Access to the Law: Accountability of the Legal Profession, Report No 48’ (1992), 35-6 [78] and Mary Seneviratne, ‘The Rise and Fall of Advocates’ Immunity’ (2001) 21(4) *Legal Studies* 644. Neither of these sources appears to rely on actual empirical evidence about rates of litigation against advocates. The Seneviratne article refers to anecdotal evidence (for example that the relevant professional indemnity insurer had not increased premiums in response to the removal of immunity for advocates in the UK). Kirby J reports that the Law Reform Commission found ‘no objective evidence of any increase in the length of criminal trials….or evidence of a sudden rise in negligence claims against lawyers’ following a Victorian case which had (prior to reversal on trial) removed advocate immunity.
unnecessarily impinged. In addition, it appears to be consistent with the effect of ‘negative’ (yet empirically unsupported) assumptions about plaintiffs and personal litigation that were circulating in the media and community more generally in 2001-2005.\textsuperscript{224}

\section*{C. Invaluable Barristers}

All High Court judges during 2001-5 were barristers before they were judges.\textsuperscript{225} As discussed at the start of this section, SF about the legal profession (apart from plaintiff lawyers) identified in this study reflected values which stressed the importance and status of lawyers. While SF about personal injury litigants and personal injury lawyers were not generally positive in nature, SF about barristers and advocates (particularly those referred to by McHugh J and Callinan J) tended to suggest that barristers played a critical and unique role in the Australian legal profession and the Australian legal system.\textsuperscript{226} These SF included:

\begin{quote}
In Australia, the barrister like the solicitor, is an officer of the court, as indispensable to the administration of justice as the judge.\textsuperscript{227}
\end{quote}

\begin{quote}
Without an independent Bar, investigating and arguing the legal rights and duties of members of the public in the courts and assisting in the administration of justice, the cost of administering justice would increase dramatically. Government functionaries, or perhaps the judges themselves, would have to take on the role of the advocates. They would have to engage in many out-of-court activities that
\end{quote}

\begin{footnotes}
\item[224] This raises the possibility that judges, like other members of the community, were affected by the availability heuristic. This is discussed further in Chapter 8.
\item[225] Callinan J was the only judge to be appointed to the High Court directly from the Bar.
\item[226] This is unsurprising for a number of cognitive and cultural reasons which will be discussed further in Chapter 8. These include the impact of the culture of the Bar on judges, the egocentric/self-serving bias, and the general cognitive impulse of people to avoid cognitive dissonance. In addition, given the ‘elite’ status of members of the Bar in Australian society, veneration of the role of people of that status would align with the hierarchical cultural worldview.
\end{footnotes}
are now carried out by members of the Bar. That would include investigating, researching and presenting claims and defences in the great majority of cases.\textsuperscript{228}

Cross-examination requires of counsel careful preparation but it is still both a technical skill and an art. Decisions with respect to it have often to be made instantaneously, and, accordingly, in part at least, intuitively. It is frequently impossible to know whether a question in chief or cross-examination should have been asked, until after it has been answered.\textsuperscript{229}

Few other professions, teaching, psychology and psychiatry are perhaps some, require their practitioners to attempt to see into the minds, and anticipate the thinking, reactions, and opinions of other human beings, as does the profession of advocacy.\textsuperscript{230}

Similarly to the SF discussed above in this chapter concerning employers, government and public authorities, commerce and insurers, SF about advocates also suggested there would be undue burdens imposed on advocates by potential negligence liability. These SF were far less concerned with burdens on plaintiffs suffered as a result of advocate error. For example:

Further, although not irrelevant, we would consider the ‘chilling’ effect of the threat of civil suit, with a consequent tendency to the prolongation of trials, as not of determinative significance in deciding whether there is an immunity from suit. That is not to say, however, that the significance, or magnitude, of such effects should be underestimated.\textsuperscript{231}

If liability were to attach to underestimation of a sentence, practitioners might give higher estimates in their advice and depress the number of guilty pleas entered.\textsuperscript{232}

The advocate must make decisions about the extent of cross-examination, the witnesses to be called, points to be taken, submissions and objections to be made. An advocate, concerned about the exposure to liability for negligence to the client, might, in making such decisions, delegitimate the interests of efficient

\textsuperscript{228} Ibid.

\textsuperscript{229} Ibid, 114-5 [366] (Callinan J).

\textsuperscript{230} Ibid, 116-7 [370] (Callinan J).

\textsuperscript{231} Ibid, 15-16 [29] (Gleeson CJ, Gummow J, Hayne J, Heydon J).

\textsuperscript{232} Ibid, 54 [161] (McHugh J).
conduct of litigation to second place in favour of the exclusion of any possible avenue of success for the client, however hopeless.\textsuperscript{233}

An advocate must also, on occasion, act contrary to her or his client's interests, even instructions, and refuse to allege fraud or other disgraceful conduct without good cause, to mislead the court or to fail to disclose authority contrary to the client's position. The burden of meeting allegations of negligence, even assuming that courts would not visit liability on a practitioner for upholding their obligation to the court, would influence the discharge of that obligation.\textsuperscript{234}

While McHugh J and Callinan J in particular focussed on the unique and ‘indispensable’ nature of advocates and barristers to the legal process, other members of the court did suggest similarities between barristers and other professions. For example:

Likewise, it is as well to mention at this point a further consideration that must be put aside as irrelevant. It may readily be accepted that advocates must make some decisions in court very quickly and without pausing to articulate the reasons which warrant the choice made. But so too do many others have to make equally difficult decisions. Reference to the difficulty of the advocate’s task is distracting and irrelevant.\textsuperscript{235}

The organisation of contemporary legal practice in Australia has greatly altered. Increasingly, advocacy is performed by lawyers who do not practise exclusively as barristers. Often they practise in national, indeed international, firms. Australian lawyers increasingly deal with lawyers in other lands, virtually none of whom enjoy the immunity that lingers in Australia as an historical vestige.\textsuperscript{236}

Litigants are represented in our courts by advocates of differing skills.\textsuperscript{237}

As discussed earlier in this section, Barton has argued that lawyers show a particular preference for case outcomes which benefit members of the legal profession.\textsuperscript{238}
in particular, noted the potential ‘empathy’ judges have for barristers, having once been barristers themselves:

…not to mention the empathy and understanding of judges for co-professionals in unmeritorious cases) make it completely unnecessary to retain an absolute immunity of the broad, even growing, ambit propounded in this case.\(^\text{239}\)

In the words of Lord Hoffmann, intuition and sympathetic understanding confined to lawyers, from whom ordinarily Australian judges are drawn, ‘will not do.’\(^\text{240}\)

Ultimately however, while Kirby J (and on occasion some other judges) noted the difficulties of injured plaintiffs in navigating the Australian legal system, and conceived of legal institutions as properly reflecting the individual interests of plaintiffs, this was not the main trend in SF about legal institutions, legal actors and the legal process. Most SF about these matters were more likely to reflect values that would be traditionally valued by the legal profession itself, rather than by consumers of the legal process. In addition, SF tended to reflect values such as the need for ‘individual responsibility’ by plaintiffs, and the potential burdens legal action placed on ‘elites’ such business, employers, government, insurers and the legal profession itself. For the most part, individual plaintiffs were not described in ways that considered them to be equal and valued participants in the legal system.

**CONCLUSION**

This chapter has argued that SF identified in this study about individual responsibility and autonomy, accident prevention and deterrence, risk, employment and the risks of employment, government, commerce and insurance, and legal actors and legal institutions were not ‘neutral’. SF about these matters predominantly reflected values

\(^{239}\) D’Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1, 103 [328].

\(^{240}\) Ibid, 71-2 [218]. See also 106 [336].
which stressed individualism and individual responsibility, the importance of free
enterprise, and the value of traditional social structures and social elites. These SF tended
to be associated with arguments which favoured defendants rather than plaintiffs. There
were potentially competing versions of SF about these matters. For example, SF which
aligned with values such as accident prevention and more communal approaches to
social responsibility were less common and predominantly came from judgments of
Kirby J.

These results give rise to two questions. The first is why did these patterns in the judicial
construction of SF occur? Part 3 (Chapters 7 and 8) address that question and suggest
that there are complex, inter-related and interdependent legal, institutional, individual,
cognitive and cultural factors that interact to potentially explain how judges use and
construct SF. As will be argued in those chapters, judges might for example be affected
by cognitive mechanisms and the impacts of cultural worldviews which lead them to
unconsciously favour a particular set of individualistic values, which then influence the
way in which they construct ‘facts’ about the world.

There is a second question that arises from the results of this study. Looking at the
bigger picture, is it a bad thing that judicial SF mostly reflect values like individualism,
free enterprise, and respect for social elites (rather than values like accident prevention
and communal responsibility)? Should we care that some categories of SF in High Court
negligence cases appear to be predominantly aligned with these values? Don’t these
values just reflect legitimate approaches to the ‘good’ life, and thus are perfectly worthy
of judicial respect? Should anything be done about this? This question is taken up in
Chapter 9. However, a few brief points can be made here that suggest the question is
worthy of further exploration. First, we need to ask whether judicial reasoning can be seen as legitimate and as respecting differing societal perceptions about how society should operate, when SF in judicial reasoning tend to mostly reflect only particular values to the relative exclusion of others. Second, recall that Chapter 5 argued that there were categories of ‘missing’ SF, and empirically questionable ‘SF’ which were identified in this study. Missing SF were typically those which would have incorporated into judicial reasoning the experiences of those typically disenfranchised by the law and legal system (i.e., concerns which are associated with more communitarian and egalitarian values). Where SF clashed with empirical evidence, the empirical evidence would have suggested ‘facts’ that also might have aligned with more communitarian and egalitarian values. This suggests that the interaction between judicial ‘values’ and SF in judicial reasons can potentially result in judicial error, and judicial (unconscious) bias.
Chapter 7


INTRODUCTION

Part 2 (Chapters 4-6) discussed and analysed the results of the content analysis of High Court negligence cases from 2001-2005, carried out as part of this study. The study found that Australian High Court judges did use SF\(^1\) as part of their reasoning in negligence cases, although SF did not generally dominate judicial reasoning. Judges made greater use of SF in high significance cases (rather than in low and medium significance cases), in dissent (rather than majority) judgments, and in single (rather than joint) judgments. Most of the time, judges gave no reference or source for SF. Where a source was given for a SF, it was usually to a case or other legal source. Judicial reference to empirical material in support of a SF was rare. While judges tended to use and construct SF in broadly similar ways, the study showed there were some areas of difference between judges. For example, some judges used SF in their judgments somewhat more than other judges, and some judges referred to sources for SF somewhat more than other judges.

Most SF were drawn from judicial ‘common sense’ or ‘common knowledge’. The study found this can lead to judicial use of inaccurate SF, and SF which conflict with available

\(^1\) SF refers to the plural ‘social facts’ and the singular ‘social fact’.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

empirical evidence.\(^2\) It can also result in judicial failure to refer to SF which reflect the experiences of those groups of people most marginalised by the law and legal system.\(^3\) Many SF identified in the study reflected a particular set of values— values which stress the role of the individual in society and individual responsibility, the importance of free enterprise, and the value of traditional social structures and social elites.\(^4\) SF which reflected more egalitarian and community (or communal) focussed values (such as accident prevention and substantive rather than formal equality) were less common. Where they were used, these SF were typically (although not always) drawn from the judgments of Kirby J. The overall findings of the content analysis raise two very big and very complex questions. What factors explain these findings? Why did the High Court judges studied, use and construct SF in negligence cases in the way they did?\(^5\)

The role and use of SF in judicial reasoning in negligence cases (and more broadly) in the High Court has been largely ignored by scholars,\(^6\) and there is little available research that directly answers those ‘big’ ‘complex’ questions. One of the significant contributions made by this study is to propose an explanatory framework for judicial use and construction of SF in negligence cases in the Australian High Court. Part 3 (Chapters 7 and 8) develops an explanatory framework that is consistent with the results of the content analysis conducted as part of this study, and that can form the basis for future research.\(^7\) Section 1 introduces this explanatory framework. The development of the

\(^2\) See discussion in Chapter 5.
\(^3\) See discussion in Chapter 5 Section 3.
\(^4\) See discussion in Chapter 6.
\(^5\) Research Question 2.
\(^6\) See discussion in Chapter 1.
\(^7\) The data from a single exploratory study utilising one empirical method cannot by itself answer the very complex and larger questions about what factors ‘cause’ judicial use and construction of SF.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

explanatory framework draws on the interpretivist epistemology and social constructionist approach adopted in this study. It utilises both deductive and inductive theory building. The explanatory framework is built upon analysis and critique of existing literature about a range of matters including evidence law and judicial notice, legal culture and the legal profession, human and judicial cognition, empirical studies of judicial reasoning, and cultural cognition. It is also informed by insights from the data collected in the content analysis conducted as part of this study. Section 1 argues that the judicial use and construction of SF should be seen as a complex dynamic process involving interrelated and inter-dependent legal, institutional, individual, cognitive and cultural factors. It is not always easy or possible to separate or isolate the effects of each of these factors individually, but to facilitate discussion this chapter examines the legal and institutional factors (those factors ‘external’ to the judges themselves) and Chapter 8 considers the individual, cognitive and cultural factors (those factors ‘internal’ to the individual High Court judges).

Sections 2 and 3 consider how legal factors impact on judicial use and construction of SF in negligence cases in the High Court of Australia. Section 2 argues that the law, legal principles and theory of private law and principles of negligence law act as some constraint against judicial use of SF, but do not act to completely restrain judicial use of SF, particularly in ‘high significance’ cases. Section 3 argues that the application of the

---

8 See discussion in Chapter 1.
9 As discussed in Chapter 2, all High Court negligence cases studied in the content analysis were coded as high significance, medium significance, or low significance (see Appendix 2.1). High significance cases were those cases which would be considered the most complex and important from the perspective of the High Court, the legal profession and the academy. These cases were typically difficult and complex, related directly to one of the elements of negligence law, involved an unresolved or novel issue, involved 5-7 High
principles of evidence law (particularly the common law and statutory provisions concerning judicial notice) to SF are unclear. Judicial use of SF appears to fall outside the doctrine of judicial notice, and to be considered an inherent part of judicial reasoning. The doctrine of judicial notice does not appear to generally restrain judicial use of SF. As a result it is unclear what, if any, guiding principles judges can draw upon to assist them in determining how to appropriately use and construct SF in negligence cases. Section 144 of the Evidence Acts\(^{10}\) may operate to restrain some judicial use of SF, but again the ambit of the section is unclear.

Finally, Section 4 considers the impact of institutional factors (factors relevant to the organisation of the High Court and the processes of the High Court) on judicial use and construction of SF. It argues that aspects of the adversarial system and the institutional nature of the High Court of Australia affect judicial use and construction of SF. While the nature of the adversarial system and the High Court as an institution do not actively restrain judicial use of SF, they do not facilitate, encourage or support the supply of good quality SF information to judges.\(^{11}\)

---

\(^{10}\) Evidence Act 1995 (Cth); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic).

\(^{11}\) This can result in and contribute to judicial bounded rationality. This is discussed further in Chapter 8 Section 2, however for present purposes bounded rationality refers to the concept that human cognitive ability is limited and that human beings utilise shortcuts in decision-making. Bounded rationality can arise from the inherent complexity of a human decision, factual ambiguity and lack of information about decision-alternatives. See Russell B Korobkin and Thomas Ulen, 'Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics' (2000) 88 California Law Review 1051, 1076-1053.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

1. INTRODUCING AN EXPLANATORY FRAMEWORK FOR JUDICIAL USE AND CONSTRUCTION OF SF

This section argues that an explanatory framework for judicial use and construction of SF should have a number of key features. It must recognise that judicial SF statements do not necessarily represent ‘reality’, but rather are statements which reflect judges’ ‘inner worlds’, the influence of culture, context and societal interactions, and the effects of cognitive factors and cultural worldviews. This ‘interpretivist’ ‘constructionist’ account of judicial reasoning and judicial use and construction of SF differs significantly from ‘positivist’ accounts of judicial decision-making which assume facts are ‘observable, measurable’, ‘independent’ and ‘objective’.

For example, traditional ‘formalist’ or ‘orthodox’ accounts of judicial decision-making and judicial reasoning assume that only legal principles and adjudicative facts are permissible influences on judicial decision-making. These accounts of judicial decision-making understand relevant facts to be introduced to judges through the evidence adduced by parties and through parties’ submissions, with the law then applied to those facts. There is limited acknowledgment of the judge’s own role in independent fact finding other than through narrow rules of

---


13 Ibid, 930. See the further discussion of the interpretivist epistemology and social constructionist approach underlying this study in Chapter 1.

14 A formalist model of judging considers that judges ‘apply law to the facts of a case in a logical, mechanical and deliberative way’. See Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93(1) *Cornell Law Review* 1, 1. Guthrie, Rachlinski and Wistrich (at 3) contrast this with the realist model which assumes that judges take a purely intuitive approach to reach conclusions. They argue neither the formalist or realist models adequately reflect how judges make decisions, and that judges are both deliberative and intuitive decision-makers. See also discussion of this ‘orthodox’ model of judicial reasoning in Jason I. Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006), Chapter 3, 41.
Institutional Factors

judicial notice\textsuperscript{15} or defined rules relating to official documentary evidence. The ‘law’ and the rules of procedure and evidence are seen as the main factors that affect how judges receive and interpret ‘facts’. This view of judicial decision-making is reflected in modern scholarship that derides the use of extra legal considerations by judges.\textsuperscript{16}

However, these models of judicial decision-making do not account for ‘extra-legal’ influences on judicial reasoning and decision-making. Jason Pierce’s recent study of the Mason High Court and the transformation of the judicial role (from a more legalistic orthodox model to a more activist model) during the period of the Mason High Court, questioned ‘single’ factor explanations for judicial role and judicial reasoning.\textsuperscript{17} Pierce found that there are ‘complex interactions of legal, individual, institutional and political variables that go into judicial decision-making and changes to the judicial role’.\textsuperscript{18} Similar propositions have been advanced by Posner who suggests that legal, individual,

\textsuperscript{15} This is discussed further in Section 2 of this chapter.


\textsuperscript{17} Jason L. Pierce, Inside the Mason Court Revolution: The High Court of Australia Transformed (2006).

\textsuperscript{18} Ibid, 23.
institutional, ideological and strategic considerations drive judicial behaviour and judicial reasoning. ¹⁹ A positivistic or single factor model of judicial use and construction of SF does not adequately explain the results of the content analysis conducted as part of this study.

The explanatory framework for judicial use and construction of SF proposed in this study suggests that judicial use and construction of SF involves the interaction of multiple, interacting and interdependent legal, institutional, individual, cognitive and cultural factors. ²⁰ The framework acknowledges the context in which judges use and construct SF. This includes the legal context within which judges operate—the relevant legal rules and evidential rules. It also includes the institutional context—the nature of the adversarial system, and the institutional nature of the High Court of Australia. The framework understands that judges as individuals have their own ‘cultural’ context (which includes the culture of the legal profession, Bar and Judiciary), their own personal experiences, and their own ‘social interactions’. These are factors which can influence judicial use and construction of SF. Judicial use and construction of SF is also as a cognitive process. The cognitive factors that affect human reasoning also affect judicial

---


The framework also understands judicial reasoning as a process which involves a certain kind of societal interaction—decision-making as part of a group of judicial colleagues. Judicial group deliberation is a factor which can affect judicial use and construction of SF. Finally, the framework accepts that judges, like other human beings, can be influenced by their cultural values or their ‘cultural worldview’—their preferences or values about how society should be best organised.

The rest of Chapters 7 and 8 discuss in more detail the role of each of the legal, institutional, individual, cognitive and cultural factors, in explaining judicial use and construction of SF. Legal and institutional factors are discussed in this chapter, and cultural, cognitive, and cultural factors are dealt with in Chapter 8. Each of these factors is dealt with separately to aid the reader’s understanding of each factor, and to show how certain factors appear to be of particular relevance to certain findings of the content analysis conducted in this study. However, it is important to understand that these legal, institutional, individual, cognitive and cultural factors should not be viewed as distinct and separate from each other. A single factor in isolation cannot be considered the ‘sole’

21 See Guthrie, Rachlinski and Wistrich, above n 14.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

explanation or ‘cause’ of a particular finding of this study, or of judicial use and construction of SF more generally. Factors can be highly interdependent. For example, a judge’s cultural values may be influenced by their ‘group commitments’, formed because they draw on similar individual ‘life experiences’, cultural background, or social background as other judges.24 Their cultural values or cultural worldviews can interact with other cognitive mechanisms, influencing how those cognitive mechanisms affect judicial perceptions of ‘fact’.25 Finally, all of this may occur within the shared judicial ‘context’ of legal rules and institutional structures.26

2. LEGAL FACTORS AND JUDICIAL USE AND CONSTRUCTION OF SF?

The content analysis conducted in this study found that High Court judges did use SF in their reasoning in negligence cases. Clearly, neither the ‘law’, nor any other factor, completely restrained judicial use of SF in the cases studied. The study identified 1208 SF in the 45 cases studied.27 There was an average of 26.84 SF/case. However, the study also found that while judges used SF in their reasoning in negligence cases, their

25 Donald Braman, Dan Kahan and David Hoffman, ‘A Core of Agreement’ (2010) 77 University of Chicago Law Review 1655, 1655. For example, the availability heuristic suggests that people will use information more ‘available’ to them (for example media reports) as the basis for their reasoning even where that information is inaccurate. Cultural cognition might explain why people preference particular versions of available information over other equally available versions of information. For example, consider two stories in a newspaper about climate change, one which suggests the science on global warming is clear and one which gives the viewpoint of a climate change sceptic. Cultural cognition suggests why some people will unconsciously favour the first story as the basis of their ‘knowledge’ about climate change, while others will favour the second story.
26 These factors can contribute to bounded rationality, which in turn can prompt or amplify the effects of cognitive factors on judicial reasoning. See above n 11 and discussion in Chapter 8 Section 2.
27 See Table 4.1.
reasoning was by no means predominated by SF. Most of the text of judgments was taken up by statements of law and legal reasoning and adjudicative facts. For example, there was only an average of 7.65 SF/judgment and an average of one SF for every 5.52 paragraphs in the cases. In some cases, judges used SF very little or not at all. These were typically low or medium significance cases. However, in other cases, typically high significance cases, judges used SF much more. Nine hundred SF (74.5% of the SF identified in the study) came from high significance cases.

Overall, the findings of the content analysis suggest that judges are generally constrained from using SF in negligence cases, but they are not completely restrained. Judges appear to be constrained far less in ‘high significance’ cases, typically complex, novel and difficult cases. It is these cases where SF play a much more important role in judicial reasoning. High Court judges should not however be considered a homogenous group—some judges use SF less and some use SF more. For example, Kirby J (the highest user of SF identified in the content analysis) used 9.27 SF/judgment while Gummow J used only

---

28 See Chapter 4, Table 4.1. ‘Judgment’ refers to each individual judgment within an overall decision on a case. Many High Court decisions contain multiple judgments.

29 See Chapter 4, Table 4.2. For example no SF were identified in Czatyroko v Edith Cowan University (2005) 214 ALR 349 or Manley v Alexander (2005) 223 ALR 228 and only one SF was identified in Willett v Fitcher (2005) 221 CLR 627; Shony v PT Limited (2003) 197 ALR 410; Amaca Pty Ltd v State of New South Wales (2003) 199 ALR 596.

30 Ibid. These were typically cases of (relatively) lesser importance, difficulty and complexity, less likely to involve all of the judges of the High Court, less likely to involve novel, difficult and complex issues directly related to elements of negligence, less likely to be reported in the CLR, and comparatively less cited by other judges or written about by scholars in the five years following the decision.

31 See discussion in Chapter 4 Graph 4.3 and Chart 4.4.

Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

4.92 SF/judgment. This suggests that constraints on judicial use of SF in negligence cases do not operate uniformly. They affect different judges in different ways. They may even affect individual judges differently dependent upon the particular case being decided, and whether they are in a single or joint judgment.

This section argues that although there are ‘legal’ factors or principles that affect or constrain the way judges use and construct SF, these factors do not operate as complete restraints against judicial use of SF. This explains the results of the content analysis discussed above. The section discusses the role of law generally as a potential constraining factor against judicial use of SF, the principles and ‘theory’ of ‘private law’ as potential constraining factors, and finally considers whether the High Court’s approach to the use of policy in negligence cases affects judicial use of SF in negligence cases.

A. Does the ‘Law’ Generally Restrain Judicial Use and Construction of SF?

If a strict version of formalism or ‘legalism’ was adopted as accurately describing the judicial decision-making process, then it would have to be accepted that there was little or no place for SF in judicial reasoning in negligence cases or any other kind of case.

33 See Chapter 4 Section 4, Table 4.11.
34 The commentary in this chapter discusses the effects of constraints on High Court judges more broadly and refers to the results of the content analysis as to overall patterns of judicial use and construction of SF. However, based on the differing rates of SF use by individual judges, further analysis of individual judges would likely reveal some differences in the effects of constraints.
35 For example, as discussed in Chapter 4 Section 4, Heydon J was the second highest user of SF identified in the content analysis with 8.23 SF/Judgment. However most of these were from Cattanach v Melchior (2003) 215 CLR 1. If this was case was disregarded then Heydon J’s average SF/judgment would have only been 4.8. The Cattanach case accounted for all the single judgment SF made by Heydon J. All other SF identified in the sample were made in joint judgments.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

Posner argues that legalists decide cases ‘by applying pre-existing rules, or in some versions of legalism, by employing allegedly distinctive modes of legal reasoning, such as “legal reasoning by analogy.”’ The law is treated as ‘an autonomous domain of knowledge and technique’. The leading proponent of this approach on the High Court of Australia is Justice Heydon. He strongly supports the pre-eminent role of law in the judicial decision-making process, arguing that there are strict limits to the powers of appellate courts to make law. These include the doctrine of precedent, principles relating to the injustice of retrospectivity, respect for the ‘province of the legislature’ and the need for coherence in the law overall. ‘The duty of the court is not to make law, or debate the merits of particular laws, but to do justice according to the law.’ However, Posner argues that legalism cannot fully explain the judicial process given that legal materials cannot answer all questions facing judges, particularly those in appellate courts. It is widely acknowledged that judges, at least when confronted by ‘novel’ cases do more than merely apply ‘established principle’ to adjudicative facts, and do create ‘new law’.

36 Also called ‘formalists’.
37 Posner, above n 19, 7.
38 Ibid, 8. See also the discussion of this in work of John Gava, above n 16.
39 J.D Heydon, 'Limits to the Powers of Ultimate Appellate Courts' (2006) 122 Law Quarterly Review 399. See also Heydon, above n 16. However, see Hon J D Heydon, Cross Evidence (8th ed, 2010), 220-230 where it is acknowledged that judges often make use of their 'common experiences of life'.
40 Heydon, above n 39, 15.
41 Posner, above n 37. See also his extended discussion and critique of legalism as a model of judicial decision-making, 41-56.
42 For example see Harold Luntz et al, Torts: Cases and Commentary (6th ed, 2009), 147; Michael Kirby, 'Judicial Activism? A Riposte to the Counter-Reformation' (2004) 24 Australian Bar Review 1; Ronald Sackville, 'Why Do Judges Make Law? Some Aspects of Judicial Law Making' (2001) 5 University of Western Sydney Law Review 59. Sackville argues (at 59) that ‘today no informed observer disputes that judges—especially judges of the High Court—do make law.’ Of course these ‘descriptive’ accounts of what judges actually do are inconsistent with some normative theories of law such as those of legal positivists such as
Malbon has argued that ‘the appellate judge stands at the fringes of the known law and is thus compelled, when making a decision, to base it on certain (articulated and unarticulated) policy assumptions.’ As Malbon notes there is a ‘burgeoning field of study’ in the United States that empirically studies judicial decision-making. This ‘field of study’ (arising predominantly from political science) has centred on the use of the attitudinal and strategic models of judicial decision-making. The attitudinal model is based on the proposition that judicial preferences are best explained by the underlying political ideology of a judge, usually judged on the basis of the party of President who nominated them. The strategic model, which is ‘compatible with the attitudinal’ model, predicts that judges who want the decisions of an overall court to conform to their ‘political preferences’ will strategically choose voting strategies that advance this goal. Contrary to a legalistic (or formalistic) model, both of these models suggest that the ideology or value preferences of judges play a very significant role in judicial decision-making and may even outweigh the effect of legal principles. This might be thought to lead to significant use of SF by judges, which reflect their personal ideology or values.

HLA Hart (see for example H L A Hart, *The Concept of Law* (1962)) and other legal theorists such as Ronald Dworkin (see for example Ronald Dworkin, *Law’s Empire* (1986); Ronald Dworkin, *Taking Rights Seriously* (1977)). As Chapter 1 argued (Section 3 and n 96) this study is not primarily concerned with constructing normative theories of law. It is concerned with constructing a descriptive model of what factors actually affect judicial use and construction of SF. Chapter 9 Section 4 argues however that the study has ramifications for existing theories of judicial reasoning in negligence cases (for example corrective justice and rights based theories) to the extent that those existing theories purport to be accurate descriptive accounts.


44 Ibid, 581.

45 Posner, above n 19, 20.

46 Ibid, 30. See further discussion of these models in Chapter 8.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

However, recent reviews of this body of work have suggested that the effects of ‘ideology’ and personal policy preferences may have been overstated.\footnote{Gregory Sisk and Michael Heise, ‘Judges and Ideology: Public and Academic Debates About Statistical Measures’ (2005) 99 Northwestern University Law Review 743. See also Hon Harry Edwards and Michael Livermore, ‘Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking’ (2008-2009) 58(8) Duke Law Journal 1895.} Sisk and Heise have suggested that while ‘ideology’ may have an effect in some categories of case,\footnote{For example complex appellate level cases in hot button areas like discrimination law and environmental law.} the effect should not be overstated.\footnote{Ibid, 774.} The research on judicial decision-making should be understood as showing ‘jurists are driven by a complex mix of factors—legal, ideological, and strategic.\footnote{Ibid, quoting Frank Cross and Blake Nelson, ‘Strategic Institutional Effects on Supreme Court Decisionmaking’ (2001) 95 Northwestern University Law Review 1437, 1492. See also Malbon, above n 43, 583-4. For a discussion of the effect of attitudinal, environmental and institutional factors on dissent rates in the High Court of Australia see Russell Smyth, ‘The Role of Attitudinal, Institutional and Environmental Factors in Explaining Variations in the Dissent Rate on the High Court of Australia’ (2005) 40(4) Australian Journal of Political Science 519. Smyth indicates (at 536) that earlier studies he conducted showed the Court’s institutions are better predictors of dissent rates than attitudinal factors. This Smyth study showed a combination of both attitudinal and institutional factors contributed to dissent rates in the High Court.} Other research confirms there is empirical support for the influence of legal principle and legal precedents on judicial decision-making.\footnote{Sisk and Heise above n 47, 774-5 citing and discussing the empirical study reported in Frank Cross, ‘Decisionmaking in the U.S Circuit Courts of Appeals’ (2003) 91 California Law Review 1459.} Guthrie, Rachlinski and Wistrich have argued that ‘while judges surely rely on intuition, rendering a purely formalist model of judging clearly wrong, yet they also appear able to apply legal rules to facts, similarly disproving a purely realist model of judging.’\footnote{Guthrie, Rachlinski and Wistrich, above n 14, 3.} Livermore suggests that a better way to describe judicial decision-making would be to adopt a ‘realist legal model which combines aspects of both the realist and legalist schools of thought, recognizes not only that traditional legal materials are a key determinant of judicial decisions but also...
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

that law is not deterministic, and that ideology (properly understood\textsuperscript{53}) is also central to legal decisionmaking.\textsuperscript{54} This approach does not see the use of ‘ideology’ by judges as ‘bad’ but rather as ‘complementary’ to ‘traditional legal materials’ in difficult or complex cases.\textsuperscript{55}

This ‘realist legal model’ (at least in a modified form which recognises SF rather than ‘ideology’) seems to best account for the findings of the content analysis of Australian High Court cases conducted as part of this study. The findings support an argument that most judicial reasoning by High Court judges in negligence cases will indeed be based predominantly on legal principle and the application of those principles to adjudicative facts. The law (through the doctrine of precedent and legal ‘values’ such as coherency and consistency) constrains judicial reliance on SF in judicial reasoning in negligence cases. It does not appear that SF always play a significant role in judicial reasoning in all negligence cases. Judges do not always rely (at least explicitly) on SF as the backbone of their negligence judgments. There is little evidence from this study to support an attitudinal model of judicial decision-making in Australian High Court negligence cases (at least if the use of SF was considered as a ‘marker’ of judicial use of ideological

\textsuperscript{53} Livermore is referring here to what he has previously critiqued as a ‘lack of a good proxy for judicial ideology, which has caused empirical legal scholars to dubiously equate the political party of the President who appoints a judge with that judge’s “ideology.”’ See Hon Harry Edwards and Michael Livermore, 'Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking' (2008-2009) 58(8) Duke Law Journal 1895.


\textsuperscript{55} Ibid, 1189.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

values).\(^{56}\) However, SF are used by judges to complement traditional legal reasoning in some circumstances. The findings of this study do support the argument that there are categories of cases where SF will form a significant part of judicial reasoning. These are the ‘novel’ cases or as Malbon argues those cases at ‘the fringes of the known law’.\(^{57}\) In this study, these were the ‘high significance’ cases where judges felt apparently far less constrained by the ‘law’ and more inclined to use SF in their reasoning. The very nature of these ‘high significance’ cases is that they are likely to have a greater impact on the law of Australian negligence and on Australian society more generally. Given this, the use of SF in these cases forms an important part of explaining the phenomena of judicial reasoning in negligence cases.

B. ‘Anti-Policy’ Influences and Restraints on Private Law Negligence Judging

Chapter 3 discussed how judges use SF in a number of different ways (or roles) in their reasoning in negligence cases. These included using SF as part of general background and context statements, as part of the ‘social framework’ used to assess and evaluate adjudicative facts, and as part of the discussion of the general social consequences of liability (or ‘policy’). The role of SF in negligence cases more broadly (particularly as background, context and ‘social framework’) has generally been neglected by scholars.\(^{58}\) However, there have been discussions about the permissibility of judicial use of ‘policy’ in judicial reasoning in the private law, including in negligence and tort cases. This raises the possibility that there are potential constraints that affect judicial use of ‘policy’ SF in

\(^{56}\) A different result might be reached if the ‘outcomes’ of the cases were studied. However, as discussed in Chapter 8, the minimal existing Australian empirical evidence regarding the impact of judicial ideology and policy preferences on judicial reasoning is, at best, mixed and tentative.

\(^{57}\) Malbon, above n 43.

\(^{58}\) See the discussion in Chapters 1 and 3.
negligence cases in the High Court. As argued above, it is clear from the results of this study that judges do use SF in their reasoning in negligence cases in the High Court, including ‘policy’ SF—they are not precluded from using SF. In addition, even if the principles and theory of private law act as some constraint against judicial use of ‘policy’ SF, they do not appear to be directed to constraint of other kinds of SF (ie background, context or social framework SF).

Robertson notes the use of policy arguments in the private law, including negligence, has ‘recently come under sustained attack from scholars advocating a strict corrective justice or rights-based approach.’ Key proponents of corrective justice and rights based theories of private law include Ernest Weinrib, Allan Beever and Robert Stevens.

---

59 Andrew Robertson, ‘Constraints on Policy-Based Reasoning in Private Law’ in Andrew Robertson and HW Tang (eds), The Goals of Private Law (2009). Robertson defines policy as ‘justifications (for or against a legal rule or outcome in a particular case) that are concerned with community interests not related to the form of law’. These include both consequentialist policy arguments and deontological policy arguments. Robertson notes (at 262-3) that it is not possible to draw ‘sharp distinctions’ between these.

60 Ibid. Scholars outside ‘corrective justice’ and ‘rights theory’ scholarship have also similarly criticised the use of policy by judges in negligence cases as constituting an impermissible ‘instrumentalist’ approach to judging. See Gava, above n 16.


Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

These approaches share some important commonalities. They share the ‘idea that judges who take account of policy considerations in private law decision-making exceed their judicial role and improperly act as legislators’. In addition, they draw a ‘stark dichotomy’ between a law of torts which considers legitimate interests (ie corrective justice or primary rights), and one which is ‘overrun’ by judicial determinations of policy. Robertson states, for example, that ‘for the corrective justice purist…private law can have no goals, and policy considerations can have no legitimate role to play in private law adjudication or the development of private law rules’. The evaluation of whether an act of the defendant was negligent focuses only on the individual relationship between plaintiff and defendant. Matters outside that relationship, such as SF which are about the general societal consequences of liability, are irrelevant and impermissible for judges to consider. It is unclear how such accounts of judicial reasoning in negligence would respond to judicial use of SF that are not in the nature of ‘policy’, but rather are judicially used as part of general context or background or as part of judicial evaluation of adjudicative facts. These kinds of SF are about matters ‘external’ to the parties to a particular action such that they could be considered impermissible. However, they are not about the ‘consequences’ of liability for parties beyond an individual litigation (which seem to be the focus of the concerns of corrective justice and rights theorists).

---

64 Robertson, above n 59, 261.
65 Ibid, 262.
66 Ibid, 261.
While corrective justice theories and rights-based theories assume that judges are unconstrained in their use of policy concerns in reasoning in tort law cases (such that any ‘policy’ based reasoning should be impermissible as activist\(^67\)), Robertson shows this is not in fact the case. The High Court could not be described as a ‘formalist’ court. However, neither can it be described as an ‘instrumentalist’ court.\(^68\) Robertson argues that ‘when judges take account of policy considerations they do so in a constrained judicial capacity and not in a relatively unconstrained legislative capacity.’\(^69\) However, the use of ‘policy’ by judges is not completely constrained by these factors. Robertson accepts there is a role for policy in judicial decision-making in negligence cases.\(^70\)

However, the use of ‘policy’ is at least partially restrained by legal and institutional constraints.\(^71\) These constraints include institutional constraints,\(^72\) common law method and convention, goals of consistency and coherence and the need for justice between parties.\(^73\) Robertson also argues that the legal profession and the legal academy provide a ‘significant institutional constraint’ by critiquing judicial statements and assumptions

---

\(^67\) This also seems to be the argument made by Gava, above n 16. Gava appears to suggest that any judicial use of extra-legal material would be ‘instrumental’—that is would support judicial abandonment of proper legal reasoning method.

\(^68\) Robertson describes an instrumentalist account of private law judging as ‘premised on an unfettered use of policy, while the formalist account rejects it.’ See Robertson above n 60, 262.

\(^69\) Ibid.

\(^70\) Ibid.

\(^71\) Ibid, 268-279. He notes (at 279) that this ‘has implications for both formalist and instrumentalist approaches to private law.’ See also the discussion by Malbon of the institutional and other constraints that operate on the extra-legal reasoning of judges particularly in the Australian High Court, see Malbon above n 43, 582-584.

\(^72\) Ibid. This includes the necessity to give reasons for judgment. This is because the existence of written reasons opens a judge to ‘the prospect of peer scrutiny’ and the ‘desire to maintain one’s reputation both within and outside the legal profession significantly limit the extent to which judges can rely on unorthodox justifications’.

\(^73\) Ibid.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

including those on ‘potential social and economic consequences of particular legal rules’.

The findings of the content analysis of High Court negligence cases carried out in this study suggest that Robertson is correct that there is a role for judicial use of policy in negligence reasoning, that there are legal and institutional constraints that moderate judicial use of policy in negligence cases, and that neither formalist or instrumentalist accounts of private law judging are accurate. Instead, it could be said that there is a ‘realist legal model’ of judging operating inside the private law and within negligence judging. As noted above, judges clearly did refer to ‘policy’ SF in their judicial reasoning in the cases studied. But, that use of ‘policy’ SF was not unrestrained. Judges mainly utilised legal principles and adjudicative facts in their judicial reasoning. However, again, it needs to be emphasised that there were cases in the high significance category where judges used SF (including policy SF) much more. In those cases, the constraints against judicial use of SF (including ‘policy’) operated weakly. Judicial SF were used as complementary to traditional legal reasoning.

---


75 The results of this study also support his argument (above n 59, 266-7) that courts are ‘more concerned to ensure that the defendant is not unjustly burdened by liability than to ensure that the plaintiff is not unjustly denied enforceable rights’. See the discussion of this in Chapter 6 of this study.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

C. The Australian High Court and Policy in Negligence Cases

There has been significant recent judicial and academic discussion about the role of policy factors in Australian High Court negligence judgments. As previously discussed SF are often used by High Court judges as part of policy discussions in negligence cases. Luntz has also traced a long history of the High Court of Australia utilising policy based reasoning in negligence cases. The results of the content analysis of High Court negligence cases, also confirmed judges referred to ‘policy’ SF in their reasoning in negligence cases in 2001-2005. Some judges, notably Justice Kirby, have long advocated a more frank acknowledgement of policy concerns in negligence cases. The High Court of Australia in Sullivan v Moody however, expressly rejected a test for duty of care that involved an explicit consideration of policy concerns by judges to determine duty of care. Since that time, the High Court has indicated that it takes a very


77 See Chapters 1 and 3.  

78 See Luntz above n 76.  

79 See Chapters 3 and 4.  


81 Sullivan v Moody (2001) 207 CLR 562. In this case (in which Justice Kirby did not sit) the High Court expressly rejected the English Caparo ‘three stage’ test which included a determination of whether the imposition of a duty of care would be fair, just and reasonable. This had been proposed by Justice Kirby as a replacement for the much maligned ‘proximity test’ for duty in negligence. For a discussion of the evolution of the ‘search for a methodology’ for the determination of duty of care in Australia see the judgment of Kirby J in Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540, 616-618, 622-629.
restrictive approach to the use of policy in negligence cases preferring to focus on ‘legal policy’.

Witting has described the effect of the judgment in *Sullivan v Moody* as evidencing the High Court’s discomfort with ‘formulating policies’. Its ‘formal’ approach to policy in negligence cases is that ‘where it has no choice but to reason by reference to policy’ the High Court will ‘reason by reference to established policies rather than ad hoc policy concerns’. These will include policies enshrined in statutes, case law and ‘judicial values’. Given this, it might have been expected that this restrictive approach apparently adopted by the High Court to the use of policy would severely restrain or prevent the use of SF (at least ‘policy’ SF) by Justices of the High Court during 2001-2005. However, Witting has argued that since *Sullivan* there has not been ‘any great change in the nature of judicial reasoning in negligence and other tort cases.’ In fact, ‘at times, the High Court has engaged in an in-depth consideration of ad hoc policy issues—issues that go far beyond the established policies found in statutes, principle and legal values.’

---

82 For example Justice Kirby accepted (reluctantly) in *Cattanach v Melchior* (2003) 215 CLR 1, 49 [122] that the majority of the High Court has decided that transparent discussion of ‘policy’ issues was impermissible and that judges must approach novel questions by evaluating legal principles and ‘legal policy.’ It could be suggested that the position taken by the High Court on the role of policy in negligence cases shows some influence of corrective justice arguments in its focus on the use of concerns central to the law itself such as coherence and consistency. For example see the discussion of the importance of coherency in *Sullivan v Moody* (2001) 207 CLR 562.

83 Witting, above n 76, 582.

84 Ibid.

85 Ibid. The dangers of this are discussed in Chapters 5 and 6 of this study.

86 Ibid.

87 Ibid.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

As argued above,\textsuperscript{88} the results of the content analysis conducted in this study also clearly showed that judges did use SF (including policy SF) in their reasoning in negligence cases in 2001-2005. This suggests that while the prevailing ‘formal’ approach of the High Court justices to the use of policy in negligence cases may in some cases affect the use or construction of SF, it certainly does not act to completely restrain the use of SF. It may be that the High Court’s strict view has some constraining effect on judicial use of SF (particularly in low and medium significance cases) but this constraint operates more weakly in high significance cases.\textsuperscript{89} This may occur for a number of reasons. First, there has been little discussion, recognition or understanding of the role of SF in judicial reasoning (as distinct from ‘policy’)\textsuperscript{90} and accordingly judges may not consider use of SF (other than policy) problematic. Second, as discussed below, the rules of evidence and the doctrine of judicial notice do not appear to exclude judicial use of SF. Finally, as will be discussed in Chapter 8, there may be individual, cognitive and cultural factors which unconsciously encourage judges to utilise SF in their judicial decision-making and judicial reasoning.

Section 2 has recognised (unsurprisingly) that ‘law’ is important in judicial reasoning in negligence cases. Legal principles and doctrines (such as the doctrine of precedent and the judicial obligation to give reasons) and principles of private law and negligence law

\textsuperscript{88} See also Chapters 3 and 4.
\textsuperscript{89} As discussed in Chapter 4, Sullivan v Moody (2001) 207 CLR 562 is the obvious exception to this. Although it was coded as ‘high significance’ case, it contained only 4 SF. This is however understandable as it would have been counter-intuitive for the High Court to rely heavily on SF in a case where it has indicated that use of ‘policy’ was undesirable and legal concerns ought to be emphasised. In addition, it (uncommonly) for High Court negligence cases involved a unanimous single judgment and did not involve Kirby J. As discussed in Chapter 4 these factors are also associated with lower incidence of SF.
\textsuperscript{90} See Chapter 1.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

may constrain judicial use of SF. However, the ‘law’ does not act as complete restraint on judicial use of SF in the High Court of Australia, and operates more weakly in high significance cases. It appears that a modified version of the ‘realist-legal model’ of judging, which recognises the predominant role of law and the complementary role of SF particularly in high significance cases, best describes judicial reasoning in negligence cases. The next section considers how the rules of evidence, including the doctrine of judicial notice, affect judicial use and construction of SF.

3. EVIDENTIAL RULES AND JUDICIAL USE AND CONSTRUCTION OF SF

It will be apparent from what has already been discussed in this chapter that the results of the content analysis of High Court negligence cases conducted in this study showed that the rules of evidence, including the doctrine of judicial notice, do not prevent judicial use of SF in High Court negligence cases. If the rules of evidence have some effect on judicial use of SF it is not a completely restraining effect. This section considers why the rules of evidence, including the doctrine of judicial notice, did not have this restraining effect.

The section argues that the rules of evidence have been designed to govern the admissibility and use of adjudicative facts rather than the admissibility and judicial use of SF. As discussed below, SF material can be introduced into evidence (and then into judicial reasons) in similar ways to adjudicative facts — via admissible expert evidence, testimony from the parties and pursuant to particular evidentiary provisions concerning official records and documents. Clearly, when this occurs there are no evidentiary issues raised about the permissibility of judicial use of those SF. However, most SF identified in
the content analysis of High Court negligence in this study did not come into evidence or judicial reasons in those traditional ‘adjudicative’ ways. Most SF referred to by judges of the High Court were unsourced and appeared to rely on judicial common sense or ‘common understanding’ and sometimes (very rarely) on some kind of empirical or other secondary source located by the judge. It is those SF, which did not source from evidence admitted by the parties to the litigation, that are the focus of the discussion in Section 2.

It might initially be thought that the doctrine of judicial notice should significantly restrain the use of these SF by Justices of the High Court. However, the application of the doctrine of judicial notice and its statutory equivalent (s 144 Evidence Acts) to judicial use of SF is controversial and unclear. Judges may not be generally restrained from using SF in their judicial reasoning by either the common law doctrine of judicial notice or s 144. This tends to give rise to judicial confusion over what rules or practices govern SF reception. It may also affect the way judges construct SF, resulting in poor quality or empirically unsupported SF. For example, judges may refrain from referring to empirical sources for SF on the basis they consider (perhaps wrongly) that reference to those sources (but not to judicial common sense) will breach judicial notice provisions.

---

91 See discussion in Chapters 4 and 5.
92 The discussion in Section 3 will focus predominantly on the ‘uniform’ evidence legislation (Evidence Act 1995 (Cth); Evidence Act 1995 (NSW); Evidence Act 2001 (Tas); Evidence Act 2008 (Vic) in force in the Commonwealth, NSW, Tasmania and Victoria as it relates to judicial use of common knowledge in s 144. Reference will also be made to the common law regarding judicial notice which applies in other jurisdictions (and potentially concurrently with the uniform evidence legislation).
A. Where do Judges Source SF?

Judges have traditionally dealt with the need for wider context or background knowledge to assist them in determining and applying general legal principles, in three ways. Most often, there is no explicit reference at all in judgments to the underlying SF or assumptions which judges have relied on in determining legal principle. This is the least satisfactory course, as it tends to disguise the law-making function of the judge and does not provide any opportunity to examine or debate the SF a judge may have relied upon.\(^93\)

Second, particularly in negligence cases, judges will refer to numerous SF as part of discussion of relevant policy concerns, as part of the general background or context of their reasons, or as part of evaluating adjudicative facts. These SF may be unreferenced or referenced generally to case law, legislation or general academic articles\(^94\) however will most often be unreferenced. The results of the content analysis conducted for this study showed that only 315 out of 1208 SF (26\% of SF) were referenced in any way.\(^95\) While this at least reveals the judge’s reasoning process, it is also an unsatisfactory course. It allows judges to state contestable SF as if proven, and increases the possibility that judgments will be based on incorrect assumptions of fact.\(^96\) This was discussed in Chapters 5 and 6.

---

\(^93\) See for example discussion in Malbon, above n 43, 581.


\(^95\) See Chapter 4, Table 4.7 and Chart 4.8.

Finally, and far less frequently, judges will cite empirical material in support of their statement of SF.97 The results of the content analysis showed this was very rare with only 14 SF (or 4% of all SF) referenced to an empirical source.98 While it seems that judicial reference to empirical material in support of SF might be the most preferable course, it raises its own serious problems and questions. These include whether the relevant empirical material is contemporary and up to date,99 methodologically sound or simply ‘junk science’, whether there is competing empirical material not referred to, whether there has been selective use of the material, whether the judge has properly interpreted the relevant material and whether the parties to the action have had an opportunity to respond.

SF used by judges may come from a range of different sources including expert evidence, the record of the matter at trial100 or original appeal, previous reported cases, parties’ submissions, submissions from interveners (or very rarely in Australia from amicus curiae), from independent judicial research or more commonly from judicial intuition. The content analysis showed that the most common kind of references given by judges for SF were to case law (200 SF or 57% of all references). Where no reference for a SF is

---

97 See also Jones v Bartlett (2000) 205 CLR 166, 196-8 (McHugh J) where several references are made to a study of environmental health in the home, and to Erin Cassell and Joan Ozanne-Smith, Report 158: Women’s Injury in the Home in Victoria (1999) regarding the incidence of broken glass injury.

98 See Chapter 4 Table 4.9.

99 For example see the discussion in Chapter 4 Section 3 and Chapter 5 Section 2 which identifies the use of very dated empirical material by High Court judges identified in the content analysis.

100 For example SF material may be introduced pursuant to evidential rules regarding official documents and official records, via particular sections of the Family Law Act 1975 (Cth) relevant to family court proceedings, and via direct testimony during trial. For further discussion of this see Graham R. Mullane, ‘Evidence of Social Science Research: Law, Practice and Options in the Family Court of Australia’ (1998) 72(6) Australian Law Journal 434, 448-452.
given by a judge, it is usually impossible to know the source of the SF. This makes a discussion of the applicability of evidence law to SF more difficult. The least problematic scenario is when the source for a SF has been admitted as relevant evidence at trial, for example via the testimony of an expert witness. But what of the situation, far more common, when the SF which appears in a judgment is ‘extra-record’—that is it was not introduced as evidence in the original trial of a matter? How does the law of evidence, particularly the doctrine of judicial notice deal with judicial use of those SF?

B. Evidence Law, SF and Judicial Notice

The Australian rules of evidence appear to have been designed to support and reflect the adjudicative fact finding function of judges, without any significant consideration of how to respond to the wider role of SF in judicial decision-making. This contrasts with the experience in the United States. The US Federal Rules of Evidence Rule 201 on Judicial Notice was specifically designed to only apply to the traditional category of adjudicative facts with a deliberate decision to leave the reception of ‘legislative facts’ within the inherent and unfettered discretion of the judicial decision-maker. This was in response to the work of Kenneth Culp Davis.

---

101 For an example of this see the discussions of sandbanks and beach formation in the judgments in Swain v Waverley Municipal Council (2005) 220 CLR 517.


103 As discussed in Chapter 3 ‘legislative facts’ are included in the definition of SF in this study.

104 See Federal Rules of Evidence 201 (including Advisory Committee Notes). This matter has been recently discussed by the Australian Law Reform Commission in Australian Law Reform Commission, ‘Uniform Evidence Law: Report 102 ’ (2005), Chapter 17 but no changes were recommended in relation to current judicial notice provisions.

105 The work of Kenneth Culp Davis was discussed in Chapter 3.
Judicial use of SF in Australia appears to be understood predominantly as the application of judicial common sense, which falls outside the rules of evidence and outside the doctrine of judicial notice. The doctrine of judicial notice does not generally apply to SF. The common law doctrine of judicial notice has traditionally applied to allow the admission of notorious ‘adjudicative’ facts, or facts which are so well known that every ordinary person may be said to be aware of them. It operates as an exception to the general rule of evidence that the parties must prove all facts to a case by the means of relevant and admissible evidence. Courts may judicially notice a fact either with or without enquiry. Some SF could clearly fall within the doctrine of judicial notice as notorious or commonly known facts—for example ‘many Australians live in houses’. However, the essence of many SF is contrary to the basis of the doctrine of judicial notice. This is because many SF are not ‘notorious’ or ‘commonly known’. For example, the precise physiological reactions of people when they are intoxicated, could not be said to be ‘commonly known’, although most people have some general experience of drunken conduct.

---

109 Ibid.
110 Mullane, above n 106 at 441-2.
Heydon has argued (in relation to legislative facts) that it is ‘clear from the cases that judges have felt themselves relatively free to apply their own views of and to make their own enquiries about social ethics, psychology, politics and history where relevant without requiring evidence or proof’. In addition, he notes that ‘the teachings of ordinary experience’ which form ‘part of the make-up of the human beings who form courts arising out of their general common experience of life’ are also used by judges in their decision-making. This has occurred even though these ‘teachings’ have not come from any admitted evidence or via the doctrine of judicial notice, and have been used ‘without admissions being made’ and without warnings being given to parties. This kind of material is used by judges for a number of purposes including by ‘the trier of fact in understanding evidence, assessing its truthfulness, evaluating it and drawing inferences from it.’

Heydon has also suggested that there is a category of ‘facts’ ‘going to the content and development of the common law’. Judges have also exercised freedom in ascertaining

111 See discussion in Chapter 3. The term SF as used in this study includes the concept of ‘legislative fact’ as developed by Kenneth Culp Davis.

112 Heydon, ‘Cross on Evidence’ above n 39, 156.

113 Ibid. See however the recent case of Damar Pty Ltd v Hawchar [2011] HCA 21 where the High Court held that a judge of the NSW Dust Diseases Tribunal could not rely on his own experience and knowledge gained hearing cases and evidence in the Tribunal in relation to silicosis to make findings of adjudicative facts.

114 Ibid, 220-1. These purposes include those discussed as ‘social framework’ in chapter 2. Chapter 2 argued that these are among the roles played by SF in judicial reasons in Australian High Court negligence cases. Heydon argues that the difference between these matters and matters which are properly subject to the doctrine of judicial notice are ‘obscure’.

115 Ibid, 157. Heydon suggests that factual matters relevant in cases might be divided into five distinct categories where the approach to proof differs dependent on the category of fact. These categories include facts in issue (adjudicative facts), constitutional facts, facts going to the construction of non-constitutional statutes, facts going to the construction of constitutional statutes and facts relevant to the content and
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

facts in this category, and have not felt restricted by rules of evidence or judicial notice and have ‘discovered’ facts for themselves.116 Heydon argues there may be certain caveats to this judicial practice including the desirability of parties being given notice of judicial reliance on extra-record material and a chance to respond.117 He also notes that ‘questions’ remain about how material ought to be tendered to the court (at trial or appeal) and ‘what other procedures for eliciting it should be employed.’118 Similarly, Selway (writing about the use of history in the High Court) has suggested a three fold classification of the use of facts in the High Court as adjudicative facts, constitutional facts and as part of legal reasoning to explain development of the law.119 He argues that in the third use, the ‘facts’ are not treated as evidence.120 As such, Selway suggests that the facts do not need to be proved, the parties are not required to have a fair hearing in relation to them, and as ‘the relevant history is used as an aspect of the reasoning of the
development of the common law. See also the discussion of these categories by Heydon J in Thomas v Mowbray (2007) 233 CLR 307, 512-25 [613]-[646]. Heydon J argues (at 517[629]) that many facts in the categories other than adjudicative facts are ‘incapable of being judicially noticed by recourse either to common law principles or statutory principles applying to facts in category one because they are controversial rather than beyond dispute.’ Facts in these categories (other than facts in issue between the parties) can be relied on even though ‘they have not been proved by evidence admissible under the rules of evidence.’ (520-1[635]).

116 Ibid, 212. Heydon gives footnote examples(n 436, 437 and 439) of two Australian negligence cases in this category, Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460 and Perre v Apand Pty Ltd (1999) 198 CLR 180, where judges utilised SF as part of their judicial reasoning. These matters are discussed further in Chapter 9.

117 Ibid.

118 Ibid.


120 Ibid, 132.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

Judge, he or she can inform him or herself as to that history in any way that he or she thinks fit. 121

Unsurprisingly, there is judicial uncertainty about whether SF can be used by judges of the High Court in their reasoning in negligence cases without being received as evidence at trial. Clearly, the results of the content analysis showed that the doctrine of judicial notice does not, as a matter of practice, actually prevent judges from using SF particularly those drawn from judicial ‘common sense’ or ‘common understandings’. In Tame v NSW 122 McHugh J argued that concepts within negligence law such as ‘normal fortitude’ had ‘nothing to do with judicial notice or evidence. It requires the application by the jury of a standard—a community standard—that the law imposes.’ This he said was ‘no different from requiring a tribunal of fact to decide any issue of civil or criminal liability by reference to community standards’. This placed use of this kind of SF material (community standards), outside of the rules of evidence and within the ambit of judicial reasoning itself.

The situation may be different in relation to the use of empirical material to support judicial use of SF. This may be one of the reasons why judges rarely appear to refer to empirical material in support of SF. In Woods v Multi Sport Holdings 123 McHugh J and Callinan J debated the use of extra-record empirical material in judgments. Justice McHugh made reference in his judgment to a number of empirical reports as part of his

121 Ibid, 148-7. Selway then refers to a number of the ‘innumerable examples’ where this has occurred in the High Court of Australia.


discussion of the underlying principle of accident prevention in tort law. He referred to this material as legislative facts ‘that a court may judicially notice and use to define the scope or validity of a principle or rule of law.’ This, he argued, was ‘legitimate and in accordance with long-standing authority and practice.’ Justice Callinan strongly disagreed that it was generally legitimate for judges to refer to statistical extra-record material as part of their reasoning, or that the doctrine of judicial notice generally allows the reception of legislative facts. He identified two main reasons for caution to be exercised. The first was that as a matter of fairness parties must be given an opportunity to deal with and respond to all matters that are to be taken into account in judgments. The second reason was that there is rarely any acceptance of what are ‘true history, policy or social ethics’. While he acknowledged that judges sometimes make assumptions about ‘current conditions and modern society’, he counselled great caution and treated such a practice as exceptional not usual. Justice Callinan specifically rejected McHugh J’s use of the relevant statistics in *Woods* as unhelpful and impermissible, and not within ‘the

---


125 Ibid.

126 Ibid.

127 Ibid, 184. This is a natural justice argument.

128 Ibid. In Callinan J’s terms this is a ‘post-modern’ argument however a similar argument could surely be made about the content and interpretation of legal principles themselves.

129 Ibid, 185. In fact Callinan J himself did so in *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199. In *Woods* he justified his use of such material in *Lenah* as exceptional and cautious. As discussed in Chapter 4, the content analysis of High Court judgments from 2001-2005 revealed Callinan J did use SF in his reasoning in negligence cases considered in this study.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

categories of material which might properly influence the outcome of the appeal, or any other case'.

It is difficult to see how the statistics cited by McHugh J are so notorious or so commonly known that they would be strictly within the common law doctrine of judicial notice. No notice of the use of such material was apparently given to the parties as (arguably) required by the common law doctrine of judicial notice. However, the refusal by Callinan J to allow reference to such matters on the basis that they are not relevant to the issues at hand in the particular case (or adjudicative facts), or that the reception of such material does not come within the traditional ambit of the doctrine of judicial notice is unnecessarily restrictive. It fails to address the fact that judges, particularly of the High Court, perform a law-making as well as an adjudicative role.

In *Cattanach v Melchior* Kirby J indicated that if liability in a negligence case is to be denied on public policy grounds it is ‘essential that this policy be spelt out so as to be susceptible of analysis and criticism. Desirably it should be founded on empirical evidence, not mere judicial assertion’. This seems to suggest that Kirby J accepts that judicial use of SF material, including empirical material, in negligence cases is permissible and is not restrained by the doctrine of judicial notice. However, later in his judgment he referred to the SF material introduced by the state interveners before the High Court relating to costs of actions and effect of liability on state health care systems as not admissible to

130 Ibid, 186.
supplement the evidentiary record. He cited the criminal cases of *Mickelberg v R* and *Eastman v R* (prohibiting fresh evidence before the High Court) in support of this proposition. This could mean that parties themselves or interveners could not raise ‘new’ SF or refer to relevant empirical SF evidence on appeal before the High Court. However, High Court judges could do so independently and unfettered. This seems to overlook the difference between adjudicative facts and SF and their respective roles in judicial reasoning. This approach to the admissibility of ‘new’ SF material appears to unnecessarily limit the usefulness of interveners. It would greatly restrict the admission of ‘new’ SF material (including empirical evidence) or SF arguments by parties for the first time before the High Court (for example in submissions or oral arguments). These

---

133 *Cattanach v Melchior* (2003) 215 CLR 1, 59 [153]. He held this material was only admissible in relation to the States’ application to intervene. See also *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 599 [224] where Kirby J referred to material provided by state interveners as potentially admissible in special leave applications. ‘Although tendered for the purpose of supporting the applications of a number of the States to intervene in the interests of the respondents, it is perhaps permissible (as these proceedings constitute applications for special leave, and not appeals to take into account the evidence of State officials. Their affidavits recount the huge extent of highways, roadways and pathways throughout the nation and the very large funds already devoted to their expansion, upkeep and improvement.’

134 *Mickelberg v The Queen* (1989) 167 CLR 259 (in which Kirby J dissented) and *Eastman v The Queen* (2000) 203 CLR 1. In both these cases, the new evidence sought to be adduced was clearly of an adjudicative kind affecting substantive issues relating to the accused, rather than SF related to the content, development and application of law. See also comments of Callinan J in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 511-2 [165].

135 See also Kirby J’s more conservative approach to constitutional facts in *Thomas v Mowbray* (2007) 233 CLR 307, 398-9 [259]-[260] where he held although constitutional facts could be the subject of ‘judicial notice’ of ‘matters of general public knowledge’ they could not be ‘invented by courts out of thin air’. He held that it was ‘not unreasonable to expect’ that as a consequence of the adversarial model of litigation it was the primary role of the parties (ie the Cth) to tender admissible evidence in support of constitutional facts.

136 Kirby J’s comments are also surprising as, as discussed in Chapter 6, the content analysis of negligence judgments from 2001-2005 identified him the most prolific user of SF in his judicial reasons in negligence cases.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

SF may well be more reliable than judicial ‘common sense’ SF. It may be that Kirby J did not actually intend that parties themselves could not introduce SF material before the High Court. In his own judgment in Cattanach v Melchior he referred to a report prepared by the National Centre for Social and Economic Modelling Pty Ltd for AMP setting out the costs of child-raising which had been referred to in appellant’s submissions and provided to the High Court by the appellant.  

The issue of whether the doctrine of judicial notice does govern judicial use of SF is unresolved and controversial. It appears, based particularly on judicial practice, that judges have not generally considered themselves bound by the doctrine of judicial notice in relation to SF (and least in relation to their own ‘common sense’ judicial SF). This is confirmed by the findings of the content analysis. Alternatively, judges have interpreted the judicial notice tests of ‘common knowledge’ or notoriety very broadly to include SF. SF mostly appear, however, to have been considered as part of the application of judicial ‘common sense’ intrinsic to the judicial reasoning role. As discussed above, not all judges of the High Court have taken the view (at least in theory) that judicial use of SF is so unrestricted. They have raised issues such as the necessity for notice to the parties and the reliability and permissibility of SF material not proved during trial. The issue of how and when the High Court should refer to such material was considered by Gleeson CJ.

---


\section*{C. Section 144 Evidence Act and SF}

The issue of judicial use of ‘common knowledge’ and judicial use of extra-legal material is also dealt with in the uniform evidence legislation. Section 144 of the \textit{Evidence Acts}\footnote{\textit{Evidence Act 1995} (Cth); \textit{Evidence Act 1995} (NSW); \textit{Evidence Act 2001} (Tas); \textit{Evidence Act 2008} (Vic).} in the Commonwealth, New South Wales, Victorian and Tasmanian jurisdictions provides that ‘proof is not required of knowledge that is not reasonably open to question’, and is common knowledge in the relevant locality or generally, or is ‘capable of verification by reference to a document’ where the authority of the document cannot be reasonably questioned.\footnote{\textsection 144(1).} Judges may acquire knowledge of those matters in any way they see fit\footnote{\textsection 144(2).} however judges must give parties an opportunity to make submissions in relation to the relevant knowledge or refer to other relevant information to avoid unfair prejudice.\footnote{\textsection 144(4).}

Heydon suggests it is as yet unclear whether the ‘uniform’ evidence legislation (particularly \textsection 144) excludes the operation of the common law of judicial notice in jurisdictions where the legislation applies, or whether the common law doctrine operates...
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

alongside the legislation. The NSW Court of Appeal has recently indicated that there is an unresolved question about whether s 144 displaces or supplements the common law concerning judicial notice. If s 144 applies to SF (either in combination with the doctrine of judicial notice or on its own account) then it could exclude the possibility of much judicial use of SF. This is because SF are often matters which cannot be said to come within the criteria of ‘not reasonably open to question’, or ‘capable of verification by reference to a document the authority of which cannot be reasonably questioned’ (italics added).

Although the ambit of the operation of s 144 has not been definitively determined by the High Court, it has interpreted the section in a way which would potentially restrict judicial use of SF. In Gattellaro v Westpac Banking Corporation all members of the High Court held that the doctrine of judicial notice encapsulated in s 144 did not allow reception of the fact that banks such as Westpac use a standard form of guarantee.

143 See Heydon, above n 39, 215. Heydon argues that this is because s 144 does not in its terms prohibit the reception of material judicially noticed at common law—it therefore does not exclude the common law because its language does not ‘cover the field.’ See also the cases referred to at 215, n 463.

144 Seiwa Australia Pty Ltd v Beard (2009) 75 NSWLR 74, 88 [272] (Campbell JA).

145 Mullane above n 106, 443.

146 Gattellaro v Westpac Banking Corporation (2004) 204 ALR 258. The case was originally given special leave on the question of whether the doctrine of judicial notice allowed reception of the fact that ‘banks such as Westpac used a standard form of guarantee and that it could be inferred that the appellants had signed it’ which was held to be a ‘far-reaching proposition of great importance in the conduct of commercial litigation’ (269-70 [55]-[56]). This turned out to be of far less importance upon the argument of the actual appeal of the matter before the High Court due to concessions made by Westpac.

147 Ibid, 262 [15]-[18] (Gleeson CJ, McHugh J, Hayne J and Heydon J), 272 [69] (Kirby J). The joint judgment suggested (although the outcome of the case did not turn on this) that in NSW where s 144 applied there appeared to be ‘no room for the application of the common law’, while Kirby J indicated the result would be the same whether approached by reference to the common law or the statute. However, as
This was on the basis that such knowledge was not common knowledge in the locality, and was not capable of verification by a document whose authority could not reasonably be questioned. It had also not been demonstrated that the Court of Appeal had given the Gattellaros an opportunity to make submissions on the question of judicial notice. The use of extra-record empirical SF material by judges has also become an issue of particular salience in the Family Court in recent years. This has occurred in cases where Family Court judges or magistrates have referred to social scientific material or academic journal articles in their judgments particularly where the material was not tendered by the parties at trial. Appeal cases in the Family Court have generally considered that judicial use of such material is impermissible pursuant to s 144 on the basis that it is not ‘common knowledge’ and/or has not been brought to the attention of the parties. However, this issue has not yet been definitively determined by the High Court. Despite this potential ‘strict’ operation of s 144, the findings of the content analysis appeared to show that discussed above (at n 143 and 144) these obiter comments do not appear to have definitively resolved the question of whether the common law operates alongside s 144.

See Maluka v Maluka [2011] FAMCAFC 72 (Bryant CJ, Finn and Ryan JJ) where the trial judge used published material as part of the evidence supporting the finding of likely further violence by the father. The judge had given prior notice to the parties and requested submissions however this was held to be unsatisfactory because the judge did not clarify that the material would be used in relation to the proof of a fact in issue; Salvati v Donato [2010] FACAF 263 (Boland, Strickland and Benjamin JJ); McCall v Clark (2009) FLC 93-405 (Bryant CJ, Falks DCJ and Boland J); Barclay v Orton [2009] FamCAFC 159 (May J); Allen v Green (2010) 42 Fam LR 538, 549 (Boland J) holding reference to this kind of material is not appealable if it only forms part of the ‘background’ to or was extraneous to judicial reasons; Vance v Vance [2010] FamCAFC 250 [65]-[71]; Lamereaux v Neirot (2008) FLC 93-364 [48]-[56] (Coleman, May and Boland JJ). See also Wheldon v Dinah [2010] FamCAFC 740 (Murphy J) on whether published research can be accepted when tendered by Counsel during a trial and Donaghey v Donaghey [2010] FamCAFC 740 [2011] FAMCA 13 (Murphy J) which counsels a very restricted approach to the use of s 144 to allow judicial reference to material on matters such as child sexual abuse. It is possible that the material might be permissible pursuant to particular sections of the Family Law Act 1975 (Cth) in Division 12A ‘Principles for Conducting Child-Related Proceedings’.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

judges were not, in practice, generally restrained from using SF in their reasoning in negligence cases by s s 144.

The Australian Law Reform Commission (in the reports proposing s 144 and in the subsequent review of the uniform evidence legislation) considered that s 144 could arguably extend to and adequately deal with SF. However, as Mullane notes, s 144:

does not expressly or impliedly indicate that it does apply to legislative fact. On the contrary, the heading and the provision itself purports only to apply to what was addressed by the common law of judicial notice. There is no particular indication in the Evidence Act itself of an intention to change or end the common law in relation to legislative fact.

Heydon has also argued that the ‘language of s 144 does not suggest that it is dealing with ‘legislative facts’. Nor does it suggest that it is dealing with the teachings of ordinary experience’. Accordingly, although it is possible that s 144 may technically operate to restrain some judicial use of SF, the applicability of s 144 to SF cannot be said to be absolutely clear. In addition, even if s 144 does technically apply to SF it is apparent from the results of the content analysis that judges of the High Court were not practically restrained by s 144 from using SF.

In summary then, the Australian rules of evidence and the doctrine of judicial notice are not significant restraints against judicial use of SF in the High Court of Australia for a number of reasons. The Australian rules of evidence, unlike the rules of evidence in the United States of America, were not designed to differentiate between adjudicative facts

---


150 As discussed in Chapter 3 the term SF in this study includes ‘legislative facts’.

151 Mullane, above n 106, 443.

152 See discussion in Chapters 4-6.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

and SF. The common law doctrine of judicial notice does not appear to apply to SF, which will often not be matters which are notorious or of common knowledge. Judicial use of SF has been mostly treated as outside the doctrine of judicial notice. Judicial use of SF is primarily treated as part of the normal judicial use of common experience in judicial reasoning, which is not subject to rules of proof. There is some suggestion that some rules of evidence such as those relating to fresh evidence, may operate to restrict judicial use of SF. Again, however, it is currently unclear whether these rules only have application to adjudicative facts rather than SF. Similarly, the application of s 144 of the Evidence Act to SF is unclear. The Australian Law Reform Commission considered it might apply to ‘legislative facts’ and SF. There has been judicial commentary strictly applying s 144 to SF type material including empirical material. However, as Heydon and Mullane have argued, the actual text of s 144 does not explicitly indicate it applies beyond the limits of the common law doctrine of judicial notice to cover SF. It may operate as a restraint against judicial use of SF (particularly empirical material) but its operation and scope are unclear. Finally, the results of the content analysis show that even if the doctrine of judicial notice or s 144 are ‘technical’ restraints against judicial use of SF, this is having little practical effect in preventing judicial use of SF in negligence cases in the High Court.

4. INSTITUTIONAL FACTORS AND JUDICIAL USE AND CONSTRUCTION OF SF

Some of the striking results of the content analysis conducted for this study were that the majority of SF used by High Court judges had no source (74% of SF were unsourced\textsuperscript{155}) and that SF were often drawn from judicial common knowledge and judicial common

\textsuperscript{155} Chapter 4, Table 4.7.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

sense.\textsuperscript{154} Very few SF (14 SF or 1.16\% of all SF) referred to an empirically based source.\textsuperscript{155} Part of the explanation for why this occurs might have been the legal and evidential factors already discussed in this chapter. These factors do not completely restrain judicial use of SF but have some potential constraining effects particularly in relation to those SF based on empirical evidence rather than judicial common sense. However, this section suggests that there are also institutional factors which affect how judges use and access SF (and ultimately how they then construct SF). These institutional factors include the nature of the legal adversarial process itself and the nature of the High Court as an institution. The next chapter discusses the individual, cognitive and cultural factors which may also result in judicial use and construction of ‘common sense’ SF.

This section argues that the nature of the adversarial process and also the institutional nature of the High Court do not prevent judicial use of SF. However, neither do they promote or support judicial use of accurate and reliable SF.\textsuperscript{156} They create a framework for judicial reasoning which is antithetical to judicial use of SF and which fosters a focus on legal knowledge and legal argument. This (along with the individual, cultural and cognitive factors discussed in Chapter 8) results in judicial reliance on predominantly ‘common sense’, ‘common understandings’ and legal sources for SF.

\textsuperscript{154} See the discussion in Chapter 5. Chapter 5 also discussed the dangers that can result from this including judicial use of empirically incorrect or incomplete SF and a failure to consider SF which reflect the experiences of those groups traditionally disenfranchised by the law.

\textsuperscript{155} See Chapter 4 Table 4.9.

\textsuperscript{156} Other commentators have also noted how the nature of the adversarial system and the institutional nature of the High Court present impediments to the provision of extra-legal material to judges. See for example Gava, ‘Unconvincing and Perplexing’ above n 16, 78-9. See also Jane Stapleton, ‘Regulating Torts’ in Christine Parker et al (eds), Regulating Law (2004) 122.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and
Institutional Factors

A. Nature of Australian Adversarial Trial and Appellate Process

The nature of the Australian adversarial and appellate system acts as a significant practical barrier to the receipt of reliable and accurate SF information by High Court judges. This does not mean that the judges themselves are restrained from using SF — rather that the nature of the adversarial system does not assist judges by encouraging or facilitating the provision of SF material to judges. In the Australian adversarial system, as in other common law countries such as the United Kingdom and the United States, typically evidence is presented to the original trial court by the parties themselves, either via oral or documentary evidence.\(^{157}\) The role of advocates arguing cases at trial and at appeal is not to present the best or most complete information to the court. Rather it is to present the best argument for their client and to maximise (within ethical and legitimate limits) the chance of a ‘win’ for the client.\(^{158}\) Cases which are given special leave to appeal to the High Court come to the High Court with the record of the factual information gathered by the trial and appellate courts below.\(^{159}\) Justices consider the judicial decisions in the trial and appellate courts below and these judgments may themselves contain SF statements by the lower court judges.\(^{160}\)

\(^{157}\) Heydon, ‘Cross on Evidence’, above n 39, 155.


\(^{159}\) These would form part of the Application Book and the Appeal Book that parties are required to file with the High Court prior to the hearing of special leave applications and appeals. See High Court Rules 2004 (CTH) Chapter 4 Part 41 r 41.09 and Part 42 r 42.10 and 42.13. The length of the Appeal Book must not exceed 500 pages (r 42.13.4).

\(^{160}\) See for example Ohlstein v Lloyd (2006) Aust Torts Reports 81-866; [2006] NSWCA 226 which involved SF findings about how autistic children ride horses. Special leave to appeal to the High Court was granted (Transcript of Proceedings, Lloyd v Ohlstein [2007] HCATrans 262 (25 May 2007)) but the case was settled before the appeal was heard on the basis of judgment for defendants by consent (Transcript of
Parties are required to file written submissions\textsuperscript{161} and are able to make oral submissions before the High Court when it hears the appeal.\textsuperscript{162} Parties are required in their written submissions to include explicit discussion and reference to relevant legal issues, material facts and relevant legal principles.\textsuperscript{163} The appellant is also to refer to ‘where relevant, an analysis of the rationale of the legislation, principle or rule.’\textsuperscript{164} There are no explicit rules or guidelines in the High Court in relation to provision of or reference to relevant SF material.\textsuperscript{165} Despite this, it appears that parties may sometimes refer to SF arguments or SF material as part of their written submissions filed in support of case on appeal in the High Court and may include this material in the Appeal Book.\textsuperscript{166} Some American

\textsuperscript{161} High Court Rules 2004 (CTH) Chapter 4 Part 44. This includes interveners.

\textsuperscript{162} Ibid. An outline of oral submissions must also be provided to the High Court and other parties pursuant to High Court Rules 2004 (CTH) Chapter 4 Part 44 r 44.08.

\textsuperscript{163} High Court Rules 2004 (CTH) Schedule 1 Forms 27 A, C, D.

\textsuperscript{164} High Court Rules 2004 (CTH) Schedule 1 Form s 27 A. This may perhaps raise SF issues in some written submissions.

\textsuperscript{165} It is unclear whether documents (for example empirical evidence in support of parties’ SF arguments) can be included in the Appeal Book if they have not been admitted at the trial or prior appeal. It should be noted that under High Court Rules 2004 (CTH) Chapter 4 r 42.11 and 42.12 the High Court Registrar settles the index (and allowable content) of the Appeal book in advance and can exclude irrelevant or unnecessary documents. As noted above at n 159 there is a maximum length of the Appeal Book which may discourage the addition of additional material. The written submissions, outline of oral submissions, or oral submissions themselves might make reference to evidence in support of SF arguments. The High Court of Australia Practice Direction No 3 2010 provides for parties to provide a list of authorities to be cited by counsel during argument (including ‘all cases, text books, articles, legislation, extrinsic material…and other authorities which counsel intend to cite at the hearing of the matter’) in advance of the hearing of the appeal.

\textsuperscript{166} As noted in Chapter 4 Section 3 n 54 there is some (limited) evidence that High Court judges refer to SF provided by parties (for example in written submissions or as part of the Appeal Book) as part of their
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

Research has shown that oral and written arguments made by counsel before the United States Supreme Court does have some influence on the judicial reasoning adopted in the court. However, the overall occurrence of reference to SF and relevant empirical material by parties to negligence cases before the High Court in their submissions and written material is unclear. The incidence and influence of SF in oral and written submissions before the High Court and the influence of this on judicial reasoning is an area for further research noted in Chapter 9.

It is not the traditional role of a trial or appellate judge to investigate or gather facts for themselves. Galanter classically described the features of the litigation system as ‘passivity’ and ‘overload’. Courts are passive in the sense that ‘the burden is on each party to proceed with his case. The presiding official acts as umpire, while the

judicial reasons in negligence cases. For example Justice Kirby referred to Richard Percival and Ann Harding, 'AMP:NATSEM Income and Wealth Report Issue 3: All They Need is Love ...and Around $450 000' (National Centre for Social and Economic Modelling, 2002) on the costs of child raising in his reasoning in Cattanach v Melchior (2003) 215 CLR 1, 56 [144]. This had been referred to and provided to the High Court as part of appellant’s submissions in the case, Appellants’ Submissions and Accompanying Materials (Appellant) Volume 2, Submission in Cattanach v Melchior, 24 January 2003. This was noted during a search of the High Court file for the case carried out during the research for this study. In addition, a search of the case file for the case reported at D’Orta-Ekenaik v Victoria Legal Aid (2005) 223 CLR 1 also revealed some evidence of reference to sourced and unsourced SF material in the written submissions and material filed by the parties.


Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

development of the case, collection of evidence and presentation of proof are left to the initiative and resources of the parties’. The very nature of an adversarial system relies primarily on the parties themselves (crucially via their lawyers) to provide information to the court. It is this feature of the adversarial system, the reliance on lawyers, which likely explains why judges often lack information regarding SF.

There are a number of factors that may result in very inadequate SF material being presented to the justices of the High Court by lawyers for the parties to the proceedings. First, as noted above, it is not the role of an advocate to present the most complete and most reliable information available to assist the court in reaching the optimum possible decision. It is the role of the advocate to advance (ethically) the best case for their own client. In addition, as will be discussed in the next chapter, there is a deep cultural entrenchment of the ‘legalistic’ mindset in the legal profession. Galanter has referred to the ‘lawyers’ preference for complex and finely-tuned bodies of rules, for adversary proceedings, for individualized case-by-case decision-making’. This is exemplified by submissions made by the Senior Counsel for the plaintiff respondent in Cattanach v Melchior, the leading Australian wrongful birth case. Senior Counsel commented when making submissions during the hearing of the High Court appeal, responding to judicial questions relating to the relevance of particular matters of ‘public policy’, that ‘in our submission, if public policy is to be used from time to time in the shaping of the common law….then it ought never to be by choice of a kind which could realistically and

169 Ibid, 120. The issue of over-load is discussed below (in relation to the nature of the High Court as an institution) and also further in Chapter 8 Section 2 in relation to its effect of judicial cognition.

170 Ibid, 119.

Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

fairly be called partisan during a current or raging controversy. There is some irony in this given strong policy arguments were clearly available in favour of the plaintiff parents’ case.

Traditional models of legal education stress to students the primacy of legal principles in judicial reasoning. Legal students are generally prepared to ‘think like a lawyer’ by applying legal principles to a defined set of adjudicative facts. Law students in Australia also continue, in general, to be inadequately prepared in theory and critique. The area where Australian law students are most poorly prepared is in relation to an understanding and ability to analyse material from other disciplines as they relate to law. Accordingly, most lawyers trained in Australia are unlikely to have a significant

172 Transcript of Proceedings, Cattanach v Melchior (High Court of Australia, B22/2002, Mr B W Walker S C, 12 February 2002).
174 Cowrie notes the improvements in this area in the last two decades, see Cowrie, 'Legal Education and the Legal Academy' in Peter Cane and Herbert Kritzer (eds), The Oxford Handbook of Empirical Legal Research (2010) 854 869-70. However, others have noted that modern Australian legal education in most Australian law schools still demonstrates significant limitations in this area. See for example Nick James, 'The Marginalisation of Radical Discourses in Australian Legal Education' (2006) 16 Legal Education Review 55; Nick James, 'Expertise as Privilege: Australian Legal Education and the Persistent Emphasis Upon Doctrine' (2004) 8(8) University of Western Sydney Law Review 1; Nick James, 'Australian Legal Education and the Instability of Critique' (2004) 28(1) Melbourne University Law Review 1.
appreciation of materials from other disciplines and empirical methodologies unless they have independently studied in these areas. This may well explain why empirical or other material supporting SF arguments are unlikely to be presented to the High Court by lawyers representing parties. There is not a tradition in the High Court of Australia, as there is in the United States Supreme Court, of parties utilising a Brandeis brief to provide the High Court justices with SF or social science information relevant to a case being heard. Other reasons for failure to provide this kind of information to the court may include the costs of provision, and reasons of litigation strategy.

Each year many different cases come to the High Court involving multitudes of different parties, represented by a large range of different law firms. This might be thought to increase the possibility of SF material of differing perspectives being presented to the High Court. However, once cases reach the High Court they are actually prepared and argued before the High Court by a very small number of Senior Barristers, most of them men. This results in a very small number of ‘voices’ before the High Court and accordingly a small number of potential providers of SF information to judges. The chance of SF coming before the High Court shrinks even further when, as discussed above in relation to Cattanch v Melchior, Senior Counsel takes a view that SF material is irrelevant to judicial reasoning. By way of example of the very homogenous nature of

176 A brief of supporting social scientific material filed with the court by the parties to the action. The Brandeis brief is named after the submission of such material by Justice Brandeis (prior to elevation to the US Supreme Court) in Muller v Oregon, 208 US 412 (1908). As noted above the rules and practice of the High Court do not specifically provide for this kind of ‘brief’.

argument before the High Court, in the 44 negligence cases from 2001-2005 analysed in the content analysis for this study DF Jackson QC appeared for a party in 19 cases, and B W Walker QC appeared for a party in 14 cases. There were nine cases where these barristers appeared for opposing parties.

If the lawyers for parties themselves are unlikely to provide SF material or empirical material to the High Court of Australia, do third parties provide SF material to the High Court? In the United States Supreme Court there is an established tradition of Amicus Curiae and Interveners filing briefs in Supreme Court cases providing SF and social science information. This has proved influential on occasion, and is evident in many US Supreme Court decisions. The High Court of Australia generally takes a restrictive approach to allowing third parties to either intervene in a case before the court or to provide additional information as an amicus curiae. During the period of 2001-2005, only four negligence cases involved interveners. There was only one case involving an

---

178 This was revealed by an examination of counsel appearing in the 45 cases studied in the content analysis conducted as part of this study.


181 Cattanach v Melchior (2003) 215 CLR 1 (intervention by the states of Western Australia and South Australia); Brodie v Singleton Shire Council (2001) 206 CLR 512 (intervention by the states of Western Australia, Victoria and NSW); New South Wales v Lepore (2003) 212 CLR 511 (intervention by the states of South Australia and Western Australia); Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540 (intervention by Western Australia).
amicus curiae\textsuperscript{182} and in that case only written submissions were filed. Accordingly, while there is obvious potential in the USA for judges to be provided with SF material through third party amicus briefs or Brandeis briefs, the potential for this in the Australian High Court is very limited. The nature of the Australian adversarial system as it operates at the level of the High Court restricts the flow of SF information to judges both from parties to appeals, via their lawyers, and via third parties. The way the adversarial system operates does not encourage the provision of high quality SF information to judges.

**B. The High Court of Australia as an Institution**

There are also features of the High Court as an institution that restrict the flow of reliable SF information to judges. These factors include the ‘overload’\textsuperscript{183} problem caused by excessive and complex workload, as well as the lack of research support in empirical and social sciences. Court over-load may be caused by growing case-load, complexity of case-load and fixed judicial resources.\textsuperscript{184} There is increasing evidence of the negative effects of judicial overload on members of the judiciary.\textsuperscript{185} The caseload of the High

\textsuperscript{182} Willett v Futcher (2005) 221 CLR 627 (Written submissions on behalf of the Public Advocate as amicus curiae).

\textsuperscript{183} See Galanter, above n 168.

\textsuperscript{184} See also Posner’s discussion of environmental constraints on judging in Posner, above n 19, Chapters 5 and 6.

Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

Court has increased rapidly in recent years, and increased every year from 2001-2005.\textsuperscript{186} The higher the workload of the High Court, the more difficult it becomes for justices to consider closely all material filed in support of appeals and to carry out further independent research if they wish to do so. In addition, the High Court is not structured institutionally to provide justices assistance in locating or evaluating SF information.

Gleeson CJ described in 2004 how the facilities, techniques and procedures that the High Court worked under created major difficulties for how the Court approached the issue of ‘legislative facts’ (which are included in the concept of SF as used in this study):

A conclusion that a rule of the common law is not suitable to modern conditions is not a proposition of law. It may be, or involve, a proposition of economics, or sociology, or science, or some other discipline. And it may also involve a substantial component of fact. In a given case, there may be a serious question about the completeness and reliability of the information base upon which such a conclusion rests. As Sir Anthony Mason pointed out in 1979, the Court is neither a legislature nor a law reform agency. Its facilities, techniques and procedures are ill-adapted in many cases to undertaking to decide whether common law rules are working well, or are suited to the needs of the community. Questions about the role of the Court, and the facilities, techniques and procedures available to the Court, are closely interrelated. There is a limit to the distance that can develop between the Court’s view of its responsibilities and the Court’s techniques, upon where its capacity to discharge these responsibilities fairly and reliably must depend. That is the larger issue underlying the controversy about legislative facts.\textsuperscript{187}

All Australian High Court judges have two associates. There is a body of American literature which considers the influence of the clerks on justices of the United States Supreme Court, and suggests that clerks exert influence on the decisions of their justices.\textsuperscript{188} This raises the possibility that associates to High Court judges may act as an

\textsuperscript{186} High Court of Australia, \textit{Annual Reports} <http://www.hcourt.gov.au/publications/annual-reports/annual-reports> at 5 October 2011.


Influence on judicial use and construction of SF. There is not a developed Australian scholarship in this area, and little public information is available regarding the demographic background of associates to the High Court of Australia. \(^{189}\) Leigh’s study of High Court associates from 1993-2000 showed that the ‘the pool’ from which associates was drawn was still relatively narrow. \(^{190}\) Only in recent times had the proportion of female associates grown, although in his study in 2000 two justices had still not at that stage employed a woman. \(^{191}\) ‘Those from non-English speaking backgrounds and public schools’ continued to ‘be under-represented’ and ‘a substantial majority of associates’ were drawn from ‘just five universities.’ \(^{192}\)

Leigh argued that there is some ‘measure of influence’ that associates to the High Court justices have over the work of the court, however it is difficult to argue that it is excessive. \(^{193}\) He suggested that there are a number of systemic factors in the High Court of Australia that restrain the potential influence that associates may have over their justices. These include that there are fewer associates per High Court judge than clerks per American Supreme Court justice, there are fewer applications in the High Court to

---

\(^{189}\) During the research for this study I contacted the High Court Registry to request information regarding the demographics of High Court associates but was told this information was not available for public release.

\(^{190}\) Leigh, above n 188.

\(^{191}\) Ibid, 297-8. The overall gender breakdown from 1993-2000 was 47% women and 53% men.

\(^{192}\) Ibid. In Leigh’s study of High Court associates from 1993-2000 he found that 77% of Associates were drawn from the University of Sydney, the University of New South Wales, the Australian National University, the University of Melbourne and the University of Queensland. He also found that 52% of associates had completed their law degrees at the University of Sydney, the University of New South Wales or the Australian National University.

\(^{193}\) Ibid, 296-7.
be sifted through by associates, a different judicial culture, and a different judicial attitude to delegation. It appears that Australian High Court judges have been less likely to delegate judicial work such as drafting judgments to their associates than their American counterparts. Leigh does however note that as the workload of the High Court changes and the complexity of cases before it increases, so the pressure on judges to delegate to associates will increase.

It appears then, on the basis of the more limited Australian evidence available, that associates to the Australian High Court exert less influence over the judgments of the Australian High Court, than do their American counterparts. Accordingly High Court associates are unlikely to significantly impact or influence judicial use and construction of SF. Associates may, however, have a confirmatory effect on their judges. As Leigh has argued, supporting the views of Mark Brown made in the US context, ‘if associates tend to be from the same demographic group… this simply perpetuates the dominance of that group in the legal profession.’

194 Ibid. This may have changed in recent years as applications to the High Court increase and there is more reliance on the written papers in the hearing of special leave applications, see High Court Rules 2004 (CTH) Part 41.
195 Ibid. Although note the changes to the processes of the High Court since 2000 which now allow resolution of special leave applications on the papers. See High Court Rules 2004 (CTH) Part 41. The 2009-10 Annual Report of the High Court, High Court of Australia, Annual Reports <http://www.hcourt.gov.au/publications/annual-reports/annual-reports> at 5 October 2011 noted that 59% of special leave applications were determined on the papers in 2009-10.
196 Ibid. See also discussion in Young, above n 188.
197 Ibid.
198 Ibid.
199 Ibid, 298.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

While High Court judges have access to other research support, this support is generally for legal research.\(^{200}\) The High Court does not have a separate social science or empirical research service able to provide justices with social science information.\(^{201}\) It does have a Legal Research Officer connected to the High Court library, and of course the library may be able to provide general research assistance in this area.\(^{202}\) As might be expected, the High Court is organised to maximise the assistance justices receive in legal research. The lack of explicit research support in social sciences and other empirical disciplines means that justices are likely to experience a ‘gap’ in SF information. This, combined with the increasing availability of electronic forms of information via the internet, might serve to encourage judges to carry out their own research into SF material with the possible problems this may bring.\(^{203}\)

\(^{200}\) See discussion in Amelia Simpson, 'Research Assistance' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007) (Also available Oxford Reference Online. Oxford University Press <http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t241.e350>). Simpson also notes the library and Legal Research Officer as providing ‘historical, philosophical, or comparative’ research particularly during the period of the Mason High Court. Simpson notes a shift in provision of research post the Mason and Gleeson High Court to more legally orientated research.

\(^{201}\) This has been suggested in the American context by Kenneth Culp Davis, see Kenneth Culp Davis, 'Judicial Legislative and Administrative Lawmaking: A Proposed Research Service for the Supreme Court' (1986) 71 Minnesota Law Review 1.

\(^{202}\) See discussion in Simpson, above n 200.

Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

The operation of the adversarial and appellate systems, the ‘overload’ features of High Court workload, and the lack of SF research support for High Court judges has a combined effect. Like the legal restraints discussed earlier, these ‘institutional factors’ do not operate as a formal ‘restraint’ on judicial use of SF. However, they result in a lack of reliable SF material being provided to judges, create SF ‘gaps’ for judges to fill independently, and encourage judges to utilise SF which source from ‘common sense’ or intuition or their own research. These factors combine with (and in some cases induce) the individual, cognitive and cultural factors discussed in Chapter 8, to impact on the use and construction of SF by judges in High Court negligence cases. This can lead to judicial use of SF which are empirically incorrect, judicial failure to consider SF which represent the experiences of groups traditionally disenfranchised by the law, and judicial use of SF which predominantly stress only one set of societal values (those typically associated with liberal concerns such as individualism and free enterprise, and which support traditional social elites and social structures).\(^{204}\)

CONCLUSION

Why did the High Court judges studied in the content analysis conducted in this study use and construct SF in the way they did? Part 3 (Chapters 7 and 8) develops an explanatory framework for judicial use and construction of SF in High Court negligence cases. This framework is consistent with the results of the content analysis conducted as part of this study and can form the basis for future research. Section 1 of this chapter outlined the basis for the explanatory framework and argued that there are complex inter-related and inter-dependent legal, institutional, individual, cognitive and cultural

\(^{204}\) See Chapters 5 and 6.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

factors that affect judicial use and construction of SF in negligence cases in the Australian High Court. This chapter discussed the legal and institutional factors which affect judicial use and construction of SF.

Section 2 argued that the law, legal principles and theory of private law and principles of negligence law act as some constraint against judicial use of SF. However, these factors do not completely restrain judicial use of SF, particularly in ‘high significance’ cases. Judicial reasoning in negligence cases might best be understood by a modified realist-legal model—a model of judicial reasoning which recognises the predominant role of law and legal principles but also understands the significance of SF particularly in complex high significance cases. Section 3 argued that the application of the principles of evidence law (particularly the common law and statutory provisions concerning judicial notice) to SF was unclear and did not prevent judicial use of SF. The doctrine of judicial notice does not appear to restrict judicial use of SF, although there is some debate over the exact application of the doctrine. Section 144 of the *Evidence Acts* may operate as some constraint upon judicial use of SF (particularly empirical SF material), however again the ambit of the section is unclear. Finally section 4 argued that are some significant aspects of the nature of the adversarial system and institutional nature of the High Court of Australia and its processes which might affect judicial use and construction of SF. However, this is not because the nature of the adversarial system and the High Court as an institution actively restrains the judicial use of SF. They do not. However, they do not provide positive assistance to judges by aiding in the provision of reliable high quality SF information.
Chapter 7 An Explanatory Framework for Judicial Use and Construction of SF: Legal and Institutional Factors

When these legal and institutional factors are considered together, it is unsurprising that judges would be confused in relation to whether and how to use SF in their judicial reasoning in High Court negligence cases. It is also unsurprising that judges would rely on their own ‘common knowledge’ about SF, their own research, or would refer to the SF statements of other judges in other cases. Judges are not significantly or completely restrained from using SF by the factors discussed in this chapter. Judges are not however, despite an apparent need for SF information, typically well provided with reliable SF information by the parties to actions, by third parties, or via other research support systems. The cases where SF information may be required by judges as part of judicial decision-making are the most complex and difficult cases. Judicial consideration of these cases typically occurs within the high pressure and heavy workload environment of the High Court. The evidential rules about how judges can access and use SF material are unclear and unhelpful. The next chapter discusses how individual, cognitive and cultural factors interact with these legal and institutional factors and impact on how judges use and construct SF in the High Court negligence cases.
Chapter 8


INTRODUCTION

The last chapter introduced an explanatory framework for judicial use and construction of SF in High Court negligence cases. The basis of that explanatory framework is that there are complex inter-related and interdependent legal, institutional, individual, cognitive and cultural factors that explain judicial use and construction of SF in negligence cases in the Australian High Court. There is not a single factor explanation for how judges use and construct SF. Rather, judicial use and construction of SF needs to be understood as a complex and dynamic process which involves the interaction of a range of related factors which recognise legal, institutional, cultural and individual context, societal interaction including group determination, and which reflect human

---

1 SF includes the singular term ‘social fact’ and the plural term ‘social facts’.
2 The development of this explanatory framework has been influenced by the interpretivist epistemological paradigm and social constructionist approach adopted in this study and informed by deductive and inductive theory building drawing on existing literature and the results of the content analysis conducted as part of this study. The explanatory framework is consistent with the results of the content analysis conducted as part of this study, and provides a basis for future research.
3 Research Question 2.
4 For example that judicial use and construction of SF is explained by legal and evidential factors, or can be explained only by reference to judicial values or ideology.

cognitive processes. As Chapter 7 argued, it is not always easy or possible to isolate the impact of each individual factor on judicial use and construction of SF as factors are often highly interdependent. However, to facilitate discussion Chapter 7 discussed legal and institutional factors and this chapter focuses on individual, cognitive and cultural factors.

Section 1 discusses Australian legal culture, including the culture of the Australian legal profession, Bar and judiciary, and individual characteristics of the Australian judiciary. It argues that these factors play a role in judicial use and construction of SF and that they help explain why High Court judges typically use and construct SF in negligence cases in broadly similar ways. The explanatory framework also understands judicial use and construction of SF as a cognitive process. Section 2 argues that cognitive factors (including decision-making short-cuts) can affect judicial use and construction of SF and help explain judicial reliance on ‘common sense’ as a dominant source for SF. In addition, the section argues that the group environment in which judicial reasoning occurs can influence judicial use and construction of SF. This is consistent with the results of this study, which showed differing rates of judicial use of SF dependent on whether judges were in a single or joint judgment and whether they were in majority or dissent judgment. Finally, Section 3 considers how cultural values and cultural worldviews affect judicial use and construction of SF. It argues, applying cultural cognition scholarship, that judicial cultural worldview can influence how judges use and construct SF in the Australian High Court. The impact of cultural worldviews is consistent with the results of this study which showed that SF about a range of matters

5 See discussion in Chapter 4 Section 5.
predominantly reflected values which stressed individualism, the importance of free enterprise, and respect for traditional social structures and social elites.⁶

### 1. LEGAL CULTURAL FACTORS, INDIVIDUAL FACTORS AND JUDICIAL USE AND CONSTRUCTION OF SF

The content analysis conducted as part of this study found that Australian High Court judges used and constructed SF in negligence cases in broadly similar ways.⁷ For example, most SF were based on judicial common sense. Most SF were not sourced or referenced in any way. Where judges referred to a source for a SF, it was usually to a legal source. Judicial use of empirical sources was rare. What explains this ‘commonality’ of judicial approach to use and construction of SF? Korobkin and Ulen have suggested that context affects human decision-making, including habits, traditions and addictions.⁸

These behaviors can be driven by tradition and reflect conformity to ‘family, group or community practice’.⁹ In the legal context, Kahan suggests that ‘the law often requires decision-makers to infer facts they cannot directly observe…People who share formative identities tend to apprehend facts in a similar way in part because they are likely to be

---

⁶ See discussion in Chapter 6. SF which were associated with alternative values such as more egalitarian and communitarian values were typically from judgments of Kirby J.

⁷ See Chapters 4-6. As Chapters 4-6 note the study identified some areas of difference between judges—for example some judges used SF more than other judges, and some judges sourced SF more than other judges. Chapter 6 also noted that SF about a range of matters from judgments of most members of the High Court tended to reflect values which stress individualism, free enterprise and respect for social hierarchy and social elites. However, SF which reflected more egalitarian and communitarian values or social diversity predominantly came from judgments of Kirby J.


⁹ Ibid.
drawing on common life experiences when interpreting the significance of various events. These 'common' life experiences and common cultural (or group) identities inform, contribute to and interact with other factors such as group commitments, cognitive effects such as cognitive dissonance and cultural worldviews to influence how 'facts' are constructed. This section argues the relatively similar judicial approaches to the use and construction of SF identified in this study could in part be explained by shared legal cultural values (common to judges as lawyers, barristers and members of the judiciary) and by the similar demographic and social backgrounds of judges.

A. The Nature of the Australian Legal Culture and Australian Lawyers and Judges

Judges of the High Court are likely to construct SF in similar ways and in ways that differ from at least some other members of society for a number of reasons. Judges have some


11 Ibid. An individual’s psychological need to process information in ways that affirm rather than disconfirm an individuals' own belief.

12 Ibid. These factors are discussed in Sections 2 and 3 of this chapter.

13 The empirical study of the influence of individual judicial 'social background' characteristics on judicial decision-making forms the basis of social background theory (a variant of the attitudinal theory). There is some mixed (and not particularly strong) evidence that judicial decision-making in the Australian High Court might be affected by particular judicial characteristics. See for example Russell Smyth, 'The Role of Attitudinal, Institutional and Environmental Factors in Explaining Variations in the Dissent Rate on the High Court of Australia' (2005) 40(4) Australian Journal of Political Science 519; Russell Smyth, 'What Explains Variations in Dissent Rates' (2004) 26 Sydney Law Review 221; Rebecca Gill, 'Dimensions of Decision Making: Determining the Complexity of Politics on the High Court of Australia' (Paper presented at the Annual Meeting of the Southern Political Science Association, Savannah, GA, 7-9 November 2002); Rebecca Gill, 'The Fading Utility of the Australian Legalist Story: Using Social Background Theory to Explain Outcomes on the High Court' (Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, 2-6 April 2009). However, much of this research focuses only on individual characteristics rather than how those factors also interact with cognitive and cultural factors.

characteristics that other human decision-makers do not. They perform decision-making tasks including finding, interpreting and applying the law. They have legal training and have been entrenched within the culture of the legal profession, including the Bar and the judiciary itself. Their work lives, work patterns, and expectations of workload differ from many in the Australian population. The demographic composition of the legal profession, Bar and judiciary differs from the general population in a number of important ways including gender, social and racial background. The nature of legal culture, and the demographics and culture of the Australian legal profession (including the Bar and judiciary) are factors which influence judicial experiences of life and the way in which the judiciary interprets the lives of others. This is because legal cultural values and judicial experiences of life can inform judicial ‘common sense’ and accordingly SF. Culture includes ‘a set of practices, values and beliefs which establish the patterns of

15 Ibid. The impact of legal and institutional factors on judicial use and construction was discussed in Chapter 7.
16 Ibid.
17 See the discussion of this in Hon Justice Robert French, 'Speaking in Tongues-Courts and Cultures' (Paper presented at the 25th Australian Institute of Judicial Administration Annual Conference Cultures and the Law 12-14 October 2007) <http://www.fedcourt.gov.au/aboutct/judges_papers/speeches_frenchj30.html>. Section 3 of this chapter will discuss how these factors can also influence a person’s overall cultural values or cultural worldviews.
behaviour of a group of people. Chief Justice French has described ‘the concept of culture’ as embracing the ‘worldviews, mindsets, traditions and practices of a society and societal subgroups defined by geography, indigenous character, ethnicity, religion, occupation and organisational affiliation.’ Occupational cultures include those of the judiciary and the legal profession.

Chief Justice French has acknowledged that ‘judicial decision-makers are people who are inescapably part of a legal professional culture, a wider societal culture and of groups or organisations which have their own subcultures.’ Australian legal culture involves the ‘behaviour and values of the legal profession in its social context’. This includes language, dress codes, rituals, ways of work, patterns of relationship, and role within a commercial and economic framework. There are distinct features of the legal culture and the culture of legal profession that have been identified not just in Australia but in

---

19 Ainslie Lamb and John Littrich, Lawyers in Australia (2007), 60. It should be noted that ‘culture’ can be a contested term in different disciplines, and even within the law itself. See discussion in Naomi Mezey, 'Law as Culture' (2001) 13 Yale Journal of Law and Humanities 35; David Nelken, 'Using the Concept of Legal Culture' (2004) 29 Australian Journal of Legal Philosophy 1; Roger Cotterrell, Law, Culture and Society (2007); Jennifer Bellot, 'Defining and Assessing Organizational Culture' (2011) 46(1) Nursing Forum 29. These ‘differences’ are beyond the scope of this study. However Mezey notes the importance of understanding ‘culture’ as encompassing the process of ‘cultural practice as one of making, reproducing and contesting meaning.’

20 French, above n 17, 2.

21 Ibid. French has suggested that there are distinct cultural groups with the wider legal profession.

22 Ibid, 10. The discussion in this chapter focuses on ‘internal legal culture’ (‘the ideas and practices of legal professionals’) rather than ‘external legal culture’ (‘the opinions, interests and pressures brought to bear on the law by wider social groups’).

23 Lamb and Littrich, above n 19, 60.

24 Ibid. Lamb and Littrich note at 61-2 that over the last decades that there have been shifts in the culture of the Australian legal profession in a number of ways including in the nature of the legal market for services, the size of law firms, the rise of corporatisation and globalisation of law.
other countries with common law systems. These include the inculcation of the ideal of ‘thinking like a lawyer’,25 the role of the law as the primary source of reasoning,26 ideals of ‘remoteness and neutrality’27 and the ethos of adversarialism.28 Significant feminist literature and literature concerning race, class, indigeneity and transgender gay and lesbian studies have also noted the predominant male, elite, Anglo-Saxon29 and heterosexual aspects of traditional legal culture.30

26 Schauer, above n 14, 106.
27 Ibid.
29 The Oxford English Dictionary defines the term Anglo-Saxon as ‘a person of English (or British) heritage or descent, or (more generally) of Germanic origin.’ (The Oxford English Dictionary <http://www.oed.com/libraryproxy.griffith.edu.au/> at 15 September 2011) This term is used in this study (and by authors generally) interchangeably with the term ‘Anglo-Celtic’ (which encompasses both those of British and English descent as well as those descended from the ‘Bretons in France, the Cornish, Welsh, Irish, Manx, and Gaelic of the British Isles.’)
30 For example see discussion in Graycar, ‘Gender, Race, Bias’, above n 18; Margaret Thornton, Dissonance and Distrust: Women in the Legal Profession (1996). See also Lamb and Litrich, above n 19, 61 who suggest that for ‘most of the 20th century, the legal profession throughout Australia’ was predominantly ‘white, male, middleclass and Anglo-Saxon.’ This was also the case in the legal profession in the United Kingdom. See discussion in Avrom Sherr, 'Legal Profession, Social Background, Entry and Training' in Peter Cane and Joanne Conaghan (eds), The New Oxford Companion to Law (2008)

Despite demographic shifts in the composition of the Australian legal profession, the legal profession continues to differ from the composition of Australian society in a number of key ways. It is still significantly made up of people of Anglo-Saxon heritage, of people educated at private schools, of people with highly educated parents in professional employment and of people with ‘legal family connections’. There is still very little participation of Indigenous people in the legal profession despite some gains in this area. The nature of high academic entry requirements for law courses means that law students and lawyers generally come from the ranks of very high academic achievers. Women once made up a small fraction of the Australian legal profession. Women now outnumber male graduates from law school, although continue to be significantly under-represented in the senior ranks of law firms, in the judiciary and in senior legal academic positions. There is still clear evidence of practices in the legal profession that inhibit the progress of women, which concentrate female participation within defined areas of legal work, and which constitute discrimination and harassment.

31 For example the rising number of female law students and students from non-english speaking backgrounds. See Lamb and Littrich, above n 19, 66.
32 Ibid.
33 Ibid, 77-80.
37 Lamb and Litrich, above n 19, 70-73. See also discussion in Thornton, above n 30.
38 Ibid.

The Bar is a specific legal sub-culture in the Australian legal profession. The culture of the Bar is particularly individualistic, hierarchical and has been associated with masculine values such as competitiveness and aggression. This arises from a number of factors. Barristers in Australia work as sole practitioners, although are clustered in groups in chambers. Entry to the Bar involves informal yet significant financial barriers due to lack of income in the early days of practice, the need to obtain chambers and the need to pay support staff. Barristers rely on ‘reputation’ and networks to acquire briefs. This has a tendency to reinforce existing social networks, and present difficulties to ‘outsiders’ to those networks. Most barristers are, by the inherent nature of their role, significantly employed in advocacy in courts which reinforces the traditional adversarial values of legal culture. The composition of the Bar is even more dominated by those of male, white, Anglo-Saxon, private school background than the legal profession as a whole. Although also experiencing change over the last several decades, the Bar has still been recently identified as having an ‘agrressive male culture’ which limits the potential for women to become barristers. Women are significantly under-represented in the ranks of the Bar and particularly in the ranks of Senior Counsel or Queen’s Counsel. They have


40 Lamb and Litrich, above n 19, 53-4.

41 Ibid, 73.

42 Ibid.

43 Ibid, 73. See also discussion in Hunter, above n 39; Bartlett, above n 39.

44 Lamb and Litrich, above n 19, 73.

45 For example see Law Council of Australia Equalising Opportunities in the Law Committee and Australian Women Lawyers, '2009 Court Appearance Survey-Beyond the Statistical Gap' (2009); Law

relatively few speaking roles before the High Court of Australia. Research by Hunter in relation to the Victorian Bar identified that there are gendered patterns in briefing practices, with female barristers experiencing more difficulty obtaining briefs than their male colleagues.

Most Australian High Court judges have been a judge in another jurisdiction prior to appointment to the High Court and all have been senior barristers. Like the Australian legal profession and the Bar, the composition of the Australian judiciary has changed over the last several decades. There has been an increasing appointment of female judges with the percentage of female judges in Australian states and the High Court of Australia increasing. However, female lawyers are still significantly under-represented in the ranks of the Australian judiciary. There are also few judges from backgrounds that are not Anglo-Saxon. Judges are often criticised on the basis that they are ‘out of touch’ with community values. This has been contested by Chief Justice Gleeson who suggests that there is ‘no empirical evidence, that as a group, their general experience of life is


47 See discussion in Hunter above n 39. See also the surveys at n 45 above. The 2009 survey suggests improvements but there are still apparent differences in briefing practices.

48 Francesca Dominello and Eddy Neumann, 'Background of Justices' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007).


50 Dominello and Neumann, above n 48.

51 Lamb and Littrich, above n 19, 94.
narrower than that of most other occupational groups.'\textsuperscript{52} Chief Justice Gleeson and other judges have suggested that the nature of the work of advocate and judge means that judges have had very significant life experience and exposure to the ‘human’ side of life through their contact with litigants and litigation.\textsuperscript{53} However, as Lamb and Littrich argue ‘it might still be argued that judges are a breed apart, because they have earned and continue to earn high salaries, have been brought up and continue to live in affluence, and have not themselves directly experienced the exposure to crime or family breakdown that the litigants or other parties appearing before them have experienced.’\textsuperscript{54}

The work-lives and work-patterns of the Australian legal profession, the Bar and Australian High Court judges also appear to differ from many in the general working population. The work patterns of barristers are individualistic—by virtue of choosing to go to the Bar barristers work for themselves rather than as employees of others. Many SF (including those about employment and the risks of employment) identified in the study also reflected those individualistic values.\textsuperscript{55} The Australian legal profession has exhibited widespread acceptance of toxic workplaces with a culture of long hours, high pressure and difficulties in the recognition of work-life balance.\textsuperscript{56} The Justices of the High Court


\textsuperscript{53} Lamb and Littrich, above n 19, 95-6.

\textsuperscript{54} Ibid. See also the comments of Chief Justice French, above n 17, 3 where he suggests that ‘we may have formed views or provisional theories about particular groups. But experience, however wide, is no substitute for an informed awareness which not only enables us to regard diversity from within our occupational world, but to stand outside that world and see how it fits into the larger society.’

\textsuperscript{55} See discussion in Chapter 6.

\textsuperscript{56} Lamb and Littrich, above n 19, 73-7.

are notorious for their work ethic and for the long hours they work.\(^{57}\) This dedication to
work by High Court justices is no doubt one of the reasons that the justices performed
to the high standard that warranted appointment to the High Court. However it also
suggests that like many in the legal profession and judiciary, the justices of the High
Court have experienced difficulties with work-life balance due to the demands of senior
careers at the Bar and in the judiciary, with work prioritised over other aspects of life.\(^{58}\)
Excessive workload is increasingly being recognised by the Australian legal profession
and Australian judiciary as a factor in high rates of lawyer and judicial mental illness such
as depression.\(^{59}\) However, as argued earlier in this study traditional legal cultural
acceptance (and encouragement) of excessive workload may influence how judges

\(^{57}\) For example at the swearing in of Justice Heydon to the High Court his work habits were described by the Attorney General as ‘extraordinary. It has been said about your Honour that you have always taken on a workload that should have been outlawed by some post-Dickensian Factory Act’. See Ceremonial Heydon J Swearing in C0/2003 [2003] HCA Trans 563 (11 February 2003). In fact, the first of the many ‘Factory Acts’ was passed in the United Kingdom in 1802 well before Dickens was even born in 1812. See also discussion of the work ethic and enormous workload of Kirby J in A J Brown, Michael Kirby: Paradoxes and Principles (2011); Simon Sheller, 'Kirby, Michael Donald' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to The High Court of Australia (2007) where reference is made to Kirby J’s entry in Who’s Who as listing his recreation as ‘work’.

\(^{58}\) For example Heydon J commented during his swearing in speech that ‘it is a truism that the families of lawyers do not have easy lives. My family, like others, probably suffered less while I was on the Bench than in the years during which I was involved in the din and dust of life at the Bar. Judicial life is calmer but it still imposes some strains.’ See Ceremonial Heydon J Swearing in C0/2003 [2003] HCA Trans 563 (11 February 2003).


construct SF in negligence cases about ‘reasonableness’ of workload and ‘reasonable foreseeability’ of psychological injury caused by work overload.\(^6^0\)

The shared legal cultural background of judges in combination with other factors assists us to understand why High Court judges in this study generally used and constructed SF in similar ways. However, the culture of the legal profession, Bar and judiciary also appeared to have had more specific effects on how judges used and constructed SF. There were certain kinds of SF identified in this study (for example those about legal actors, legal institutions, and administration of justice) where the interests of the legal profession and legal concerns were positively reflected in the nature of SF and preferred to the interests of society as a whole.\(^6^1\) There was little recognition of the life experiences of those groups traditionally disenfranchised by the law and legal culture (for example women).\(^6^2\) SF were often stated in ways that were ‘neutral’ and which assumed (wrongly) that the experiences of both genders were the same.\(^6^3\) In addition, there were missing SF—those about those groups which the legal system has traditionally served poorly.\(^6^4\) The lack of the provision of reliable and comprehensive SF information by barristers to the High Court is also an institutional barrier to accurate use and construction of SF by High Court judges.\(^6^5\) This is particularly given a very small, select and male group of

---

\(^6^0\) See the discussion in Chapter 6 Section 4 particularly in relation to SF about workplace psychological injury in *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 which were inconsistent with empirical evidence.

\(^6^1\) See discussion in Chapter 6 Section 6.

\(^6^2\) See discussion in Chapter 5.

\(^6^3\) Ibid.

\(^6^4\) Ibid.

\(^6^5\) See discussion in Chapter 7.
barristers argued the relevant negligence cases in this study before the High Court, with many cases being argued by one or both of two male senior counsel.66

B. Characteristics of Australian High Court Judges

While High Court judges share a common ‘legal’ cultural background, they also share broadly similar gender, geographic, racial, religious, educational, professional and social backgrounds. It is far too simplistic to make assertions that particular aspects of an individual judge’s background (even in combination with the effect of legal culture) are the ‘sole’ cause of how they used and constructed SF in negligence cases from 2001-2005. As argued in this and the last chapter, the way judges use and construct SF needs to be seen as involving the complex interaction of multiple interdependent factors—legal, institutional, individual, cognitive and cultural. In addition, different methodologies would need to be used to attempt to pinpoint how particular individual judicial background factors affect how judges reason.67

This study argues that common judicial ‘life experience’ and social background factors likely interacted with other legal, institutional, cognitive and cultural worldview factors.68

This is consistent with the findings of this study that High Court judges generally used

66 See discussion in Chapter 7 Section 4.
68 For example, see Kahan above n 10 on the interaction between individual life experiences, cognitive factors and cultural cognition.

and constructed SF in broadly similar ways. However, this study also revealed that there were some differences between how individual judges used and constructed SF. For example, Justice Kirby used SF more than other members of the High Court. He referred to non-case law sources for SF more than most judges. In addition, SF about a range of matters which aligned with values of communal responsibility, egalitarianism and social diversity, most commonly came from a judgment of Justice Kirby, rather than other members of the High Court. This suggests that there may be factors individual to some judges that lead them to use and construct SF somewhat differently to other judges. This should not be unexpected as although judges tend to share ‘similar’ backgrounds they are clearly still individuals and are not identical. As will be discussed later there are certain ‘individual’ factors in Justice Kirby’s background which might

---

69 For example, all judges predominantly relied on case law, adjudicative facts and legal values in their reasoning, referred to empirical evidence for SF rarely or not at all, and most appeared to favour individualistic, free enterprise and traditional values.

70 There was a varying tendency for judges to refer to SF see Table 4.11 which shows that that the average SF/judgment varied from 9.27SF/judgment (Kirby J) to 4.8 (Gaudron J).

71 Secondary sources, empirical sources and other sources (which includes legislation, expert evidence, counsel submissions). As Table 4.13 shows 14.1% of Kirby J SF were referenced to one of these sources. McHugh J (14.18%) and Gaudron J (14.58%) were also higher users of sources other than case law. Justices Callinan (5.78%) and Heydon (4.97%) were the lowest users of sources other than case law. Justices McHugh and Kirby were the highest users of empirical sources with McHugh J responsible for 7 of the 14 references and Kirby J for four of the references.

72 Chapter 6 discusses SF about Australian society; individual responsibility, autonomy and accident prevention; risk; employment and the risks of employment; government, commerce, and insurance; and legal actors and legal institutions.

73 See Chapter 6.

explain (in combination with other factors) why he diverged from the other High Court judges in some respects.74

Davis and Williams argue that ‘despite the role of the High Court in determining law on behalf of the nation across a full spectrum of social and political issues, it has remained a remarkably homogenous institution.’75 This is particularly true of the justices serving on the High Court between 2001-2005.76 The High Court at this time was made up predominantly of older white men from Sydney with an Anglo-Saxon background who had practiced at the Bar prior to judicial appointment. All of the High Court justices studied were aged between 55 and 70 during the period of study.77 Justice Gaudron was the only female High Court judge on the High Court during this period.78 As she retired in February 2003 she was only present on the High Court bench for two years (and 10 cases) of the sample used in the study. Justice Gaudron was the first female appointed to the High Court of Australia and only female judge to sit on the High Court of Australia until the appointment of Justice Susan Crennan in 2005, Justice Susan Keifel in 2007 and Justice Virginia Bell in 2009. Most Justices have come directly from the Bar79 or the

74 These factors might have also interacted with other cognitive factors and cultural worldviews. In addition, the fact that Justice Kirby was often in dissent and single judgments may have also influenced how he used and constructed SF. See discussion in Chapter 4 and also in Sections 2 and 3 of this chapter.
75 Davis and Williams, above n 49, 826.
76 This is the period studied in the content analysis which was conducted as part of this study.
78 Although Justice Crennan was appointed in November 2005, she was not involved in any judicial decisions handed down in 2005.

Bench, and there have been no judges appointed to the High Court of Australia directly from a full-time academic role. This is true of all judges in the sample studied in this thesis—Gleeson CJ, Kirby J, Gummow J, Hayne J, Gaudron J, McHugh J, Callinan J and Heydon J. All were either senior barristers or judges immediately prior to appointment to the High Court of Australia. The majority of the judges on the High Court during 2001-2005 were appointed to the High Court from NSW with only Justice Hayne appointed from Victoria and Justice Callinan from Queensland. As Davis and Williams noted in 2003 at that stage, no judge of the High Court had been appointed from a non Anglo-Celtic background, and there had only been one openly gay justice, Justice Kirby.

There are other remarkably similar characteristics shared by the Justices of the High Court from 2001-2005. A majority of the judges were educated at leading private high schools. The majority of justices on the High Bench in 2001-2005 also attended the

Dame Brenda Hale once said it is wrong to imagine that experience in large commercial litigation is the only prerequisite to the wisdom and foresight to be expected of the highest judiciary. I agree'.

Ibid. Although it should be noted that some judges had at some stage taught law at universities. For example Justice Heydon once had an academic career and was a Dean of Sydney Law School. He is also the author of noted academic texts including Hon J D Heydon, Cross Evidence (8th ed, 2010). Justice Gummow also taught law part-time at the University of Sydney for many years and is also the author of respected equity textbooks. See John Lehane, ‘Gummow, William Montague Charles’ in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007). Chief Justice Gleeson and Justices Kirby, Gummow, McHugh, Gaudron and Heydon from New South Wales.

Davis and Williams, above n 49, 826.

For example Justice Callinan was educated at Brisbane Grammar School, Chief Justice Gleeson at St Josephs College Hunters Hill Sydney, Justice Gummow at Sydney Grammar School, Justice Hayne at Scotch College Melbourne, Justice Heydon at SCEGS Sydney. Justice Kirby attended the renowned Sydney selective public high school Fort Street Boys High.

University of Sydney Law School, resulting in their exposure to the same or very similar approaches to legal education.\textsuperscript{84} Many of the judges had known each other for many years prior to appointment to the High Court as university classmates, colleagues, adversaries and rivals.\textsuperscript{85} Two judges were Rhodes scholars and attended Oxford University for post-graduate studies.\textsuperscript{86} The High Court judges came from Anglican or Roman Catholic religious backgrounds. Many of the outside interests of the justices of the High Court are similar, with cricket and rugby cited as frequent outside interests in biographical information on the justices.\textsuperscript{87}

While most Justices of the High Court also studied degrees other than law,\textsuperscript{88} only Justice Kirby had a background through his law reform and other work of significant interaction with and understanding of social science materials.\textsuperscript{89} Justices McHugh, Kirby and

\textsuperscript{84} Justice Heydon, Justice Gaudron, Chief Justice Gleeson, Justice Gummow and Justice Kirby all attended the University of Sydney Law School. Justice Callinan attended the University of Queensland and Justice Hayne attended the University of Melbourne. Alone among the High Court justices, Justice McHugh did not attend University and after leaving school at 15, later gained his qualifications through the Barristers’ Admission Board. See Kate Guilfoyle, ‘McHugh, Michael’ in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007).

\textsuperscript{85} See discussion in Brown, above n 57. For example, Brown notes at 42 that Kirby J and Gleeson CJ were in the same year at the Sydney Law School and their association there ‘was the beginning of a lifelong association with Gleeson, marked by an important competitive edge.’

\textsuperscript{86} Justices Hayne and Heydon.

\textsuperscript{87} For example see Guilfoyle, above n 84; Brett Walker, ‘Gleeson, Murray’ in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007); Nicholas Hasluck, ‘Callinan, Ian’ in The Oxford Companion to the High Court of Australia (2007) Justice Callinan is particularly known for his plays and novels.

\textsuperscript{88} For example Chief Justice Gleeson, and Justices Hayne, Heydon, Gummow, Kirby, and Gaudron studied arts. Justice Kirby also studied economics.

\textsuperscript{89} For example he was the foundation Chairman of the Australian Law Reform Commission, he is an Honorary Fellow of the Academy of Social Sciences in Australia, he was a member of the Ethics
Gaudron have backgrounds that are somewhat divergent from other members of the High Court, and which differentiate them from ‘typical’ demographics of the legal profession and Bar. Justice McHugh comes from a ‘strong working class tradition’.90 He left school at fifteen and worked a wide array of different jobs including ‘labourer, telegram boy, crane chaser, sawmill worker and clerk’ before returning to complete evening classes for his Leaving Certificate and eventually the Barristers’ Admission Board qualifications.91 Similarly, Justice Gaudron had working class parents and grew up in rural Australia.92 She was educated at a Catholic girls’ secondary school in Armidale before attending Sydney University on a scholarship.93 She graduated in 1965 already ‘mother to a baby daughter’.94 She faced significant discrimination in the early years of her admission to the Bar.95 During the course of her judicial career she consistently ‘sought to draw attention to the status of women, particularly women in the legal profession.’96

Like Justice Gaudron, Justice Kirby had a family whose ‘sympathies were generally with the Australian Labor Party.’ He also personally experienced the effect of societal discrimination due to his sexual identity. Sheller has argued that ‘the experience of forced isolation taught him the pain and distress that discrimination causes.’ Justice Kirby has always been and continues to be a public advocate against discrimination. He has the broadest and most extensive experience outside of the Bar and the judiciary.

Justice Kirby should not however be seen as an ‘outlier’ judge based on the findings of this study. In many ways, the way he used and constructed SF in negligence cases was similar to other members of the High Court. However, particular background factors (individual to him) might explain (along with other factors) why he used and constructed SF somewhat differently to other members of the High Court. His background, particularly in law reform, made him more receptive to the benefits of referring to empirical and other ‘non-legal’ material. This is consistent with the results of this study which found he used these materials as sources for SF more than most.

---

97 See Sheller, above n 57.
98 Ibid. See also discussion in Brown, above n 57.
99 Ibid.
100 See above n 89.
101 There is some evidence in Chapters 4-6 that McHugh J might have used and constructed SF somewhat differently to other members of the High Court on occasion; however there is not strong evidence of significant differences. Obviously, the presence of Gaudron J in this study raises question about whether her gender and background made any difference to how she used and constructed SF. However, due to her retirement early in the period of this study there is insufficient data to make any comment on Gaudron J.
other judges. In addition, his own experiences of discrimination made him aware of the discrimination suffered by others.\textsuperscript{103} This is consistent with the findings of the study that he was more likely than other judges to refer to SF about diversity and gender. In addition, particular background factors might have played a part in Justice Kirby referring to SF which reflected values which align with a different cultural worldview to other members of the High Court.\textsuperscript{104} This is discussed further in section 3 of this chapter.

2. \textbf{COGNITIVE FACTORS AND JUDICIAL USE AND CONSTRUCTION OF SF}

Section 1 argued that there are legal cultural and individual features which set members of the High Court of Australia apart from the rest of us and which help explain (in interaction with other factors) why High Court judges use and construct SF in broadly similar ways. However, in some (important) ways High Court judges \textit{are} like you and I. The explanatory framework developed in this study\textsuperscript{105} understands judicial use and construction of SF as a human cognitive process and as occurring as part of a certain kind of societal interaction (decision-making in a group). This section argues that the cognitive factors that affect human reasoning can also affect judicial reasoning and judicial use and construction of SF. As Barton has argued, judges are ‘driven by the same combination of incentives, experiences and cognitive biases that drive the rest of us’.\textsuperscript{106}

\begin{flushright}
\textsuperscript{103} See above n 98.
\end{flushright}

\begin{flushright}
\textsuperscript{104} Cultural worldviews are discussed in section 3 of this chapter.
\end{flushright}

\begin{flushright}
\textsuperscript{105} See discussion in Chapter 7 Section 1.
\end{flushright}

\begin{flushright}
\end{flushright}

Human reasoning can also be affected by social interactions with others. This section argues that judicial use and construction of SF can be affected by the ‘group’ process of judicial deliberation.

This section draws on the emerging literature on judicial cognition and shows how the findings of the content analysis conducted as part of this study are consistent with the broader scholarship on effects of cognitive factors and group influence. In the last several decades there has been a significant expansion in the field of behavioural law and economics and in the application of cognitive and social psychology to law and legal and judicial decision-making. Behavioural law and economics utilises insights from ‘cognitive psychology, sociology, and other behavioural sciences’ to challenge the place of the rationality assumption in law. 107 Research from the fields of cognitive and social psychology challenges the assumptions that human beings always reason in ways that are deliberative and rational. 108 There is emerging empirical research that suggests that judicial reasoning can also be affected by an array of cognitive shortcuts and illusions. 109

---

107 See Korobkin and Ulen, above n 8, 1053. The field has been used as a tool of analysis in a wide range of legal applications to consider the way in which people respond to law. It challenges the assumption that law and economics theorists make that people will respond rationally in response to legal rules (rational choice theory), and demonstrates why human beings will often act in ways that are not in their own self interest in response to legal rules. (1075).


Maroney has also suggested that affect or emotion can affect judicial cognition and judicial reasoning. This cognitive research is predominantly American, and little empirical research has been conducted on Australian judges. The application of the research on judicial cognition to Australian judging is one of the contributions made by this study.

The emerging judicial cognition research suggests that judging is at least partly an intuitive or "unconscious" cognitive process. The term 'unconscious' in this research typically refers to the fact that human beings can be affected by a range of cognitive factors of which they are unaware. What we simplistically call judicial 'experience' or 'intuition' is really the result of bounded rationality including the effects of a range of


112 For example see Chris Guthrie, Jeffrey Rachlinski and Andrew Wistrich, 'Inside the Judicial Mind' (2001) 86 Cornell Law Review 777; Dan Kahan, "Ideology In" or "Cultural Cognition of" Judging: What Difference Does it Make?" (2009) 92(3) Marquette Law Review 413. The use of the term 'unconscious' in this empirical cognitive psychology research and in cultural cognition research is to be distinguished from the use of the term 'unconscious' in psychoanalytic theory which has a somewhat different meaning. In psychoanalytic theory (which stems from the work of Sigmund Freud) the influence of the 'unconscious' typically refers to the effects of ‘hidden’ and unpleasant thoughts and feelings on conscious human action and human personality. See Rudolf Bernet, 'Unconscious Consciousness in Husserl and Freud' (2002) 1 Phenomenology and the Cognitive Sciences 327.

cognitive short-cuts and illusions. Sometimes this assists in quick and efficient decision-making. However, it can also produce ‘systematic errors in judgment’.

The revelation that judges sometimes reason intuitively and can be unconsciously impacted upon by decision-making short cuts has significant implications for understanding judicial use and construction of SF in the High Court of Australia. The most important implication is that judges should not generally be assumed to deliberately choose to favour or disfavour particular SF or to be deliberate users of poor quality SF. Rather, we should consider judicial decision-making to reflect the mostly unconscious use of a range of cognitive heuristics and biases and other cognitive factors (such as the effects of group deliberation). While these cognitive factors can affect the nature and accuracy of the SF used by judges in the High Court, it does not follow that this results from poor judging. Rather, it is the natural and inevitable result of the effect of cognitive factors on judges in interaction with legal, institutional, individual and cultural factors. This section discusses how judicial bounded rationality and decision-making short cuts (heuristics and biases) can affect judicial use and construction of SF and can result in systematic judicial use of unreliable or incorrect SF. In addition, this section argues that group deliberation could affect judicial use and construction of SF.

A. Judicial Bounded Rationality and Judicial Intuitive Decision-making

There are strong reasons to suggest that judges are affected by bounded rationality in the course of their judicial decision making in the High Court of Australia. The term

113 Korobkin and Ulen, above note 8, 1085 suggest that that decision-making heuristics may simplify decision-making tasks reducing costs of information processing and making it ‘possible to operate in an increasingly complex world.’

114 Ibid.

‘bounded rationality’\textsuperscript{115} refers to the concept that ‘human cognitive abilities are not infinite’\textsuperscript{116} and that ‘actors often take short-cuts in making decisions that frequently result in choices that fail to satisfy the utility maximisation prediction.’\textsuperscript{117} Reasons for making ‘boundedly rational decisions’ include ‘intentional “satisficing” behaviour’ because ‘both the costs of obtaining and processing the information necessary to make maximising choices and the cognitive limitations of human beings often render utility-maximisation physically impossible.’\textsuperscript{118} This may arise because of the inherent complexity of the relevant decision or the ambiguity of the consequences of decision alternatives.\textsuperscript{119} ‘Boundedly rational decision-making’ can also be ‘an unintentional consequence of an unconscious use of heuristics in judgment and decision-making tasks.’\textsuperscript{120}

Complexity and ambiguity of decision-making are two phenomena which can cause bounded rationality.\textsuperscript{121} Very complex choices which tax the ‘limits of human cognitive ability’ lead to the substitution of ‘a simplified decision strategy.’\textsuperscript{122} Even if it would be possible for a particular human decision-maker to physically make a particular complex

\textsuperscript{115} Originally coined by Herbert Simon, see Herbert A. Simon, ‘A Behavioral Model of Rational Choice’ (1955) 69 Q.J Econ. 99.


\textsuperscript{117} Korobkin and Ulen, above n 8, 1076.

\textsuperscript{118} Ibid, 1075-6.

\textsuperscript{119} Ibid, 1079-83.


\textsuperscript{121} Ibid, 1077.

\textsuperscript{122} Ibid.

decision ‘she might choose to limit her search for information or consideration of the decision short of reaching a utility-maximising decision.’\textsuperscript{123} A ‘simplified decision strategy’ might be adopted because it ‘might be sensible given the marginal benefits and costs of making an optimal decision relative to a satisfactory one.’\textsuperscript{124} Another cause of ‘suboptimal decision making’ is ambiguity concerning ‘the consequences of decision alternatives.’\textsuperscript{125} This occurs because of the lack of availability of information regarding the consequences of decision-making.

As Chapter 7 discussed, there are legal and institutional factors that contribute to judicial bounded rationality. The appellate decisions made by judges in the High Court of Australia typically arise from the most complex of cases. The cases involve the most difficult or most unsettled legal principles, and typically unusual or complex factual scenarios. They also involve a large volume of materials which judges need to consider during the decision-making process. This includes trial and appellate transcripts, trial and appellate judicial decisions, trial materials including copies of relevant documents, oral and written submissions by counsel during High Court special leave and appeal hearings, any additional material referred to by counsel before the High Court including Australian and international case law and legislation, and relevant academic material. Judges may also access material outside of that referred to or submitted by the parties. Increasing judicial work load causes time pressures on judges in the production of decisions. Increased time pressure and information over-load combine to increase judicial incentive to adopt decision-making short-cuts.

\textsuperscript{123} Ibid, 1078.
\textsuperscript{124} Ibid.
\textsuperscript{125} Ibid, 1083.
The adversarial process and the nature of the High Court as an institution do not facilitate the flow of quality SF information to judges. Reasons for this include that the rules of evidence are unclear regarding the admission of SF material, the adversarial process does not encourage the presentation of high quality SF information to the High Court, lawyers are not well trained in the use of SF materials and there is limited use of amicus curiae and interveners in the Australian High Court. All of this results in significant barriers to Justices of the High Court receiving sufficient reliable SF information to support their judicial decision-making in negligence cases. This may lead to judicial uncertainty regarding relevant SF. As discussed above, complexity and uncertainty are factors which contribute to bounded rationality and which increase the likelihood of the use of decision-making short-cuts. The complexity of negligence cases before the High Court, information over-load, time pressures and other institutional features of the High Court combine to contribute to judicial ‘bounded rationality’. Maroney has suggested that the failure of the legal system to appropriately account for and manage judicial emotional responses also increases cognitive load, and affect or ‘emotion’ may also magnify other cognitive effects.126 These factors together greatly raise the possibility of intuitive judicial reasoning including the unconscious judicial use of decision-making short-cuts which can result in erroneous SF in judgments.

Recent research, has found that judges can be intuitive in their decision-making as opposed to deliberative.127 Guthrie, Rachlinksi and Wistrich carried out a range of

---

126 See Maroney, above n 110.
127 Guthrie, Rachlinski and Wistrich, above n 108 and 109.
empirical experimental research projects based on surveys of different kinds of American judges, typically at judicial education programmes.\textsuperscript{128} This research showed that ‘judges surely rely on intuition, rendering a purely formalist model of judging clearly wrong, yet they also appear able to apply legal rules to facts, similarly disproving a purely realist model of judging.’\textsuperscript{129} The results of this study also support the proposition that judges rely (at least partly) on intuition as a basis for decision-making—for example judges typically relied on ‘common sense’ (which is intuition in disguise) as the basis of SF. Guthrie, Rachlinski and Wistrich propose a model of decision-making which acknowledges judges are both intuitive and deliberative decision-makers and which encourages the use of deliberation to ensure judicial intuition does not lead to judicial error or inaccuracy.\textsuperscript{130} They refer to this as an ‘intuitive-override model’ of judging. This model ‘means that judges often rely on simple heuristics, attend closely to various informational cues that can be misleading, and can be influenced by untoward psychological phenomena in their decision-making’.\textsuperscript{131} Judges can however ‘sometimes override these misleading intuitive responses with a more deductive and deliberative decision-making approach’.\textsuperscript{132} This model will be discussed further in Chapter 9.

\textbf{B. Decision-making Short-Cuts: Heuristics and Biases}

There has not been an Australian empirical study which has investigated the effect of cognitive factors on Australian judges. However, The Chief Justice of the High Court, Chief Justice French, has recently commented on the work of Guthrie, Rachlinski and

\textsuperscript{128} Ibid.
\textsuperscript{129} Guthrie and Rachlinski, ‘Blinking’, above n 108, 2-3.
\textsuperscript{130} Ibid, 3.
\textsuperscript{131} Guthrie, Rachlinski and Wistrich, ‘Hidden Judiciary’, above n 109, 1482.
\textsuperscript{132} Ibid.
Wistrich and accepted that it ‘certainly seems plausible’ that such cognitive illusions exist and affect judges.\(^{133}\) Heuristics and biases are decision-making short-cuts.\(^{134}\) As discussed above, while the use of heuristics and biases in human decision-making can result in accurate factual decisions, they may also lead to deeply flawed factual assumptions. The following discussion highlights how particular heuristics and biases can affect judicial reasoning (and could affect judicial use and construction of SF) and where the operation of heuristics and biases were consistent with the results of this study.

**Availability Heuristic**

The availability heuristic suggests that people tend to think a risk is more serious if it can be ‘readily called to mind.’\(^{135}\) Human judgments tend to be memory based.\(^{136}\) Where we do not have the necessary data to make a decision, we tend to utilise information learned


\(^{134}\) See Tversky and Kahneman, above n 120.


in the past that we deem may be useful to the present decision.¹³⁷ The use of this past ‘data’ informs our ‘common sense’ or ‘experience’. Judicial ‘common sense’ was a frequent source for SF identified in this study.¹³⁸ The difficulty with this heuristic is that it can induce incorrect assumptions or over-estimated assumptions into the decision-making process. The ease of recall of a ‘fact’ rather than its accuracy is what determines its importance in the human decision-making process. For example vivid media coverage of events such as plane crashes or risks of violence such as homicide tend to increase the chance that humans will overestimate their own personal chance of experiencing those events.¹³⁹

This may impact upon judicial use and construction of SF in two main ways. First, judges are more likely to utilise SF in their judgments that can be easily called to mind —SF which are familiar to them rather than unfamiliar. This is consistent with the results of the content analysis that showed judges failed to refer to the life experiences of those who were usually disenfranchised or marginalised in the law, such as women. Second, judges may use inaccurate SF which over-estimate the chance of particular events because of judicial exposure through culture, training, or the media to that particular SF. For example, if judges have been exposed to a lot of media comment or anecdotal claims of rising liability insurance costs or difficulty in obtaining insurance, they may tend to assume this is correct or overstate its effect without adequate proof. This is consistent with the results of the content analysis which showed members of the High Court were willing to make SF assumptions that tort law was the cause of the Australian ‘insurance’

¹³⁷ Ibid.
¹³⁸ See discussion in Chapters 4-6.
¹³⁹ Hastie and Dawes, above n 136, 91-8.

crisis and also to make SF assumptions that there was blame culture amongst Australian plaintiffs and plaintiff lawyers.140

Representative Bias

The Representative Bias operates through a process whereby ‘when one thing resembles something else in a category, we judge the possibility that the first item is a member of that category as high. If there is no resemblance to the second item, we judge the likelihood as less.’141 This occurs when people tend to ‘undervalue statistical information which can lead to notable decision errors.’142 This bias results in a ‘form of automated stereotyping’143 which leads people to rely on ‘impressionistic and intuitive reactions of the representativeness’ of information.144 For example, Guthrie, Rachlinski and Wistrich relate the results of a study where people were asked to determine whether a person with certain characteristics such as high intelligence, lack of creativity, high need for order and low social skills was a computer science student or humanities and education student. Most people tended to guess a person with those characteristics was a computer science student, even though they knew that three times as many students studied humanities.


143 Herald, above n 141, 9.

and education than studied computer science.\textsuperscript{145} Guthrie, Rachlinski and Wistrich suggest that as a result of the representative bias ‘to many it seems more likely that New York City might face a terrorist attack committed by Muslim extremists than that New York City might face a terrorist attack.’\textsuperscript{146} Of course the latter proposition is far more likely than the former given ‘Muslim extremists who might commit a terror attack’ are but one sub-category of the larger group of ‘all extremists who might commit terrorist attacks’.

Guthrie, Rachlinski and Wistrich, utilising empirical experimental studies of judges, have found that judges can also be affected by the representative bias.\textsuperscript{147} Herald also suggests that the effect of the representative bias can result in inappropriate and unconscious gender stereotyping by judges.\textsuperscript{148} The method used in this study was not an experimental study of judges individually to test for the effects of representative bias on individual judges of the High Court. However, the results of this study are consistent with the proposition that Australian High Court judges are likely to be unconsciously impacted upon by the representative bias to the extent that ‘stereotypes’ form part of judicial construction of ‘common sense’ and ‘common knowledge’. For example, the representative bias is consistent with the ‘aspirational’ approach to SF about women and


\textsuperscript{146} Guthrie, Rachlinski, Wistrich, ‘Hidden Judiciary’, above n 109, 1509.

\textsuperscript{147} Guthrie, Rachlinski, Wistrich, ‘Blinking’, above n 108, 23-4. Although they note that judges performed better than other people on similar tests including doctors. They suggest that overall judges performed well on testing and even though most judges answered the relevant experimental question wrongly, others showed the ability to use deliberative judging to overcome the effect of the representative bias. See also ‘Hidden Judiciary’, above n 109, 1511-2.

\textsuperscript{148} Herald, above n 141, 23.

Australian society more generally as discussed in Chapters 4 and 5. This study showed that judges tended to over-estimate the positive ‘changes’ that occurred in relation to the status of women and in Australian society and to under-estimate more negative remaining aspects of gender and social inequality despite significant empirical evidence. This may have resulted from both the availability heuristic and representative bias where the judges’ own experiences of social life and achieving women were extrapolated to represent the whole of society.

**Hindsight Bias**

Hindsight bias suggests that people are more likely to think that some event was inevitable or extremely likely after the event occurs, even if evidence before the event would not have suggested this.\(^{149}\) “The bias arises from an intuitive sense that the outcome that actually happened must have been inevitable.”\(^{150}\) Guthrie, Rachlinski and Wistrich suggest that this occurs because of the human tendency to ‘update their beliefs about the world’ upon learning of outcomes.\(^{151}\) Hindsight bias has been shown to affect a range of professionals in their decision-making and to affect the decision-making of jurors.\(^{152}\) As the role of courts involves evaluating ‘events after the fact’ judges may be particularly susceptible to the hindsight bias.\(^{153}\) This bias may be particularly applicable in

---


\(^{150}\) Guthrie, Rachlinski, Wistrich, above n 108, 24.


\(^{152}\) Guthrie, Rachlinski, Wistrich, ‘Can Judges Ignore’, above n 109, 1314 n 247 and n 248.

\(^{153}\) Ibid.
negligence cases. Research in the United States has found that judges were more likely to consider conduct negligent after it had produced an accident.\textsuperscript{154}

In their studies of American judges, Guthrie, Rachlinski and Wistrich found that American judges are subject to the effects of the hindsight bias.\textsuperscript{155} It appears, however, that the hindsight bias may be overcome in certain circumstances which induce deliberative judicial decision-making. This can occur where a ‘web of rules’ and the nature of giving a particular kind of legal ruling with familiar case law prompts judges to overcome their intuitive response.\textsuperscript{156} The very nature of negligence cases in the High Court of Australia is that there are not clearly and easily applicable legal principles which necessarily prompt judicial deliberation to overcome intuitive responses. The factual nature of negligence cases is that many, if not all, involve the present judicial evaluation of past events many of which were very unlikely to occur.\textsuperscript{157} These are the very kind of conditions most likely to give rise to hindsight bias in judicial reasoning. Obviously this has the potential to influence judicial findings about adjudicative facts such as whether

\textsuperscript{154} Ibid.

\textsuperscript{155} For example in their 2006 study of Florida Circuit Court judges they found that judges were subject to intuitive decision-making. See Guthrie, Rachlinski, and Wistrich, ‘Blinking’ above n 108. The effect of the hindsight bias was measured through the judges’ response to a hypothetical fact pattern based on a case which asked them to consider the likely outcome on appeal. The judges’ response to the scenario was impacted upon by being told of what the actual appeal outcome was. Knowledge of the outcome positively influenced the likelihood judges would choose the same likely outcome on appeal. Similar results were found in Guthrie, Rachlinski and Wistrich’s 1999 study of federal magistrate judges. See Guthrie, Rachlinski, Wistrich, ‘Inside the Judicial Mind’, above n 151.

\textsuperscript{156} Guthrie, Rachlinski and Wistrich suggest (‘Blinking’ above n 108, 26-8 citing ‘Can Judges Ignore , above n 109) this is what may have occurred in their survey study of a range of judges asked to make a ruling on probable cause for a search warrant (where some judges were aware of the outcomes of the search and some not). Hindsight bias was not shown to have a statistically significant effect.

\textsuperscript{157} For example consider \textit{Chappel v Hart} (1998) 195 CLR 232.
the conduct of a particular defendant or plaintiff was reasonable. However, it also has the potential to influence the use of SF.

There are a number of examples identified in this study (discussed in Chapter 6) where judges of the High Court appeared to be aware of the effects of the hindsight bias and were keen to avoid it where it would be to the detriment of defendants.\(^{158}\) For example, in *Rosenberg v Percival*\(^ {159}\) the effects of hindsight bias were referred to as a reason to doubt a plaintiff’s testimony she would have acted differently if warned of particular risks of surgery. In *Koehler v Cerebos*\(^ {160}\) the High Court said that employers could not be said to be aware of the risks of psychological injury to employees from stress at work—this was despite there being a large body of empirical evidence suggesting the link between stress at work and psychological injury. However, as discussed in Chapter 6, SF about the kinds of risks plaintiffs should be aware of often suggested (in hindsight) the ‘inevitability’ of such risks, such that plaintiffs themselves should have attended to the risk. This would be consistent with the operation of the hindsight bias, but in a way that supported judicial constriction rather than expansion of liability in negligence and which supported defendants rather than plaintiffs.

**Optimism, Self-Serving and Egocentric Bias**

Optimism bias\(^ {161}\) suggests that ‘people tend to be both unrealistically optimistic and overconfident about their judgments’ and tend to underestimate the nature of certain

---

\(^{158}\) See for example the discussion of knowledge of ‘risk’ to defendants in Chapter 6.

\(^{159}\) *Rosenberg v Percival* (2001) 205 CLR 434.

\(^{160}\) *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44.

\(^{161}\) Also called over-confidence bias.

This may lead to the under-estimation of major risks such as the risk of an individual suffering a major health event such as heart attack or stroke. There is a wide range of experimental studies that show the existence of optimism bias in human reasoning. One of the most famous of these involved a survey of people about to be married. Although it was known that around half of marriages would end in divorce, all respondents replied their own marriage would not fail. The operation of the optimism bias is consistent with the findings of the content analysis conducted in this study that showed that SF about Australian society tended to be aspirational and tended to neglect more negative aspects of Australian social life such as continuing gender inequity, disparities of bargaining power in the Australian workplace, discrimination, and poverty.

The optimism bias is closely related to the self-serving bias which suggests that people often ‘interpret information in ways that serve their interests or preconceived notions’. Guthrie, Rachlinski and Wistrich call this the ‘egocentric bias’. This manifests in overestimations of ‘desirable characteristics’ including those regarding individual ability, professional skill, and contributions to groups. This occurs, they suggest for a range of reasons including ‘self-presentation’, the individual’s need for evidence to believe in their

---

162 Sunstein. above n 135, 1182.
163 Ibid.
165 See discussion in Chapters 5 and 6.
166 Korobkin and Ulen, above n 8, 1092.
167 Guthrie, Rachlinski, Wistrich, 'Inside the Judicial Mind', above n 151, 811.
168 Ibid.

own ‘theory’ about something, the egocentric nature of human memory, and the ambiguous nature of ‘standards’ of behaviour.\textsuperscript{169} Experimental research has shown that lawyers may be subject to this bias in the litigation process, resulting in over-estimation of their own ability and the chance of success of their case.\textsuperscript{170} Research by Guthrie, Rachlinski and Wistrich has shown that judges, like other professionals, may be prone to the egocentric bias.\textsuperscript{171} They suggest this may prevent judges from having an awareness of their own limitations, and an appreciation they may make mistakes in judgment.\textsuperscript{172}

The operation of this bias is consistent with the results of the content analysis in a number of ways. This bias may be one of the factors that explain why judges were apparently very confident to frequently base SF on their own experience or common sense rather than seek out empirical support. It could also explain why judges chose one version of a SF which valued their own ‘identity’ and choices, when another version was equally plausible. For example, judges predominantly reflected the interests of the legal profession and ‘legal’ concerns (rather than concerns of individual plaintiffs or litigants) in SF about issues such as administration of justice and the social value of the legal profession, particularly the Bar.\textsuperscript{173}

\textsuperscript{169} Ibid, 812-3. For example, Guthrie, Rachlinski and Wistrich give the example that safe driving means different things to different people such that we can all think that we are better than average ‘safe’ drivers.

\textsuperscript{170} Ibid.

\textsuperscript{171} Ibid.

\textsuperscript{172} Ibid, 815.

\textsuperscript{173} See discussion in Chapter 6 Section 6.

Status Quo Bias

The status quo bias suggests that people like the status quo and will resist departure from the status quo except where there are significant reasons to do so.\(^{174}\) The effect of ‘this unconscious caution is that our brains often intuitively refuse to budge from existing coordinates when movement is necessary. Accordingly, we erroneously overvalue our present position simply because it is our present position and not because it is the better option.’\(^{175}\) This can cause judges to over-value existing interpretation of law and fact, even where this leads to inaccurate decision-making. Herald suggests this occurs because ‘a preference for the comfort of the familiar heavily influences a reading of the law that is at odds with its language and purpose.’\(^{176}\) This is consistent with the findings of this study that where judges sourced SF, the sources were predominantly legal sources such as case law\(^{177}\) (ie the existing status quo) which resulted in repetition of ‘accepted’ SF from one case to another. The use of case law as a source for SF simply tends to reproduce potentially inaccurate ‘common sense’ judicial assumptions from one case to another.\(^{178}\) The use of a SF by one judge is no guarantee of accuracy. Case law is simply an ‘available’ source of ‘status quo’ SF—not necessarily an accurate source.

---

\(^{174}\) Sunstein, above n 135. This is also linked to the endowment effect where people value a possession or status they currently possess more than one they do not. The crux of this effect is reflected in the old saying a bird in the hand, is worth two in the bush. See Herald, above n 141, 7.

\(^{175}\) Herald, above n 141, 8.

\(^{176}\) Ibid.

\(^{177}\) This would also be consistent with the operation of the availability heuristic as reported cases would be one of the most available sources of SF for judges, even though (as argued in Chapters 4-6) case law can be highly unreliable or outdated sources of SF.

\(^{178}\) See discussion in Chapters 4 and 5.

**Anchoring Heuristic/ Framing Heuristic**

The anchoring heuristic suggests that probability judgments are made ‘on the basis of an initial value or anchor’ which ‘may have an arbitrary or irrational source.’ That initial number provides an ‘anchor’ and the higher that initial anchor number, the higher the final numerical judgment likely to be given by the ultimate decision-maker. Guthrie, Rachlinski have found that this heuristic can affect judges, even where the initial anchor number is irrelevant and inadmissible. The framing heuristic operates in a similar way, and is based on the assumption that people prefer gains to losses. When facts are presented as a ‘gain’ they are likely to be more preferred by people, than when similar facts are presented as a ‘loss’. The ‘framing’ of a factual problem, ‘can lead to impressionistic and irrational judgments.’

Guthrie, Rachlinksi and Wistrich have found some evidence in their empirical studies that the framing heuristic can affect judges, particularly in relation to the evaluation of settlement offers. They have also found that the manner in which a matter is framed can impact upon judicial evaluations of the fairness of conduct. When presented with a factual scenario where a rent payment was substantially similar except one was framed as involving a discount and the other a penalty, judges were more likely to consider the

---

179 Sunstein, above n 135, 1188.
181 Ibid, 1502.
182 See also the discussion of the extremeness aversion bias in Sunstein, above n 135, 1181-2.
183 Guthrie, Rachlinski and Wistrich, ‘Hidden Judiciary’ above n 109, 1506.
184 Ibid.
185 Ibid, 1507.
186 Ibid.
‘penalty’ scenario unfair than the discount scenario.\footnote{187} Herald has suggested that in the United States examples ‘the use of misleading frames in judicial decisions abound.’\footnote{188} She identifies, for example, the use of gender neutral terminology in discrimination cases such as ‘person’ which frame judicial reasoning in ways that avoid the inherent gender bias implicit in the nature of a case.\footnote{189}

The anchoring and framing heuristics are likely to affect the judicial use and construction of SF in High Court negligence cases particularly when the SF have an element of numerical estimation. For example, the likelihood of particular SF events (for example the likelihood of litigation resulting from a particular finding of negligence liability or the quantum of likely insurance premiums resulting from a particular finding of liability)\footnote{190} could be affected by the manner in which such estimates are anchored and framed by the parties to an action. Of course, that anchoring or framing could be completely without evidence and inaccurate yet still has the ability to affect the way in which judges use and construct SF in their judgments. It cannot be determined from the content analysis study of judgments conducted for this study whether the parties’ submissions actually had a framing effect on judicial estimations of future liability. This is because the study did not also examine the parties’ oral and written submissions and other court documents and attempt to correlate the parties’ estimations about matters such as future litigation and

\footnote{187} Ibid.\footnote{188} Herald, above n 141, 11.\footnote{189} Ibid. For example ‘breastfeeding and non-breastfeeding persons’.\footnote{190} See Chapter 6 which discusses how SF about employers, government, business, and insurers tended to stress burdens or limitations these bodies would suffer as a result of liability in negligence most often with no actual evidence of these possible effects.
future liability, with judicial SF about these matters in the judgments. This is an area for future research discussed in Chapter 9.

However, there was evidence from the findings of this study that judges did ‘frame’ their judicial reasoning in ways that resulted in ‘missing’ SF and which failed to recognise inherent gender bias. For example, as discussed in Chapter 5, in *Cattanach v Melchior*¹⁹¹ neutral terms such as ‘parent’ were used when describing the effects of child-raising on families. Only Kirby J acknowledged the gendered nature of the effects of parenting, with the practical burdens of parenting being borne substantially by women. The rest of the judges of the High Court referred to no SF about the gendered nature of parenting. This was despite significant available empirical evidence showing the uneven distribution of parenting workload.

### C. Group Deliberation and Judicial Use and Construction of SF

Chapter 4 Section 5 discussed how the findings of the content analysis conducted as part of this study showed that judicial use of SF varied depending on whether judges were in single or joint judgments and whether they were in dissent or majority judgments. For example, the frequency of SF in single judge judgments (8.54 SF/judgment) was much higher than the frequency of SF in joint judgments (5.33 SF/judgment). The frequency of SF in dissent judgments (11.33 SF/judgment) was much higher than the frequency of SF in majority judgments (6.56 SF/judgment). When these factors were combined, there were even larger differences, with 11.74 SF/judgment in dissent single judgments and 5.14 SF/judgment in joint majority judgments.

These results are consistent with arguments by others that judicial grouping results in more reliance on legal principles and adjudicative facts and less reliance on extra-legal matters. Care needs to be taken in extrapolating the grouping results of this study to make broader arguments about the High Court. As already acknowledged, grouping effects in this study could be related to individual judicial characteristics and the study was restricted to a sample of negligence cases only over a five year period. However, given the literature on grouping discussed below, the results of this study clearly raise the need for further Australian research on the effects of grouping on judicial decision-making in the High Court.

High Court judges sitting on appellate cases form part of a small group of judicial colleagues. They are generally one of a group of five to seven High Court judges who must collectively determine the outcome of a case. The rationale behind using groups of judges to make decisions in appellate level cases is that it increases the likelihood that correct decisions will be made through the interaction and contributions of a number of experienced judges. This use of ‘collegial’ appellate courts raises the possibility that group dynamics can impact upon the way in which an individual judge comes to a


193 See Chapter 4 Section 5.

194 For example many of the single judgments in the study were by Justices Kirby and McHugh and Chief Justice Gleeson, who were also amongst the highest user of SF/judgment identified in the study. See Table 4.11.

195 Martinek, above n 192, 73.

decision. Judicial use and construction of SF may be affected by the collegial decision-making process and the influence of judicial colleagues.

Why can grouping of judges affect their judicial reasoning and decision-making (and potentially the way they use and construct SF)? Martinek suggests that interdisciplinary work on small group dynamics flowing from fields such as sociology, organisational psychology, social psychology and anthropology can be applied to analyse judicial appellate decision-making. She argues that group dynamics can impact upon how judges use non-legal factors in their decision-making. Membership in the small group of ‘the court’ with its shared cultural and legal norms (as discussed in Section 1 of this chapter and in Chapter 7) may drive more reliance on ‘legal’ factors. This is consistent with the findings of this study. Groups of appellate judges in the High Court of Australia can be seen to operate within the concept of a ‘small group’. They operate as a defined number of people who interact often with a common purpose in a common institutional environment. There is an ‘affective’ component to their interactions both with each other and to the institution they serve. Particular judges may have friendships with each other or particular antipathy for each other. They have a ‘common frame of

196 Ibid.
197 Ibid.
198 Ibid, 77.
199 Ibid.
200 There is evidence of pre-existing and on-going relationships, professional associations and rivalries between various of the judges of the High Court considered in this study discussed in Brown, above n 57. See also ‘cohesion’ research on the High Court including Jason Pierce, ‘Institutional Cohesion in the High Court of Australia: Do American Theories Travel Well Down Under?’ (2008) 46(3) Commonwealth and Comparative Politics 318; Michael Coper et al, ‘Multiple Opinions Project - Report’ (ANU College of Law,

reference— for example the legal and institutional factors discussed in Chapter 7. They must act collectively to achieve a final result in any particular case. This often results in joint judgments where particular groups of High Court judges have collectively crafted shared written reasons which contain shared SF.

There is also empirical research that suggests judicial decision-making can be 'profoundly' affected by the nature of the composition of a judicial group, with judges affected by conformity affects. American research in this area has suggested that the gender and ‘political’ mix on an appellate panel influences panel deliberations. For example, panels having Republican and Democrat majorities decide differently from all Democrat and all Republican panels. Gender composition may also affect reasoning and outcomes. It appears that a judge of a different tendency to the majority of judges in a panel may serve as ‘an antidote to the tendency of collective deliberations of the like-

National Judicial College, 2010); Jason I. Pierce, Inside the Mason Court Revolution: The High Court of Australia Transformed (2006).

201 Martinek, above n 192, 75.
202 Ibid.
203 See the discussion in Brown, above n 57, Chapter 17 of writing patterns of judges on the High Court during the period covered by this study. For example, Brown notes (at 387) the tendency of Gummow J and Hayne J to write together, the tendency of Kirby J to dissent, and (at 399) how ‘not joining Kirby’s own reasons had become institutionalised as part of the culture of the court.’ Brown also notes (at 400) how Kirby J rarely got assigned the responsibility for first draft judgments even where he agreed with the majority of the High Court.
205 Posner, above n 204, 31. In these forms of study judges are assigned as Democrat or Republican based on the party of the President that appointed them.
206 Ibid.
mind ed to drive them to extreme conclusions.’ 207 This research suggests the inter-
dependency of individual judicial characteristics (discussed earlier in this chapter),
cultural values (discussed in the next section) and cognitive ‘group’ effects. It has also
been suggested that the phenomena of ‘dissent aversion’ may affect judicial behaviour.
Judges may minimise dissent to maintain collegial relations. 208 Despite his own high
dissent rate, Justice Kirby has noted that for judges ‘it is usually easier to agree.
Concurring in someone else's opinion may be more congenial to colleagues. It certainly
involves less work than expressing one's own contrary opinion. 209 It may be this
‘dissent’ aversion that at least partly explains why this study found that there were less SF
in majority joint judgments than single dissent judgments, with judges perhaps
dampening down their own SF ‘views’ to reach judicial consensus.

These group cognitive ‘effects’ may not always affect the individual decision of a High
Court judge or their use and construction of SF. However, it is likely in light of the
existing research (including this study) that the group context in which High Court
decisions are made is one of the factors that can affect how judges make decisions and
how they use and construct SF. Recent research by Jason Pierce, for example, on the
institutional cohesion of the Australian High Court over time found that the identity of
the Chief Justice of the High Court may affect court cohesion which is measured by the

207 Ibid.
208 Ibid, 33. This may also be described as a conformity effect. See Martinek, above n 192, 82.
379; Andrew Lynch, 'Dissent: The Rewards and Risks of Judicial Disagreement in the High Court of

ratio of majority to dissent judgments.\(^{210}\) Court cohesion was also improved where the majority of the court were appointed by a Labour government.\(^{211}\) Where a court is highly cohesive, there will be more joint judgments and more ‘shared’ SF.

D. Summary

This section has discussed why it is likely, based on the extensive research in human cognition and the emerging empirical research into judicial cognitive behaviour, that judges are subject to bounded rationality and are affected by decision-making short cuts and other cognitive factors including grouping effects. Legal and institutional factors contribute to judicial bounded rationality by creating circumstances of complexity, uncertainty, time pressures and stress. This arises from the lack of clarity of the law, the inherent complexity of the judicial decision-making task, the volume of materials that must be processed in order to come to a decision at the appellate level, the lack of reliable SF material presented to the High Court to utilise in decision-making, and lack of institutional support in the High Court for judicial use of SF. In addition, judges are human and are unconsciously affected by cognitive factors including heuristics and biases and other cognitive factors including grouping effects. This section has argued that the results of the content analysis conducted as part of this study were consistent with the proposition that cognitive factors are a factor (in interaction with legal, institutional, individual and cultural factors) that affect judicial use and construction of SF.

\(^{210}\) Pierce, above n 200.

\(^{211}\) Ibid.
3. CULTURAL COGNITION AND JUDICIAL USE AND CONSTRUCTION OF SOCIAL FACTS

The personal political preferences (or ‘ideology’)\(^{212}\) and values of a judge are obvious possible influences on how that judge might use and construct SF. Chapter 6 discussed how the results of this study showed that SF about a range of matters\(^{213}\) tended to be predominantly aligned with a set of values which emphasise the role of the individual in society and individual responsibility, the importance of free enterprise, and the value of traditional social structures and social elites.\(^{214}\) The content analysis method adopted in this study did not directly investigate the effect of ‘ideology’ or judicial political preferences as a quantitative attitudinal study\(^{215}\) of the outcomes of cases might have done. However, the results of the content analysis do suggest that the ‘values’ of High Court judges can impact upon how they use and construct SF.

The influence of personal political preferences and personal values in judicial decision-making has been the focus of much recent and often heated debate in Australia.\(^{216}\) This

---

\(^{212}\) The term ideology is used in this study with its general meaning of ‘a systematic scheme of ideas, usually relating to politics, economics, or society and forming the basis of action or policy; a set of beliefs governing conduct.’ The Oxford English Dictionary <http://www.oed.com.libraryproxy.griffith.edu.au/> at 15 September 2011.

\(^{213}\) Australian society; individual responsibility, autonomy and accident prevention; risk; employment and the risks of employment; government, commerce, and insurance; and legal actors and legal institutions.

\(^{214}\) As Chapter 6 also discussed SF which stressed alternate values of communal responsibility, egalitarianism and social diversity tended to come mostly from judgments of Kirby J.

\(^{215}\) See discussion of the attitudinal and strategic theories of judicial decision-making in Chapter 7 Section 2.

debate has been philosophically based and has been largely devoid of discussion or reference to any empirical support for the proposition that Australian judges (or particular judges) in fact do rely unduly on ‘ideology’ or personal values. Despite this, those critical of the judicial use of personal ‘ideology’ and values have tended to proceed on the basis that some Australian judges are judicial activists and deliberately and consciously attempt to decide cases to achieve their own preferred policy outcomes.

Gava has christened such judges ‘hero judges’ and attributes to such judges an instrumentalist attitude borne out of dissatisfaction with the political landscape. 217 Justice Heydon, just prior to the appointment to the High Court, suggested there had been a change in the Australian judiciary in recent times. ‘There is within our ranks a large segment of ambitious, vigorous, energetic and proud judges. Ambition, vigour, energy and pride can be virtues. But together they can be an explosive combination.’ 218

There is relatively minimal empirical research on the impact of ‘ideology’ on judicial decision-making in the Australian High Court. 219 The results of this research seem to be

---

217 See Gava, ‘Hero Judges’, above n 216.
218 Heydon, above n 216, 9.
conflicting and sometimes tentative. There is some evidence that ‘ideology’ (if simplistically conflated to the political philosophy of the political party who appointed a judge) might sometimes be a factor in individual judicial behaviour. There is some, although not strong, evidence that some certain judicial characteristics might be relevant in explaining judicial behaviour. The Australian evidence to date could not be said to approach anywhere near the persuasiveness of the American evidence for the attitudinal theory\textsuperscript{220} even given the limitations of that theory. Even if it is accepted that judges in the Australian High Court do use ‘ideological’ values as part of judicial reasoning and this would affect how they use and construct SF in their judgments, a critical question remains. Does the evidence demonstrate that judges of the High Court deliberately and consciously use ideological approaches to judging, manifesting in the use and construction of ‘ideological’ SF? The Australian empirical evidence to date simply does not support that conclusion.


\textsuperscript{220} See discussion in Chapter 7 Section 2.
Recent American research suggests that ‘perceptions of fact are persuasively shaped by our commitments to shared but contested views of individual virtue and social justice.’²²¹ This can be called our ‘cultural worldview’.²²² This ‘cultural cognition theory’ has recently been applied to judicial decision-making and like judicial cognition literature suggests unconscious rather than conscious judicial reference to value judgments.²²³ There is no existing Australian research which applies cultural cognition scholarship to Australian courts, and this is one of the contributions made by this study. This section argues that the reflection of ‘values’ in judicial SF is better explained by the influence of cultural worldviews on judges in interaction with legal, institutional, individual, and cognitive factors, than by deliberate judicial use of political preferences, ideology or values.

A. Cultural Cognition and Judicial Use and Construction of SF

The available empirical evidence does not support the proposition that Australian High Court judges deliberately utilise personal ‘ideology’ or personal values in their judgments. However, the results of the content analysis conducted for this study provide some support for the argument that judicial SF align with cultural ‘world views’.²²⁴ Section 1 of this chapter argued that there were aspects of the identity of judges both as individuals


²²⁴ Edwards and Livermore, above n 192, 1963 while accepting the claims of cultural cognition scholars as plausible have argued ‘that it is far from clear, however, that empirical scholars will ever be able to meaningfully measure the effects of cultural cognition on appellate decisionmaking.’ The empirical measurement of the effects of cultural cognition on judges is an area requiring further research in the future.

and as lawyers and judges that potentially influenced their use of SF, and Section 2 discussed how cognitive factors could impact on judicial reasoning and judicial use of SF. Work emerging from the Yale Cultural Cognition Project\(^{225}\) adds another layer of explanation to how judges might reason and use and construct SF. It argues that judicial use of ‘values’ needs to be seen not as deliberate but as a result of ‘sub-conscious’ influence on cognition.\(^{226}\) Kahan argues that it matters whether judicial use of values is seen as deliberate (as the attitudinal model or Australian commentators like Gava and Heydon might suggest) or sub-conscious/unconscious. This is because understanding the process as unconscious ‘spares us from the disappointment associated with believing that judicial disagreement stems from self-conscious, and self-consciously concealed, political disregard for the law, but also it would supply us with tools for mitigating this form of judicial conflict.’\(^{227}\) Cultural cognition also gives an account of ‘how ideology actually works.’\(^{228}\)

Cultural cognition is ‘a species of motivated reasoning that promotes congruence between a person’s defining group commitments, on the one hand, and his or her perceptions of risk and related facts, on the other.’\(^{229}\) Cultural cognition interacts with and reinforces other cognitive factors, such as those discussed in Section 2. Kahan, Hoffman, Braman, Evans and Rachlinksi argue that there are a variety of cognitive


\(^{226}\) Kahan, Hoffman, Braman, above n 221, 899.

\(^{227}\) Kahan, above n 112, 421.

\(^{228}\) Ibid, 422.

mechanisms that ‘contribute’ to the effects of cultural cognition.\textsuperscript{230} These include individual’s tendency to evaluate empirical information in a way that is ‘congenial to their cultural values’, to ‘impute knowledge and expertise’ to others who share the same values as them and to note, recall and attach significance to ‘facts that are supportive of their cultural outlooks’ rather than facts ‘subversive of them’.\textsuperscript{231} Simply providing sound empirical evidence about a particular policy or factual proposition is unlikely to convince a person that it is ‘empirically sound information’ unless it accords with their cultural persuasion.\textsuperscript{232}

Kahan and Bra\textsuperscript{233}man draw on work in anthropology and psychology\textsuperscript{233} that classified individuals within particular cultural worldviews (Hierarchical, Solidarist/Communitarian, Individualist, Egalitarian).\textsuperscript{234} They argue that a person’s place within these cultural worldviews (their cultural orientation) predicts and explains an individual’s attitudes to particular policies and facts and their risk perceptions.\textsuperscript{235} Other

\begin{flushright}
\textsuperscript{230} Ibid.
\textsuperscript{231} Ibid.
\textsuperscript{232} Kahan, Braman, ‘Cultural Cognition and Public Policy’, above n 222, 149. They argue at 163-4 this occurs because of related psychological mechanisms including biased assimilation (the tendency to evaluate information based on conformity with prior beliefs), naïve realism (the tendency to view your own beliefs or those of your cultural group as ‘objective’ and those of others as ‘subjective’) and reactive devaluation (the tendency to dismiss the ‘persuasiveness of evidence’ offered by adversaries in a conflict).
\textsuperscript{233} They particularly draw on the work of Mary Douglas and Aaron Wildavsky. See Mary Douglas, \textit{Purity and Danger} (1966); Mary Douglas and Aaron Wildavsky, \textit{Risk and Culture} (1982).
\textsuperscript{234} Ibid, 151-2.
\textsuperscript{235} Ibid.
\end{flushright}

‘psychological mechanisms’ which support this include cognitive-dissonance avoidance,\textsuperscript{236} affect\textsuperscript{237} and ‘in-group/out-group’ dynamics.\textsuperscript{238}

As indicated below in Figure 8.1\textsuperscript{239} cultural worldviews are classified ‘along two dimensions’, ‘group’ and ‘grid’.\textsuperscript{240} Individualistic cultural orientations expect individuals to ‘secure their own needs without collective assistance’ and allow individuals ‘immunity from regulation aimed at securing collective interests’.\textsuperscript{241} Solidaristic or communitarian cultural orientations involve collective needs trumping ‘individual initiative’ and a society which is ‘expected to secure the conditions of individual flourishing’.\textsuperscript{242} Hierarchical cultural orientation favours a society ‘in which resources, opportunities, duties, rights, political offices and the like’ are distributed on the basis of particular social characteristics such as gender, class, lineage and race.\textsuperscript{243} Egalitarian worldview favours an egalitarian society which denies that social characteristics should determine ‘how resources, opportunities, duties and the like are distributed.’

\textsuperscript{236} Ibid, 153. This relates to the human tendency to evaluate information on the basis that it confirms existing beliefs and identity.

\textsuperscript{237} Ibid. This refers to the role of emotions in the human evaluation of phenomena.

\textsuperscript{238} Ibid. The tendency to conform to the beliefs of those whom you trust.

\textsuperscript{239} Ibid, 151. This is reproduced from the work of Kahan and Braman.

\textsuperscript{240} Ibid, 151. The results of their survey confirming the effects of these on the public is discussed at 155-158. Policy issues discussed included global warming, gun control, nuclear power, environmental pollution, drug criminalisation, abortion and business regulation.

\textsuperscript{241} Ibid.

\textsuperscript{242} Ibid.

\textsuperscript{243} Ibid.
Beliefs about policy issues and ‘facts’ cluster according to cultural worldview. For example, the more individualistic and hierarchical individuals are, the less they are concerned about issues such as global warming, nuclear power and environmental pollution, and the more destructive they think business regulation to be to economic prosperity. Social, cultural, racial, demographic and gender factors (of the type discussed in Sections 1 and 2) appear to be related to what cultural worldview an individual will adopt. For example, research has shown that white males are ‘more

---

244 Ibid.
245 Ibid, 156.
247 Kahan, Hoffman, Braman, ‘Whose Eyes’ above n 221, 860-4,870. See also Dan Kahan et al, ‘Culture and Identity Protective Cognition: Explaining the White Male Effect in Risk Perception’ (2007) 4(4) Journal of Empirical Legal Studies 465. This raises a number of possibilities for further research. These include
likely to hold certain anti-egalitarian and individualistic attitudes than members of the general population. This kind of research provides another way to understand why and how individual and cultural factors affect how an individual constructs SF.

Research from the Yale Cultural Cognition Project has found that cultural cognition explains a range of political differences over issues such as global warming, terrorism, gun-control, global warming, HPV vaccination of school girls, and attitudes to same sex parenting. Members of the project have also shown how cultural cognition may affect decision-making in legal contexts. They have found that cultural cognition affects how people respond to controversial self defence claims and how people assess the issue of consent in acquaintance rape cases. For example, egalitarians were more likely to believe, and hierarchs to disbelieve, that a battered woman who killed an abusive husband while he was asleep faced a genuine threat and had an honest belief she was in danger. Kahan, Braman and Hoffman recently studied how people assessed video evidence of a car chase in a criminal matter which had been heard before the United

whether lawyers as cultural group manifest particular cultural worldviews, whether the research that attempts to link social background, gender and ideology to judicial decision-making would be better conceived if it focussed on the effects of cultural worldviews more broadly, and whether there should be more diversity in judicial appointment. This is discussed further in Chapter 9.

Kahan, Braman, Gastil, Slovic, Mertz, above n 247, 466. Note however, Kahan, Braman, Gastil, Slovic and Mertz argue at 466-7 that it is not gender, racial or demographic differences as such that cause differing risk or fact perceptions, but rather the cultural worldviews adopted by an individual which themselves 'feature race or gender differentiation.'


Ibid.
Chapter 8: An Explanatory Framework for Judicial Use and Construction of SF: Individual, 
Cognitive and Cultural Factors

States Supreme Court. The Supreme Court found, by majority, that on the basis of the video no reasonable jury could have failed to believe that the defendant constituted such a risk to the public as to warrant the application of potentially lethal force by the police. Kahan, Braman and Hoffman found that hierarchical and individualistic white males were more likely to consider the video in that light than ‘egalitarians and communitarians of any race or gender. Although the majority of people might have shared similar views to the members of the Supreme Court, the perception of the videotape by the judges was not as neutral or as straightforward as the judges assumed.

The inevitable conclusion of all of this is that judges are likely affected by cultural cognition and process information in ways that accord with their own cultural world-views. However, judges are unlikely to recognise this and are likely to assume that any alternate views of relevant information are incorrect. They are impacted upon by ‘naïve realism’. This term, coined in social psychology, recognises that human beings are good at detecting when those who hold the opposite point of view are being influenced by their own cultural beliefs but poor at identifying the influence of their beliefs on their own views. This may lead to individual certainty about one’s own beliefs, however controversial and uncertain in reality, and contempt towards others beliefs.

253 See Kahan, Braman, ‘Whose Eyes’, above n 221. This article discusses Scott v Harris, 550 US 372, 127 S Ct 1769 (2007). The Supreme Court in this case also took the unusual step of posting a video of the car chase on-line in support of the decision.
255 Kahan, Braman, ‘Whose Eyes’, above n 221, 895.
256 Ibid.
Secunda has recently applied the cultural cognition theory to a number of United States Supreme Court labour and employment cases. He found that in this category of case there are a range of uncertain and contentious facts likely to give rise to disagreement. He found that the judicial decisions studied appeared to be based on speculative, inconclusive and uncertain evidence about a range of things including employer and employee motivations, efficiency in the workplace, and future effects on employment litigation. SF about similar matters identified in the content analysis conducted as part of this study were discussed in Chapter 6. Secunda argues that the prior cultural commitments of judges explain how these facts are likely to manifest at the end of these disputes. He found that factual statements of judges in the labour and employment cases he studied reflected particular cultural worldviews. Secunda supported the arguments of Kahan, Hoffman and Braman that cultural cognition is the mechanism by which judicial values influence the outcome of cases rather than deliberate judicial flouting of judicial process.

Critics of existing empirical approaches to judicial decision-making including the attitudinal model have accepted that cultural cognition offers the potential to better explain how the personal values of judges influence judicial decision-making. No empirical measure of the effect of cultural cognition on the Australian High Court has

\footnote{Secunda, above n 223.}{
\footnote{Ibid, 110.}{
\footnote{Ibid, 110-1.}{
\footnote{Ibid, 122-38. Some judges, for example Justice Scalia, interpreted facts in a way consistent with an individualistic and hierarchical cultural worldview. Other judges, for example Justice Marshall, interpreted facts in a way that reflected egalitarian and communitarian cultural worldviews.}{
\footnote{Edwards, Livermore, above n 192, 1962-3.}{
yet been undertaken. This is not surprising as the field is in its infancy in the United States. However, the effects of cultural cognition offer significant potential to explain how High Court judges use and construct SF in negligence cases. This study found that judicial reasoning in negligence cases includes judicial assertions about a whole range of SF based on uncertain premises with inconclusive or no evidence. It is these kinds of ‘facts’ that Secunda argues are likely to manifest the effects of judicial cultural cognition. The results of this study also suggest the likely effect of cultural cognition as a factor impacting on judicial use and construction of SF.

Chapter 6 discussed how SF identified in this study about Australian society, individual responsibility, autonomy and accident prevention, risk, employment and the risks of employment, government, commerce, and insurance and legal actors and legal institutions predominantly aligned with values associated with individualistic and hierarchical cultural worldviews. Where SF aligned with more communitarian or egalitarian values, they tended to come from a judgment of Kirby J. This raises a range of interesting questions for future research. For example, have the ‘shared’ legal cultural values and demographic backgrounds discussed in Section 1 of this chapter resulted in the majority of justices of the High Court exhibiting individualistic and hierarchical cultural worldviews? How does this play out in the wider legal profession? Is it the ‘differences’ in background of Justice Kirby discussed in Section 1 that result in him exhibiting more ‘communitarian and egalitarian’ values?

---

262 See Chapters 4 and 5.
At the end of Chapter 6, we asked the question whether it really matters that one particular set of values (which we now know align with individualistic and hierarchical cultural worldviews) predominated particular kinds of SF identified in this study. Chapter 6 suggested that it did matter for a number of reasons. First, it meant that other legitimate societal viewpoints were not recognised by the High Court which threatened its legitimacy. Second, it appeared to result in ‘missing’ SF and erroneous SF as discussed in Chapter 5. Kahan, Hoffman, Braman, Evans and Rachlinksi also argue that cultural cognition (or motivated cognition) pose an ‘obvious hazard’ for law for similar reasons to those discussed in Chapter 6. They suggest that cultural cognition threatens the neutrality and integrity of legal decision-makers who, as a result of cultural cognition, ‘unwittingly’ form ‘perceptions of facts’ which ‘promote the interests and values of groups with whom they’ have an affinity.’ Citizens who adhere to ‘disfavoured’ ways of life, suffer disadvantages as a result. We return in the final chapter to discuss the implications of this for judicial decision-making in Australian High Court negligence cases and possible reforms to ameliorate the effects of cultural cognition on judges.

**CONCLUSION**

Part 3 (Chapters 7 and 8) has proposed an explanatory framework for judicial use and construction of SF in negligence cases in the Australian High Court. Chapters 7 and 8 have argued that there are complex, inter-related and inter-dependent legal, institutional, cultural, individual and cognitive factors which affect judicial use and construction of SF. The process of judicial use and construction of SF can not be explained by a single

---

263 Kahan, Hoffman, Braman, Evans, Rachlinksi, ’They Saw a Protest’. above n 229, 3.
264 Ibid.
265 Ibid, 4. They refer to this as ‘cognitive illiberalism’.

factor—like judicial use and construction of SF is governed by legal or evidential principles. Rather, it needs to be seen as a process which occurs within particular legal, cultural and group contexts, involves individuals with their own personal experiences and social interactions and is (like other human decision-making) a human cognitive process which can be impacted upon by cultural worldviews. The factors associated with judicial use and construction of SF cannot be artificially separated. They are often interdependent. For example, this chapter has discussed how individual characteristics might influence a judge’s cultural worldview, how a judge’s cultural worldview might interact with, draw upon and influence particular cognitive mechanisms, how legal and institutional factors might contribute to judicial bounded rationality (inducing the use of cognitive factors which can lead to errors in reasoning) and how ‘grouping’ can influence cognitive factors and contribute to how an individual develops a cultural worldview.

Chapter 7 discussed how legal and institutional factors can affect judicial use and construction of SF. This chapter focussed on individual, cultural and cognitive factors. Section 1 discussed the influence of legal cultural identity and individual identity on judicial use and construction of SF. It argued that the relatively similar judicial approaches to use and construction of SF identified in this study could, in conjunction with other factors, be explained by shared legal cultural values (common to judges as lawyers, barristers and members of the judiciary) and by the similar demographic and social backgrounds of judges. Section 2 argued that cognitive factors can affect judicial use and construction of SF. It discussed the impact of judicial bounded rationality (contributed to by the legal and institutional factors discussed in Chapter 7), cognitive shortcuts and other cognitive factors (including group effects). Finally, Section 3 discussed how judicial values appear to influence some judicial use and construction of

SF in negligence cases. It argued that the emerging field of cultural cognition offers a better explanation for how the values of Australian High Court judges unconsciously affect their use and construction of SF, than theories which suggest deliberate judicial preference for political or policy preferences.

The process of judicial use and construction of SF is undeniably complex—understanding judicial use and construction of SF is not simple or easy. Judicial use and construction of SF is a ‘wicked’ problem. This is a lesson I have learned in this study. In that sense, the explanatory framework proposed by this study is deliberately ambitious drawing on some very recent (and as yet not always significantly empirically tested) ideas about judicial reasoning which incorporate the perspectives of non-legal disciplines about human and cultural cognition. Chapters 7 and 8 have shown how the framework is consistent with the results of the content analysis conducted as part of this study. However, the explanatory framework has also been developed as an object for further investigation and research in the future given the lack of existing research about how judges use and construct SF. Chapter 9 will discuss how responding to the complexity of the process of judicial use and construction of SF poses significant challenges to traditional understandings of judicial reasoning in negligence cases (and more broadly). The contribution of this study is to begin to recognise that complexity—to show us not only what we know but what we need to know more about.

266 This is discussed further in Chapter 9.
From the earliest negligence cases judges have used SF as part of their judicial reasoning.¹ Mrs Donoghue’s snail in the bottle founded a possible action in negligence partly because Lord Atkin made the SF assumption that manufacturers knew that ‘articles of common household use’ are used by people other than the purchaser.² Despite this, there has been very little investigation of how judges use and construct SF in negligence cases and existing discussions have tended to focus only on the use of ‘policy’. This study has aimed to fill that gap and to significantly contribute to knowledge by reconceptualising a role for SF in negligence cases, utilising an empirical method and by proposing an explanatory framework for judicial use and construction of SF. The study has examined the issue through the lens of three main research questions:

1. Do judges use SF in negligence cases in the High Court of Australia and how do they use and construct SF?

2. What factors explain judicial use and construction of SF and how do those factors impact upon judicial use and construction of SF?

¹ See for example the cases discussed in Chapter 1.

² Donoghue v Stevenson [1932] AC 562, 583.
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further

Research

3. What are the implications of judicial use and construction of SF for our understandings of judicial reasoning in negligence cases, and for accuracy of judicial reasoning?

The study utilised a content analysis method to study High Court negligence cases from 2001-2005. It found that SF do form a part of judicial reasoning in negligence cases particularly in high significance cases; that SF play a range of roles in judicial reasoning in negligence cases; and that most SF were drawn from judicial ‘common sense’. The study found that this can lead to judicial error and judicial use of inaccurate SF—for example SF which conflict with available empirical material. It can also lead to judicial failure to refer to SF which reflect the lives of those people most marginalised by the law. SF about a range of matters also predominantly stressed values associated with individualism, free enterprise and respect for traditional values and social elites rather than alternative values. The study developed an explanatory framework for judicial use and construction of SF. The basis of that framework was that there are complex inter-related and interdependent legal, institutional, individual, cognitive and cultural factors that explain judicial use and construction of SF in Australian High Court negligence cases. This chapter reviews those findings and importantly suggests they throw up major challenges to existing understandings of judicial reasoning in negligence cases and to understandings of what factors affect judicial reasoning in the High Court of Australia.

3 It is the first study to explicitly use a content analysis method to study High Court negligence decisions. Chapter 2 discusses the content analysis methodology adopted in this study including how cases were coded.

4 These include SF about Australian society; individual responsibility, autonomy and accident prevention; risk; employment and the risks of employment; government, commerce, and insurance; and legal actors and legal institutions. See the discussion in Chapter 6.
Judicial use and construction of SF could be described as a ‘wicked’ problem. Wicked problems are ‘complex, open-ended, and intractable.’ Both the nature of the “problem” and the preferred “solution” are strongly contested. Competing values and differences in attitudes pervade ‘wicked’ problems and they are resistant to quick, single, clear and agreed solutions. Wegner suggests that ‘wicked problems occur when the factors affecting possible resolution are difficult to recognize, contradictory, and changing; the problem is embedded in a complex system with many unclear interdependencies, and possible solutions cannot readily be selected from competing alternatives.’ The findings of this study and the explanatory framework developed in Chapters 7 and 8 suggest judicial use and construction of SF is a ‘wicked’ problem. It is beyond the scope of this study to suggest definitive reforms that will solve the ‘wicked’ problem of judicial use and construction of SF, or to construct a new theoretical framework that purports to accurately describe judicial reasoning in negligence cases. However, the chapter argues that this study provides valuable initial data that can be used to initiate and ground an Australian discussion about those issues. It is acknowledged the study was necessarily exploratory and has revealed areas where much further empirical research is required to

6 Ibid.
7 Ibid,102.
9 The very nature of a ‘wicked’ problem is that solutions can also be wicked — complex, interdependent, unclear, contested and uncertain.
begin to develop appropriate responses to those challenges. It is within that spirit that this chapter has been written.

Section 1 will summarise the findings of the study regarding how SF were used and constructed in judicial reasoning in negligence cases in the High Court from 2001-2005. Section 2 summarises the explanatory framework for judicial use and construction of SF proposed in Chapters 7 and 8. Section 3 argues that the accuracy and legitimacy of SF in judicial reasons can and should be improved, and suggests a range of options that could be considered to improve the accuracy and legitimacy of judicial reasoning in negligence cases. Section 4 argues that the results of the content analysis and the insights of the explanatory framework have implications for existing descriptive accounts of judicial reasoning in negligence law. Descriptive theorising about judicial reasoning in negligence cases needs to find a way to account for judicial use of SF. Finally, Section 5 considers issues that were identified during the course of the study which provide fertile ground for further empirical investigation and which might enhance discussions of how to improve judicial use and construction of SF.

1. SF ARE USED AND CONSTRUCTED BY HIGH COURT JUDGES IN NEGLIGENCE CASES

In one of the cases that was examined as part of this study, Woolcock St Invest v CDG Pty Ltd, Kirby J emphasised the critical role of ‘facts’ in modern Australian negligence law:

the one lesson that has emerged from recent Australian cases about the law of negligence is that the facts and the evidence, taken as a whole, are critical for the resolution of the issues presented by the tort. It is out of the detail of the facts that the ‘salient features’ and pertinent factors will emerge that help the decision-
This study has argued from the outset that we need to understand that the ‘facts’ that matter in judicial reasoning in negligence case are not just adjudicative facts (ie facts directly relevant to parties of an individual dispute) but also include SF. This section highlights the findings that judges did use SF in their reasoning in High Court negligence cases from 2001-2005 and how they used and constructed them.

A. How did Judges use SF in Australian High Court Cases 2001-2005?

Redefining SF

The starting point for this study was to define the term SF and to distinguish the term from other similar terms. In this study SF are statements about society, the world, and the nature and behaviour of institutions (including legal institutions) and human beings. They are statements made as part of judicial development and general application of law, rather than as part of adjudicative fact finding relevant only to the parties to a dispute.

Chapter 3 discussed how the concept of SF was informed by both existing literature, including the work of Davis (and his concepts of legislative and adjudicative facts) and Monahan and Walker (and their heuristic categories of social authority, social

12 Research Question 1 (f).
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

framework, and ‘social fact’) but also inductively from the data collected in the content analysis. Critically, the concept of SF developed in this study involves a distinction between the way judges used ‘facts’ in ways only relevant to parties to an action and the way they used facts more generally in their judicial reasoning when developing or applying law. The latter kinds of facts are ‘SF’. SF may come from a range of sources and it is not necessary that a judicial statement have an actual or notional empirical source. SF are not restricted to statements of human behaviour or to SF which have a basis in particular disciplines only.15

Roles for SF in Judicial Reasoning16

There is significant existing literature on the role of ‘policy’ or consequence based judicial reasoning in negligence cases.17 Early observations of data during the process of data


15 Chapter 3 discussed how the concept of SF was to be distinguished from similar terms used by Mullane and English. See Graham R. Mullane, 'Evidence of Social Science Research: Law, Practice and Options in the Family Court of Australia' (1998) 72(6) Australian Law Journal 434; Peter Wayne English and Bruce Sales, More Than the Law: Behavioral and Social Facts in Legal Decision Making (2005); Peter Wayne English, Behavioural and Social Facts in Legal Decision-making University of Arizona, (2003).

16 Research Question 1 (II).

collection in this study and the results of the content analysis discovered that High Court judges did not just use SF as part of ‘policy’ reasoning in negligence cases. Rather judges used SF in a number of different ways in their judicial reasoning. This study confirmed that SF were used by judges to provide context and background, to assess adjudicative facts (as ‘social framework’) and to make policy statements or statements about the consequences of liability. Existing discussion of ‘extra-legal’ concerns in judicial reasoning in negligence cases had neglected to account for the use of SF in these other ways.

**Do Judges Use SF and How Often?**

The content analysis study clearly confirmed that the High Court judges studied did use SF in their judgments in negligence cases. The study identified 1208 separate SF records in the 45 High Court decisions analysed. This was an average of 26.84 SF for every case studied, 7.65 SF for every judgment studied and one SF for every 5.52 paragraphs of text. Although the study identified widespread judicial use of SF, SF did not generally dominate judicial reasoning. Judicial reasoning in the negligence cases

---

18 See discussion in Chapter 3. For example in *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 485 [84], Kirby J stated that ‘Many Australians are as dedicated to cricket as the English.’

19 For example in *Cole v South Tweed Heads Rugby League Football Club* (2004) 217 CLR 469, 504 [125] Callinan J found in considering whether the defendant had breached a duty of care to an alcohol affected plaintiff ‘Forceful restraint was out of the question. No sensible person would ever remotely contemplate such a course, capable, as it would be, of leading to a physical altercation, an assault, and the possibility of criminal and civil proceedings in relation to it.’ (SF in italics).

20 For example in *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 117 [374] Callinan J stated that ‘Risk of action does no doubt conduce to the defensive practice of a profession, in turn leading to delay and unnecessary expense.’ (SF in italics).

21 See Research Questions 1 (III)–(IV). This was discussed in Chapter 4.

22 Research question 1(III). See Chapter 4 Section 1.

23 See Table 4.1. The 45 cases included 158 separate judgments and 6676 separate paragraphs of text.
relied predominantly on legal principles and values and adjudicative facts. The majority of text in negligence judgments overall were not statements of SF—as noted above there was an average of one SF statement for every 5.52 paragraphs of text.\textsuperscript{24}

However, when individual cases were considered it became apparent that judges did not use SF in all cases in the same way.\textsuperscript{25} There were clusters of cases where judges used SF much more frequently and clusters of cases where SF were little used.\textsuperscript{26} In high significance cases\textsuperscript{27} SF appeared to have quite an important role to play in judicial reasoning, while SF generally played little to no role in low significance cases. For example, the judgments in the leading and controversial wrongful birth case of \textit{Cattanach v Melchior}\textsuperscript{28} (a high significance case) included 167 SF, the highest number identified in the study. This could be compared with low significance cases like \textit{Czatycko v Edith Cowan University}\textsuperscript{29} and \textit{Manley v Alexander}\textsuperscript{30} which contained no SF. There were very significant differences between the average use of SF by judges in high significance cases and the

\textsuperscript{24} Of course this is still a relatively significant ‘average’ number of SF.
\textsuperscript{25} See Chapter 4 Section 2.
\textsuperscript{26} See Table 4.2.
\textsuperscript{27} Chapter 2 discusses how cases were coded as high significance, medium significance and low significance. High significance cases were those cases which would be considered the most complex and important from the perspective of the High Court, the legal profession and the academy. These cases were typically difficult and complex, related directly to one of the elements of negligence law, involved an unresolved or novel issue, involved 5-7 High Court judges, were reported in the CLR and were highly cited in cases and discussed in journal articles in the five years following the decision. Medium and low significance cases were typically cases of (relatively) lesser importance, difficulty and complexity, less likely to involve all of the judges of the High Court, less likely to involve novel, difficult and complex issues directly related to elements of negligence, less likely to be reported in the CLR, and comparatively less cited by other judges or written about by scholars in the five years following the decision.
\textsuperscript{28} \textit{Cattanach v Melchior} (2003) 215 CLR 1.
\textsuperscript{30} \textit{Manley v Alexander} (2005) 223 ALR 228.
average judicial use of SF in low and medium significance cases. High significance cases had on average 56.25 SF/case, with medium significance cases having only 12.9 SF/case and low significance cases 4.63/case.\textsuperscript{31} In addition, the majority of \textit{all} SF came from high significance cases (74.5\%) with only 22.4\% of SF from medium significance cases and only 3.1\% from low significance cases.\textsuperscript{32}

The number of SF in a case also appeared to be affected by the number of separate judgments in a case.\textsuperscript{33} Cases with a larger number of judgments tended to have a larger number of SF. The larger the number of judgments in a case, the larger the number of average SF in the case.\textsuperscript{34} The number of judgments in a case had a further effect. The more judgments there were in a case, the more SF there were in \textit{each} individual judgment.\textsuperscript{35}

**Do Judges Source SF and What Kind of Sources do they Use?**\textsuperscript{36}

The study found that judges mostly did not source or reference their SF statements in any way. Only 26\% of all SF used by judges were referenced or sourced.\textsuperscript{37} Although

\begin{itemize}
  \item \textsuperscript{31} See Graph 4.3.
  \item \textsuperscript{32} See Chart 4.4.
  \item \textsuperscript{33} See Chapter 4 Section 2.
  \item \textsuperscript{34} Graph 4.5. Six judgment cases had an average of 59.8 SF/case, five judgment cases an average of 43.22 SF/case, four judgment cases an average of 36.5 SF/case, three judgment cases an average of 13.88 SF/case, two judgment cases an average of 4.8 SF/case and one judgement cases an average of 2.38 SF/case.
  \item \textsuperscript{35} See Graph 4.6. Six judgment cases had an average of 9.9 SF/judgment, five judgment cases had an average of 8.64 SF/judgment, four judgment cases had an average of 9.13 SF/judgment, three judgment cases had an average of 4.63 SF/judgment, two judgment cases had an average of 2.4 SF/judgment and one judgment cases had an average of 2.38 SF/judgment.
  \item \textsuperscript{36} Research Questions 1(VI) and (VII). See discussion in Chapter 4 Section 3.
  \item \textsuperscript{37} See Table 4.7 and Chart 4.8. Only 351 SF were referenced in some way.
\end{itemize}
some unreferenced SF could have originated from undisclosed sources (e.g., expert evidence, parties’ submissions or judicial research), most were likely drawn from judges’ own general knowledge or intuition. Where judges did provide a reference or source for SF statements, these were mostly to case law or some other legal source. Judicial reference to empirical sources for SF was extremely rare—the study identified only 14 references to empirical material which accounted for only 4% of all references and only 1.16% of all SF. The study also found that empirical research that had not been introduced to a case through expert evidence, by the parties in submissions or was not drawn from an official government body was very unlikely to be used by judges in High Court negligence cases. In addition, the empirical sources used by High Court judges identified in this study were also not necessarily comprehensive or necessarily up to date.

**Individual Judges and SF**

There were significant commonalities amongst the High Court judges studied in relation to their use and construction of SF. All judges studied predominantly referred to legal principles and values and adjudicative facts in their judicial reasons, mostly gave no source or reference for their statements of SF, and where references were given these were mostly to cases or other legal sources. That said, there were some variations in how individual judges used and sourced SF, and these variations were most pronounced in relation to the judgments of Kirby J. The frequency of use of SF in judgments ranged from the 9.27 SF/judgment for Kirby J (the highest judicial user of SF) to 4.92

---

38 Table 3.9. 57% of references were to cases, 21.37% were to other sources (which included legislation, counsel’s submissions, and expert evidence), 17.66% were to secondary sources (predominantly legal journals and books) and only 4% of references were to an empirical source.

39 Research Question 1 (IV).

40 Table 4.11 and Table 4.12.
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

SF/judgment for Gummow J and 4.8SF/judgment for Gaudron J (the lowest judicial users of SF). The highest judicial users of SF (leaving aside the anomalous use of SF by Heydon J) namely Kirby J, Gleeson J and McHugh J had significantly more SF in single judgments than joint judgments. The lowest judicial users of SF had significantly more SF in joint judgments.

There were also some variations in how frequently judges referred to sources or references for their SF statements. Justices Gaudron, Gummow and Kirby were the most frequent users of a source for a SF. Gleeson CJ was the judge least likely to refer to a source or reference for a SF. Differences were also noted in the kinds of sources judges referred to. Gaudron J, McHugh J and Kirby J were the highest users of sources which were not case law or legal sources; however even they only used secondary sources, empirical sources or other sources for just over 14% of SF. Heydon J referred to non-legal sources the least — only 4.97% of his references were to secondary sources, empirical sources or other sources.

---

41 Table 4.11.
42 Chapter 4 Section 4 discussed how although Heydon J was the second highest judicial user of SF identified in the study (8.23 SF/judgment), he would have been one of the lowest judicial users if his highly criticised judgment in Cattanach v Melchior (2003) 215 CLR 1 was disregarded. It accounted for all his single judgment SF.
43 See Table 4.12.
44 Even those judges did not use sources for the majority of SF, with between 64.6% (Gaudron J) and 67.35% (Kirby J) SF unsourced or unreferenced.
45 See Table 4.12. Only 19.27% of Gleeson CJ SF were referenced or sourced.
46 Table 4.13.
Single/Joint Judgments, Dissent/Majority Judgments and SF

The study found that a number of other factors appeared to affect judicial use of SF. There were apparent ‘group’ and dissent effects in the results of the content analysis.\(^{47}\) Judges used SF more in single judgments than joint judgments, and more in dissent judgments than majority judgments. When these factors were combined (for example in a single dissent judgment) there were even greater effects on judicial use of SF. The frequency of SF in single judge judgments (8.54SF /judgment) was much higher than the frequency of SF in joint judgments (5.53 SF/judgment).\(^{48}\) In other words, judges in joint judgments and majority judgments relied less on SF and more on legal principles and values and adjudicative facts. As Chapter 4 noted, care needs to be taken not to overstate the implications of these apparent ‘group’ and dissent effects to High Court decision-making more generally. This is because many of the single judgments were by Kirby J, McHugh J and Gleeson CJ who were among the highest users of SF/judgment identified in the study, and Kirby J was very often in dissent. It is possible that the ‘group effect’ and/or the dissent effect seen in the results of this study are attributable to individual characteristics of those judges rather than the effects of grouping more broadly. That said, the findings do raise interesting possibilities about the effects of

---


\(^{48}\) See Table 4.14. Even greater effects could be seen when the factors of single judgment, joint judgment, dissent and majority were combined. See Table 4.18 and 4.19. For example the average number of SF in dissent single judge judgment was 11.74 compared to an average of 5.15 SF in joint majority judgments.
judicial grouping and judicial dissent on judicial use and construction of SF that could be explored in future research.49

B. How did Judges Construct SF in Australian High Court Cases 2001-2005? 50

One of the important findings of the content analysis was that judges most often referred to no sources or references for their SF statements and judicial use of empirical evidence for SF was very rare. How then did judges ‘construct’ SF in the High Court negligence cases studied? This study found that most SF used by judges were drawn explicitly or implicitly from judicial notions of ‘common sense’ or ‘common understandings’.51 As Chapters 5 and 6 argued, judges often tended to assume that their own ‘private’ constructions of knowledge were in fact commonly accepted ideas or views about SF. This occurred despite acknowledgment by High Court judges in some of the cases studied that there were dangers in judges applying their own understandings of ‘common’ social values or ‘common sense’.52

49 For example, whether grouping or dissent effects can be seen in a broader sample of High Court cases, and whether differing characteristics of the High Court affect grouping, dissent and use of SF (for example differences in the Chief Justice of the High Court and differing experiences of court cohesion over time).

50 Research Question 1 (VIII). See also Research Question 3 (II) in relation to accuracy of SF.

51 See Chapter 5 Section 1.

52 For example see De Sales v Ingrilli (2002) 212 CLR 338, 406 [192](Callinan J); Cattanach v Melchior (2003) 215 CLR 1, 64 [164] (Kirby J); Cattanach v Melchior (2003) 215 CLR 1,88 [242] (Hayne J); Neindorf v Junkovic (2005) 222 ALR 631, 634 [9] (Gleeson CJ); Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460, 511 [165] (Callinan J); De Sales v Ingrilli (2002) 212 CLR 338, 405 [192] (Callinan J). Chapter 5 Section 1 and Chapters 7 and 8 argued this occurred due to the interaction of legal, institutional, individual, cognitive and cultural factors. For example, the combined effect of cognitive dissonance and naïve realism might cause judges to paradoxically dismiss the reliability of the ‘common sense’ assessments of other judges while believing their own intuitive assessments to be ‘objective’.
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

It should come as little surprise that, like the rest of us, judges make intuitive ‘common sense’ assessments of how the world works. As Chapter 5 Section 2 acknowledged many ‘common sense’ judicial SF are likely to be uncontroversial. For example, ‘a supply of pure water is a feature of Australian domestic life. Living in houses connected to a water supply is not unusual in Australia’ is hardly likely to be contentious. However, not all ‘common sense’ SF identified in this study could be placed in this category. Not all ‘common sense’ SF could be characterised as value-free, certain, unlikely to attract criticism and as inherently likely to reflect a universally acceptable version of societal ‘common understanding’. Sometimes these SF formed a critical part of judicial reasoning. This study identified a number of dangers of judicial use of ‘common sense’ SF that can threaten the accuracy and legitimacy of judicial reasoning. SF can be wrong, can conflict with available empirical evidence or may be completely unsupported by empirical information. Relevant SF might be ‘missing’—judges may fail to consider or include SF which reflect the life experiences of groups marginalised by the law. Finally SF may reflect only particular sets of values, where there might be competing (and equally acceptable) versions of SF reflecting alternative values.

Common Sense Dangers

Chapter 5 discussed a range of examples that demonstrated how SF may be empirically inaccurate, incomplete or out of date, and how particular kinds or categories of SF might be missing from judgments. For example, in Cattanach v Melchior the judgment of Heydon J referred to a number of SF which were empirically inaccurate or unsupported, yet formed a major part of his reasons to reject the plaintiff’s claim. These included

---

53 Tepko Pty Ltd v Water Board (2001) 206 CLR 1, 54 [165] (Kirby J, Callinan J).
54 Cattanach v Melchior (2003) 215 CLR 1. This is the leading Australian case on wrongful birth actions.
assumptions that secrecy in adoption was protective of adopted children (when in fact openness in adoption is now widely supported) and that children would be emotionally harmed if they became aware of litigation in respect of their ‘wrongful birth’. \(^{55}\) In Koehler \(^{56}\) the High Court also made critical assumptions about the lack of foreseeability of stress related psychiatric injury in the workplace as part of reasoning declining a claim by an injured worker. \(^{57}\) These assumptions were substantially in conflict with Australian and international empirical evidence that had at that time been available for twenty to thirty years. \(^{58}\) The study also identified examples of some SF which were congruent with some aspects of available empirical evidence but which were incomplete or outdated in some respects. \(^{59}\) For example, SF about the changing financial and social status of women correctly identified some positive changes but tended to be ‘aspirational’ and failed to acknowledge or address the empirical evidence which still shows very significant disparities between the social and economic position of men and women in Australian society. In addition, SF about human credibility assessment correctly identified scientific evidence that calls into doubt the ability of judges to judge credibility on appearance. However the SF relied (via case law) on very old empirical evidence where more recent evidence had shown even stronger doubts about the capability of human credibility assessment.

\(^{55}\) See discussion in Chapter 5 Section 2.

\(^{56}\) Koehler \(^{56}\) the High Court also made critical assumptions about the lack of foreseeability of stress related psychiatric injury in the workplace as part of reasoning declining a claim by an injured worker. \(^{57}\) These assumptions were substantially in conflict with Australian and international empirical evidence that had at that time been available for twenty to thirty years. \(^{58}\) The study also identified examples of some SF which were congruent with some aspects of available empirical evidence but which were incomplete or outdated in some respects. \(^{59}\) For example, SF about the changing financial and social status of women correctly identified some positive changes but tended to be ‘aspirational’ and failed to acknowledge or address the empirical evidence which still shows very significant disparities between the social and economic position of men and women in Australian society. In addition, SF about human credibility assessment correctly identified scientific evidence that calls into doubt the ability of judges to judge credibility on appearance. However the SF relied (via case law) on very old empirical evidence where more recent evidence had shown even stronger doubts about the capability of human credibility assessment.

\(^{57}\) Ibid, 57 (McHugh J, Gummow J, Hayne J, Heydon J). See also Callinan J (65 [57]) regarding pressure and stress being a normal part of employment conditions.

\(^{58}\) See discussion in Chapter 5 Section 2.

\(^{59}\) Ibid.
Importantly the study also confirmed the relative exclusion of SF that reflected the life experiences of those already marginalised by the law including women, people with a disability, young people, elderly people, people not of white Anglo-Saxon/Anglo-Celtic heritage, and lesbian, gay, bisexual and transgender people.\(^{60}\) For example, the study identified very few SF which related to nature or incidence of disability in our community or the general lived experiences of those with disabilities. This was despite many cases studied involving plaintiffs with significant and often catastrophic disabilities following an injury.\(^{61}\) The experiences of ‘women’ tended to be subsumed into neutral expressions (eg ‘parent’) even where there would have been available empirical evidence showing how the experiences of women substantially differed from men and this would have been relevant in a particular case.\(^{62}\)

**Judges and Values**

One of the most significant findings of this study was that SF about a range of matters\(^ {63}\) were not ‘neutral’—there were ‘patterns’ in how judges constructed SF. This finding provided further evidence for claims made by others about ideological shifts in the Gleeson High Court\(^ {64}\) and was also consistent with neo-liberal trends in Australian social

\(^{60}\) See Chapter 5 Section 5.

\(^{61}\) In this respect this study supports the claims of disability theorists and disability studies scholars that the law and the legal system considers able-bodiedness as the ‘norm’ and fails to appreciate or acknowledge the lived experiences of people with a disability. See for example Arlene Kanter, ‘The Law: What's Disability Studies Got to do With it Or An Introduction to Disability Legal Studies’ (2011) 42 Columbia Human Rights Law Review 403.

\(^{62}\) For example, see the discussion of *Cattanach v Melchior* (2003) 215 CLR 1 in Chapter 5 Section 3.

\(^{63}\) Australian society; individual responsibility, autonomy and accident prevention; risk; employment and the risks of employment; government, commerce, and insurance; and legal actors and legal institutions.

\(^{64}\) For example see Harold Luntz, 'Torts Turn Around Downunder' (2001) 1 Oxford University Commonwealth Law Journal 95; Harold Luntz, 'Editorial Comment: Round-up of Cases in the High Court of Australia in
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

and public policy more broadly. SF predominantly reflected values which stressed the individual in society and individual responsibility, the importance of free enterprise, and the value of traditional social structures and social elites. These are values which align with individualistic and hierarchical cultural worldviews. SF which reflected these values tended to support arguments in favour of defendants rather than plaintiffs. SF which reflected values which stressed communal responsibility, egalitarianism and social diversity, and which supported arguments in favour of plaintiffs were far less frequent. They were almost always from judgments of Kirby J.


66 A 'cultural worldview' is a preference ‘for how society should be organised’. Dan Kahan, David Hoffman and Donald Braman, 'Whose Eyes Are You Going to Believe ? Scott v Harris and the Perils of Cognitive Illiberalism' (2009) 122 Harvard Law Review 837, 859. Individualist cultural worldviews expect people to ‘secure the conditions of their own flourishing without interference or assistance.’ Hierarchical cultural worldviews favour ordering ‘in which entitlements, obligations, opportunities, and offices are all assigned on the basis of conspicuous and largely fixed attributes, such as gender, race, lineage, class and the like.’

67 These values align with more solidaristic/communitarian and egalitarian cultural worldviews. A communitarian worldview support a social ordering ‘in which the interests of the individual are subordinated to the needs of the collective, which is in turn responsible for securing the needs of individual flourishing.’ An egalitarian worldview rejects that traditional ‘hierarchical’ distinctions or characteristics should affect social opportunities, entitlements and offices. See Kahan, Hoffman and Braman, above n 66.
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

SF about the changing nature of Australian society tended to continue to emphasise the significance or importance of traditional values and traditional social institutions. Similar to SF about the ‘changing’ lives of Australian women, SF about Australian society were ‘aspirational’ and very few SF mentioned continued social inequalities or continuing matters of significant social tension or disagreement. Individual responsibility and autonomy were strong themes in SF. SF tended to emphasise the need to avoid unnecessary burdens on defendants and defendant action and to suggest the need for plaintiffs to take individual responsibility for their injuries. Accident prevention and deterrence (which would have supported ‘communal’ approaches to liability) were not strong themes in SF. These SF were predominantly from judgments of Kirby J and McHugh J. Risk was a very significant theme in SF—Australian life was presumed to be inevitably and naturally ‘risky’. However, risk was linked to individual responsibility with plaintiffs expected to individually ‘assume’ or accept risk, rather than defendants respond to ‘risk’ collectively.

These themes continued in SF about employment and the risk of employment. SF about these matters predominantly aligned with values about ‘freedom’ of contracting in the workplace and the individual responsibility of workers to respond to the risks of employment. These SF suggest a shift from more ‘preventative’ approaches taken in

---

68 See Chapter 6 Section 1.
69 Ibid.
70 Chapter 5 Section 2.
71 Ibid.
72 Chapter 5 Section 3.
73 Chapter 5 Section 4.
earlier High Court workplace negligence cases and are incompatible with modern approaches to occupational health and safety. Kirby J was, however, more inclined than other members of the High Court to stress values of workplace accident prevention. SF about government, commerce and insurance also tended to stress the values of those ‘institutions’ to Australian life, the necessity to avoid undue burdens on those classes of defendants, and the need for avoidance of over-regulation and over-intervention. Again, where SF in these categories reflected values such as accident prevention, egalitarianism and defendant power and responsibility for risk, they were most likely to come from a judgment of Kirby J. The study also found that traditional views that the existence and nature of insurance was irrelevant in negligence cases did not prevent judicial reference to SF about insurance. However, contrary to what might have been assumed by commentators, insurance SF did not tend to favour plaintiffs. Instead (apart from those SF in Kirby J judgments) they favoured arguments which supported defendants and which suggested burdens on insurers.

SF about legal actors and legal institutions tended to align with values which support and revere the role of legal institutions and the legal profession. The ‘public’ interest in the administration of justice was a recurring theme through many negligence cases in 2001-

74 For example see McLean v Tedman (1984) 155 CLR 306, Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301, 309.
76 Chapter 6 Section 5.
77 Ibid.
78 Chapter 6 Section 6. This supports arguments made by others that judges tend in their reasoning (where relevant) to favour the interests of the legal profession. See for example Benjamin Barton, 'Do Judges Systematically Favour the Interests of the Legal Profession' (2007-8) 59 Alabama Law Review 453.
2005. These SF tended to reflect values that considered the legal system, the court system and legal institutions as critical parts of Australia’s social and governmental structure. Apart from some Kirby J SF, SF about the ‘public’ interest in administration of justice were not generally linked to factors that might have a personal effect on people like getting a ‘wrong’ or unjust outcome, wrongful imprisonment, or incurring legal costs. SF about personal injury litigation (apart from those of Kirby J) tended to assume that plaintiffs (and plaintiff lawyers) were likely to be litigious and were unlikely to assume personal responsibility for their own actions. These SF were consistent with the effects of negative (yet empirically unsupported) assumptions about a ‘blame’ culture that were circulating in the media and the community more generally during the period of this study. Finally, SF about barristers (particularly in judgments of McHugh J and Callinan J) suggested the importance and ‘special’ status of barristers in the legal system such that special protection was required to protect advocates from ‘burdens’ of liability.

In summary then, this study found that judges commonly relied on ‘common sense’ assumptions to ‘construct’ SF. This was, in reality, judicial extrapolation and application of ‘private’ knowledge to construct SF. Much of the time this did not appear to cause judicial use of highly contestable SF. However, the study found that there were particular threats to judicial accuracy and legitimacy of judicial reasoning that arose in certain circumstances. These included the use of empirically inaccurate, out of date or unsupported SF in cases where the SF formed a critical part of judicial reasoning. There were also certain kinds of SF which were ‘missing’ from judgments —these particularly concerned sectors of society traditionally disenfranchised by the law such as women and people with a disability. Judgments did not include SF which concerned all members of society. Finally SF were not always neutral —the study found a pattern of SF which
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

reflected a set of values which would not be shared by all members of society. Citizens with more communal or egalitarian value systems would find few SF in the High Court judgments studied (apart from those in the judgments of Kirby J) which would reflect how they understand their world.

**2. AN EXPLANATORY FRAMEWORK FOR JUDICIAL USE AND CONSTRUCTION OF SF IN THE HIGH COURT OF AUSTRALIA**

One of the significant contributions of this study is the development of an explanatory framework to account for how judges used and constructed SF in High Court negligence cases. This framework drew on the interpretivist epistemology and social constructionist approach adopted in this study and utilised both deductive and inductive theory building. The framework was consistent with the findings of the content analysis conducted as part of this study, but also provides a basis for future research. Chapters 7 and 8 proposed that judicial use and construction of SF must be seen as a complex dynamic process involving inter-related and interdependent legal, institutional, individual, cognitive and cultural factors. Judicial use and construction of SF is a ‘wicked’

---

79 Research Question 2 ‘What factors explain judicial use and construction of SF, and how do those factors impact on judicial use and construction?’ See discussion in Chapters 7 and 8.

80 The explanatory framework drew on existing literature about a range of matters including evidence law and judicial notice, legal culture and the legal profession, human and judicial cognition, empirical studies of judicial reasoning, and cultural cognition.

81 The explanatory framework was also informed by insights from the data collected in the content analysis conducted as part of this study.

82 It was recognised that in this sense this study was ‘exploratory’ and any models or frameworks developed in this study must be tested in future research.

83 This ‘multiple factor’ approach was distinguished from existing single factor explanations for judicial reasoning, such as that the ‘law’ or ‘ideology’ are the main factors in judicial reasoning. Chapter 7 argued
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

problem. Chapters 7 and 8 discussed each of these factors separately to aid discussion and to show the relevance of particular factors to particular findings of the content analysis. However, the chapters also argued that each of the factors were highly interdependent on others and could not be artificially separated out as the ‘sole’ cause of any single judicial SF. For example, legal and institutional factors may contribute to judicial bounded rationality. Judicial bounded rationality might induce the effects of cognitive factors such as heuristics and biases, including the effects of group determination. The cultural worldview of a judge (influenced in turn from factors such as individual judicial background, and ‘cultural’ background) could interact with the influence of cognitive factors.\(^{84}\)

A. Legal and Institutional Factors\(^{85}\)

A range of ‘legal’ factors might affect how judges use and construct SF. This study considered how the law more generally, legal principles and theory of private law, the principles of negligence law, and the rules of evidence including judicial notice affected judicial use and construction of SF in negligence cases. While these factors may constrain some judicial use of SF, they do not completely restrain judicial use of SF particularly in high significance cases. Chapter 7 argued that judicial reasoning in negligence cases was best understood using a modified realist-legal model—a model of judicial reasoning which recognises the predominant role of law and legal principles and adjudicative facts but also understands the significance of SF particularly in high significance cases. The

---

84 For example, a judge’s cultural worldview might interact with the availability heuristic to influence which ‘available’ source of information a judge placed most emphasis on in judicial construction of SF.

85 These were discussed in Chapter 7.
rules of evidence and doctrine of judicial notice did not prevent judicial use of SF. The common law doctrine of judicial notice and s 144 of the Evidence Acts had unclear operation in relation to judicial use of SF. They did not restrict judicial use of SF, but had some possible constraining effects.

There are also institutional features of the adversarial system and the High Court itself which potentially impact on judicial use and construction of SF. The adversarial system and the institutional features of the High Court do not facilitate the provision of reliable SF information to High Court judges. For example, the nature of the trial and appellate processes acts as a barrier to the receipt by High Court judges of SF information. Adversarial litigation is typically focused on the presentation of adjudicative facts rather than SF evidence, the appellate process does not explicitly provide for the provision of SF information to judges (and may restrict this information), lawyers are not well trained to appreciate the value of SF information or how to present or provide it, there is a small number of ‘voices’ who appear before the High Court, and there is little use in the High Court of submissions by interested third parties such as interveners and amicus curiae. Institutional features of the High Court added to these ‘barriers’ to good SF information. Overload factors such as High Court workload decrease judicial opportunity to closely consider SF material. The procedures and research facilities of the High Court are not well orientated to the provision of good quality SF information. Research assistance

86 Evidence Act 2008 (Vic); Evidence Act 2001 (Tas); Evidence Act 1995 (NSW); Evidence Act 1995 (Cth).
87 The better view as discussed in Chapter 7 is that these principles were designed for adjudicative fact finding so should not apply to SF at all.
88 For example in relation to the use of empirical material.
89 Chapter 7 Part 4 referred to the fact that many of the negligence cases studied involved the same two senior barristers.
(including from associates) is typically provided by legally trained personnel and is focused on legal research. In light of these factors it was unsurprising that High Court judges relied on their own ‘common sense’ as the basis for SF.

B. Individual, Cultural and Cognitive Factors

While Chapter 7 focused on those factors ‘external’ to judges, Chapter 8 focused on factors ‘internal’ to judges. It investigated the impact of individual, cultural and cognitive factors on judicial use and construction of SF. It argued that the effects of ‘legal culture’ and similar backgrounds helped to explain why the High Court judges in the study approached the use and construction of SF in broadly similar ways. Cognitive factors (including heuristics and biases) helped explain why judges often relied on ‘common sense’ as a basis for SF. The group environment of judicial deliberation also had the potential to affect judicial use and construction of SF. This was consistent with the findings of the content analysis that decision-making in groups tended to reduce judicial use of SF and induce greater reliance on legal principles. The effects of cultural worldviews was consistent with the findings of the study that showed that SF about a range of matters predominantly reflected values that stressed individualism, the importance of free enterprise and respect for traditional social structures and social elites.

Legal Cultural Factors and Individual Factors

Common identities and common cultural background can lead individuals to ‘apprehend facts in a similar way.’ The influence of common inculcation in the culture of the legal

---

90 Chapter 8 Part 1.
profession including the Bar and judiciary, and common individual backgrounds are likely to be part of the explanation as to why the content study found that judges used and constructed SF in broadly similar ways and constructed ‘common sense’ SF in similar ways. The culture of the Australian legal profession has a number of significant features including the focus on ‘thinking like a lawyer’, an ethos of adversarialism and a focus on the ‘law’ as the primary source of legal and judicial reasoning. Although there has been shifts in the culture and diversity of the legal profession over time, the culture of the contemporary legal profession (particularly the Bar and judiciary) continues to be criticised as male, elite, Anglo-Saxon, and heterosexual. While there have been welcome changes in the demographic composition of the legal profession, the elite levels of the Bar and the judiciary are still dominated by white, Anglo-Saxon, heterosexual older men. Judges have a notorious work ethic and work-life balance is an issue in the judiciary. The effects of these legal cultural factors were consistent with a number of findings of the content analysis. This included the predominance of legal sources for referenced SF, the positive reflection and affirmation of the interests of the legal profession in SF concerning legal institutions and legal actors, the lack of accurate recognition of SF concerning groups traditionally disenfranchised by the law (for example women) and inaccurate representations of what ‘reasonable’ responses to workload stress and pressure might involve.92

Chapter 7 also discussed how the High Court judges studied in the content analysis had broadly similar gender, geographic, racial, religious, educational, professional and social

92 For example see the discussion in Chapter 5 of SF concerning workplace stress in Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44.
backgrounds. Justice Gaudron was the only female justice on the High Court during 2001-2005 and she retired in February 2003 and only sat on ten cases in the study. These similar background factors are also consistent with the findings of the content analysis that judges generally used and constructed SF in broadly similar ways. However, the study did find that there were some differences in how judges used, sourced and constructed SF. These were most pronounced in the case of Kirby J. For example, he used SF more than other judges, sourced SF more than other judges and was a higher user of non-law sources for SF than most other judges. He was also more inclined to use SF which were consistent with solidaristic, communitarian or egalitarian cultural worldviews, while other members of the High Court were more likely to refer to SF which were consistent with individualistic and hierarchical cultural worldviews. This is consistent with some differences between Kirby J and other judges including his background in law reform, his work in human rights, anti-discrimination and support for minority groups including women and lesbian, gay and transgender groups.

**Cognitive Factors**

The explanatory framework proposed in this study recognised that judges, like other human decision-makers, are unconsciously affected by cognitive factors and illusions including decision-making shortcuts.\(^\text{93}\) Judging needs to be understood as at least partly an intuitive or unconscious cognitive process.\(^\text{94}\) As Chapter 8 argued, this has significant

---

\(^{93}\) Heuristics and biases.

implications for understanding judicial use and construction of SF by Australian High Court judges. Chief among these is that we should not generally assume that judges deliberately (or consciously) choose to favour or disfavour particular SF or to be deliberate users of poor quality SF. The findings of this study should not be considered as showing ‘poor’ judging. Rather, the findings should be considered as the result of the effects of cognitive factors on judges in interaction with legal, institutional, individual and cultural factors.

Judges are likely to be affected by judicial bounded rationality in their decision-making in the High Court. This ‘bounded rationality’ is contributed to by the legal and institutional factors discussed in Chapter 7. As noted earlier, the study found that high significance cases (where complexity and ambiguity were most pronounced) were the ‘kind’ of case where judges were most likely to refer to SF. Cases in the High Court involve judicial overload—judges are required to consider and process large amounts of written and oral material. The legal and evidential provisions regarding judicial use of SF are (as discussed above) unclear. The adversarial process and institutional nature of the High Court do not support the flow of quality SF information to judges. All these factors contribute to judicial ‘bounded rationality’ and create what might be called a ‘wicked’ environment for reliable and accurate judicial use of SF.


95 Perhaps we might even call these the ‘wicked’ cases.

Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

This ‘wicked’ environment contributes to and encourages judicial use of intuitive reasoning. In other words, it encourages judges to rely (as found in the content analysis) on their assumptions of ‘common sense’. Intuition can be a powerful aid to judicial decision-making and intuitive decision-making can foster accurate decision-making. However, as found in this study, it can also result in the use of inaccurate SF, empirically unsupported SF, ‘missing’ SF and SF which fail to recognise the perspectives of those traditionally disenfranchised by the law. This can occur as the result of various heuristics and biases. The availability heuristic can cause judges to over-rely on material easily available and accessible to them (like cases, ‘common sense’ and media articles) as sources for SF information. The representative bias can encourage judicial use of stereotyping. The hindsight bias can cause judges to over-estimate the risks plaintiffs should be aware of before they undertake an activity. The interaction of the optimism and egocentric biases were consistent with the findings of this study that judges were very confident to base SF on their own assumptions about ‘common sense’ or common understandings rather than seek out empirical support for SF. In addition, it might explain why the interests of the ‘legal profession’ or legal interests were favoured in SF about legal institutions, legal actors and the administration of justice.

The status quo bias was consistent with the findings of the study that where judges referred to sources for SF it was generally to legal sources such as case law— the sources with which they were most familiar. This occurred even though case law was not typically a reliable or accurate source for SF information, simply reproducing judicial common


The study did not find the same effect of judicial hindsight bias on assumptions about defendants. Rather judges were particularly keen to avoid the operation of the hindsight bias in relation to SF about defendant awareness of risks.
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

sense. The framing/anchoring heuristic could affect the way judges make estimates about consequences of liability such as the impact on litigation on particular kinds of defendants. This study found, as discussed in Chapter 6, judges were particularly keen to avoid burdening defendants including employers, business, public authorities and insurers. This study could not determine the actual effect of defendants’ submissions on judicial SF about defendants as it did not examine oral and written submissions to the High Court and compare them to the judicial reasons. The findings of this study were also consistent with the effects of grouping on judges. As discussed above, judges used SF more in single judgments and in dissent judgments, than in joint and majority judgements. Grouping seemed to moderate judicial use of SF.

Schauer has also argued that case law is a poor source of policy information for judges because appellate cases typically deal with the most complex and aberrant of circumstance. General policy predictions of consequence that flow from decisions about such cases may not be easily extrapolated to typical rather than aberrant cases. See Frederick Schauer and Richard Zeckhauser, 'The Trouble with Cases' in Daniel Kessler (ed), Regulation versus Litigation (2011) 45.

Chapters 4 and 8 noted care needs to be taken extrapolating the findings of this study about the effects of judicial grouping more broadly given the potential for other factors like individual judicial characteristics to also be at play. For example, many of the single dissent judges involved Kirby J, the highest overall user of SF identified in the study. This finding clearly does raise however the need for further research on the impact of judicial grouping on judicial decision-making in the Australian High Court.

Cultural Cognition

This study found, as discussed above, that judicial SF about a range of different matters predominantly reflected values which stressed the individual in society and individual responsibility, the importance of free enterprise, and the value of traditional social structures and social elites. SF which reflected values which stressed communal responsibility, egalitarianism and social diversity were far less frequent. They were almost always from judgments of Kirby J. One possible explanation for why judges emphasise particular ‘values’ in SF is that they are deliberately favouring a particular political preference or ideology in their judgment. Chapter 8 argued that a better explanation for the findings of this study was that proposed by cultural cognition scholars. Judicial preference for particular values should not be seen as usually deliberate. Rather, it is the result of particular cultural worldviews. Cultural cognition interacts with and reinforces other cognitive factors, including those discussed above. In addition, a person’s cultural

102 Australian society; individual responsibility, autonomy and accident prevention; risk; employment and the risks of employment; government, commerce, and insurance; and legal actors and legal institutions.

103 This is the underlying premise of the attitudinal theory of judicial decision-making. As discussed in Chapters 7 and 8, the existing Australian empirical evidence on this point is tentative and does not conclusively show a link between judicial ideology and outcomes in cases in the High Court. Even if the link could be shown, the existing evidence does not support the argument that judicial use of ideology is deliberate rather than unconscious.

Research

worldview might be influenced by or formed as a result of their individual and social backgrounds. In other words, cultural cognition might be the mechanism or vehicle by which the individual and legal cultural characteristics of judges (discussed earlier) manifest themselves into SF.

This study found that SF used by most members of the High Court about a range of matters predominantly stressed values which are aligned with individualist and/or hierarchical cultural worldviews. SF which were aligned with solidarist, communitarian or egalitarian worldviews were predominantly from judgments of Kirby J.

3. **Nudging SF Judging: Can the Accuracy and Legitimacy of SF Be Improved?**

As has been noted earlier in this study, much of the time SF used by judges may not present difficulties. Some statements of judicial ‘common sense’ may actually accord with what most people think. In many low and even medium significance cases SF do not play a significant role in judicial reasoning. However, this study has shown that we should care about the way in which judges use and construct SF in High Court negligence cases for a number of reasons. First, SF play an important role in the most important high significance cases in the High Court. These are the cases most likely to affect the overall direction of Australian negligence law and most affect Australian citizens. Second, this study has shown that the SF judges use can be wrong, incomplete and conflict with available empirical evidence. This presents problems when these SF form a significant part of judicial reasoning in a case and can affect the outcome of cases. Third, it is a problem that SF which reflect the experiences of significant numbers of Australians (including those most disenfranchised by the law) are simply left out of or minimised in
Research

judicial reasoning. Finally, the study found that SF about many matters were not ‘neutral’. They predominantly reflected values which were associated with individualistic and hierarchical cultural worldviews. This means that alternative values, such as those held by Australians who have egalitarian and communitarian cultural worldviews, were minimised. This threatens the legitimacy of judicial reasoning, because judicial reasoning favours values which are held by only some members of Australian society. Judicial use and construction of SF in negligence cases in the Australian High Court should be recognised and improved.

Thaler and Sunstein have suggested that it is appropriate to make changes to environments in which decisions are made so that people are encouraged to make better decisions—that is overcome the effects of their cognitive limitations and the effects of cognitive factors such as heuristics and biases.105 These changes are called ‘nudges’.106 Similarly, the literature on judicial cognition107 and cultural cognition108 also suggests that better judicial decision-making will occur if judges are able to overcome the effects of cognitive limitations and cultural cognition to the extent that these inhibit accurate and legitimate judicial reasoning. What are the changes that might respond to the legal, institutional, cognitive and cultural factors that this study has argued affect judicial use and construction of SF? Clearly given the complex and ‘wicked’ nature of judicial use and construction of SF any possible options for reform could not be single factor reforms—

105 Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth and Happiness* (2008). They refer to this as libertarian paternalism—it allows freedom of choice in decision-making while ‘nudging’ people to make decisions which will improve their lives.

106 Ibid.

107 For example see above n 94.

108 For example see above n 104.
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

for example require all parties to lodge Brandeis briefs or appoint more women to the bench. Only a complex suite of changes is likely to respond to the complex problem of judicial use and construction of SF. Even then, the best we might hope for is improvement in the accuracy and nature of judicial SF, not completely accurate judicial use and construction of SF.\textsuperscript{109}

A. Options for Responding to Legal and Institutional Factors

As Chapter 7 argued, legal factors including evidential rules and the doctrine of judicial notice do not restrain judicial use of SF however they do act as some constraint. The rules of evidence and doctrine of judicial notice do not appear to apply to judicial use of SF, but this area is unclear and there are possible constraints on judicial use of empirical material. In addition, adversarial and institutional factors do not support (and sometimes prevent) the flow of quality SF information to judges. There are a number of reforms which might be considered to respond to these problems.

Rules of Evidence and Judicial Notice

The rules of evidence could be amended to clarify that the doctrine of judicial notice and Section 144 of the Evidence Acts do not apply to SF.\textsuperscript{110} This would simply make the law consistent with what appears to be judicial practice. This could overcome the problems that occur when judges mistakenly apply these rules to reject the use of quality SF

\textsuperscript{109} In fact there could never be ‘completely’ accurate SF because many SF are uncertain and there are a range of SF where there might be acceptable but different versions of SF.

\textsuperscript{110} This suggestion is in contrast to the position of the Australian Law Reform Commission that s 144 might extend to adequately deal with SF. See Australian Law Reform Commission, ‘Evidence (Interim): Report 26’ (1985), 545-6; Australian Law Reform Commission, ’Uniform Evidence Law: Report 102 ’ (2005) [17.26].
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

empirical material and instead rely on unfounded common sense SF. It would also encourage specific discussion of how parties and judges should respond to and deal with what is now the ‘hidden’ problem of SF.\footnote{In the American context see Brianne Gorod, ‘The Adversarial Myth: Appellate Court Extra-Record Factfinding’ (2011) 61(1) Duke Law Journal 1. Gorod refers to the ‘adversarial myth’ that dominates the litigation system which assumes that facts only come to courts through evidence and submissions of parties. This can prevent appropriate consideration of how to respond to the ‘real’ issues surrounding judicial use of extra-record facts.}

Improving the Flow of SF Information

Methods could be considered to improve the flow of quality SF information to High Court judges. The findings of this study suggest this would only be likely to be required in the most important high significance negligence cases before the High Court and that the dangers of judicial over-reliance on SF generally have been over-exaggerated. The \textit{High Court Rules} \footnote{High Court Rules 2004 (CTH).} could be amended to allow judges who grant special leave to appeal cases to order that on appeal parties provide a summary of any relevant SF empirical material as part of their Written Submissions and/or Appeal Book. Given this material would be available before the hearing of the appeal to all parties, and each party could provide and respond to this material in advance, problems of notice would be overcome. Of course this does increase costs, but no more than for example providing detailed information regarding international precedent on an area. In addition, research support for judges could be expanded to include the provision of reliable empirical SF information. This could be done via a dedicated research service or in conjunction with...
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further

Research

the library.\textsuperscript{113} Similar services are available to the Commonwealth Parliament\textsuperscript{114} and the Family Court has access to the reports of the Australian Institute of Family Studies.\textsuperscript{115}

\textbf{Role of Expert Evidence}

This study identified that there was a role for expert evidence in providing SF information to the High Court. This raises issues that need to be considered further about how to encourage parties to better utilise expert evidence at earlier stages of proceedings to provide relevant SF information.

\textbf{Role of Third Parties}

There is clearly a role for further use of interveners and amicus curiae in the most complex high significance cases to the extent these parties could provide alternate SF information to judges.\textsuperscript{116}

\begin{itemize}
\item\textsuperscript{113} For example see the suggestions of Kenneth Culp Davis, ‘Judicial, Legislative, and Administrative Lawmaking’, above n 13.
\item\textsuperscript{114} The Federal Parliamentary Library provides a whole array of background notes and research papers which provide members of parliament with a summary of available research in a whole array of areas to provide more reliable information for law making. See Parliamentary Library, \textit{Research Papers} \url{http://www.aph.gov.au/library/pubs/rp/rp10-11.htm} at 25 October 2011. Current research includes marketing of junk food and obesity, paternalism in public policy, the transition to a digital television environment, and socio-economic indicators in Australian electorates.
\item\textsuperscript{115} This body was set up pursuant to the \textit{Family Law Act} 1975 (Cth) s 114 B to ‘promote, by the conduct, encouragement and co-ordination of research and other appropriate means, the identification of, and development of understanding of, the factors affecting marital and family stability in Australia, with the object of promoting the protection of the family as the natural and fundamental group unit in society.’
\item\textsuperscript{116} Gorod, above n 111, 69-71 makes even broader suggestions about altering rules of standing in litigation such that third parties who can provide high quality extra-record material could be involved at an early stage in litigation, for example during the trial of matters.
\end{itemize}
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

**Guidelines and Procedures for Empirical SF Material**

It might be necessary to develop guidelines (for example via case law, in legislation, or in judicial ethical guidelines\(^{117}\)) and procedures which assist judges to use empirical SF material appropriately. For example, guidelines could consider whether notice ought to be given to parties if a judge intends to rely on an empirical study which they have located through independent research, what the best methods of adducing SF material to the High Court might be, and what standards ought to apply in evaluating the quality of SF information.\(^ {118}\)

**Legal Education and Judicial Education**

As discussed in Chapters 7 and 8, typically lawyers and judges are not well trained in empirical methods or in the importance or use of non-legal materials. This is likely one of the many reasons why little empirical material is referred to in High Court cases by lawyers and judges. This raises the need for models of legal education and judicial education to include discussions of empirical methods and empirical materials and their value to law.\(^ {119}\)


\(^{118}\) See for example the discussion of this in the work of Monahan and Walker, above n 14. Gorod, above n 111, 71-3 also notes the necessity to respond to these matters.

Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

B. Options for Responding to Individual, Cognitive and Cultural Factors

Simply improving SF information flow\(^{120}\) to judges is not likely by itself to improve the way judges use and construct SF. This is because individual, cognitive and cultural factors also impact on how judges use and construct SF. Simply providing a judge with reliable empirical SF material does not mean the judge will read it, let alone believe it, rely on it, or think that it is in any way relevant to their judicial reasoning.\(^{121}\) For example, as discussed in Chapter 8, the effect of cultural cognition can be that judges (like other people) will simply dismiss empirical information to the extent that it is not consistent with their cultural worldview.\(^{122}\) In addition, the effects of ‘legal culture’ on judges may mean they dismiss non-legal SF information as an inappropriate source of judicial reasoning. Providing judges with even more material to process in order to reach a decision may simply increase cognitive load and judicial bounded rationality.\(^{123}\) This may prompt judges unconsciously and intuitively to rely on decision-making short-cuts (ie heuristics and biases) rather than deliberatively consider the application of empirical SF information.

\(^{120}\) Much existing literature (including that of Davis and Monahan and Walker) assumes that simply improving information flow to courts has the capacity to improve the way judges use extra-record facts. See for example the literature noted in n 111 and 113. See also Ellie Margolis, 'Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs' (2000) 34 University of San Francisco Law Review 197; Michael Saks, 'Judicial Attention to the Way the World Works' (1990) 75 Iowa Law Review 1011; Richard B Cappalli, 'Bringing Internet Information to Court: Of "Legislative Fact"' (2002) 75 Temple Law Review 99.

\(^{121}\) For example note the debate between McHugh J and Callinan J in Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460 about the relevance of ‘legislative fact’ material in that case. See discussion of this in Chapter 7 Section 3.

\(^{122}\) Chapter 8 discussed why this occurs, and in particular noted the effects of cognitive dissonance and naive realism.

\(^{123}\) See discussion in Chapter 8 Section 2.
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

It is a tricky business responding to those factors ‘internal’ to judges themselves. Some possible interventions to be canvassed below rely on broad changes to the legal profession and judiciary which may then have some trickle down impact at the level of individual judges. Other interventions might affect how individual judges are affected by cognitive factors and cultural cognition. Many of these possible ‘reforms’ are still tentative in the literature and are yet to be empirically verified as being effective in influencing judges. The following options for reforms might be considered or researched further.

Responding to Legal Culture and Individual Background

Chapter 8 argued that the effects of ‘legal culture’ and also the relative homogeneity of the individual backgrounds of judges are likely factors that affect how judges use and construct SF and in particular might explain why judges of the High Court tend to use and construct SF in broadly similar ways. Of course, this does not always have negative effects. However, to the extent that it does have negative effects (for example where it results in ‘missing’ SF, privileges the values and interests of the legal profession or encourages judicial reliance on ‘common sense’ which is really individual knowledge) this can only likely be impacted upon over time by systemic changes. These include changes in legal education, changes in legal professional training and movements to broader judicial diversity and judicial appointment. Greater judicial diversity should not be seen as a panacea however—it provides an opportunity for a range of SF views to come before the High Court but does not guarantee this will occur.124

---

124 Caution does have to be exercised to the extent that it assumed that simply appointing a more ‘diverse’ group of people to the High Court will necessarily result in a broader range of SF before the High Court. The argument that more women on the court would necessarily result in major changes to how courts
Acknowledging the Effects of Cognitive Factors and Cultural Cognition

Justice Mason, formerly President of the New South Wales Court of Appeal, argued in 2001 that the first response to countering unconscious judicial prejudice (contributed to by cognitive factors) should be to ‘come clean and get real.’ In other words judges should explicitly acknowledge they are like other human decision-makers and are likely to be affected by cultural factors and cultural worldviews. This is clearly the most important first step for responding to the impact of cognitive factors and cultural worldviews on judicial use and construction of SF. If we don’t understand and acknowledge how cognitive factors and cultural worldviews impact on judges, then nothing will or can be made decisions has not always been borne out in empirical work. See for example discussion in Rosalind Dixon, 'Female Justices, Feminism and the Politics of Judicial Appointment: A Re-Examination' (2010) 21 Yale Journal of Law and Feminism 297; Rosemary Hunter, 'Can Feminist Judges Make a Difference?' (2008) 15(1 and 2) International Journal of the Legal Profession 7; Rosemary Hunter, 'An Account of Feminist Judging' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), Feminist Judgments: From Theory to Practice (2010) 30. This is likely because 'individual' factors are only one factor that affect judicial reasoning. As identified in the explanatory framework proposed in this study judicial reasoning might be impacted by a whole array of other factors including the impacts of legal culture, cognitive factors, group determination, cultural worldviews, legal and institutional factors. These factors might moderate the influence of gender (and other individual judicial characteristics). Of course, this does not negate the necessity for diversity on the bench. It is desirable for many reasons including societal equity, that it increases the opportunity for different SF views to come before the High Court and that diversity in judicial panels has been shown to have positive effects on judicial group deliberation. See for example discussion in Nadia Jilani, Donald Songer and Susan Johnson, 'Gender, Consciousness Raising, and Decision Making on the Supreme Court of Canada' (2010-2011) 94 Judicature 59.


Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research
done to respond to the negative effects these factors may have on judicial use and construction of SF.  

**Responding to Cognitive Factors**

Guthrie, Rachlinski and Wistrich have argued that ‘eliminating all intuition from judicial decision-making is both impossible and undesirable because it is an essential part of how human brains function. Intuition is dangerous not because people rely on it but because they rely on it when it is inappropriate to do so.’ We need to accept that intuition will always be a part of judicial reasoning and in many cases may be both an accurate and efficient approach to judicial fact finding. However, as this study found and as Guthrie, Rachlinski and Wistrich also found in their work, inappropriate or excessive judicial reliance on intuitive reasoning (which involves unconscious judicial use of heuristics, biases and other cognitive factors) can lead to judicial error. Guthrie, Rachlinski and Wistrich suggest that intuition can also be the pathway by which ‘undesirable influences’

---

127 This clearly again raises the need for discussion of the impact of these factors in legal and judicial education. Chief Justice French has suggested that judicial education and professional development might mitigate the effects of cognitive illusions, see above n 125. There is some coverage of the effects of cognitive factors in judicial education programmes conducted by the Judicial College of Australia and other Australian judicial education bodies such as the Judicial Commission of NSW. See for example NJCA, ANU and Australian Academy of Forensic Sciences, *Conference: Judicial Reasoning: Art of Science? 7-8 February 2009* (2009) <http://njca.com.au/Professional%20Development/programs%20by%20year/2009/Judic%20reason%20public.htm> at 25 October 2011; NCJA, *National Judicial Orientation Program 2011* (2011) <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2011/web%20version%20NJOP%20Nov%202011.pdf> at 25 October 2011. However, of course this only likely impacts on judges who actually attend these programmes and are inclined to be receptive to thinking about judging in this way.

128 Guthrie, Rachlinski, Wistrich, above n 94, 5.
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

such as inappropriate gender and racial biases infiltrate judicial reasoning. They propose an ‘intuition-override’ model of judging which recognises both the intuitive and deliberative elements of judicial reasoning. Judges need not completely reject intuitive reasoning but should be encouraged to use deliberative reasoning to ‘verify’ their intuitive responses. In order to encourage this it is necessary to respond to the ‘wicked’ environment in which judges make decisions. Guthrie, Rachlinski and Wistrich also suggest judicial training in the effect of cognitive limitations and biases and statistics ‘increases the likelihood that individuals will make rational, deliberative decisions.’ Judges could be trained to recognise their own cognitive limitations and how to prevent the adverse effects of intuition.

There have been arguments that the appellate process itself and judges collegially deliberating together can limit the influence of inappropriate cognitive effects on

---

130 Ibid, 6-10. Intuitive processes are also referred to as ‘System 1’ processes and deliberative processes are also referred to as ‘System 2’ processes. See also discussion in Guthrie, Rachlinski and Wistrich, ‘Hidden Judiciary’, above n 94.
131 Ibid, 33.
132 Ibid. For example see the discussion above of responding to legal and institutional factors. Guthrie, Rachlinski and Wistrich also suggest (32-42) responding to other factors which might create judicial bounded rationality. They suggest expanding time to make decisions, writing opinions (although of course this is already a feature of High Court appellate cases) and using scripts and multi-factor tests. See also Hon John Irwin and Daniel Real, ‘Unconscious Influences on Judicial Decision-Making: The Illusion of Objectivity’ (2010) 43 McGeorge Law Review 1.
133 Ibid, 38. This could also include the provision of feedback via peer review.
134 Ibid, 42-3. Guthrie, Rachlinski and Wistrich note that their reforms are likely to increase the time and cost of judicial decisions but suggest that improvements in judicial accuracy may be worth the costs of reform. Maroney has also suggested reforms which would specifically respond to the impact of ‘affect’ (or emotion) on judicial reasoning. See Terry Maroney, ‘Emotional Regulation and Judicial Behaviour’ (2011) 99 California Law Review forthcoming; Terry Maroney, ‘The Persistent Cultural Script of Judicial Dispassion’ (2011) 99 California Law Review 628.
While these factors may have some dampening effect on judicial use of intuition as the basis for SF, they can not be said to be complete solutions to the problem of over-use of judicial intuition. First, as argued in Chapters 7 and 8, the current nature of the adversarial process, the appellate process and the institutional nature of the High Court may in fact create incentives (rather than disincentives) for judges to rely on their own intuition and ‘common sense’ as the basis for SF. In addition, as Posner has suggested, group deliberation does not adequately counter the effects of judicial intuition where the group of judges deliberating together share heterogeneous characteristics (for example as noted in Chapter 8 High Court judges share broadly similar demographic and legal cultural backgrounds).

**Responding to Cultural Cognition**

Just as scholars writing about judicial cognition have suggested that judges need to ‘deliberately’ acknowledge and respond to cognitive factors, so researchers attached to the Cultural Cognition Project have suggested that judges need to focus attention on responding to cultural worldviews. Kahan, Hoffman, Braman, Evans and Rachlinski have suggested that ‘judges throttle back.’ Judges should exercise ‘judicial humility’ where they ‘acknowledge the controversies before them’, and openly acknowledge other members of society may hold views or interpret facts in different ways. 

135 See French, above n 125; Edwards and Livermore, above n 47, 1963.


137 Kahan et al, ‘They Saw a Protest, above n 104.

C. Responding to Legitimate Judicial Uncertainty

Uncertainty is a natural and inevitable part of judicial reasoning in High Court cases. There will often be uncertainty about SF that are relevant to particular negligence cases. Judicial uncertainty about SF can occur for a number of reasons. First, it can occur because inadequate SF information has been presented to or located by the High Court. This was addressed above. Second, judges may be uncertain because even though SF material is available to the High Court, judges do not access it or use it due to the individual, cultural and cognitive factors discussed in Chapter 8. Responses to this are also discussed above. However, there will also be a range of SF where there is no clear or available empirical material, where empirical evidence is conflicting, or where it would be so costly or time consuming to obtain empirical information that it would simply not be efficient or productive. What is a High Court judge to do in those circumstances? As a starting point, judges should be wary of using their ‘common sense’ (for the reasons already discussed in this study) to fill that void and confidently state ‘uncertain’ SF as certain where there is considerable doubt as to whether that SF is accurate or not. Cane has suggested, in the context of discussing consequence based arguments, that where evidence is available a judge should either refer to it or give reasons why it should be ignored. 139 When evidence is not available or is not used by a judge, the judge should openly acknowledge the argument does not rest on actual ‘knowledge’. 140 If a judge does intend to rely on an uncertain SF as part of their judicial reasoning then clearly the best

---

139 Peter Cane, ‘Consequences in Judicial Reasoning’ in Jeremy Horder (ed), Oxford Essays in Jurisprudence (2000) 41. Cane also suggests that there should also be a consideration of what good decision-making criteria should be in cases of judicial ‘ignorance’.

140 Ibid.
course is to candidly acknowledge that SF in their written reasons to enable the SF to be scrutinised.\textsuperscript{141}

4. RECONCEPTUALISING A ROLE FOR SF IN THEORIES ABOUT JUDICIAL REASONING IN NEGLIGENCE CASES\textsuperscript{142}

As discussed in Chapter 2, in recent years there has been an increased scholarly focus on theories of tort law and negligence law which focus on ‘pure’ or monistic theories of judicial reasoning, particularly those based on versions of corrective justice or on theories of rights.\textsuperscript{143} These corrective justice and rights based theories share some common features. Of importance to this study, they typically suggest that judicial reasoning in negligence cases should be focused only on factors relevant to the particular individuals to a dispute (ie adjudicative facts). \textsuperscript{144} Cane has argued of justice theorists that they ‘seem united in the idea that private law is best understood “non-instrumentally”, as a relatively autonomous universe of normative discourse based on concepts such as “rights”, “wrongs”, “responsibility” and, of course, “justice”’.\textsuperscript{145} This leaves little (or no) room to recognise judicial assertions of SF, which by definition in this study exclude adjudicative facts and encompass wider ‘facts’ about the world (including matters traditionally considered as ‘policy’ concerns).

\textsuperscript{141} Monahan and Walker, ‘Empirical Questions’, above n 14, 593. Monahan and Walker acknowledge this approach allows for revision in light of future developments in science but may also stimulate future empirical research.

\textsuperscript{142} Research Question 3 (I).


\textsuperscript{145} Ibid.
It is beyond the scope of this study (which does not purport to deliver a new ‘high’
type of tort law) to engage in debate about the extent to which corrective justice and
rights-based theories (or other monistic instrumentalist theories)\textsuperscript{146} of judicial reasoning
in negligence cases are normatively desirable, or ‘ought’ to be aspired to by judges in their
judicial reasoning.\textsuperscript{147} However, the findings of this study have ramifications for these
theories to the extent that they purport to be accurate descriptions of judicial reasoning
in negligence cases. If theories of judicial reasoning in negligence cases aspire to be
‘descriptive’ of how judges actually reason rather than just ‘aspirational’ then they need to
be responsive to empirical evidence about the nature of judicial reasoning in negligence
cases.

There are reasons to suggest that most theorising about judicial reasoning in negligence
law is not empirically informed. Cane has suggested that ‘many contemporary theorists
show little or no interest in empirical studies of legal phenomena’ and that justice
theorists in particular ‘focus almost entirely on legal doctrine, and ignore legal
institutions, and the practical operation and implementation of the law.’\textsuperscript{148} He asks ‘can a
theory of tort law that ignores such data — either because it focuses on doctrine or
because it understands the “practices” of tort law only in terms of the resolution of tort

\textsuperscript{146} For example economic theories.

\textsuperscript{147} Although see convincing critiques of these theories which suggest tort law, including negligence law, is
better understood as involving the interaction of a plurality of factors. Scott Hershovitz, ‘Harry Potter and
the Trouble with Tort Theory’ (2010) 63 Stanford Law Review 67; Tim Kaye, ‘Rights Gone Wrong: The
Economic Loss: Lessons from Case-Law Focussed Middle Theory’ (2002-3) 50 University of California Law
Review 531.

\textsuperscript{148} Cane, above n 144, 208.
claims by courts – be a good theory of tort law?149 Importantly for this study, Cane has also noted that ‘theorists generally pay little or no attention to the nature of judicial reasoning and the law-making process’ and that ‘both economic theorists and litigation-focused justice theorists understand the activities of courts in the area of private law primarily in terms of the resolution of individual disputes largely ignoring the judicial decision-making task’.150 He notes that economic theorists and critical analysis theorists typically focus on court decisions and the ‘rules’ on which they are based, ‘at the expense of the reasoning and argumentation offered by courts’.151 Similarly, while justice theorists may stress the importance of judicial reasons ‘their accounts of the law more or less ignore the contingency or contestation that is characteristic of judicial reasoning.’152

Others have also critiqued ‘pure’ theories of tort law (including theories of judicial reasoning in negligence cases) to the extent that they purport to describe judicial reasoning based on anecdotal or selective use of cases. For example, Kaye has recently argued that ‘fundamentalist’ tort theory is marked by a tendency for ‘too many theorists’ to ‘resort to re-writing or re-engineering the case law.’153 Stapleton has suggested that ‘high theorists tend to ignore, or dismiss as “wrong”, precedents that do not fit the pure theory.’154 Stapleton believes that the most ‘illuminating critiques of legal reasoning in

---

149 Ibid.
151 Ibid.
152 Ibid. Cane notes that ‘it is only by ignoring the dialectical nature of the common law that austerely formalistic, conceptual accounts of private law (of which Weinrib’s is the leading example) can be made to appear at all plausible.’
153 Kaye, above n 147, 934. See his critique of the work of Robert Stevens on these grounds at 959–66.
154 Stapleton, above n 147, 533.
case law’ is ‘case-law-focused’ “middle theory”.\textsuperscript{155} This is theory that emerges from ‘the messiness of real-world judicial reasoning from case law.’\textsuperscript{156}

This study then, as a detailed empirical study of negligence cases in the High Court of Australia from 2001-2005, provides the possible starting point for examining what ‘actual’ features of judicial reasoning need to be accommodated in descriptive middle range theoretical accounts of judicial reasoning. What lessons for the future of theories about judicial reasoning in negligence cases do the results of this study have? What factors would a potential future ‘descriptive theory’ of judicial reasoning in negligence cases have to accommodate?

- Descriptive accounts of judicial reasoning in negligence cases need to move beyond existing false dichotomies between unrestrained ‘instrumentalist’ policy concerns, and adjudicative facts and legal concerns. They must recognise the distinct role of SF in judicial reasoning in negligence cases and the different ways SF are used (ie as context and background to judicial reasons, as part of evaluation of adjudicative facts, and as part of prediction of policy consequences).

- The findings of this study suggest that SF are used by judges in a multiplicity of different ways. Descriptive theories of judging must accommodate the idea that there are pluralities of concerns that influence judicial reasoning in negligence cases.

\textsuperscript{155} Ibid, 532.

\textsuperscript{156} Ibid. She suggests this type of theorising is also more acceptable and useful to the judiciary than ‘high’ theory.
Descriptive theories of judicial reasoning in negligence cases need to accommodate and reflect the influence of institutional, individual, cultural and cognitive factors on judges. Theories of judicial reasoning in negligence cases which suggest that only legal principles or legal concerns (such as rights or corrective justice) impact on judicial reasoning remain incomplete descriptive accounts.

Descriptive theories of judicial reasoning in negligence cases should build on and reflect empirical research on judicial reasoning in negligence cases and judicial reasoning more generally. To the extent that descriptive theories of judicial reasoning in negligence cases ignore broader empirical work on judicial reasoning they are incomplete. While there are particular concerns which are ‘special’ to private law and negligence judging, private law and negligence judging should been seen as a species of judging more generally.

5. WHAT WE DON’T KNOW: AREAS FOR FURTHER RESEARCH

As in all empirical studies, there were inherent limitations in this study. It used a content analysis methodology to study negligence cases in the High Court from 2001-2005. Given no other studies have been conducted of the use and construction of SF in the High Court, the findings of this study are necessarily exploratory. They provide the foundation for future research. During the course of this study gaps in existing research were also discovered, identifying future fertile areas for research. This section identifies some of the more important areas for possible future research identified as a result of this study:
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research

- As discussed at various points in this study, the empirical research on Australian judicial decision-making is relatively sparse although in recent years there has been an increase in empirical work. Despite a large Australian literature on matters such as the appropriate limits of judicial decision-making and judicial activism, there is very little empirical Australian work on what judges actually do. This leaves Australian debates on the nature of judging largely uninformed and raises the potential for much future empirical work.

- This study was the first explicit study of SF in the Australian High Court. It focused only on negligence cases from 2001-2005. This raises the potential for further research which considers how High Court judges use SF in different kinds of cases (for example constitutional cases), in different time periods, under the leadership of different Chief Justices and with different compositions of the High Court. This would allow a consideration of whether the findings of this study are consistent with overall patterns of judicial use and construction of SF in the High Court and whether there are factors which influence differing results (for example do different Chief Justices affect how the High Court use and construct SF, does the High Court use and construct SF differently in other kinds of cases, can the grouping effects shown in this study be replicated in different samples etc).

- Future research could also investigate whether and how trial court and lower appellate court findings of SF influence judicial use and construction of SF in the High Court.

- There was some evidence in the findings of this study that expert evidence and oral and written submissions of parties might influence how judges use and
construct SF in the Australian High Court. Future research could study and compare SF in counsel submissions and documents and in transcripts and affidavits of expert witnesses and compare these with SF in judicial reasoning.

- Unlike the United States research on Supreme Court clerks, there is very little existing research on High Court associates, or on whether and how High Court associates influence and interact with their justices. This is an area for future possible research.

- Since 2005 the gender balance of the High Court has substantially improved with the appointment of Justices Crennan, Kiefel and Bell. Future research could investigate whether changing gender dynamics on the Australian High Court alters how the High Court uses and constructs SF.

- While it appears there is some judicial acceptance that cognitive and cultural factors can affect judicial reasoning in Australian courts, there is little existing empirical research which investigates this. Given the emerging American research in this area this is a particularly important area for future empirical work. Future work in this area could also investigate the extent to which individualistic and hierarchical cultural worldviews are represented in the Australian legal profession and judiciary, given the strong effects these seemed to have on judicial construction of SF in this study.

- This study showed that grouping and dissent had effects on judicial use of SF. This raises the need for further research on how grouping and dissent affect judicial use and construction of SF, and judicial reasoning more generally.

- This study found that High Court judges tended to have negative perceptions of personal injury lawyers and personal injury plaintiffs. Given the rise of tort
reform in Australia and the more stringent approach being taken to plaintiff claims over the last decade, the pervasiveness of these perceptions and their effect on outcomes for plaintiffs is an important area for future research.

- This was a study of appellate High Court cases. Future research could focus on whether and how trial court and lower appellate courts use and construct SF and whether this differs from the High Court of Australia.

- As discussed in Chapter 2, there has been very little use of a content analysis method to study judicial decision-making in Australia. This opens the possibility for further development and application of this method to study Australian judicial decision-making.

CONCLUSION

It should not come as a surprise to us that this study found that judges are like us and other human beings—we talk about the world we think we know. Our own lives and our own experiences are the benchmark for what we think is true, admirable and objective. Very rarely (or never) do we consult empirical evidence to see if we are right. But judges of the High Court of Australia carry out decision-making tasks which other citizens do not. They decide cases which have lasting impact on the negligence law of Australia and the lives of Australian citizens. Their words about the world speak to others in the Australian community. Those words signify whose views matter and whose do not, and whose interests matter and whose do not. For these reasons, we need to consider how we can improve judicial use and construction of SF in Australian High Court negligence cases.
Chapter 9 Wicked Problems, Wicked Solutions: Summary, Implications, Reforms and Further Research
A. ARTICLES/BOOKS/REPORTS


Adler, Michael, 'Recognising the Problem: Socio-Legal Research Training in the UK' (2007)


Australian Human Rights Commission, 'Accumulating Poverty? Women's Experiences of Inequality over the Lifecycle' (2009)


Beck, Ulrich, Risk Society-Towards a New Modernity (1992)

Beever, Allan, Rediscovering the Law of Negligence (2007)

Bellot, Jennifer, 'Defining and Assessing Organizational Culture' (2011) 46(1) Nursing Forum 29

Benforado, Adam, 'Colour Commentators of the Bench' (2011) 38 Florida State University Law Review forthcoming

Bernet, Rudolf, 'Unconscious Consciousness in Husserl and Freud' (2002) 1 Phenomenology and the Cognitive Sciences 327

Blackshield, Tony, 'Quantitative Analysis: The High Court of Australia 1964-1969' (1972) 3 Lawasia 1

Blackshield, Tony, 'X/Y/Z/N Scales: The High Court of Australia' in Roman Tomasic (ed), Understanding Lawyers (1978) 133


Braman, Donald and Kahan, Dan, 'Legal Realism as Psychological and Cultural (Not Political) Realism' in Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (eds), *How Law Knows* (2007) 93


Burns, Kylie and Hutchinson, Terry, 'The Impact of "Empirical Facts" on Legal Scholarship and Legal Research Training' (2009) 43(2) Law Teacher 153


Cane, Peter, 'Searching for United States Tort Law in the Antipodes' (2011) 38 Pepperdine Law Review 257

Cane, Peter and Kritzer, Herbert, The Oxford Handbook of Empirical Legal Research (2010)


Chew, Pat, 'Judges' Gender and Employment Discrimination Cases: Emerging Evidence-Based Empirical Conclusions' (2011) 14 *Journal of Gender, Race and Justice* 359

Cochran, Cathy, 'Surfing the Web for a "Brandeis Brief": The Internet and Judicial Use of Legislative Facts' (2007) *Texas Bar Journal* 780


Coper et al, Michael, 'Multiple Opinions Project - Report' (ANU College of Law, National Judicial College, 2010)

Corley, Pamela, 'The Supreme Court and Opinion Content: The Influence of Parties' Briefs' (2008) 61 *Political Research Quarterly* 468


Cousins, Rosanna et al, 'Management Standards' and Work-Related Stress in the UK: Practical Development' (2004) 18(2) *Work and Stress* 113

Cownie, 'Legal Education and the Legal Academy' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (2010) 854


Cross, Frank and Nelson, Blake, 'Strategic Institutional Effects on Supreme Court Decisionmaking' (2001) 95 Northwestern University Law Review 1437


Davis, Peggy C., "'There is a Book out...': An Analysis of Judicial Absorption of Legislative Facts' (1987) 100 Harvard Law Review 1539

Deering, Rebecca and Mellor, David, 'Sentencing of Male and Female Child Sex Offenders: Australian Study' (2009) 16(3) Psychiatry, Psychology and the Law 394


Dominello, Francesca and Neumann, Eddy, 'Background of Justices' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007)

Douglas, Mary, Purity and Danger (1966)

Douglas, Mary and Wildavsky, Aaron, Risk and Culture (1982)


Dworkin, Ronald, Law's Empire (1986)

Dworkin, Ronald, Taking Rights Seriously (1977)


English, Peter Wayne and Sales, Bruce, More Than the Law: Behavioral and Social Facts in Legal Decision Making (2005)


Epstein, Lee and Martin, Andrew, 'Quantitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), The Oxford Handbook of Empirical Legal Research (2010) 901


Faigman, David L, 'To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy' (1989) 38 Emory Law Journal 1005


Freeman, Michael (ed), Law and Childhood Studies (forthcoming)

Furphy, Joseph, Such is Life: Being Certain Extracts from the Diary of Tom Collins (1903)

Galanter, Mark, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) Law and Society Review 95


Gava, John, 'Another Blast from the Past or Why the Left Should Embrace Strict Legalism: A Reply to Frank Carrigan' (2003) 27(1) Melbourne University Law Review 186


Graycar, Reg, 'Judicial Activism or 'Traditional' Negligence Law? Conception, Pregnancy and Denial of Reproductive Choice' in Ian Freckleton and Kerry Peterson (eds), Disputes and Dilemmas in Health Law (2006) 436


Graycar, Reg, 'Sex, Golf and Stereotypes: Measuring, Valuing and Imagining the Body in Court' (2002) 10 Torts Law Journal 1


Guilfoyle, Kate, 'McHugh, Michael' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007)


Hart, H L A, The Concept of Law (1962)

Hasluck, Nicholas, 'Callinan, Ian' in The Oxford Companion to the High Court of Australia (2007)

Hastie, Reid and Dawes, Robyn, Rational Choice in an Uncertain World: The Psychology of Judgment and Decision Making (2nd ed, 2010)

Head, Brian, 'Wicked Problems in Public Policy' (2008) 3(3) Public Policy 101


Herald, Marybeth, 'Deceptive Appearances: Judges, Cognitive Bias and Dress Codes' (2007) 41 University of San Francisco Law Review 1


Hesse-Biber, Sharlene Nagy and Leavy, Patricia, The Practice of Qualitative Research (2006)


Heydon, Hon J D, 'Developing the Common Law' in Justin Gleeson and Ruth Higgins (eds), Constituting Law: Legal Argument and Social Values (2011) 93


Hill, Graeme, 'Hayne, Kenneth Madison' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007)

Hitchcock, Jan, 'Gender Differences in Risk Perception: Broadening the Contexts' (2001) *Risk: Health, Safety and Environment* 179


Howard-Wagner, Deirdre, 'Who are the Real Heroes and Villains: The Print Media's Role in Constructing the Public Liability Crisis as a Moral Panic Drama' (2006-2008) 10(1) *Newcastle Law Review* 69


James, Nick, 'Expertise as Privilege: Australian Legal Education and the Persistent Emphasis Upon Doctrine' (2004) 8(8) University of Western Sydney Law Review 1


Jilani, Nadia, Songer, Donald and Johnson, Susan, 'Gender, Consciousness Raising, and Decision Making on the Supreme Court of Canada' (2010-2011) 94 Indicature 59


Kahan, Dan, 'Fixing the Communications Failure' (2010) 463 Nature 296


Kahan, Dan, 'Two Conceptions of Emotion in Risk Regulation' (2009) 156 University of Pennsylvania Law Review 741


Kahneman, Daniel and Tversky, Amos, 'On the Psychology of Prediction' (1973) 80 Psychology Review 237
Kalowski, Henrik, 'Gaudron, Mary Genevieve' in Michael Coper, Tony Blackshield and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2007)


Kendall, Christopher, 'Psychological Distress and Depression in the Legal Profession: Summary of Report' (2011) 38(5) *Brief* 8

Kendall, Elizabeth et al, 'Occupational Stress: Factors that Contribute to its Occurrence and Effective Management: A Report to the Workers' Compensation and Rehabilitation Commission Western Australia' (2000)


Kirby, Justice Michael, 'Judicial Dissent' (2005) 12 James Cook University Law Review 4


Kirby, Michael, 'Judicial Activism? A Riposte to the Counter-Reformation' (2004) 24 Australian Bar Review 1


Krippendorf, Klaus, *Content Analysis: An Introduction to Its Methodology* (2nd ed, 2004)

Kritzer, Herbert and Richards, Mark, 'The Influence of Law in the Supreme Court's Search and Seizure Jurisprudence' (2005) 33(1) *American Politics Research* 33


Kritzer, Herbert M, "'Data, Data, Data, Drowning in Data": Crafting The Hollow Core' (1996) 21 *Law and Social Inquiry* 761

Kritzer, Herbert M, 'Interpretation and Validity in Qualitative Research: The Case of H.W. Perry's *Deciding to Decide* (1994) 19 *Law and Social Inquiry* 687


Law Council of Australia Equalising Opportunities in the Law Committee and Australian Women Lawyers, '2009 Court Appearance Survey-Beyond the Statistical Gap' (2009)


Luntz, Harold, 'Torts Turn Around Downunder' (2001) 1 Oxford University Commonwealth Law Journal 95


Malbon, Justin, 'Extra-Legal Reasoning' in Ian Freckleton and Hugh Selby (eds), Appealing to the Future: Michael Kirby and His Legacy (2009) 579


Marchetti, Elena, 'Indigenous women and the RCIADIC: part II' (2007) 7(2) Indigenous Law Bulletin 6


Marlow, George, 'From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sue Sponte Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision Making Process' (1998) 72 St Johns Law Review 291


Mason, Anthony, 'Policy Considerations' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007)


Mezey, Naomi, 'Law as Culture' (2001) 13 *Yale Journal of Law and Humanities* 35

Modak-Truran, Mark, 'A Pragmatic Justification of the Judicial Hunch' (2001) 35 *University of Richmond Law Review* 55


Monahan, John and Walker, Laurens, 'Judicial Use of Social Science Research' (1991) 15 *Law & Human Behavior* 571


Nelken, David, 'Using the Concept of Legal Culture' (2004) 29 Australian Journal of Legal Philosophy 1

Economic Prospects of Female Carers in Australia' (National Centre for Social and Economic Modelling University of Canberra, 2009)


Percival, Richard and Harding, Ann, 'AMP: NATSEM Income and Wealth Report Issue 3: All They Need is Love ...and Around $450 000' (National Centre for Social and Economic Modelling, 2002)


Pierce, Jason, 'Institutional Cohesion in the High Court of Australia: Do American Theories Travel Well Down Under?' (2008) 46(3) Commonwealth and Comparative Politics 318

Pierce, Jason L, Inside the Mason Court Revolution: The High Court of Australia Transformed (2006)


Priel, Dan, 'Torts, Rights and Right-Wing Ideology' (2011) 19(1) *Torts Law Journal* 1

Public Bodies Review Committee, Parliament of New South Wales, 'Public Liability Issues Facing Local Councils' (November 2000)


Queensland Department of Families, 'Adoption Legislation Review: Consultation Paper' (Queensland Department of Families, 2002)

Queensland Department of Families, 'Future Adoption Laws for Queensland: Policy Paper' (Queensland Department of Families, 2008)


RJL, 'The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage' (1965) 9 Utah Law Review 808

Robertson, Andrew, 'Constraints on Policy-Based Reasoning in Private Law' in Andrew Robertson and HW Tang (eds), The Goals of Private Law (2009)

Robertson, Gerald, 'Civil Liability Arising from "Wrongful Birth" Following an Unsuccessful Sterilization Operation' (1978) 4(2) American Journal of Law and Medicine 131


Safe Work Australia, 'Occupational Disease Indicators' (2010)


Schauer, Frederick and Zeckhauser, Richard, 'The Trouble with Cases' in Daniel Kessler (ed), *Regulation versus Litigation* (2011) 45


Schubert, Glendon, 'Political Ideology on the High Court' (1968) *3 Politics* 21


Sheller, Simon, 'Kirby, Michael Donald' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to The High Court of Australia (2007)

Sherr, Avrom, 'Legal Profession, Social Background, Entry and Training' in Peter Cane and Joanne Conaghan (eds), The New Oxford Companion to Law (2008)


Silverman, David, Doing Qualitative Research (2nd ed, 2005)


Simpson, Amelia, 'Research Assistance' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007)


Smyth, Russell, 'Citation of Judicial and Academic Authority in the Supreme Court of Western Australia' (2001) 30(1) *University of Western Australia Law Review* 1


Stapleton, Jane, 'Comparative Economic Loss: Lessons from Case-Law Focussed Middle Theory' (2002-3) 50 *University of California Law Review* 531


Sunstein, Cass, 'If People Would be Outraged by Their Rulings, Should Judges Care?' (2008) 60 *Stanford Law Review* 155


Tamanaha, Brian, 'How the Instrumental View of Law Corrodes the Rule of Law' (2006) 56 *DePaul Law Review* 469


Tani, Massimiliano and Vines, Prue, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession' (2009) 19(1) *Legal Education Review* 3

Thackrah, Andrew, 'Neo-liberal Theory and Practice' (2009) 32 *Arena* 83


Thornton, Margaret, *Dissonance and Distrust: Women in the Legal Profession* (1996)


Twining, William, 'Evidence as a Multi-disciplinary Subject' (2003) 2 Law, Probability and Risk 91


Walker, Brett, 'Gleeson, Murray' in Michael Coper, Tony Blackshield and George Williams (eds), The Oxford Companion to the High Court of Australia (2007)


Wangmann, Jane, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) University of New South Wales Law Journal 945

Warren, D, 'Australian Law Journals: An Analysis of Citation Patterns' (1996) 27 Australian Academic and Research Libraries 261

Webley, Lisa, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (2010) 927


Weinrib, Ernest, 'Does Tort Law Have a Future' (2000) 34 *Valparaiso University Law Review* 561


Woolhandler, Ann, 'Rethinking the Judicial Reception of Legislative Facts' (1988) 41 Vanderbilt Law Review 111


Young, Katherine, 'Open Chambers: High Court Associates and Supreme Court Clerks Compared' (2007) 31 Melbourne University Law Review 646

B. CASES

Agar v Hyde (2000) 201 CLR 552

Allen v Green (2010) 42 Fam LR 538

Amaca Pty Ltd v State of New South Wales (2003) 199 ALR 596


Anikin v Sierra (2004) 211 ALR 621

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd (2001) 208 CLR 199

Australian Knitting Mills Ltd v Grant (1933) 50 CLR 387

Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479

Bankstown Foundry Pty Ltd v Braistina (1986) 160 CLR 301

Barclay v Orton [2009] FamCAFC 159

Boone v Mullendore, 416 So 2d 718 (Ala, 1982)

Brodie v Singleton Shire Council (2001) 206 CLR 512

Brown v Board of Education 347 US 483 (1954)
Bryan v Maloney (1995) 182 CLR 609

Burke v Rivo, 551 NE 2d 1 (Mass, 1990)

CAL No 14 Pty Ltd v Motor Accidents Insurance Board (2009) 239 CLR 390

Caparo Industries plc v Dickman [1990] 2 AC 605

Cattanach v Melchior (2003) 215 CLR 1


Chester v The Council of the Municipality of Waverley (1939) 62 CLR 1


Commissioner of Main Roads v Jones (2005) 215 ALR 418

CSR Limited v Eddy (2005) 226 CLR 1

Custodio v Bauer, 251 Cal App. 2d 303, 59 Cal Rptr 463, 27 ALR 3d 884 (1967)

Czatytyrko v Edith Cowan University (2005) 214 ALR 34

Dasreef Pty Ltd v Hawchar [2011] HCA 21

De Sales v Ingrilli (2002) 212 CLR 338

Derrick v Cheung (2001) 181 ALR 301

Donaghey v Donaghey [2010] FamCA 740

Donoghue v Stevenson [1932] AC 562

D’Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1

Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317

Eastman v The Queen (2000) 203 CLR 1

Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (1997) 188 CLR 241

Fox v Percy (2003) 214 CLR 118
Frost v Warner (2002) 209 CLR 509

Gattellaro v Westpac Banking Corporation (2004) 204 ALR 258

Geyer v Downs (1977) 138 CLR 91

Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269

Graham Barclay Oysters Pty Ltd v Ryan (2002) 211 CLR 540

HML v The Queen (2008) 235 CLR 334

Holland v Jones (1917) 23 CLR 149

Hollis v Vauln Pty Ltd (2001) 207 CLR 21

Hoys Pty Ltd v Burns (2003) 201 ALR 470

HTW Valuers(Central QLD) Pty Ltd v Astonland Pty Ltd (2004) 217 CLR 640

Imbree v McNeilly (2008) 236 CLR 510

Jay Burns Baking Co v Bryan, 264 US 504 (1920)

Jones v Bartlett (2000) 205 CLR 166

Joslyn v Berryman (2003) 214 CLR 552

Kars v Kars (1996) 187 CLR 354

Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44

Lamereaux v Noirot (2008) FLC 93-364

Laybutt v Glover Gibbs Pty Ltd (2005) 221 ALR 310

Liftronic Pty Ltd v Unver (2001) 179 ALR 321


Maluka v Maluka [2011] FAMCAFC 72
Manley v Alexander (2005) 223 ALR 228
McCall v Clark (2009) FLC 93-405
McFarlane v Tayside Health Board [2000] 2 AC 59
McHale v Watson (1966) 115 CLR 199
McKernan v Aasheim, 687 P 2d 850 (Wash, 1984)
McLean v Tedman (1984) 155 CLR 306
Mickelberg v The Queen (1989) 167 CLR 259
Muller v Oregon, 208 US 412 (1908)
Mulligan v Coffs Harbour City Council (2005) 223 CLR 486
Nagle v Rottnest Island Authority (1993) 177 CLR 423
Neindorf v Junkovic (2005) 222 ALR 631
New South Wales v Bujdoso (2005) 227 CLR 1
New South Wales v Commonwealth (2006) 229 CLR 1
New South Wales v Fahy (2007) 232 CLR 486
New South Wales v Lepore (2003) 212 CLR 511
Northern Sandblasting Pty Ltd v Harris (1997) 188 CLR 313
Parkinson v St James and Secroft University Hospital NHS Trust [2002] QB 266
Perre v Apand Pty Ltd (1999) 198 CLR 180
Pledge v Roads and Traffic Authority (2004) 205 ALR 56
Rees v Darlington Memorial Hospital NHS Trust [2004] 1 AC 309

Rosenberg v Percival (2001) 205 CLR 434

Salvati v Donato [2010] FACAFc 263

Scott v Harris, 550 US 372,127 S Ct 1769 (2007)

Seiwa Australia Pty Ltd v Beard (2009) 75 NSWLR 74

Shaheen v Knight, 6 Lyc 19, 11 Pa D & C 2d 41 (1957)

Sherlock v Stillwater Clinic, 260 NW 2d 169 (Minn, 1977)

Shorey v PT Limited (2003) 197 ALR 410

State Rail Authority of NSW v Earthline Constructions Pty Ltd (in liq) (1999) 160 ALR 588

Sullivan v Moody (2001) 207 CLR 562

Suvaal v Cessnock City Council (2003) 200 ALR 1

Swain v Waverley Municipal Council (2005) 220 CLR 517

Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161

Tame v New South Wales (2002) 211 CLR 317

Tepko Pty Ltd v Water Board (2001) 206 CLR 1

Thomas v Mowbray (2007) 233 CLR 307

Thompson v Woolworths (QLD) Pty Ltd (2005) 221 CLR 234

Trawl Industries Pty Ltd v Effem Foods Pty Ltd (1992) 27 NSWLR 326

Trustees of the Roman Catholic Church for the Diocese of Canberra and Goulburn v Hadba (2005) 221 CLR 161

University of Arizona Health Services Center v Superior Court of the State of Arizona, 667 P 2d 1294 (Ariz, 1983)

Vairy v Wyong Shire Council (2005) 223 CLR 442
Vance v Vance [2010] FamCAFC 250

The Waterways Authority v Fitzgibbon (2005) 221 ALR 402

Wheldon v Dinah [2010] FamCA 740

Whisprun Pty Ltd v Dixon (2003) 200 ALR 44

Wilbur v Kerr, 628 SW 2d (Ark, 1982)

Willett v Futcher (2005) 221 CLR 627

Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460

Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515

Wyong Shire Council v Shirt (1980) 146 CLR 40

C. LEGISLATION

Adoption Act 2000 (NSW)

Adoption Act 2009 (QLD)

Adoption of Children Act 1964 (QLD)

Civil Liability Act 2003 (QLD)

Civil Liability Amendment (Personal Responsibility) Act 2002 (NSW)

Evidence Act 1995 (Cth)

Evidence Act 1995 (NSW)

Evidence Act 2001 (Tas)

Evidence Act 2008 (Vic)

Family Law Act 1975 (Cth)

Federal Rules of Evidence 201 (USA)

High Court Rules 2004 (CTH)

High Court of Australia Practice Direction No 3 2010

US Federal Rules of Evidence

Workplace Relations Amendment (Work Choices) Act 2005 (CTH)
D. OTHER


Australasian Legal Information Institute, (High Court of Australia )<http://www.austlii.edu.au/au/cases/cth/HCA/> at 5 October 2011


The Cultural Cognition Project at Yale Law School <http://www.culturalcognition.net/> at 30 October 2011


Gill, Rebecca, 'Disagreement on the Australian High Court: Reconsidering the Legalist Model' (Paper presented at the American Political Science Association Annual Meeting, San Francisco, 29 August 2001)

Gill, Rebecca, 'The Fading Utility of the Australian Legalist Story: Using Social Background Theory to Explain Outcomes on the High Court' (Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, 2-6 April 2009)


The Kinsey Institute, *Board of Governors and Trustees*  
<http://www.kinseyinstitute.org/about/board%20fall10.html> at 31 August 2011

*The Kinsey Institute* <http://www.kinseyinstitute.org/> at 31 August 2011


Lavarch, Michael, 'Have the Judges Gone too Far?' (Paper presented at the Judicial Conference of Australia's Colloquium, Launceston, 2002)


 Transcript of Proceedings, *Cattanach v Melchior* (High Court of Australia, B22/2002, Mr B W Walker S C, 12 February 2002)
